IN THE SUPREME COURT OF THE STATE OF NEVADA

SHELDON G. ADELSON, Appellant, vs. DAVID A. HARRIS; MARC R. STANLEY; AND NATIONAL JEWISH DEMOCRATIC COUNCIL, Respondents.	)	Case No. 67120 Electronically Filed Jun 03 2015 02:32 p.m. Tracie K. Lindeman Clerk of Supreme Court

Certification from the United States Court of Appeals
for the Second Circuit – Case No. 13-4173-cv

RESPONDENTS' ANSWERING BRIEF

CAMPBELL & WILLIAMS
Donald J. Campbell (1216)
J. Colby Williams (5549)
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: 702-382-5222
Facsimile: 702-382-0540
djc@campbellandwilliams.com
jcw@campbellandwilliams.com

LEVINE SULLIVAN KOCH & SCHULZ, LLP
Lee Levine (*pro hac vice* forthcoming)
Seth D. Berlin (*pro hac vice* forthcoming)
1899 L Street, N.W., Suite 200
Washington, D.C. 20036
Telephone: 202-508-1120
Facsimile: 202-861-9888
llevine@lskslaw.com
sberlin@lskslaw.com

Counsel for Respondents David A. Harris, Marc R. Stanley and National Jewish Democratic Council

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that Defendant-Respondent National Jewish Democratic Council is a not-for-profit organization and has no parent corporation and no shares of stock that could be held by a publicly held corporation. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

The names of all law firms whose attorneys have appeared for Defendant-Respondent in this case (including before the U.S. Court of Appeals for the Second Circuit and the U.S. District Court for the Southern District of New York) are:

- Campbell & Williams, 700 South Seventh Street, Las Vegas, Nevada 89101;
- Levine Sullivan Koch & Schulz, LLP, 321 West 44th Street, Suite 1000, New York, NY 10036 and 1899 L Street, Suite 200, Washington, DC 20036.

Respectfully submitted,
CAMPBELL & WILLIAMS

By: /s/ *J. Colby Williams*
Donald J. Campbell, NV Bar No. 1216
J. Colby Williams, NV Bar No. 5549
700 South Seventh Street
Las Vegas, Nevada 89101

Counsel for Respondents David A. Harris, Marc R. Stanley and National Jewish Democratic Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Page(s)

Page(s)

Statutes and Rules

Other Authorities

ISSUES PRESENTED

This Court has accepted the following certified questions:

1. Does a hyperlink to source material about judicial proceedings in an online petition suffice to qualify as a report for purposes of applying the common law fair report privilege?

Defendant-Respondents ("defendants") respectfully submit that, in this case, the answer is yes. A court applying the privilege's attribution requirement must assess a publication's "overall context." The context of the online-only publication at issue here, which (1) refers specifically to a "report," (2) includes a quotation from a sworn declaration submitted in a judicial proceeding, and (3) hyperlinks directly from that quotation – in a manner identified by the underscored, bold-face blue text that characterizes a hyperlink – to the account of the declaration from which the quotation was drawn, satisfies the requirement.

2. Did Nevada's anti-strategic litigation against public participation ("anti-SLAPP") statute, NRS §§ 41.635-.760, as the statute was in effect prior to the most recent amendments in 2013, cover speech that seeks to influence an election but is not addressed to a government agency?

Defendants respectfully submit that the answer is yes. The plain language of the operative statute unambiguously provides that it applies to speech that seeks to influence an election, with no requirement that it be addressed to a government

agency, a reading fully supported by its legislative history. Neither this Court's decision about the application of a different prong of the statute to a different category of speech in *John v. Douglas County School District*, 125 Nev. 746, 219 P.3d 1276 (2009), nor later amendments to the statute change that analysis, as this Court has twice recognized, albeit in unpublished decisions.

COUNTERSTATEMENT OF THE CASE

This is a defamation action brought by billionaire and prominent political donor Sheldon Adelson against the National Jewish Democratic Council ("NJDC") and two of its leaders, David Harris and Marc Stanley, for circulating an online-only petition urging 2012 presidential candidate Mitt Romney to decline Adelson's large donations because they had become, in NJDC's opinion, "tainted" and "dirty" (the "Petition"). The Petition recited the basis for that contention – specifically, the fact that Adelson had recently been the subject of several, widely publicized allegations about his business practices and the sources of his contributions, including (1) that the money purportedly came from "foreign" sources, (2) that he had allegedly engaged in anti-union activities and corrupt business practices in the casinos from which he derived his fortune, and (3) that he had reportedly condoned prostitution in casinos he operated in Macau. In this action, Adelson challenges only the statements that he "reportedly approved of

prostitution in his Macau casinos" and that "reports [had] surfaced" that he "**'personally approved'** of prostitution in his Macau casinos."

As relevant here, a federal district court sitting in New York (the "district court") applied substantive Nevada law and dismissed Adelson's claims pursuant to separate motions based on two independent grounds: (1) under the fair report privilege, because the Petition, through a prominently displayed hyperlink, attributed the challenged statements about "reports" that Adelson had **"'personally approved'** prostitution" to a news article explaining that the quoted language came from a sworn declaration submitted in a Nevada judicial proceeding, and (2) under Nevada's anti-SLAPP law, because the Petition, which was expressly "aimed at procuring an[] . . . electoral action, result or outcome," constituted protected speech under that statute.

Adelson appealed both rulings to the U.S. Court of Appeals for the Second Circuit. In a decision dated December 19, 2014, that court rejected a number of Adelson's contentions and accepted a number of defendants' positions (*e.g.*, holding that the Petition's assertions that Adelson's money was "tainted" or "dirty" constituted expressions of opinion protected by the First Amendment, that the Nevada anti-SLAPP statute applies in federal court and defendants had sought relief under it in a timely manner), but certified two separate questions of state law to this Court, each of which relates to a distinct ground upon which the district

court ruled in defendants' favor. As explained below, the district court correctly analyzed each of those issues under Nevada law.[1]

COUNTERSTATEMENT OF RELEVANT FACTS

A. The Parties

NJDC is a not-for-profit organization created "to maximize Jewish support for Democrats." JA-464. When the Petition was published, Harris was NJDC's President/CEO and Stanley its Chairman. *Id.*

Adelson is Chairman and CEO of Las Vegas Sands Corporation ("LVSC"), which "owns and operates casinos throughout the world, including, through its Chinese subsidiary, in Macau." Order at 3. He has "spent large sums of money to support Republican candidates" for public office. *Id.*; *see also* SA-2; JA-41, 519. He is also a frequent defamation plaintiff, regularly asserting claims, in courts around the world, against those who criticize him.[2]

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[1] With respect to the second certified question, the Second Circuit actually agreed with the district court that, because the Petition "sought to influence an election . . . it would seem to fall under the first prong [of the Nevada anti-SLAPP statute] according to the plain text of the then-existing statute." *Adelson v. Harris*, No. 13-4173-cv, slip op. at 12 (2d Cir. Dec. 19, 2014), ECF No. 132 ("Order"). However, in light of what it characterized as arguably "ambiguous" language in a decision of this Court, the Second Circuit certified this issue as well. *Id.* at 13. In so doing, however, the court noted that, "[w]ere this the only unresolved question of state law before us, we might not certify it" and further explained that, if this Court were to "decline to address the issue, . . . we would then decide the question according to our own reading of the statute." *Id.* at 13 n.4.

[2] *See*, *e.g.*, JA-844-45 (defamation lawsuit against *Wall Street Journal* reporter in Hong Kong for describing him as a "foul-mouthed billionaire");

Prior to the 2012 presidential election, Adelson engaged in a high profile effort to provide unprecedented funding to Republican candidates, first spending some $21.5 million in support of the primary campaign of former House Speaker Newt Gingrich, and then – by his own account – as much as $100 million in support of Republican nominee Mitt Romney. JA-148 ¶18, 19; 150 ¶21. The enormity of Adelson's contributions sparked heated debate throughout the nation, in which some corners of the electorate applauded Adelson's exercise of his First Amendment right to advocate for candidates of his choice as he saw fit,[3] while others decried his allegedly corrosive impact on the electoral process. Among the latter was Senator John McCain, his party's 2008 presidential nominee, who took to the Senate floor to accuse Adelson of injecting "foreign money," derived from

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Adelson v. Anderson, [2011] EWHC (QB) 2497, ¶62, 2011 WL 4529292 (Eng. July 10, 2011) (unsuccessful defamation action in England against American labor union and official); *Adelson v. Hananel*, 428 F. App'x 717, 718 (9th Cir. 2011) (long-running but unsuccessful defamation action against former employee); *In re Smith*, 389 B.R. 902, 905-06 (Bankr. D. Nev. 2008) (author of book about Adelson, forced into bankruptcy by litigation, refused Adelson's demand that he retract challenged statements and Adelson ultimately ordered to pay his costs).

[3] In so doing, Adelson became a prominent practitioner of the art of so-called "negative" campaign advocacy. One "attack" ad, sponsored by a Super PAC supporting Speaker Gingrich that Adelson and his family "almost single-handedly bankrolled," superimposed the words "illegal activity" over an image of Governor Romney's face and was so inaccurate even Gingrich called for its withdrawal – albeit to no avail. *See* Jim Rutenberg *et al.*, *In Reversal, Gingrich Calls for Withdrawal of Film Attacking Romney and Bain*, N.Y. Times, Jan. 14, 2012; Connie Bruck, *The Brass Ring: A Multibillionaire's Relentless Quest for Global Influence*, New Yorker (June 30, 2008), http://www.newyorker.com/magazine/2008/06/30/the-brass-ring.

his casino operations in Macau, into American elections. Not surprisingly, Senator McCain's accusations, and others about the sources of Adelson's wealth, were prominently reported in news accounts throughout the nation. JA-482; 154 ¶26, 155 ¶27.

B. The Jacobs Litigation

Adelson and his companies are frequent litigants in this Court, including in multiple interlocutory appeals in a civil action brought by Steven Jacobs, the former president of his casino operations in Macau. *E.g.*, *Sands China Ltd. v. Eighth Jud. Dist. Ct.* ("*Sands I*"), 2011 WL 3840329 (Nev. Aug. 26, 2011) (ordering jurisdictional discovery); *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.* ("*Sands II*"), 130 Nev. Adv. Op. 13, 319 P.3d 618, 635 (2014) (deciding discovery issue); *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.* ("*Sands III*"), 130 Nev. Adv. Op. 61, 331 P.3d 876, 880-81 (2014) (declining review of sanctions proceeding against LVSC for failure to comply with discovery orders); *Las Vegas Sands Corp. v. Eighth Judicial Dist. Ct.* ("*Sands IV*"), 130 Nev. Adv. Op. 69, 331 P.3d 905, 914 (2014) (finding LVSC could assert attorney-client privilege over corporate documents collected by plaintiff); *see also, e.g.*, *Jacobs v. Adelson*, 130 Nev. Adv. Op. 44, 325 P.3d 1282, 1288 (2014) (reinstating Jacobs' defamation claim against Adelson). Jacobs is the author of the declaration from which the challenged statement in the Petition is quoted. JA-131-32; 165 ¶40.

As this Court knows, Jacobs was "president and chief executive officer of Sands China Ltd.," which operates Adelson's casinos in Macau. *Sands IV*, 331 P.3d at 906. After his contract was terminated, allegedly for cause, Jacobs sued Adelson's companies in Nevada, claiming he was fired for resisting Adelson's demands that he engage in unlawful conduct. JA-52-54; 191-194 ¶¶27-32; 820. Jacobs' allegations spawned, *inter alia*, a federal investigation, which resulted in the company's concession that Jacobs' assertion that it had violated the federal Foreign Corrupt Practices Act was "likely correct." *Id.*[4]

In Jacobs' civil action, Sands China challenged jurisdiction over it in Nevada and, in its first decision in that case, this Court directed the trial court to "revisit the issue of personal jurisdiction." *Sands I*, 2011 WL 3840329, at *1. Following remand, in the course of discovery concerning that issue, Jacobs filed a sworn declaration on June 27, 2012 (the "Declaration"). JA-215-221. The Declaration described documents Jacobs claimed he knew "to have existed from [his] tenure with LVSC" that had "not been produced" in discovery, which he

[4] *See* JA-744-45, 820 (noting LVSC report admitting company "likely violat[ed]" the FCPA); Las Vegas Sands Corp., Form 10-K at 102 (Dec. 21, 2013), *available at* https://www.sec.gov/Archives/edgar/data/1300514/000144530514000758/lvs-20131231x10k.htm#sD764A09E2ED359D5E2D001F2E456CE6B. *See also id.* at 105 ("Company agreed to voluntarily return $47.4 million to the U.S. Treasury" related to separate investigation).

contended would show that Adelson's Macau operations were directed from Nevada. JA-215-16.[5]

Among the several categories of such documents it described, the Declaration explained that defendants had not produced documents addressing the prevalence of prostitution in Adelson's Macau casinos. Specifically, the declaration asserted:

> ***LVSC Prostitution Strategy for Macau***. E-mails and documents missing from Defendants' production demonstrate LVSC's Executive Management's control and direction from Las Vegas over acts of prostitution on Sands China's properties. As background, shortly after my arrival to Macau in May 2009, I launched "Operation Clean Sweep" designed to rid the casino floor of loan sharks and prostitution. This project was met with concern as LVSC Senior Executives informed me that the prior prostitution strategy had been personally approved by Adelson. Missing documents include but are not limited to e-mails and notes between myself and Mike Leven concerning Adelson's direct involvement, e-mails between Mark Brown and Senior LVSC Executives/Board members confirming the implementation of the strategy and highlighting its "success." Hard copies of these files were kept in my office drawer in a folder labeled "Outrageous."

JA-217 ¶5.

The following day, June 28, 2012, news reports literally around the world informed the public about the contents of Jacobs' declaration and quoted from it

[5] On May 22, 2015, the trial court ultimately concluded that it had jurisdiction in Nevada over Sands China because Jacobs had amassed substantial evidence that Adelson personally directed its day-to-day operations, including what the court described as Jacobs' "sham" termination. *Jacobs v. Adelson*, No. 10 A 627691, slip op. at 11 n.15, 13 ¶¶49-52, 17 ¶67, 18 ¶¶69-70, 25 ¶110, 25 n.27, 26 ¶¶112-13, 117, 33 ¶150 (Clark Ctny. Dist. Ct. May 22, 2015).

extensively. JA-165-67 (citing multiple publications). One such report, distributed widely that day by the Associated Press (the "AP Article"), "covered Jacobs's lawsuit, quoting this language [about prostitution], and reporting Adelson and LVSC's denial of any wrongdoing." Order at 3.

C. The Petition

Several days later, on July 3, 2012, NJDC disseminated the Petition online, and *only* online. JA-24 ¶23. Using hyperlinks "visible in the customary manner, that is, by being embedded in blue, underlined text," Order at 8, the Petition provided readers with the sources for the several statements about Adelson it contained. JA-478; 493-96; 499-501; 505. These hyperlinks were active for the entire time the Petition remained online – and, indeed, the linked web addresses remain active as of this filing nearly three years after the Petition was published.

The Petition is reprinted in Adelson's brief in this Court, albeit without the blue color and working hyperlinks found in the actual online publication. Appellant's Opening Brief ("Br.") at 3-4; *see* JA-38; 478. It begins with a headline – "Tell Romney to Reject Adelson's Dirty Money" – under which appears a graphic designed to attract readers' attention to the Petition's text. The graphic does so by superimposing a question over photos of Adelson and Romney and using a larger type font to emphasize some of its words – "If one of your BIGGEST DONORS was accused of putting 'FOREIGN MONEY' from China in

OUR ELECTIONS & reportedly approved PROSTITUTION, would you TAKE HIS MONEY?" None of the highlighted words in this question has any particular meaning in isolation; to understand what they mean, a reader must review the surrounding text, which explains that the headline's suggestion that Adelson's money is "dirty" is based, *inter alia*, on the fact that he stood "accused of" funneling "foreign money" into election campaigns and that he had "reportedly approved" prostitution.

The graphic is followed by the Petition's text, which purports to answer the question posed by the graphic. It asserts that Adelson's contributions should be considered "dirty" and "tainted" because of "where the money comes from" – specifically, because most of Adelson's fortune is derived from his Macau operations and Senator McCain had publicly criticized him for injecting "Chinese 'foreign money'" into "our political system." A hyperlink from McCain's name ("Senator John McCain (AZ)") takes the reader to a then-recent article in *Foreign Policy* entitled "McCain: Adelson funding Romney Super PAC with 'foreign money.'" The text then adds that Adelson had also been accused of "anti-union" behavior and "corrupt business practices" in Macau, again with hyperlinks to news accounts reporting the sources of those accusations.[6]

[6] The version of the Petition included in Adelson's brief omits the hyperlink in the words "anti-union" that takes the reader to a report addressing that subject.

Finally, the Petition's text explains that, most recently, "reports" had "surfaced" that "Adelson '**personally approved**' **of prostitution in his Macau casinos**," which similarly includes an underlined, bold face, blue hyperlink from the quoted words, themselves taken directly from the Declaration, to the AP article. JA-131-33 ¶9(d); 505. The linked article reported that "[t]he fired former chief executive of [LVSC]'s Macau casinos alleges in court documents revealed Thursday that billionaire Sheldon Adelson personally approved of prostitution and knew of other improper activity at his company's properties in the Chinese enclave." JA-38. In addition, it recounted and quoted from Jacobs' "seven-page declaration," describing

> effort[s] he launched after arriving in Macau in May 2009 to rid the casino floor of "loan sharks and prostitution." . . . "This project was met with concern as (company) senior executives informed me that the prior prostitution strategy had been personally approved by Adelson," Jacobs said in the documents.

JA-132.[7]

The Petition concluded by answering the question raised in the graphic: "*Given these reports*, Romney and the rest of the Republican Party must cease

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For the convenience of the Court, a courtesy copy of the electronic Petition with working hyperlinks as filed in the Second Circuit has been provided to the Clerk.

[7] Another hyperlink in the Petition, from the words "corrupt business practices," took readers to an ABC News report describing a government raid of one of Adelson's casinos in Macau, while Adelson himself was attending a meeting with public officials there, in which more than 100 prostitutes were arrested. JA-501.

accepting Adelson's tainted money immediately." JA-38 (emphasis added). Thus, the express point of the Petition was that the very *existence* and broad distribution of such reports – regardless of whether the underlying allegations were true – tainted Adelson's contributions sufficiently that Romney should reject them.[8]

Although Adelson asserts that the Second Circuit "deferred decision" on whether the Petition's references to "dirty" or "tainted" money "were constitutionally protected 'opinion,'" Br.10, that is incorrect. Rather, the Second Circuit expressly held, "[t]o be clear, we agree with the district court that, in a partisan petition like this, appellees' characterization of Adelson's money as 'dirty' or 'tainted' is the sort of rhetorical hyperbole and unfalsifiable opinion protected by the First Amendment." Order at 6. Accordingly, because that question of federal constitutional law has already been settled by the Second Circuit, the only allegedly false and defamatory statements that remain at issue are the Petition's

[8] Such criticism of "tainted" campaign donations is a staple of American politics that dates back at least a century and that know no party affiliation. *See, e.g.*, *BRYAN'S FUND FROM RYAN; Didn't Return 'Tainted' Money, Says Maher – Renews Chautauqua Contract*, N.Y. Times, May 31, 1914; *ONE GIFT ENOUGH FROM ROCKEFELLER; Disciples of Christ, While Keeping the $25,000 Given, Will Accept No More. OBJECTED TO AS TAINTED Ex-Congressman Phillipe Faile to Have It Returned, but Wins a Partial Victory*, N.Y. Times, Oct. 13, 1907. Most recently, the National Republican Senatorial Committee called on Democrats to return "dirty money" from political action committees connected to Sen. Bob Menendez after he was indicted. *NRSC Calls for Democratic Senators to Return Dirty Money*, NRSC (Apr. 2, 2015), http://www.nrsc.org/blog/nrsc-calls-fordemocratic-senators-to-return-dirty-money.

twin references to "reports" that had "surfaced" that "Adelson '**personally approved**' **of prostitution in his Macau casinos**." JA-38.[9]

On July 11, 2012, less than a week after its publication, NJDC removed the Petition from its website and posted in its stead a Press Release explaining why it had done so – "in the interest of *shalom bayit* (peace in our home/community)." JA-25 ¶31, 43; 475 ¶13; 507. Although Adelson discusses the Press Release at some length in his brief to this Court, *see* Br.7-8, it is no longer at issue in this case, SA-38.[10] Moreover, although Adelson devotes multiple pages to discussing NJDC's conduct *after* the Petition was published, *id*., none of that conduct – even if Adelson's description of it were accurate (which it is not) – is relevant to any issue on this appeal, much less to either of the certified questions.[11] Similarly,

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[9] What the Second Circuit actually asserted it would "leave to another day" was a decidedly different question: whether, even if "the statement that Adelson reportedly approved of prostitution asserts reasonably specific facts" and is otherwise "unprivileged" under Nevada law, its "republication" could support "a finding of liability . . . despite the constitutional protections outlined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny." Order at 7.

[10] The district court dismissed all of Adelson's claims based on the Press Release because, among other things, it contained no false or defamatory statements and did not constitute a "republication" of the Petition itself. SA-38. Adelson did not contest that holding in the Second Circuit.

[11] As Adelson recounts it, his some-time lawyer and self-described "representative" Alan Dershowitz contacted Harris after the Petition was posted, claiming he was aware of "written evidence" that Jacobs' sworn allegations regarding prostitution were false. Br.8. In fact, it is undisputed that Dershowitz provided *no* such evidence to NJDC, despite Harris's specific request for it. *Compare* JA-431 ¶10 *with* JA-452 ¶10; *see also* JA-31 ¶65; 444 ¶7. The

Adelson's description of a series of *different* statements about prostitution at Adelson's casinos, issued by a *different* organization with no alleged relationship to NJDC, is both demonstrably inaccurate and irrelevant to any issue before this Court.[12]

"evidence," such as it was, was submitted to the trial court in the Jacobs Litigation only *after* NJDC had taken down the Petition and it consisted of three self-serving emails in which LVSC executives denied that Adelson had approved a prostitution strategy in Macau. JA-178-80 ¶¶63-65; Br.8. It has, however, subsequently been established in sanctions proceedings in the Jacobs Litigation that Adelson's companies allowed significant evidence that Jacobs has sworn corroborates his statements to go missing, including multiple emails maintained on a computer assigned to him that Adelson and his companies conceded has either been lost or "recycled." JA-453 ¶12, 237, 248.

[12] Specifically, on June 29, 2012, before the Petition's publication, the Democratic Congressional Campaign Committee ("DCCC") circulated an email to potential donors asserting that Adelson "personally approved of prostitution and knew of other improper activity at his company's properties in the Chinese enclave of Macau, China." Dkt. 20 Ex. 100. After Adelson threatened DCCC with litigation, it retracted its statements on August 2, 2012, and apologized to Adelson. JA-32 ¶¶70-71, 53. Although Adelson alleges in this Court that DCCC's statements were "similar to Defendants,'" Br.8, that is incorrect. DCCC's emails asserted without qualification that Adelson *had in fact* personally approved prostitution, JA-168, while NJDC reported only that Adelson had been "accused of" doing so. In addition, unlike DCCC's emails, the Petition included a hyperlink to the AP Article, which described in detail the source of the reported accusation. In the district court, Professor Dershowitz curiously submitted a declaration in which he swore under oath that, during his telephone conversation with Harris some time prior to July 11, 2012, he "told Mr. Harris that the [DCCC had] dropped its baseless allegations against Mr. Adelson" and specifically referenced the DCCC's retraction. JA-444 ¶8. This sworn statement is false: It is undisputed that DCCC first issued its retraction and apology weeks later, on August 2. JA-32, 56.

SUMMARY OF ARGUMENT

I.

The alleged defamation in this case – *i.e.*, that "this week, reports surfaced that . . . Adelson **'personally approved' of prostitution in his Macau casinos**" and that he "reportedly approved PROSTITUTION" there – arises in the context of both a partisan political campaign and a publication, available only online, that quoted directly from a judicial record and hyperlinked from that quotation to a concededly privileged news report describing that document and the proceeding in which it was filed. It did so through a bright blue, bold-face link, which was contained in a sentence describing "reports" that had "surfaced" about Adelson's conduct. All of this, taken together, conveyed to the reasonable reader that the source of the quotation was described in the hyperlinked news account.

The issue before this Court is whether such information about the source of the quoted statement, contained in the hyperlinked news report, constitutes part of the publication's "overall context" for the purpose of applying the Nevada fair report privilege's attribution requirement. As the federal district court explained, in a portion of its opinion with which Adelson agrees, for the privilege to apply, it "'must be apparent from . . . the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings.'" SA-21 (quoting *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir.

1985)). In the 21st Century, part of the "overall context" that a reasonable reader of an online publication would consider is a hyperlink, "a well-recognized means for an author on the Internet to attribute a source." SA-23. Indeed, there can be little dispute now that "[n]avigating amongst web sites involves practically no effort whatsoever." *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1209 (9th Cir. 2000). Accordingly, in this case, assessment of the Petition's overall context demonstrates that it attributed its quotation of a judicial record to that document and the proceeding in which it was filed "by hyperlinking to the AP Article – which quotes directly from the Jacobs Declaration – and by using the words 'reportedly' and 'reports' to signal the reader that the hyperlink connects one to the source of the Petition's claims.'" SA-26 (citation omitted).

Adelson attempts to avoid this conclusion by analogizing to decisions assessing the putative use of hyperlinks to form online contracts. The issue raised in those cases – *i.e.*, under what circumstances a party can be deemed to have assented to the terms of an online contract – is materially different from the one before this Court – *i.e.*, whether a hyperlink constitutes part of the overall context of an online publication that a court should assess in determining the source of a quoted (and hyperlinked) statement. *That* issue is analogous to the one addressed in the growing body of precedent recognizing that information accessed through hyperlinks in allegedly defamatory online statements provides the factual predicate

necessary to render the challenged statements themselves protected from liability as opinions based on *disclosed* facts. In those cases, as in this one, the information provided through the hyperlink constitutes part of the publication's overall context precisely because a reasonable reader would understand that the link contains additional information about the basis for and/or source of the challenged statement. Accordingly, this Court should answer the first certified question in the affirmative.

Although the Second Circuit did not certify it, Adelson also urges this Court to address an additional question – whether the challenged statements constitute a "fair, accurate and impartial" rendition of the judicial record from which the Petition quoted. The question was not certified because Nevada law on the issue is well-settled: This Court has long recognized that the privilege is not forfeited where, as here, a defendant expresses an opinion or point of view based, in whole or in part, on the privileged statement. *See Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 215, 984 P.2d 164. 166 (1999). The relevant inquiry, rather, is whether the publication's account of the judicial proceeding itself is "fair, accurate and impartial." In this case, where there is no dispute that the Petition accurately summarized the allegations made by Jacobs in his sworn Declaration or that the record in the Jacobs Litigation contained no contrary evidence at the time the Petition was published, the federal district court

correctly determined that, because the Petition did not purport to endorse the accuracy of Jacobs' allegations, its republication of them was fair, accurate and impartial within the meaning of the privilege. SA-26-28.

II.

As the Second Circuit recognized, the Petition – posted online in the heat of an election campaign noted for its partisan rhetoric – self-evidently constitutes a communication "aimed at procuring an[] . . . electoral action, result or outcome." NRS § 41.637(1). The question certified to this Court is whether it nevertheless forfeits the protection otherwise afforded by the Nevada anti-SLAPP statute because it is directed not to a government agency, but rather to the broader citizenry. The statute's plain language and its unambiguous legislative history – including the legislature's rejection of the very limitation now urged by Adelson – demonstrate that the answer is no. The statute, on its face and as envisioned by the legislature, plainly protects such speech regardless of whether it is addressed to the government.

In an effort to wish away the actual statutory text and its legislative history, Adelson relies on a construction of this Court's decision in *John v. Douglas County School District*, 125 Nev. 746, 219 P.3d 1276, that does not survive reasonable scrutiny. For one thing, the statutory provision protecting speech "aimed at procuring an[] . . . electoral action, result or outcome" was not before

this Court in *John.* Order at 12. For another, the statutory provision that *was* at issue – the one protecting the "[c]ommunication of information . . . *to a* Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state" – *does* require on its face that the communication be directed to a government official. Accordingly, this Court's references in *John* to the statute's protection of the right to petition the government were necessarily limited to the scope of the provision actually before the Court and should not be read as applying to the entirely different provision at issue in this case, one that on its face is *not* limited to communications directed to the government.

By the same token, Adelson's reliance on the legislative history of a subsequent amendment to the statute does not advance his cause. Not only does he misstate the record of the legislative debate preceding that amendment, he disregards two unpublished – but persuasive – decisions from this Court expressly holding that the referenced amendment was intended, in relevant part, to *reaffirm* the broad scope of the statute *prior to* its enactment. *See Jensen v. City of Boulder City*, 2014 WL 495265 (Nev. Jan. 24, 2014); *Panicaro v. Second Jud. Dist. Ct.*, 2014 WL 4639195, at *1 (Nev. Sept. 16, 2014). If anything, therefore, the legislative history of the 2013 amendments confirms that they were intended "to clarify, not change, the law" as it applies to this case. *Jensen*, 2014 WL 495265, at *2.

ARGUMENT

I. THE FAIR REPORT PRIVILEGE'S ATTRIBUTION REQUIREMENT IS SATISFIED IN THIS CASE.

The parties agree that the fair report privilege applies whenever a publication "either from specific attribution *or from the overall context*" conveys to a reasonable reader that it is drawing on judicial documents or proceedings. *Dameron*, 779 F.2d at 739 (emphasis added); *see also* Br.14 (citing *Dameron*); Transcript of Second Circuit Argument (Dkt. 127, Addendum A) ("Tr.") at 7:9-15. There is also no dispute with respect to the material facts undergirding the question certified to this Court:

- The Petition was only published online. JA-24 ¶23.
- It references "reports" that Adelson "'personally approved'" prostitution as well as a series of other "reports" about Adelson and his conduct that had received widespread publicity in the then-recent past. JA-38; 477.
- It includes hyperlinks "visible in the customary manner, that is, by being embedded in blue, underlined text," to each of the referenced "reports," Order at 8, including in connection with the **"personally approved"** quotation from Jacobs' Declaration. JA-38; 477.

- Clicking on that link takes the reader to the AP Article, which informs the reader that the quoted language is from Jacobs' sworn declaration submitted in a specifically identified judicial proceeding. JA-38, 505.
- At the time, there was no evidence or other information contained in the record of that proceeding purporting to contradict the quoted statement from the Jacobs Declaration (although the linked article itself contains multiple denials of Jacobs' allegations made on Adelson's behalf). *Id.*
- The AP article linked to by the Petition was itself protected by the fair report privilege. SA-21-22; *see also* JA-394:8-12, 413:10-13.
- The link to the AP article, as well as all the other hyperlinks contained in the Petition, remained fully operational during the entire time the Petition was available online and, indeed, those web addresses all remain active to this day. JA-123 ¶9, 131 ¶9(d).

The issue before the Court, therefore, is whether, given this undisputed "overall context," the privilege's attribution requirement is satisfied in this case. Defendants respectfully submit that the federal district court was correct in concluding that, under these circumstances, it was, including because "[t]he hyperlink is the twenty-first century equivalent of the footnote for purposes of

attribution in defamation law" and it has therefore "become a well-recognized means for an author on the Internet to attribute a source." SA-23.

The evolution of Adelson's argument with respect to this issue is telling. In the federal district court, he conceded that, if the AP Article had been cited in a footnote to the Petition itself rather than accessed by hyperlink, the Petition would be privileged. SA-23. When pressed about the logical extension of his concession at oral argument in the Second Circuit, however, Adelson reversed course. Specifically, when the Court asked, "why isn't this better than a footnote? Because you click on it, and boom, you're right there at the source, and then, you can read it," Tr. at 5:2-5, his counsel asserted that a "textual reference" within the four corners of the online publication itself was necessary, *id.* at 5:11-12, conceding that he was "modifying his position," *id.* at 11:22-23.

In this Court, therefore, Adelson's position boils down to the contention that, to satisfy the privilege's attribution requirement in the context of an online publication, the source of a quoted statement must be set forth in the text of the challenged publication itself and that information contained in a hyperlinked source can *never* be considered part of that publication's "overall context." As defendants explain below, this cramped view of the privilege cannot be squared either with its purpose or with the reality of the reading experience in the Internet age.

A. Hyperlinks Are Properly Considered Part of a Publication's Context for Purposes of the Fair Report Privilege's Attribution Requirement.

Nevada "has long recognized a special privilege of absolute immunity from defamation given to the news media *and the general public* to report newsworthy events in judicial proceedings." *Sahara Gaming Corp.*, 115 Nev. at 215, 984 P.2d at 166 (emphasis added). The privilege serves the "public's right to know what transpires in the legal proceedings of this state and that is paramount to the fact someone may occasionally make false and malicious statements" in such a proceeding. *Id*. at 219, 984 P.2d at 168; *see also Wynn v. Smith*, 117 Nev. 6, 14, 16 P.3d 424, 429 (2001) ("The fair report privilege is premised on the theory that members of the public have a manifest interest in observing and being made aware of public proceedings and actions.").

Courts across the country have consistently cited the public's interest in being informed about and fostering robust debate concerning what transpires in judicial and other governmental proceedings as the bedrock principle that spawned the privilege. "The fair-report privilege reflects the judgment that the need, in a self-governing society, for free-flowing information about matters of public interest outweighs concerns over the uncompensated injury to a person's reputation." *Salzano v. N. Jersey Media Grp. Inc.*, 993 A.2d 778, 786 (N.J. 2010). As the leading treatise on the privilege explains, "anything that takes place before a

court (or other official proceeding open to the public) is thereby necessarily and legitimately made public, and being once made legitimately *public property*, the republisher is immune from liability therefor." David A. Elder, *Fair Report and the Common Law* § 1.00(A) (1988) ("*Elder*") (internal quotations and notes omitted).

By the same token, the immunity afforded by the privilege extends only so far as to serve this underlying purpose of providing information and fostering debate about what is said in governmental proceedings and therefore does not extend to an alleged defamation that is left "'unattributed'" to any official document or proceeding at all. *Dameron*, 779 F.2d at 739 (citations omitted). This "attribution" requirement is not, however, a mechanical or arbitrary one. It "does not mean that each quote or statement must be specifically attributed to an official document or proceeding." *Pittman v. Gannett River States Publ'g Corp.*, 836 F. Supp. 377, 382-83 (S.D. Miss. 1993) (citing *Dameron*, 779 F.2d at 739).[13] Rather,

[13] *See, e.g.*, *Ditton v. Legal Times*, 947 F. Supp. 227, 229-30 (E.D. Va. 1996) ("[j]ournalism is not legal scholarship . . . and a journalist cannot be expected to footnote every sentence to her source of information"), *aff'd*, 129 F.3d 116 (4th Cir. 1997); *Blackstone-Chi. Corp. v. Brown*, 1991 WL 331515, at *2 (Mass. Super. Ct. Oct. 15, 1991) ("Given the fact that the plaintiff acknowledges that Joan Brown made the statements contained in the article at the Board of Selectmen meeting, the article was not rendered substantially inaccurate [and therefore unprivileged] by virtue of the reporter's failure to specifically identify the forum as a Board of Selectmen meeting."); *White v. Fraternal Order of Police*, 909 F.2d 512, 527-28 (D.C. Cir. 1990) (newspaper articles reporting that "special police panel" was investigating allegations regarding plaintiff contained in letters from police union

"it is necessary only that, when considered in context, it is clear that the article is quoting, paraphrasing or otherwise drawing upon official documents or proceedings." *Id.* 836 F. Supp. at 383. In such a case, the purposes of the privilege are satisfied because the reader is reasonably deemed to be aware he or she is being provided with information and debate *about* what has transpired in a public proceeding.

For online publications, a hyperlink can not only serve that function, it can be particularly effective in doing so. As the federal district court explained, a hyperlink is an electronic footnote that not only provides attribution but also *access* to the cited material. SA-23. It is therefore a more robust form of attribution than a footnote: It is easier to click on a bright blue hyperlink than to "sojourn to the library" to find a source. SA-24.[14]

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and attributing allegedly defamatory statements to those letters "clearly m[et]" attribution requirement).

[14] Adelson's contention that online readers may not access hyperlinks provided to them – and that a reader of the Petition therefore may not "take the time" to do so, Br.17 – both belies the reality of the online reading experience and is of no legal relevance in any event. Simply put, the law surrounding the attribution requirement has never turned on the possibility that the reader might not review an entire article, turn a page in a book, or consult a footnote or endnote containing the requisite attribution. Similarly, the fact that the Petition linked to the AP Article rather than directly to the Declaration does not alter this equation. The district court correctly recognized that, so long as the hyperlinked report provides the requisite attribution by describing the source of the challenged statement, the fact that it is conveyed by a reliable intermediary, rather than through a link to the privileged document itself, is irrelevant. SA-26 n.14 (citing,

Professor Elder, the author of both the definitive work on the privilege and a treatise on defamation law, has specifically characterized the district court's analysis as "persuasive," explaining that "[i]n an Internet age, such attribution [for purposes of the privilege] may be by hyperlinking to a protected report." David A. Elder, *Defamation: A Lawyer's Guide* § 3.3 & n.6.1 (2014). Indeed, it is now common knowledge that a "hyperlink, or a link, is a 'cross-reference . . . appearing on one [W]eb page that, when activated by the point-and-click of a mouse, brings onto the computer screen another [W]eb page.'" Anjali Dalai, *Protecting Hyperlinks and Preserving First Amendment Value on the Internet*, 13 U. Pa. J. Const. L. 1017, 1018-19 (2011) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 455 (2d Cir. 2001)). Put differently, "[h]ypertext links are the signature characteristic of the World Wide Web." Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 Berkeley Tech. L.J. 1273, 1276 (2001).

No less an authority than Sir Tim Berners-Lee, the scientist credited with founding the World Wide Web, has explained that, "[a]t the heart of the web . . . is the link." Tim Berners-Lee, *Tim Berners-Lee on the Web at 25: The Past, Present*

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inter alia, *Bufalino v. Associated Press*, 692 F.2d 266, 271 (2d Cir. 1982)); *see also Elder* § 1.18 (courts generally hold that fair report privilege applies "where the defendant relies on a responsible, presumably knowledgeable, intermediary of general trustworthiness who was in attendance at the proceeding").

and Future, WIRED (Mar. 2014), http://www.wired.co.uk/magazine/archive/2014/03/web-at-25/tim-berners-lee. It is "the lynchpin that ties together the virtual, universal documentation system through which people can communicate with ease and speed." Dalai, *supra*, 13 U. Pa. J. Const. L. at 1034. Thus, hyperlinks are more than just a tool of convenience:

> Hyperlinks have long been understood to be critical to communication because they facilitate access to information. . . . Under this view, if the Internet is an endless expanse of information where "any person . . . can become a pamphleteer" then "[h]yperlinks are the paths among websites, creating the bustling street corners for distribution of those pamphlets and inviting passersby to engage more deeply with the issues raised."

Id. at 1019 (footnotes and citations omitted).

Hyperlinks have, therefore, become part of our everyday reading experience – a modern signal for readers of where to go to get a fuller context, obtain more information, or ascertain its source. As Sir Berners-Lee has explained, "[o]n the web, to make reference without making a link is possible but ineffective – like speaking but with a paper bag over your head." Tim Berners-Lee, *Links and Law: Myths*, Design Issues Blog (Apr. 1997), http://www.w3.org/DesignIssues/LinkMyths.html.

The dynamic nature of links – and the Internet – can also occasionally present problems, as both Adelson and the district court have identified by describing the potential for "link rot," SA-24 n.13, Br.20-21 – the fact that some

links may become "broken," or not operational, over time. For purposes of the privilege's attribution requirement, however, that is a fact-specific concern, no different analytically than the possibility that a cited book may go out of print. To be sure, in many cases, it will not be reasonable to contend that a stale link provided a reader with the requisite attribution to a governmental proceeding. In this case, however, the point is purely academic: it is undisputed the Petition was taken down after a week and its links were then, and still are, very much "live." In short, in *this* case, there is no dispute that the AP Article remained accessible to readers of the Petition throughout its life.

In the last analysis, the rule for which Adelson advocates – that hyperlinks can *never* properly be considered part of a publication's "overall context" for purposes of applying the privilege's attribution requirement – proves too much. More importantly, it would dramatically limit speech on the Internet, where such hyperlinks are an essential and ubiquitous tool for citing and commenting on other content, including especially reports of judicial and other governmental proceedings. As the district court concluded, it is "to be expected, and celebrated, that the increasing access to information [through hyperlinks] should decrease the need for defamation suits." SA 24-25.

B. The Petition's Blue, Underlined and Bold Hyperlink to "Reports" that Adelson "Personally Approved" Prostitution Satisfies the Attribution Requirement.

To support his argument that the Petition's hyperlink is not properly considered as part of the publication's "overall context," *Dameron*, 779 F.2d at 739, Adelson characterizes the link as "obscured" and "unexplained," Br.15-17, and cites a line of cases holding that consumers cannot be held to have formed enforceable contracts based on terms contained in difficult-to-find hyperlinks that they are not required to click on as a condition of gaining access to (or otherwise using) a website, *id.* at 17-20. Neither aspect of his argument withstands scrutiny.

First, Adelson's characterization of the Petition cannot be reconciled with the online document itself, a publication that, as the district court recognized, "repeatedly uses the phrase 'reportedly' and 'reports' when referring to the accusations in the Jacobs Declaration and puts in quotation marks the words 'personally approved,' which together make plain that the hyperlink connects to a source suggesting that Adelson 'personally approved' prostitution in Macau." SA-21. In response, Adelson asserts that the Petition's hyperlink to the AP Article was visible only "[i]f a reader viewed the Petition on a device with internet access," and if that reader "scrolled down" past the graphic to the text. Br.5. It is, however, undisputed that the Petition was published *only* online, JA-24 ¶23, that it was designed to and does in fact appear on a single screen "page" on a standard

computer monitor, and that its text does not appear in "small print" but rather in normal type size directly below the graphic on that single page. Br.3-4. The "scrolling" to which Adelson repeatedly refers would be necessary only if the Petition is viewed through a small or "minimized" browser window. And, while Adelson characterizes the link as "obscured," it is undisputed that it was "visible in the customary manner, that is, by being embedded in blue, underlined text," which in the case of the hyperlink at issue, was presented in bold face over the quoted words about which Adelson complains. Order at 8; *see also Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 852, 117 S.Ct. 2329, 2335 (1997) ("[t]ypically, the links are either blue or underlined text"). This Court's own website is replete with similar hyperlinks, signified only by their bright blue text. *See generally* http://nvcourts.gov. As courts have repeatedly recognized, "even modern-day Luddites are now capable of navigating cyberspace." *GoTo.com, Inc.*, 202 F.3d at 1209.

Second, Adelson's reliance on online contract cases is similarly unpersuasive. *See* Br.17-20. In those cases, the legal issue is not one of assessing a publication's overall context but rather whether there has been *mutual assent* within the meaning of the law of contracts, *i.e.*, whether there has been a "'meeting of the minds.'" *Grisham v. Grisham*, 128 Nev. Adv. Op. 60, 289 P.3d 230, 234-35 (2012) (citation omitted). All of the cases on which Adelson relies involve

contract formation. The only issue they purport to address is when computer users can be deemed to have provided the affirmative consent necessary to bind themselves to contractual terms contained in a hyperlinked web page. Not surprisingly, courts have been reluctant to find the required manifestation of mutual assent absent some affirmative action by the online computer user that he or she has agreed to the terms. *See, e.g., Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014). Such a determination necessarily requires a fact-specific analysis of "the conspicuousness and placement of the 'Terms of Use' hyperlink, other notices given to users of the terms of use, and the website's general design." *Id.* at 1177.

These cases, in short, turn on the issue of *consent* and have precious little to do with *context*, the dispositive issue for purposes of the fair report privilege's attribution requirement – *i.e.*, whether, in the 21st Century, a reasonable reader of an online publication would understand that a hyperlink from quoted language would provide that reader with information about its source. Thus, for example, in *Specht v. Netscape Communications Corp.*, then-Judge Sotomayor held that "a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms." 306 F.3d 17, 29-30 (2d Cir. 2002). The existence of the link in that case was insufficient to *bind*

consumers, not just because it was "submerged" lower on the screen, but because users "were responding to an offer that did not carry an immediately visible notice of the existence of license terms or require unambiguous manifestation of assent to those terms." *Id.* at 31-32. Likewise, in *Nguyen*, the hyperlinked terms were insufficient to *bind* users not because they were only available via hyperlink, but because the website "otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent." 763 F.3d at 1179.[15]

Similarly, in *In re Zappos.com, Inc. Customer Data Security Breach Litigation*, 893 F. Supp. 2d 1058 (D. Nev. 2012), the court held that users were not contractually bound by the terms of use of a website that contained a hyperlink to the terms "between the middle and bottom of each page," in the "same size, font, and color as most other non-significant links." 893 F. Supp. 2d at 1064. The mere existence of such a link was deemed insufficient to manifest the *assent* necessary to form a valid contract because "[w]here, as here, there is no acceptance by

[15] The third appellate case Adelson cites, *Campbell v. General Dynamics Government Systems Corp.*, 407 F.3d 546 (1st Cir. 2005), is even further afield. There, the issue was whether a defense contractor could require an employee to arbitrate his federal disability discrimination claim where the only reference to the arbitration requirement came in an email that contained a hyperlink to the policy containing the requirement itself. 407 F.3d at 549-50. The fundamental flaw in the contractor's argument was not that the email only made the policy available by hyperlink, but that nothing in the email suggested that it was *contractual*, *i.e.*, that "arriving for work the next morning would constitute binding acceptance of a new contractual term replacing court access with arbitration." *Id.* at 555.

Plaintiffs, no meeting of the minds, and no manifestation of assent, there is no contract pursuant to Nevada law." *Id.* at 1065.

Adelson's proffered analogy to these contract formation cases is particularly strained given the fact that, in the law of defamation itself, there is an impressive body of precedent addressing an issue that *is* analogous to the one before this Court.[16] Specifically, in assessing whether a challenged online statement constitutes a constitutionally protected expression of opinion based on disclosed facts, courts have uniformly held that the facts upon which the opinion was based could be "disclosed" through a hyperlink, precisely because such a link is properly considered part of an online publication's overall context. Thus, for example, in *Boley v. Atlantic Monthly Group*, the court considered an online publication that included the allegedly defamatory assertion that the plaintiff "George Boley" was a

[16] As the Second Circuit noted, in the specific context of the fair report privilege, the "only circuit case on point, albeit indirectly, is *Jankovic v. Int'l Crisis Grp.*, 593 F.3d 22 (D.C. Cir. 2010)." Order at 8 n.2. In that case, both the trial court and the D.C. Circuit assumed that a hyperlinked report would necessarily be considered by the reasonable reader to be part of the publication itself, or at least part of its context, for purposes of assessing the privilege's attribution requirement. *Jankovic v. Int'l Crisis Grp.*, No. 1:04-cv-01198 (RBW), slip op. at 5-6 (D.D.C. Mar. 27, 2009), ECF No. 68, *rev'd in part on other grounds*, 593 F.3d 22 (D.C. Cir. 2010) (proceeding on same assumption but ultimately concluding that the publication did not accurately describe the governmental document to which it hyperlinked); *Jankovic v. Int'l Crisis Grp.*, 429 F. Supp. 2d 165, 177 n.8 (D.D.C. 2006) (noting that "sentence ends with a footnote that lists two Internet links," which "make clear that this sentence was based on publicly available government information"), *aff'd in part and rev'd in part*, 494 F.3d 1080 (D.C. Cir. 2007).

"Liberian warlord." 950 F. Supp. 2d 249, 253 (D.D.C. 2013). As the court explained, "[t]he text of 'George Boley' in this online article contains a hyperlink" to an earlier news report by the author explaining the factual basis for his assertion. *Id.* at 253 n.2. Accordingly, the court rejected Boley's defamation claim based on the statement, which it held constituted an expression of opinion based on the facts contained in the hyperlinked article: "in referring to Boley as a warlord in his February 11, 2010 article, Goldberg provided a hyperlink to his January 27, 2010 article, thus incorporating that article by reference *and providing the necessary context* for the allegedly defamatory remark." *Id.* at 262 (emphasis added).[17]

Numerous other courts have similarly considered information contained in hyperlinks when evaluating whether an allegedly defamatory statement constituted a protected opinion based on disclosed facts. As one appellate court explained, in an observation equally applicable to the fair report privilege's attribution requirement, "the linked documents are part of the context that must be taken into

[17] Similarly, in *Agora, Inc. v. Axxess, Inc.*, a challenged online report characterized the plaintiff as an "unpaid promoter." 90 F. Supp. 2d 697, 705 (D. Md. 2000), *aff'd*, 11 F. App'x 99 (4th Cir. 2001). The publication included a hyperlink to the plaintiff company's website, where "the reader can readily review [its] disclosure policy, which reveals that its '[m]embers, . . . officers, directors, employees, and associated individuals may have positions in investments referred herein and may add to or dispose of the same.'" *Id.* (citation omitted). Considering this link as part of the publication's overall context, the court concluded that the challenged statement constituted an opinion based on the facts disclosed through the hyperlink. *Id.*

consideration when assessing what the website actually conveyed." *Rehak Creative Servs. v. Witt*, 404 S.W.3d 716, 732 (Tex. App. 2013); *see also, e.g.*, *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 7, 18 & n.7 (D.D.C. 2013) (where article "contains approximately 31 highlighted words or phrases that are hyperlinks," those hyperlinks disclosed facts that formed the basis for challenged statements), *aff'd*, 783 F.3d 1328 (D.C. Cir. 2015); *Global Telemedia Int'l, Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1268 (C.D. Cal. 2001) (information contained in link confirmed that defendant's statement was "clearly based on a public document"); *Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1102-03 (N.D. Cal. 1999) (relying on facts contained in hyperlinked articles to provide context supporting challenged statements); *Franklin v. Dynamic Details, Inc.*, 10 Cal. Rptr. 3d 429, 431 (Cal. Ct. App. 2004) (challenged statements not actionable because links disclosed facts on which they were based and reader "could view those Web sites"); *Sandals Resorts Int'l v. Google*, 925 N.Y.S.2d 407, 416 (N.Y. App. Div. 2011) (challenged statements in email not actionable because they were "supported by links to the writer's sources").

Adelson contends that these cases are inapposite because the hyperlinks at issue in them were not "embedded." Br.16. This contention is doubly flawed. Nowhere in any of these cases does the court even hint that its analysis turned on whether the link itself was embedded, contained a full URL, or otherwise provided

information about what it contained. More importantly, several of these decisions *do* in fact arise in the context of embedded links. *See, e.g.*, *Boley*, 950 F. Supp. 2d 249, 253 & n.2 (hyperlink to earlier article embedded in the words "George Boley"); *Agora Inc. v. Access, Inc.*, 90 F. Supp. 2d 697, 701 (D. Md. 2000) ("By clicking on the word 'internet' in column two . . . the reader activates a hyperlink"), *aff'd*, 11 F. App'x 99, 101 (4th Cir. 2001) ("The word in the middle column, 'Internet,' is a hyperlink to *Taipan*'s website"); *Abbas*, 975 F. Supp. 2d at 7 (article contains "31 highlighted words or phrases that are hyperlinks").

At bottom, the rationale for construing information provided in hyperlinks as part of the overall context in which a challenged statement is properly evaluated applies *both* when assessing whether it constitutes an opinion based on disclosed facts *and* whether it comes from a judicial or other governmental proceeding. In both circumstances, a reasonable reader would understand that, by following the link, he or she can ascertain the basis for challenged statement, be it the facts on which it is based or the source from which it comes. Most importantly, judicial consideration of such links as part of an online publication's overall context both allows authors and their audiences to benefit from the kind of robust debate facilitated by electronic communications and furthers the privilege's overarching purpose of providing citizens with broad freedom to communicate freely about public issues, especially about what is said and done in judicial and other

governmental proceedings. Accordingly, in this case, the Petition's well-signaled hyperlink to the AP article satisfied the fair report privilege's attribution requirement, and this Court should answer the first certified question in the affirmative.

C. The "Fair, Accurate and Impartial" Requirement Does Not Prohibit Speakers from Expressing Opinions Based on Privileged Reports.

Adelson also urges this Court to consider a second issue concerning the privilege's application to the facts of this case, one that the federal district court resolved in defendants' favor, SA-26-28, and which the Second Circuit did *not* certify. Specifically, Adelson contends that the Petition did not constitute a "fair, accurate, and impartial" account of the judicial proceeding it described because its republication of the charges leveled against him in the Jacobs Declaration was "'one-sided.'" Br.21 (quoting *Lubin v. Kunin*, 117 Nev. 107, 113-17, 17 P.3d 422, 427 (2001)). This Court may, but is by no means obliged to consider this additional issue. If it does, however, it should affirm the federal district court's application of well settled Nevada law.

There are two dispositive flaws in Adelson's argument. First, it is undisputed that, at the time the Petition was published and for as long as it remained online, the Jacobs Declaration stood unrebutted in the record of the judicial proceeding in which it was filed. For purposes of the fair report privilege,

all that is required is that a publication fairly describe what has taken place in the proceeding it references. If the "proceeding" being described is itself "one-sided," the report will necessarily be as well, but it will nevertheless constitute a "fair, accurate and impartial" account of that proceeding. Thus, for example, reporting that a person had been arrested and charged with murder is privileged if the only official proceeding to date is his arrest and booking; the same report of an arrest and charge would likely not be privileged if made following an acquittal because the report would be incomplete in a manner that renders it a "one-sided" account of the proceeding itself. In this case, therefore, the privilege's "impartiality" requirement does not oblige defendants to report Adelson's "side of the story" unless it is set forth in the proceeding itself. *See, e.g.*, *Sahara Gaming Corp.*, 115 Nev. at 218, 984 P.2d at 168 (privilege applies to union's letter that recounted allegations made in civil complaint but did not include plaintiff's extra-judicial response); *see also White*, 909 F.2d at 527 (news reports fairly summarized letters leveling charges that became subject of then-ongoing investigation).

Second, the privilege is in no sense forfeited, as Adelson suggests it should be, Br.21, because the Petition expresses the opinion that Governor Romney should reject Adelson's campaign contributions based on multiple allegations (including those contained in the Jacobs Declaration) then circulating about their provenance. On its face, the Petition advocated the view that the very existence of

these various well-publicized reports sufficiently tainted Adelson's contributions such that Romney should reject them, regardless of whether any of the reported allegations was true. As the district court explained, "there is an important difference between explicitly *endorsing* allegations in a lawsuit and stating an opinion based upon [those] allegations." SA-27 n.16. That is because, under Nevada law, the former will result in forfeiture of the fair report privilege, while the latter will not.

In this case, while the Petition expressed strong opinions about whether Romney should accept Adelson's contributions in the wake of the various controversies and allegations then surrounding him, nowhere in it did defendants purport to endorse the accuracy of those allegations. Instead, through the repeated use of words like "reportedly" and hyperlinks to the sources of the various allegations on which the expressed opinions were based, the defendants took pains *not* to do so.[18] As a result, the Petition's recounting of the allegations contained in the Jacobs Declaration remains "fair, accurate and impartial" as a matter of law.

[18] Adelson is therefore left to complain about the Petition's "artful presentation" which, he asserts, featured "stark white print against [a] dark background" and the use of different type sizes and fonts. Br.22. None of that, however, changes the fact that the Petition repeatedly makes clear that it is basing its opinions on the various "reports" it references and that it does not purport – in the headline, in the graphic, or in the text – to endorse the accuracy of any of the allegations contained in those reports.

This is the lesson of this Court's decision in *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, in which it applied the privilege to protect a publication analogous to the Petition. Just as the Petition relied in part on Jacobs' sworn allegations in advocating that Romney should reject Adelson's contributions, the defendant union in *Sahara Gaming* urged plaintiff Sahara's potential business partner to reconsider doing business with the casino and, in making its case, accurately quoted, *inter alia*, an excerpt from a civil complaint alleging that Sahara had committed fraud. 115 Nev. at 213-14, 984 P.2d at 165. This Court held that the union's accurate references to the complaint's allegations constituted a privileged report of the complaint itself, even though the union's letter was otherwise a one-sided, partisan attack on Sahara. *Id.* at 219, 984 P.2d at 168.[19]

[19] Other courts have similarly applied the privilege to publications, such as the letter in *Sahara Gaming* and the Petition at issue here, that fairly and accurately describe allegations made in a judicial document and then express a point of view based, in whole or in part, on the fact those allegations had been made. *See, e.g.*, *Boley*, 950 F. Supp. 2d at 259-60 (portion of article describing official documents protected by privilege, notwithstanding expressed opinion, based on those documents, that it was a "good thing" plaintiff was charged with war crimes and that he was "evil"); *Piscatelli v. Van Smith*, 35 A.3d 1140, 1149, 1153-54 (Md. 2012) (some challenged statements were "substantially correct, impartial" accounts of official documents protected by fair report privilege, while others constituted protected "[s]imple opinions" or "fair comment"); *Bloom v. Fox News*, 528 F. Supp. 2d 69, 76-77 (E.D.N.Y. 2007) (same); *Wilkow v. Forbes, Inc.*, 2000 WL 631344, at *12-13 (N.D. Ill. May 15, 2000) (same), *aff'd*, 241 F.3d 552 (7th Cir. 2001); *Coles v. Wash. Free Weekly, Inc.*, 881 F. Supp. 26, 30-31 (D.D.C. 1995) (same), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996); *see also Global Telemedia Int'l, Inc.*,

By the same token, Nevada courts, like those of other jurisdictions, have held that the privilege will not protect a publication that *both* recounts allegations made in a judicial proceeding *and* independently endorses their accuracy. *See, e.g.*, *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 69 (2d Cir. 1980); *Herbert v. Lando*, 596 F. Supp. 1178, 1227 n.4 (S.D.N.Y. 1984), *rev'd on other grounds*, 781 F.2d 298 (2d Cir. 1986); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1097-98 (4th Cir. 1993). In *Lubin v. Kunin*, therefore, this Court concluded that defendants, a group of parents, "arguably went beyond fair, accurate, and impartial reporting," 117 Nev. at 115, 17 P.3d at 427, when they expressly *endorsed* the accuracy of child abuse allegations made in a complaint filed against a school director:

> **This is not a frivolous lawsuit [as] there is an abundance of evidence as well as eye-witnesses**. These parents never envisioned that anything of this nature could or would happen to their child. **IT DID!** It is time to protect our children.

Id. at 119, 17 P.3d at 424, 427-28 (emphasis in original). The court explained why such a publication is not privileged: simply put, "a party may not don itself with the judge's mantle, crack the gavel, and publish a verdict through its 'fair report.'" *Id*. at 115, 17 P.3d at 427. Thus, while reporting that a person was accused of an offense in a judicial proceeding is privileged, stating that they in fact "did it" (not to mention that there is an "abundance of evidence" and "eye-witnesses" to prove

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132 F. Supp. 2d at 1268 (critical commentary by Internet poster was constitutionally protected opinion where it included hyperlink to underlying governmental document on which opinion was based).

it) transforms the statement from one reporting about a court proceeding to a direct accusation by the speaker that cannot shelter under the privilege.

In this case, the Petition accurately quoted from (and hyperlinked to a news report describing) the contents of a sworn document filed in civil litigation. Unlike the publication in *Lubin*, which affirmatively embraced the allegations made in the complaint it described, the Petition did not purport to endorse the accuracy of Jacobs' allegations. Rather, just as the letter in *Sahara Gaming* cited the allegations of a complaint to support its belief that a contract should be canceled, the Petition cited the Declaration's allegations to support its contention that widespread reports of those charges, as well as others recounted in the Petition, "tainted" Adelson's contributions. The federal district court correctly held that the Petition's expression of that opinion, which the Second Circuit has already held is protected by the First Amendment, Order at 6, does not serve to forfeit the privilege that protects its faithful recounting of the allegations contained in the Jacobs Declaration, SA-27-28 n.16.

II. THE OPERATIVE ANTI-SLAPP STATUTE APPLIES TO SPEECH, LIKE THE PETITION, "AIMED AT PROCURING" AN "ELECTORAL ACTION, RESULT, OR OUTCOME."

Adelson ignores the plain language of the relevant provisions of Nevada's anti-SLAPP statute and their legislative history to argue that, "before October 1, 2013, Nevada was among the states with limited anti-SLAPP protection covering

only the right to petition the government." Br.24 (emphasis added). In fact, at all relevant times, the statute expressly defined the "right to petition" to include speech, like the Petition at issue here, aimed at "procuring any . . . electoral action, result or outcome," regardless of the audience to which such speech is directed, and that plain language has not been abrogated either by this Court or in subsequent statutory amendments.

A. The Plain Language and Legislative History of the Anti-SLAPP Act Confirm It Applies to the Petition.

As originally enacted in 1993, Nevada's anti-SLAPP statute included only one category of protected speech and *was* limited to communications directed at government officials. SA-50; *see also* JA-859-60 (excerpts of official legislative history of S.B. 405-1993). Specifically, the 1993 legislation afforded the statute's immunity only to those who "communicate[d] a complaint or information to a legislator, officer or employee" of a governmental agency. *Id.*

The law's scope was substantially broadened in 1997 when the legislature passed Assembly Bill 485 – 1997 ("A.B. 485") "to increase protection" from SLAPP suits by extending the statutory immunity to all those "involving themselves in public affairs." JA-863, 865 (excerpts of official legislative history of A.B. 485).[20] The bill broadened the statute's scope by specifically defining the

[20] To explain the 1997 amendment's purpose, its sponsor placed in the legislative record newspaper reports illustrating the types of SLAPP suits the

"right to petition" protected by it to include not one, but *three* separate categories of speech. JA-865-66, 870. Thus, as amended in 1997, the statute expressly defines the "right to petition" to include any:

> 1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;
>
> 2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; or
>
> 3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law.

SA-43 (quoting NRS § 41.637); *see also* JA-863, 865-66, 870. In the amended statute, therefore, the phrase "right to petition" is a "term of art defined in the three prongs," each of which is set out disjunctively, using the connector "or." SA-43-45. The original, narrow protection for direct communications to government officials became prong 2 – just one of the "three classes of petitions protected by the statute." *John*, 125 Nev. at 761, 219 P.3d at 1286.

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amendment was designed to prevent. JA-874-91 (articles submitted as "Exhibit C"). Those articles described, among others, lawsuits brought by the Church of Scientology against Internet-based publications critical of the Church, JA-889-90, as well as *Immuno A.G. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991), a defamation action premised on articles published in scientific journals, JA-885-86. The Assembly Judiciary Committee's Vice-Chair explained that "the information provided in Exhibit C [provides] good examples of the types of actions that should be stopped." JA-871.

In passing the Assembly's version of the amendment, the legislature specifically *rejected* an alternate Senate bill ("S.B. 331") that would have continued to limit anti-SLAPP immunity to speech "aimed at procuring favorable government action," while expanding such immunity slightly to include such efforts when made either through a direct communication to a government official or "in a place open to the public or in a public forum." JA-902-03 (excerpts of official legislative history of SB 331-1997). The Senate committee's counsel offered as an example "a statement made to a newspaper, if it was the same statement made to a public body, *as long as it was genuinely aimed at procuring favorable government action*." JA-915 (emphasis added). This bill was passed by the Senate, JA-914-16, and referred to the Assembly Committee on the Judiciary, which was then considering A.B. 485. The chairman noted that the Senate bill was "not as strong" as the "much stronger piece of legislation" being considered by the Assembly. JA-922. Accordingly, the committee resolved to "amend S.B. 331" to incorporate all of the provisions of A.B. 485. *Id*. The amended version of S.B. 331, which included all three prongs of A.B. 485, JA-923-26, was passed by the Assembly on July 2, 1997, JA-927-28. Following the recommendation of a joint conference committee, JA-929-30, the Senate approved the broader version of what then became the revised anti-SLAPP law, JA-931-32. As the federal district court noted, this legislative history demonstrates that the 1997 amendment was

designed to "expand the Anti-SLAPP statute to reach beyond communications made to a government agency." SA-51.

In addition, because the amended statute requires a direct communication to a government official *only* for the second protected class, and *not* for the first and third (which apply broadly to speech that is either aimed at achieving governmental or electoral results, or is directly related to an issue under consideration by the government), fundamental rules of statutory construction confirm that no such limitation restricts the scope of prongs 1 or 3. *See Richardson Constr., Inc. v. Clark Cnty. Sch. Dist.*, 123 Nev. 61, 64, 156 P.3d 21, 23 (2007) (court "may look no further than any unambiguous, plain statutory language"). Reading such a requirement into prongs 1 and 3 where none exists in their text would render them entirely redundant of prong 2, *see Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) ("Whenever possible, 'we construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage.'"), and would undo the legislature's intent to expand the statute's protections beyond the 1993 Act's limited immunity. Indeed, unless only government officials vote in elections or the statute is read only to protect appeals to government officials to cast *their* ballots for a given candidate, it cannot reasonably be construed to apply solely to statements directed to such officials.

As the federal district court recognized, "the Petition and Press Release were patently partisan statements made by a Democratic organization to Democratic-leaning voters in an effort to undermine Republican candidates' financial support." SA-44. Thus, that court correctly determined, "[i]t strains credulity to argue that such communications are not aimed at procuring an action, result or outcome relating to an election." *Id.* Although the Second Circuit certified the question, it was otherwise inclined to agree, asserting that, because the Petition "sought to influence an election, . . . it would seem to fall under the first prong according to the plain text of the then-existing statute." Order at 12. As defendants explain below, none of Adelson's contentions otherwise withstand reasonable scrutiny.

B. Adelson Misreads *John v. Douglas County School District*.

To overcome the statute's plain meaning and legislative history, Adelson is compelled to place great weight on passing language in this Court's decision in *John v. Douglas County School District* to the effect that "'[t]he anti-SLAPP statute *only protects citizens who petition the government from civil liability arising from good-faith communications to a government agency*.'" Br.26 (quoting *John*, 125 Nev. at 753, 219 P.3d at 1281). This quotation, and other analogous statements in *John*, must be read in the context of what was before this Court for decision in that case. When it is, there can be little doubt that, as the federal district court recognized, the "natural reading of the case is that the court

was simply expounding upon the second prong, and was unconcerned with the first and third prongs." SA-46.

Specifically, in *John*, the plaintiff was a former security officer for a school district who sued district employees for statements they made to other government agents in the course of an official investigation of his conduct. 125 Nev. at 751, 219 P.3d at 1280. The defendants' direct communications with those officials involved in the investigation were the only statements at issue in *John* and, as a result, this Court spoke only to the availability of the statutory immunity provided under prong 2 (where such direct communications *are* required). *See id.* at 761, 219 P.3d at 1286 ("The second class of protected petitions applies to all political subdivisions of Nevada . . . which includes school districts."); *see also* SA-46 ("The defendants sought to dismiss the action under the Nevada Anti-SLAPP statute on the ground that the statements were protected under the second prong as communications to the school district regarding a matter of reasonable concern – an employee's misconduct.").

Admittedly, lower courts considering prong 3 of the anti-SLAPP statute have since divided on the import of the referenced language in *John* – language the Second Circuit ultimately found to be "ambiguous" enough to warrant certification. Order at 13 ("[W]e cannot be sure whether '*communications to a government agency*' is also emphasized for the simple reason that the

communication in *John* involved the second prong of the statute, and *only* that prong, or whether this language was meant to impose a more general limitation."). Some trial courts have read the language as meaning that the statute as a whole "only protects citizens who petition a government agency." *E.g.*, *Buckwalter v. Wey*, 2010 WL 2609100, at *3 (D. Nev. June 24, 2010). Others have followed the statute's plain terms and continued to apply prong 3 to speech not directed to the government. *See, e.g.*, *Rebel Commc'ns, LLC v. Virgin Valley Water Dist.*, 2012 WL 934301, at *1-2 (D. Nev. Mar. 20, 2012) (citing *John*, 125 Nev. at 755, 219 P.3d at 1282, but finding that speech "outside of public meetings," including "public statements," fall under prong 3, as "'statement[s] made in direct connection with an issue under consideration by a legislative, executive or judicial body'") (citation omitted); *Archey v. Nelson*, 2010 WL 3711513, at *4 (Churchill Cnty. Dist. Ct. Aug. 10, 2010) (citing *John*, 125 Nev. 746, 219 P.3d 1276, and applying prong 3 to news report because "legislature made it clear that their intent was to also apply the protections afforded by this legislation to news media accounts when they publish an article that directly pertains to a matter under consideration by a governmental body").

Especially given the statute's plain meaning and legislative history, these latter courts, as well as the federal district court in this case, have it right. In short, there is no indication in *John* that this Court was reaching out to decide an issue

that was not before it about provisions of the statute that were not at issue in the case. Construed in context, the only reasonable construction of the language in *John* upon which Adelson relies is that it was directed solely at prong 2, the only statutory provision at issue in the case and the only one that requires a communication directed to the government.[21]

C. The 2013 Amendments to the Anti-SLAPP Statute Confirm Its Pre-Amendment Scope.

Finally, Adelson's claim that the 2013 amendments "were not a clarification but an expansion" of the statute's reach, Br.28, has already been rejected by this Court in two unpublished decisions, and for good reason. As their plain language and legislative history confirm, the 2013 amendments *both* expanded the statute's reach to protect all speech relating to matters of "public concern" – not just speech concerning elections (prong 1) and matters pending before governmental bodies (prong 3) – *and* clarified that such speech, including the categories protected by

[21] If nothing else, the language from *John* on which Adelson relies is *dicta* and the issue may therefore properly be considered on its merits in this case unencumbered by principles of *stare decisis*. *E.g.*, *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009) ("A statement in a case is dictum when it is 'unnecessary to a determination of the questions involved.'") (citation omitted); *First Fin. Bank v. Lee*, 130 Nev. Adv. Op. 96, 339 P.3d 1289, 1292-93 (2014) (en banc) (Court not limited by language from prior decision "seize[d] on" by a respondent, where relevant issue of statutory interpretation had not been "squarely presented" in earlier case); *see also ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 651-55, 173 P.3d 734, 743-44 (2007) (Court properly revisits interpretations that "deviate from [a statute's] plain language").

prongs 1 and 3, does *not* need to be directed to a government agency or official to qualify for the statute's protection.[22]

Indeed, an express purpose of SB 286-2013 was to remedy what the legislature perceived to be an erroneous construction of the statute by a federal appellate court – the same construction that Adelson advocates here. As the bill's sponsor explained, "[i]n a recent decision, the 9th Circuit Court of Appeals held that the anti-SLAPP provisions of Chapter 41 only protect communications made directly to a governmental agency. . . . I am introducing Senate Bill 268 to resolve those limitations." *Opening Remarks: Senate Comm. on Judiciary*, 77th Sess., (Mar. 28, 2013) (statement of Sen. Justin Jones); *Senate Comm. on Judiciary*, 77th Sess. (Mar. 28, 2013) Minutes at 3 (Sen. Justin Jones: "The purpose of S.B. 286 is to address concerns raised by the Ninth Circuit Court of Appeals with regard to NRS41."); *see also* 2013 Nev. Sess. Laws Ch. 176 (S.B. 286), 77th Sess., Legislative Counsel's Digest at ¶2 ("The Ninth Circuit Court of Appeals recently

[22] Specifically, the statute was amended to protect, in addition to the speech previously referenced in prongs 1 through 3, communications made "in direct connection with an issue of public concern in a place open to the public or in a public forum." NRS § 41.637(1). As anti-SLAPP expert Marc Randazza testified, newly enacted prong 4 expands the statute to "*all* speech about matters of public concern," including, for example, Yelp and Avvo reviews. Senate Comm. on Judiciary, 77th Sess., Mar. 28, 2013 Exhibit D (Marc Randazza Testimony). This Court has indicated, albeit in an unpublished decision, that prong 4 does not apply retroactively to communications made prior to the 2013 amendments. *Doe v. Brown*, No. 62752, slip op. at 2 n.1 (Nev. May 29, 2015); *see infra* note 26.

held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency.").[23]

It is well settled that, "[w]here a former statute is amended, or a doubtful interpretation of a former statute [is] rendered certain by subsequent legislation . . . such amendment is persuasive evidence of what the Legislature intended by the first statute." *In re Christensen*, 122 Nev. 1309, 1319, 149 P.3d 40, 47 (2006) (quoting *Sheriff v. Smith*, 91 Nev. 729, 734, 542 P.2d 440, 443 (1975)). As this Court has explained:

> [W]hen a statute's "doubtful interpretation" is made clear through subsequent legislation, we may consider the subsequent legislation persuasive evidence of what the Legislature originally intended.

Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't ("*PEBP*"), 124 Nev. 138, 157, 179 P.3d 542, 554-55 (2008).

In *PEBP*, this Court noted that the extensive amendments to the public employee pension statute at issue were, in part, a direct response to the defendant police department's erroneous interpretation of the previous statute. *Id.* This Court held that the amendment showed that the "doubtful interpretation" by the defendant was contrary to the intent of the original statute. *Id.* Similarly, in this

[23] In fact, the referenced case, *Metabolic Research, Inc. v. Ferrell*, did *not* actually hold that the statute is limited to direct communications to a government agency; it did, however, note that the *district court* in that case had so concluded. 693 F.3d 795, 798 (9th Cir. 2012). The Ninth Circuit dismissed that interlocutory appeal for lack of jurisdiction without reaching the merits of the case or otherwise opining on the statute's scope. *Id.* at 796-77.

case, the 2013 amendments were intended, in relevant part, to "address concerns" raised by an erroneous judicial interpretation of the statute's scope. In addressing those concerns, the 2013 amendment *reaffirmed* the legislature's ongoing intent to protect speech beyond the direct petitioning of government agencies and officials. *See* S.B. 286, 77th Sess. (enacted May 27, 2013; effective Oct. 1, 2013).[24]

This Court has twice so construed the 2013 amendments, albeit in unpublished, and therefore nonprecedential, rulings.[25] In *Jensen v. City of Boulder City*, 2014 WL 495265, the Court expressly recognized that "the Legislature's amendments to Nevada's anti-SLAPP statutes appear to *clarify, not change*, the law." *Id.* at *2 (emphasis added). Although the anti-SLAPP motions at issue in *Jensen* were filed, adjudicated and appealed *prior to* the 2013 amendments, the Court held that those amendments confirm "that the Legislature intended for the anti-SLAPP statutes to cover all speech directly connected to matters of public

[24] Adelson's invocation of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is a red herring. Br.30-31. If this Court had held in *John* that the statute is limited in the manner he contends, the legislature could not retroactively overturn this Court's ruling. However, as described *supra* in Part II.B., the scope of prong 1 was simply not at issue in *John*, and this Court accordingly did not purport to issue any holding about the scope of that provision of the statute in that case.

[25] Although Nevada Supreme Court Rule 123 states that an unpublished opinion is not precedential, this Court's orders in *Jensen v. City of Boulder City*, 2014 WL 495265 (Nev. Jan. 24, 2014), and *Panicaro v. District Court*, 2014 WL 4639195 (Nev. Sept. 16, 2014) (both discussed *infra*) are directly on point and persuasive. Defendants therefore cite them as persuasive, as opposed to precedential, authority. *E.g.*, *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 121 Nev. 225, 235 n.25, 112 P.3d 1070, 1076 n.25 (2005).

concern," concluding that the district court's narrow "holding that the petition at issue in the appeal was not a protected communication was in error." *Id.* at *3;[26] *see also Panicaro*, 2014 WL 4639195, at *1 (reiterating that "the Legislature's amendments to Nevada's anti-SLAPP statutes appear to clarify the statute" and holding that denial of anti-SLAPP motion decided under prior version was immediately appealable under provision of amended law, even though prior statute had no direct appeal provision). Thus, the 2013 amendments, and this Court's treatment of them in *Jensen* and *Panicaro*, reinforce this Court's demonstrated commitment to apply the operative version of the statute according to its plain meaning.[27] For this reason as well, the Court should answer the second certified question in the affirmative.

[26] Notably, if this Court had construed the language in *John* on which Adelson relies to address prongs 1 and 3 of the 1997 statute, *Jensen* could not have been decided as it was. *See also Doe*, slip op. at 3-4 (assuming that statute would apply to posting on newspaper website if it had otherwise satisfied requirements of prong 3, despite fact that it was not directed to government agency).

[27] On June 1, 2015, the Legislature enacted S.B. 444, which amends certain procedural aspects of the anti-SLAPP statute, such as court's deadline for resolving motions and the evidentiary standard under which special motions will be decided going forward. Because the bill makes no change to the anti-SLAPP statute's definition of protected speech in NRS § 41.637, it has no effect on the foregoing analysis.

CONCLUSION

For all of the foregoing reasons, defendant-respondents respectfully request that the Court answer both certified questions in the affirmative.

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Respectfully submitted,
CAMPBELL & WILLIAMS

By: /s/ *J. Colby Williams*

Donald J. Campbell, NV Bar No. 1216
J. Colby Williams, NV Bar No. 5549
700 South Seventh Street
Las Vegas, Nevada 89101
Tel. (702) 382-5222
Fax. (702) 382-0540
djc@campbellandwilliams.com
jcw@campbellandwilliams.com

Lee Levine
(*pro hac vice* application forthcoming)
Seth D. Berlin
(*pro hac vice* application forthcoming)
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, N.W., Suite 200
Washington, D.C. 20036
Tel.: 202-508-1100
Fax. 202-861-9888
llevine@lskslaw.com
sberlin@lskslaw.com

Counsel for Respondents David A. Harris, Marc R. Stanley and National Jewish Democratic Council

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman 14 point font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,978 words.

3. Finally, I hereby certify that I have read this Respondents' Answering Brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of June, 2015.

CAMPBELL & WILLIAMS

By: /s/ *J. Colby Williams*

Donald J. Campbell, NV Bar No. 1216
J. Colby Williams, NV Bar No. 5549
700 South Seventh Street
Las Vegas, Nevada 89101
Tel. (702) 382-5222
Fax. (702) 382-0540
djc@campbellandwilliams.com
jcw@campbellandwilliams.com

Counsel for Respondents David A. Harris, Marc R. Stanley and National Jewish Democratic Council

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Respondents' Answering Brief** was served on the 3rd day of June, 2015 via U.S. Mail, first class postage prepaid, to the following:

MORRIS LAW GROUP
Steve Morris
Rosa Solis-Rainey
900 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Appellant
Sheldon G. Adelson

/s/ *J. Colby Williams*
An employee of Campbell & Williams