NO. 77708

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE WYNN,

Plaintiff-Appellant,

v.

THE ASSOCIATED PRESS AND REGINA GARCIA CANO,

Defendants-Respondents.

Appeal from the Eighth Judicial District Court
The Honorable RONALD J. ISRAEL, District Judge
District Court No. A-18-772715-C

RESPONDENTS' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure 26.1, Respondent The Associated Press ("AP") discloses that it has no parent company and no entity owns more than ten (10) percent of stock in it.

There are no corporations to disclose with regard to Respondent Regina Garcia Cano.

The law firm of BALLARD SPAHR LLP appeared on Respondents' behalf in the district court and in this Court.

Dated: June 21, 2019.

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INTRODUCTION

This case arises from a news report written and published by Defendants-Appellees Regina Garcia Cano and The Associated Press (together, "AP") regarding two complaints filed with the police alleging sexual misconduct by Plaintiff-Appellant Steven Wynn. But this case therefore also addresses something that journalists across America do every single day: inform the public about complaints of wrongdoing submitted to government agencies, including to police departments. Through this lawsuit, Mr. Wynn challenges the right of the AP and other news organizations to inform the public of such complaints—and he attempts to do so despite Nevada's longstanding recognition of the "fair report" privilege, a doctrine that permits the press and public to report on and discuss allegations contained within official proceedings and records without fear of liability even if those allegations turn out to be false. *See, e.g.*, *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 218-19, 984 P.2d 164, 168 (1999) ("It is the news media and 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."); *see also, e.g.*, Restatement (Second) of Torts § 611 cmt. d. ("The filing of a report by an officer or agency of the government is an action bringing a reporting of the government report within the scope of the privilege.").

The District Court dismissed Mr. Wynn's defamation claim—which was based on only one of the two police reports summarized by AP in a news report published at a time when an avalanche of sexual misconduct complaints against Mr. Wynn were dominating national headlines—on the basis of the fair report privilege. Mr. Wynn presses three separate arguments in urging this Court to reverse the judgment in favor of AP, but none of those arguments has merit.

First, Mr. Wynn hyperbolically—and erroneously—claims that "no other court" has ever extended the fair report privilege to police reports like those at issue here, and he urges this Court to exclude police reports from the scope of Nevada's fair report privilege entirely unless those reports result in "an arrest, an investigation, or … criminal proceedings." Appellant's Opening Br. ("Br.") at 5, 17. This contention, to which Mr. Wynn devotes the vast majority of his brief, conflates the fair report privilege with the separate judicial proceedings privilege, invokes the discredited "official action" rule, and mischaracterizes both the Restatement and the weight of national authority. Mr. Wynn is, in a word, wrong. Fair accounts of government records and reports, including the specific type of police report at issue here, are privileged. Moreover, even if this Court were inclined in this case to narrow Nevada's protection for speech about government activities and to accept Mr. Wynn's invitation to require "official action" on a complaint as a pre-condition to invocation of the privilege—a change in Nevada law that would undermine public

access to information about the government—the police report at issue would nevertheless meet that standard. The Las Vegas Metropolitan Police Department ("LVMPD") not only issued a public statement about the two sexual assault complaints, 1 J.App. 73 at ¶¶ 6-7, but also forwarded a copy of the official report at issue to authorities in Chicago (where the assault allegedly occurred), *id.* ¶ 7; 1 J.App. 93, and publicly urged victims to come forward, 1 J.App. 87.

The second argument by Mr. Wynn, that the news article at issue is not a "fair and accurate" summary of the police record in question, is primarily rhetorical. Tellingly, Mr. Wynn does *not* dispute that AP accurately summarized the rape allegation contained in the police report that he actually claims is defamatory. Instead, on nearly every page of his brief, like a marketer seeking to capitalize on a psychological exposure effect, Mr. Wynn repeatedly deploys adjectives to characterize the woman who filed the complaint and her description of events that purportedly took place after the alleged assault as incredible—*i.e.*, "fanciful," "surreal," "delusional," and "fictional." Br. at 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 18, 41, 42, 46, 48. Mr. Wynn then urges a simple but erroneous proposition: He postulates that, by failing to quote verbatim other statements in the police report that Mr. Wynn believes undermine the credibility of his accuser, AP failed to provide an accurate summary of the police record. Br. at 2; *see also id.* at 45-46 (suggesting that "Respondents arguably could have met the privilege's requirements had they quoted

verbatim from the four sentences describing the fanciful and surreal birth of the baby in the bag").

As the District Court properly recognized, however, "the News article fairly reported information that was the subject of the News article." 2 J.App. 318. The fair report privilege does not require a verbatim transcript of all statements that are potentially relevant to credibility, only a "fair abridgment" of the challenged allegations. *Wynn v. Smith*, 117 Nev. 6, 14, 16 P.3d 424, 429 (2001) (en banc) (per curiam). Indeed, the rule proffered by Mr. Wynn would render the privilege a functional nullity because no reporter could ever safely summarize only a portion of a proceeding or official record.

Finally, Mr. Wynn seeks to take back a joint stipulation through which the parties framed the District Court's consideration of AP's special motion pursuant to the immunity afforded by Nevada's Anti-SLAPP statute, Nev. Rev. Stat. § 41.635 *et seq*. The District Court properly applied the burden-shifting procedure under that statute in light of the parties' stipulation—a conclusion that becomes obvious upon review of the plain text of the stipulation. 1 J.App. 122-26. And the District Court ruled correctly in granting the special motion. The Legislature in this state has enacted and repeatedly strengthened the statute providing for prompt resolution of "strategic lawsuits against public participation," or SLAPPs, defined by the this Court as "meritless suit[s] filed primarily to chill the defendant's exercise of First

Amendment rights," the "hallmark" of which is "to obtain a financial advantage over one's adversary by increasing litigation costs." *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 749, 752, 219 P.3d 1276, 1280 (2009) (internal marks and citations omitted), *superseded by statute on other grounds as stated in Shapiro v. Welt*, 133 Nev. Adv. Op. 35, 389 P.3d 262 (2017). This action, by a billionaire against a news collective over a news report that simply summarizes official police records, is such a case. Judgment in favor of AP should be affirmed in all respects.

COUNTER-STATEMENT OF ISSUES PRESENTED

A. Applicability of the Fair Report Privilege to the Police Report

Should the Court accept Mr. Wynn's invitation to deny the protection of the fair report privilege to news reports about a complaint made to the police or other government agency unless there is subsequent "official action" on the complaint and, even if the Court were to so narrow the privilege, should judgment for AP nevertheless be affirmed because the undisputed record establishes that the Las Vegas Metropolitan Police Department in fact took "official action" on the complaint at issue?

B. Whether the AP Article Was a Fair and Accurate Summary of the Police Report

Was the AP's concededly accurate account of the accusation of rape contained in the police report rendered non-privileged because the AP only summarized, rather than including verbatim, collateral statements contained in the police report that Mr. Wynn claims undercut the complainant's credibility?

C. Applicability of the Anti-SLAPP Statute

Did the District Court err in applying the Anti-SLAPP Statute as proposed by the parties in a joint stipulation?

COUNTER-STATEMENT OF THE CASE/FACTS

Mr. Wynn's Statement of the Case/Facts is both argumentative and in certain respects inaccurate. AP therefore provides this Counter-Statement of the Case/Facts.

A. Plaintiff-Appellant

Plaintiff Steve Wynn is a billionaire and "well-known public figure in Nevada." *Wynn*, 117 Nev. at 9; *see also Wynn v. Bloom*, No. 2:18-cv-00609-JCM-GWF, 2019 WL 1983044, at *3 (D. Nev. May 2, 2019) ("There is no dispute that Steve Wynn is a public figure."). According to the Complaint in this case, he is a "visionary, a successful businessman, and a philanthropist," who, during a 45-year career, came to be "well-known and recognized for his role in the revitalization of the Las Vegas Strip in the 1990s" and viewed nationally as a leader in casino and resort development. 1 J.App. 6-7, ¶¶ 47-53. Mr. Wynn's public profile extends beyond business; he was once described by President Trump as a "great friend," is a prolific political donor, and served as the Republican National Committee's finance chairman. *See* 1 J.App. 77-84.

B. The Sexual Misconduct Allegations

In a news article published on January 27, 2018, *The Wall Street Journal* reported that, according to dozens of his former employees, Mr. Wynn had engaged in a "decades-long pattern of sexual misconduct," including "pressuring employees to perform sex acts," and that he paid a $7.5 million settlement to one manicurist.

See 1 J.App. 77-84 (the "WSJ Report"). Terrified female employees allegedly hid in bathrooms or back rooms when Mr. Wynn visited the salons and massage parlors on his properties. *Id.* at 80. He denied all of these allegations. *Id*. at 78. Days later, the *Las Vegas Review-Journal* reported that Mr. Wynn had allegedly pressured a server at one of his casinos to have sex "to keep her job."[1] Court records also revealed that he had settled claims by another former employee who had worked as a "Playboy Bunny" at a casino.[2]

In the aftermath of the WSJ Report, Mr. Wynn immediately resigned as finance chairman of the Republican National Committee.[3] The Nevada Gaming Control Board launched an investigation.[4] Wynn Resorts began its own internal investigation into the allegations and, within days, Mr. Wynn resigned as CEO and

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[1] Arthur Kane & Rachel Crosby, *Las Vegas court filing: Wynn wanted sex with waitress 'to see how it feels' to be with a grandmother*, Las Vegas Review-Journal (Feb. 5, 2018), https://www.reviewjournal.com/news/las-vegas-court-filing-wynn-wanted-sex-with-waitress-to-see-how-it-feels-to-be-with-a-grandmother/.

[2] *See, e.g.*, Regina Garcia Cano, *Steve Wynn settled with second woman over sex allegations*, AP (Mar. 19, 2018), https://www.apnews.com/ba96b0e47ccb4dbdb6f42528a878b37f.

[3] *See* Ken Thomas & Steve Peoples, *Casino mogul Steve Wynn resigns as top GOP finance chairman*, AP (Jan. 28, 2018), https://www.apnews.com/29aa609a49dd4cfca333ef052a10d397.

[4] David Montero, *Nevada Gaming Control Board's first female chief opens investigation into Steve Wynn sexual misconduct allegations*, L.A. Times (Jan. 30, 2018), http://www.latimes.com/nation/la-na-nevada-gaming-steve-wynn-20180130-story.html.

board chairman, citing "an avalanche of negative publicity."[5] Amidst these investigations, Mr. Wynn soon sold all of his stock in Wynn Resorts, for an estimated $1.4 billion.[6] Litigation followed: Several women filed civil lawsuits against Mr. Wynn alleging sexual misconduct or assault;[7] Mr. Wynn initiated multiple defamation claims, including this one, related to certain of the sexual abuse allegations made against him.[8]

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[5] *See* Maggie Astor & Julie Creswell, *Steve Wynn Resigns From Company Amid Sexual Misconduct Allegations*, N.Y. Times (Feb. 6, 2018), https://www.nytimes.com/2018/02/06/business/steve-wynn-resigns.html; *see also Law firm helps with sex misconduct inquiry into Steve Wynn*, AP (Feb. 3, 2018), https://apnews.com/72aae861b4cb4be38173879437cbe755/Law-firm-helps-with-sex-misconduct-inquiry-into-Steve-Wynn.

[6] *See* Regina Garcia Cano, *Steve Wynn no longer has stock in Wynn Resorts*, AP (Mar. 23, 2018), https://www.apnews.com/3a559d430b4a4a7e8860d2988d10ed9b.

[7] *See, e.g.*, Regina Garcia Cano, *Manicurist accuses Steve Wynn of sexual misconduct[:] suit*, AP (Mar. 7, 2018), https://www.apnews.com/aa41aea1813a48e5b2296880dcd1f533; Brady McCombs, *2 massage therapists accuse Steve Wynn of Sexual misconduct*, AP (Mar. 1, 2018), https://www.apnews.com/3b1857e21b914609a759081e0b1e8b64; Joe Nelson, *Dancer Accuses Steve Wynn of sexual harassment*, Fox5Vegas.com (Mar. 22, 2018), https://www.fox5vegas.com/news/dancer-accuses-steve-wynn-of-sexual-harassment/article_254189ed-8d58-5615-9fc8-35c26f9a474a.html, Michelle Rindels, Megan Messerly & Jackie Valley, *Manicurist alleges Steve Wynn committed sexual misconduct, demanded employees record videos denying he assaulted them*, Nev. Indep. (March 6, 2018), https://thenevadaindependent.com/article/manicurist-alleges-steve-wynn-committed-sexual-misconduct-demanded-employees-record-videos-denying-he-assaulted-them.

[8] *See, e.g.*, Ken Ritter, *Wynn sues ex-salon chief quoted in sexual conduct stories*, AP (April 30, 2018), https://www.apnews.com/0f24152a66da42828d5cf4c3351cf714 (quoting statement by Mr. Wynn's attorney that defamation action against salon director quoted in stories by ABC News and *The Wall Street Journal* was "the third defamation lawsuit by Wynn [in] recent

Ultimately, in January 2019, Wynn Resorts reached a settlement with Nevada regulators and "admitted that it systematically ignored employees' sexual-misconduct allegations" about Mr. Wynn, including a former manicurist who "told multiple people at a Wynn casino that she had been 'raped' and impregnated by Mr. Wynn."[9] The Nevada Gaming Commission levied its largest fine in history—$20 million—against Wynn Resorts. *Id.* The company that Mr. Wynn had founded also accepted without appeal a $35.5 million penalty from Massachusetts regulators after an investigation similarly determined that company "executives had run a sophisticated coverup to protect Mr. Wynn from allegations by employees that he had engaged in sexual misconduct."[10]

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weeks"); Rebecca Davis O'Brien, *Steve Wynn Sues Former Wynn Resorts Employee Over Allegations*, Wall St. J. (April 28, 2018), https://www.wsj.com/articles/steve-wynn-sues-former-wynn-resorts-employee-over-allegations-1524944395; Zlati Meyer, *Steve Wynn sues ex-casino worker for defamation over sexual misconduct allegations*, USA Today (April 29, 2018), https://www.usatoday.com/story/money/2018/04/29/steve-wynn-sues-ex-casino-worker-defamation-over-sexual-misconduct-allegations/562763002/.

[9] Alexandra Berzon & Micah Maidenberg, *Wynn Resorts to Pay $20 Million Fine Related to Sexual Misconduct Investigation*, Wall St. J. (Feb. 26, 2019), https://www.wsj.com/articles/wynn-resorts-to-pay-20-million-fine-related-to-sexual-misconduct-investigation-11551227702; *see also* Alexandra Berzon & Micah Maidenberg, *Nevada: Wynn Resorts Executives Ignored Sexual Misconduct Claims Against Steve Wynn*, Wall St. J. (Jan. 29, 2019), https://www.wsj.com/articles/wynn-resorts-to-settle-nevada-regulators-probe-11548711027.

[10] Aisha Al-Muslim, *Wynn Resorts Will Not Appeal Massachusetts Regulator's Ruling*, Wall St. J. (May 28, 2019), https://www.wsj.com/articles/wynn-resorts-will-not-appeal-massachusetts-gambling-regulators-ruling-11559079147.

C. The LVMPD Statement and AP Article

On February 12, 2018, less than three weeks after the first national news reports revealed allegations of a long-time pattern of sexual misconduct by Mr. Wynn, and the week after he resigned from Wynn Resorts amidst that controversy, *The Las Vegas Review-Journal* published an article that prompted the reporting at issue in this case. 1 J.App. 73 at ¶¶ 5-6, 87-88. The *Review-Journal* article reported that, according to an LVMPD spokesman, two women had recently filed complaints with the police alleging assaults by Mr. Wynn in the 1970s. 1 J.App. 87. The first three paragraphs of that story read as follows:

> Two women have reported to Las Vegas police that they were sexually assaulted by casino developer Steve Wynn in the 1970s, a spokesman said Monday.
>
> Metropolitan Police Department spokesman Larry Hadfield said the statute of limitations for sexual assault in Nevada is 20 years, but that should not discourage victims from speaking up.
>
> "We would encourage all victims to come forward," he said.

Id.

Ms. Garcia Cano, an AP reporter, followed up on the story. 1 J.App. 73 at ¶ 7. She asked a spokesperson at LVMPD about the report and was told that the Department's Public Information Office had publicly released an email statement, which was sent to her. *Id.* The LVMPD statement read as follows:

> The LVMPD has received two complaints against Steve Wynn alleging sexual assault. On January 29, 2018, a woman made a report from St. Louis stating the incident occurred in Las Vegas

> in the 1970's. A second woman filed a report February 5, 2018 at an LVMPD Substation in the Northwest part of the city. She stated the crime occurred in the 1970's in Chicago, IL. A courtesy report was taken and will be forwarded to Chicago authorities.
>
> Below is the Nevada Revised Statute (NRS) pertaining to the statute of limitations for Sexual Assault. Due to the fact that the report was not filed within the time frame allowed by NRS, an investigation cannot go forward.

1 J.App. 93.[11] This statement also quoted sections of the Nevada Revised Statutes, with highlighting showing the 20-year statute of limitations for sexual assault. *Id.*

Ms. Garcia Cano then submitted a request under the Nevada Open Records Act to the LVMPD Public Information Office for copies of the two police reports referenced in the police statement and the *Review-Journal* article. 1 J.App. 73 at ¶ 8. In her request, she sought expedited processing because "this information concerns a matter of intense public interest." 1 J.App. 95-96.

On February 27, 2018, LVMPD provided two redacted documents to Ms. Garcia Cano: Case Report Nos. LLV180129002695 and LLV180207001836. 1 J.App. 73 at ¶ 10; *see also id.* 1 J.App. 101-03 (police reports provided pursuant

[11] Mr. Wynn urges that "[t]he only evidence in the record … is that LVMPD *never* forwarded the report to the Chicago Police Department." Br. at 37 n.17. This is incorrect. Mr. Wynn cites the February 12 news report published by the *Review-Journal* that quotes a Chicago police spokesman saying that he had not heard about the report. *Id.* (citing 1 J.App. 87). Mr. Wynn ignores the *subsequent* emailed statement by LVMPD to Ms. Garcia Cano on February 13, which is in the record, that the report "will be forwarded to Chicago authorities." 1 J.App. 93.

to Nevada Open Records Act). Both official police reports memorialize complaints of "sex assault," and both identify Steve Wynn as the "suspect." *Id.* However, the Public Information Office redacted the "Victims" section of each report to remove personally identifiable information about the alleged victim—including the name, date of birth, address, and phone number. *Id.* For Case Report No. LLV180129002695, an "Offender Relationships" entry reads: "S – Wynn, Steve . . . Victim Was Employee." *Id.* at 101. For Case Report No. LLV180207001836, however, the same entry was partially redacted, reading simply "S – Wynn, Stephan . . . [redacted]." *Id.* at 102.[12]

[12] Mr. Wynn baselessly suggests that Ms. Garcia-Cano's affidavit may be false, citing an unsworn email communication with an LVMPD public affairs officer, Larry Hadfield, who provided to Mr. Wynn's counsel a version of the report with the text "Victim was spouse" unredacted, along with the statement that "'[a]ll documents that were provided [to the press] were exactly the same.'" Br. at 8 n.3. However, the document provided to Mr. Wynn's counsel by LVMPD is, on its face, a *different document*, stamped as released on March 6, 2018 to Andrew Craft of CNBC—likely part of a wave of media requests made *after* publication of the *Review-Journal* and AP reports in late February. Importantly, in addition to the different stamp showing the date of release, there is a different document time stamp on the bottom left of the page. *Compare* 1 J.App. 102-04 (version provided by LVMPD to AP and attached to Garcia Cano Affidavit, time stamp "2/27/2018 8:01 AM"), *with* 1 J.App. 195-96 (version provided by LVMPD to CNBC and attached to Wynn's opposition brief, document time stamp "2/27/2018 2:42 PM"). Notably, the copy of the police report attached to the Complaint is a version apparently provided by LVMPD on March 14, 2018 to a different journalist in which "spouse" is similarly unredacted—and which similarly bears a time stamp of "2/27/2018 2:42 PM." 1 J.App. 25.

Thus, the logical conclusion is *not* that Ms. Garcia Cano fabricated a redaction on the police report and then committed perjury about it in the District Court, as Mr. Wynn baselessly implies. Rather, the obvious conclusion to be drawn from the

Both of the police reports include a narrative section, in which identifying information about the alleged victims similarly has been redacted. 1 J.App. 101-03. The narrative section of Case Report No. LLV180129002695 explained that the complainant asserted that, during the time she had been employed as a dealer for the Golden Nugget in 1974, "Steve Wynn and she had sex." *Id.* at 101. Although "consensual," the victim "felt coerced to perform the acts" and, after she ultimately refused further favors following a third encounter, "[s]he was soon after accused of stealing $40.00 and forced to resign." *Id.* The narrative section of the second police report—the one that is the basis for Mr. Wynn's present defamation claim, Case Report No. LLV180207001836 (the "Police Report"), describes what another complainant's account of three rapes by Mr. Wynn in 1973-74 in her Chicago apartment, which allegedly resulted in a pregnancy and her delivery of a baby in a gas station restroom. *Id.* at 102-03. After describing the alleged rapes, the fourth

different time-stamped versions of the report is that LVMPD, after initially redacting "spouse" as victim-identifying in the report provided to AP on February 27, 2018, reversed course on that redaction and created a revised version of the redacted report later that same day. When he sent his email months later, Officer Hadfield was likely either unaware of that same-day change or had forgotten about it. His unsworn email, accompanied by a clearly different version of the police report at issue, creates no dispute of fact over which version Ms. Garcia Cano actually received—*i.e.*, the document stamped with her name as the requestor. 1 J.App. 102; *see also* 1 J.App. 73 at ¶ 10 (affirming that attached report was one she received). Nor does it matter to the legal analysis here whether the relationship entry was redacted from the copy delivered to Ms. Garcia Cano or not, as the AP Article would still be fair and accurate summary of even that version of the Police Report.

and fifth paragraphs of the narrative describe her childbirth—in terms that Mr. Wynn repeatedly dubs "fanciful, surreal, and delusional." *Id.*; *see generally* Br.

Because LVMPD redacted personally identifying information about the alleged victims from the versions of both police reports provided to Ms. Garcia Cano, her knowledge about these particular allegations—as distinct from the many allegations already publicly made about Mr. Wynn—came solely from the police reports, and she therefore did not know the name of either complainant. 1 J.App. 73-74 at ¶¶ 11-12.[13] She then prepared the news report at issue in this case about the official police records, which included the response of a person she understood to represent Mr. Wynn, 1 J.App. 74 at ¶ 14, and which was first published by AP on February 27, 2018, 1 J.App. 107-08 (the "AP Article").

The AP Article bears the headline "APNewsBreak: Woman tells police Steve Wynn raped her in '70s," and the body of the Article is reproduced here in its entirety:

> LAS VEGAS (AP) — A woman told police she had a child with casino mogul Steve Wynn after he raped her, while another

[13] For this reason, Mr. Wynn's summary of prior litigation between himself and the woman now known to be the second complainant, Halina Kuta, Br. at 10-11, is a *non sequitur* to the legal issues on this appeal. Ms. Garcia Cano could not have been aware of this civil litigation or connected it with the unnamed complainant when preparing her news article—and, in fact, she was not, 1 J.App. 74, ¶ 12. Moreover, AP did not move to dismiss Mr. Wynn's claim on the basis that this particular allegation was true, but, rather, on the ground that AP had a privilege to accurately report that the complaint had been made to police.

reported she was forced to resign from a Las Vegas job after she refused to have sex with him.

The Associated Press on Tuesday obtained copies of police reports recently filed by the two women about allegations dating to the 1970s. Police in Las Vegas revealed earlier this month that they had taken the statements after a news report in January revealed sexual misconduct allegations against the billionaire.

The allegations are the latest leveled against Wynn by women. He resigned as chairman and CEO of Wynn Resorts on Feb. 6, less than two weeks after the Wall Street Journal reported that a number of women said he harassed or assaulted them and that one case led to a $7.5 million settlement.

Wynn has vehemently denied the misconduct accusations the newspaper reported and he attributed them to a campaign led by his ex-wife, whose attorney has denied that she instigated the Jan. 26 news story.

One police report obtained by the AP shows a woman told officers that Wynn raped her at least three times around 1973 and 1974 at her Chicago apartment. She reported she got pregnant and gave birth to a girl in a gas station restroom. The woman, the child of the accuser and Wynn, now lives in Las Vegas, according to the report.

In one instance, the woman claimed that Wynn pinned her against the refrigerator and raped her. She said he then made a phone call, kissed her on the cheek and left. The report does not explain how Wynn is alleged to have entered the apartment or if they knew each other. The woman claimed she did not give him a key.

The second police report shows a woman told police she had consensual sex with Wynn “several times” while she worked as a dealer at the downtown Las Vegas casino-hotel Golden Nugget, but “felt coerced to perform the acts.” She reported she was forced to resign when she turned him down.

“In the Summer of 1976, Wynn approached her in the back hall and wanted her to go with him,” according to the report filed Jan. 29. “(S)he told him, ‘no’, she was done and had someone she was

> seeing. She was soon after accused of stealing $40.00 and forced to resign."
>
> The women's names are redacted on the reports, and police said they do not identify people who say they are victims of sex crimes.
>
> The Las Vegas case will not be investigated because the statute of limitations in Nevada is 20 years.
>
> Ralph Frammolino, spokesman for Wynn, on Tuesday declined comment on the latest allegations.
>
> Wynn Resorts is facing scrutiny by gambling regulators in Nevada and Massachusetts, where the company is building a roughly $2.4 billion casino just outside Boston. Regulators in Macau, the Chinese enclave where the company operates two casinos, are also inquiring about the allegations.
>
> In addition, groups of shareholders have filed lawsuits in state court in Las Vegas accusing Wynn and the board of directors of Wynn Resorts of breaching their fiduciary duties by ignoring what the lawsuits described as a longstanding pattern of sexual abuse and harassment by the company's founder.

1 J.App. 107-08 ("the AP Article"); *see also* 1 J.App. 28-31 (same).

D. The Complaint

Mr. Wynn filed the Complaint in this action on April 11, 2018, against Ms. Garcia Cano and the AP, as well as against Ms. Kuta and "Doe" defendants. He did not challenge the reporting about Case Report No. LLV180129002695, involving the former casino dealer who claimed she was coerced into sex. *See* 1 J.App. 1-13 (Complaint). Mr. Wynn alleges that Ms. Kuta filed the Police Report, and that it is false. 1 J.App. 3 at ¶¶ 16-17.

Among other things, Mr. Wynn alleges in his Complaint that the circumstances recounted in the Police Report were "inherently improbable," such that the AP should have known they were false, and that the AP Article was not "a fair, accurate, complete or impartial report of the relevant contents of the Police Report." 1 J.App. 4-5 at ¶¶ 30-31, 1 J.App. 10 at ¶ 83-84. Significantly, Mr. Wynn does *not* allege that the charge of *rape* standing alone is inherently improbable—and it clearly is not improbable, given the prior published allegations in the WSJ Report and elsewhere regarding the alleged decades-long pattern of sexual misconduct by Mr. Wynn. Instead, the Complaint alleges that the complainant's description of having given birth in a gas station was "clearly fanciful or delusional," and therefore that, in light of the "bizarre narrative" of a traumatic birth experience included in the narrative section of the Police Report, the rape allegation itself was "unreliable and incredible on its face." 1 J.App. 10-11 at ¶¶ 84, 88, 90-91.

E. Relevant Proceedings Below

Following an agreed extension, 1 J.App. 36-38, AP timely filed a special motion to dismiss pursuant to Nev. Rev. Stat. § 41.660, Nevada's Anti-SLAPP statute. 1 J.App. 45-108 (motion and supporting memorandum and affidavit). Given Mr. Wynn's procedural objection in this Court, Br. 13-16, 46-49, a summary of the relevant District Court proceedings adjudicating that motion is necessary.

In its special motion to dismiss, AP followed the burden-shifting approach under Nevada's statute, as recently set forth by this Court:

> A district court considering a special motion to dismiss must undertake a two-prong analysis. First, it must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of ... the right to free speech in direct connection with an issue of public concern." If successful, the district court advances to the second prong, whereby "the burden shifts to the plaintiff to show 'with prima facie evidence a probability of prevailing on the claim.'"

Coker v. Sassone, 135 Nev. Adv. Op. 2, 432 P.3d 746, 749 (2019) (citations omitted). Specifically, AP argued that it met its "initial showing" under the statute, *Delucchi v. Songer*, 396 P.3d 826, 831, 833 (Nev. 2017), given the public interest in and concern regarding the allegations against Mr. Wynn and Ms. Garcia Cano's reliance on public records, as reflected in her affidavit, 1 J.App. 62-65 (memorandum pages 12-15). AP then argued, on the second prong, that "Mr. Wynn cannot meet his burden of establishing a 'probability of prevailing on the claim' for at least two simple reasons: The 'fair report' privilege absolutely bars the claims here and, moreover, Mr. Wynn is required to but cannot prove 'actual malice' by clear and convincing evidence." 1 J.App. 65.

A dispute subsequently arose between the parties about whether discovery was needed for the District Court to adjudicate the special motion, and that dispute

was resolved by compromise. The parties filed a joint stipulation with the District Court explaining their understanding:

> In the Motion and incorporated Memorandum of Points and Authorities ("Mem."), Defendants contend that N.R.S. § 41.660 applies *and that Plaintiff cannot demonstrate a likelihood of success, as required under the statute, for two separate reasons*: first, that the reporting by Defendants is privileged (Mem. at 15-18); and second, that Wynn cannot demonstrate fault (*id.* at 18-19). Each of the bases argued for granting dismissal is separate and distinct.
>
> The Parties have conferred regarding the need for limited discovery, which can be sought under the statute. N.R.S. § 41.660(4). The Parties agree that discovery is not necessary to resolve the first basis for the Motion, *i.e.*, whether the challenged news report is subject to the fair report privilege as a matter of law.

1 J.App. 123 (emphasis added). Because the parties agreed that discovery was unnecessary to resolve the first basis for dismissal in the special motion—the fair report privilege—they jointly proposed bifurcation in order to avoid a dispute over the need for discovery, as well as the burden and expense of discovery that would be unnecessary if the Plaintiff failed to meet his burden of demonstrating a likelihood of defeating the fair report privilege. The parties jointly requested such an approach:

> At the hearing on July 31, 2018, the Court shall consider the fair report privilege under the Nevada Anti-SLAPP Statute, a question of law. If the Court finds the reporting in this case not to be covered by the fair report privilege, the Court shall continue to a second hearing to consider the issue of fault under the Nevada Anti-SLAPP Statute on a subsequent date to be determined by the Court.
>
> If such a continuance is necessary, the Parties agree to continue to meet and confer about appropriate limited discovery, in an attempt

> to resolve any differences without the need for motion practice under N.R.S. § 41.660(4).

1 J.App. 124. Thus, Mr. Wynn is mistaken in asserting that the District Court "went beyond the bifurcated procedure that was supposed to govern," Br. at 16, by granting the special motion upon concluding that the fair report privilege applied. The Joint Stipulation expressly contemplated that a second hearing would be necessary only "*[i]f* the Court finds the reporting in this case not to be covered by the fair report privilege." 1 J.App. 124 (emphasis added); *see also id.* ("If such a continuance is necessary . . . .).[14]

Following a hearing, the District Court issued a decision summarizing the stipulation, 2 J.App. 255-56, finding that the fair report privilege applied, *id.* 256, and therefore granting the special motion to dismiss:

> The Court finds that the reporter accurately described the Police reports, and therefore, the privilege is absolute. The Court further finds that the Nevada fair reporting privilege applies to the news report at issue and, therefore, pursuant to the parties' stipulation, no hearing on the issue of fault is required. The Nevada Anti-SLAPP statute applies in this case[.]

[14] Despite the joint stipulation, Mr. Wynn in a footnote to his opposition brief did purport to reserve the right to contest the threshold question of the "initial showing" under the Anti-SLAPP statute, characterizing instead the dispositive second-prong question of whether he could show a likelihood of success given the fair report privilege as the "threshold issue." 1 J.App. 146 at n.7; *see also* Br. at 14 n.6 (citing language). The District Court properly disregarded Mr. Wynn's effort to disavow the joint stipulation.

Id.[15] The District Court entered judgment, 2 J.App. 299, and this appeal followed.

SUMMARY OF ARGUMENT

I.

The District Court correctly found the Police Report to be a document subject to the fair report privilege. Once statements are memorialized in an official police record, they are imbued with an official governmental character that brings accurate reports about them within the privilege. Because the Police Report is a government record, the privilege applies.

Mr. Wynn's argument that police complaints presumptively fall outside the protection of the fair report privilege unless and until they result in subsequent investigation, arrest, or criminal proceedings misconstrues precedent in this state and misstates prevailing law around the country. He also misreads the Restatement and

[15]Mr. Wynn urges that AP's counsel "admitted" that the fair report privilege was the "only" issue before the District Court, and he quotes AP's counsel out of context to assert that AP had thereby acknowledged that the District Court could not then decide whether the Anti-SLAPP statute applied. Br. at 14-15. As the record reflects, however, what AP's counsel actually said is that the only question with respect to whether the Anti-SLAPP statute applies necessarily would be resolved by determining whether the fair report privilege applies to the AP Article, and accordingly, there was "only" one determination the District Court needed to make to resolve both legal questions, 1 J.App. 238-39, as the District Court clearly understood, 2 J.App. 299. That is also what AP said expressly in its motion papers. 1 J.App. 219-20 (framing issue to be resolved by District Court in light of parties joint stipulation as whether "the privilege applies to the news report at issue and therefore Mr. Wynn cannot show a probability of prevailing on his claim" under Anti-SLAPP statute).

conflates the fair report privilege with the judicial proceedings privilege. Moreover, the rule urged by Mr. Wynn would also raise significant practical difficulties in its application, because for every privilege assertion in reports about complaints made to government agencies courts would be required to evaluate the extent to which a complaint resulted in sufficient subsequent investigative or enforcement action. This case is no exception: Because LVMPD issued a press statement about the Police Report and forwarded it to authorities in Chicago, it would satisfy the very standard that Mr. Wynn seeks to import into the law.

II.

There is no dispute that the AP Article accurately summarized the then-unknown complainant's allegation that Mr. Wynn raped her in the 1970s. Because that is the basis of Mr. Wynn's defamation claim, the privilege applies.

Mr. Wynn repeatedly asserts that a verbatim recitation of the complainant's account of the birth of her child would have been "exculpatory," and therefore the failure to include verbatim quotations made the otherwise accurate summary of the rape allegation inaccurate. "Exculpatory," however, is the wrong adjective here. Nothing in the unusual description of the birth specifically refutes the rape allegation. Rather, Mr. Wynn really urges that a verbatim recitation of this part of the Police Report would have undercut the *credibility* of the separate, and therefore collateral, rape allegation. Whether that credibility thesis is true or not—after all,

people who suffer from mental illness, as Mr. Wynn asserts the complainant does, Br. at 6, are sometimes victims of crimes, too—is beside the point. The fair report privilege does not, and could not, require a news summary to include, verbatim, every collateral aspect of an official report or proceeding that might bear on the credibility of reported allegations. Such a requirement would swallow the protections of the privilege. It is the allegedly defamatory allegation that must be fairly summarized. Because AP did so, the AP Article is privileged.

III.

The District Court properly applied the Anti-SLAPP statute's burden-shifting framework in light of the joint stipulation by the parties. AP argued in its papers below that it had met its initial burden of showing that the AP Article was a "good faith communication in furtherance of ... the right to free speech in direct connection with an issue of public concern," and that, once the burden shifted, Mr. Wynn could not show a probability of success for two separate reasons: (1) the fair report privilege barred his claim, and (2) he could not demonstrate "actual malice" fault. Because the parties agreed that the fair report privilege was a question of law for the court, but disagreed on the extent of discovery necessary to resolve the question of fault, they jointly proposed a bifurcated procedure to the District Court. The parties proposed to limit the District Court's hearing to application of the privilege and then, if AP's motion was denied on that basis, take up questions of discovery and fault.

The District Court found the privilege applicable and, pursuant to the parties' stipulation, granted the special motion to strike. There was no error, and Mr. Wynn's attempt on appeal to undo the stipulated procedure should be rejected.

ARGUMENT

Mr. Wynn begins his argument by citing the language found in some California Anti-SLAPP cases to the effect that a plaintiff need only show "minimal merit" to his claims to defeat a special motion. Br. at 19. Such authority is irrelevant to Mr. Wynn's burden under Nevada's statute to establish a probability of prevailing on his claim. *Coker*, 432 P.3d at 749 (citing *Shapiro*, 389 P.3d at 267 (quoting NRS 41.660(3)(b))). Indeed, the quoted California language merely means that, when deciding an Anti-SLAPP motion, a court should "not weigh the credibility or comparative probative strength of competing evidence" such that the plaintiff is effectively required to "prove" that he will prevail on his claim. *Mann v. Quality Old Time Serv., Inc.*, 120 Cal. App. 4th 90, 105 (2004); *also, e.g.*, *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598-600 (9th Cir. 2010) (cited by Br. at 19). Evidentiary concerns are not implicated in this appeal, where the basis for decision below was that Mr. Wynn's claim was barred as a matter of law by a privilege. *See, e.g., J-M Mfg. Co. v. Phillips & Cohen LLP*, 247 Cal. App. 4th 87, 96, 98-104 (2016). As demonstrated below, the privilege applies to the AP Article as a matter of law and

Mr. Wynn therefore cannot meet his burden of showing a probability of prevailing on his claim.

I. THE FAIR REPORT PRIVILEGE APPLIES TO OFFICIAL RECORDS SUCH AS THE POLICE REPORT.

Like nearly every state, 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 (emphasis added). This Court explained the importance to public discourse in another case involving Mr. Wynn:

> 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. . . . If accurate reports of official actions were subject to defamation actions, reporters would be wrongly discouraged from publishing accounts of public proceedings.

Wynn, 117 Nev. at 14; *see also Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 61, 657 P.2d 101, 104 (1983) ("The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements."). Courts across the country have similarly cited the public's interest in learning about and debating the activities reflected in governmental proceedings as the bedrock principle for 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); *cf. Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) (noting that "[p]ublic records by their very nature are of interest to those concerned with the administration of government" and there is "public benefit" to news reporting about them).

In accord with this purpose, it bears emphasis that the privilege in Nevada is an *absolute one*. Even a reporter's knowledge that the underlying allegations are false does not abrogate the privilege, because the privilege exists to permit discussion of public proceedings and records regardless of whether the underlying allegations within those proceedings and records are true. In other words, the privilege permits public discussion of allegations even when they are false because the mere fact that such allegations have been made is itself of legitimate public concern. *Adelson v. Harris*, 402 P.3d 665, 667-68 (Nev. 2017) ("In Nevada, if the privilege applies, it is 'absolute,' meaning it 'precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff.'" (quoting *Sahara Gaming*, 115 Nev. at 213 and *Circus Circus Hotels*, 99 Nev. at 60)).

Thus, Mr. Wynn's argument that a complaint submitted to the police is "wholly unsubstantiated and unverified," Br. at 24, is beside the point. The fair

report privilege exists because there is a paramount societal interest in permitting the press to freely report on "what is being done and said in government." *See, e.g.*, *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 739-40 (D.C. Cir. 1985). That public interest in the activities of government applies regardless of whether information is true, or even when it is known to be false. As such, the privilege properly applies to official government records, including official police reports of complaints, regardless of whether criminal prosecution results. Restatement (Second) of Torts § 611 cmt. d (privilege applies to "a report by an officer or agency of the government," without condition of subsequent activity). Indeed, the public may have a *heightened* interest in official documents bearing on a police department's decision *not* to prosecute a case, particularly where the target of the complaint is a high-profile and powerful individual.

This Court has not yet, in its handful of decisions applying the fair report privilege, specifically applied the privilege to police reports. Nevertheless, this Court has recognized that the privilege is not limited to judicial records, but rather is applicable to "all public, official actions or proceedings." *Wynn*, 117 Nev. at 14. This Court also has looked to the Restatement, *id.* at 14, which, as noted above, includes official reports within the scope of the privilege, Restatement (Second) of Torts § 611 cmt. d. And this Court has cited D.C. Circuit authority as "[t]he primary test to resolve whether a report qualifies for the fair report privilege." *Adelson*, 402

P.3d at 668 (citing *Dameron*, 779 F.2d at 739). In the D.C. Circuit, complaints submitted to police fall within the privilege. *White v. Fraternal Order of Police*, 909 F.2d 512, 527 (D.C. Cir. 1990) (applying privilege to reporting about complaint letters submitted to police).[16] Thus, the District Court's determination that the fair report privilege applies to an official police "case report" document such as the Police Report is entirely consistent with this Court's decisions applying the privilege, this Court's reliance on the Restatement, and this Court's recognition of *Dameron* and D.C. Circuit authority as leading authority on the scope of the privilege. Indeed, courts throughout the country routinely and unequivocally hold that police case or incident reports fall within the privilege. *See, e.g.*, *Trainor v. Standard Times*, 924 A.2d 766, 772 (R.I. 2007) ("Police reports have often been held to constitute the sort of official report to which the fair report privilege may attach."); *see also infra*, Part I.C (discussing authority from around country).

[16] Mr. Wynn argues that this Court could not have adopted the D.C. Circuit's broad formulation of the privilege in the 2017 *Adelson* decision because this Court in 2001 found the privilege inapplicable to an unofficial, confidential Scotland Yard report, citing *Wynn*, 117 Nev. at 16. *See* Br. at 25 n.11 ("*White* is clearly not the law in Nevada."). Even aside from the fact that *Adelson* post-dated *Wynn* by 16 years, the conflict is not as clear as suggested by Mr. Wynn. Although the *White* case involved a confidential proceeding, the court there actually found the newspaper reports to be "fair summaries of the contents of the [complaint] letters," 909 F.2d at 527. It was the subsequent committee *investigation* that was confidential. That scenario is no different from one in which a complaint submitted to police and made an official police record then prompts a non-public law enforcement investigation.

Mr. Wynn devotes the majority of his Brief in this Court to an attempt to escape the conclusive weight of the foregoing authority, arguing for a new rule limiting the fair report privilege only to police reports that are subsequently investigated. None of his arguments in support of such a rule withstand scrutiny.

A. The Fair Report Privilege Is Distinct from the Judicial Proceedings Privilege

Mr. Wynn first urges that the scope of the fair report privilege "is identical" to the separate "judicial proceedings" privilege, Br. at 21, in order to rely on a decision construing that privilege narrowly in the context of complaints to police, *id.* at 22. In drawing this false equivalency, Mr. Wynn principally relies on the fact that this Court in *Sahara Gaming Corp.* discussed *both* the judicial proceedings privilege and the fair report privilege. *Id.* ("The Court's point was clear: *both of these absolute privileges cover the same type of proceedings.*"). With all due respect, *Sahara Gaming Corp.* does not bear the weight Mr. Wynn places upon it. Nowhere did this Court in *Sahara Gaming Corp.* declare that the fair report privilege is in all cases limited to judicial proceedings, or that the scope of the two distinct privileges is in all circumstances co-extensive. Nor would such a rule be consistent with the Restatement, the rationales for the two privileges, or subsequent decisions of this Court.

The Restatement, of course, by its plain terms does *not* limit the fair report privilege only to judicial proceedings. *See generally* Restatement (Second) of Torts

§ 611. The two privileges also protect very different interests. The judicial proceedings privilege protects the *participants* in judicial or quasi-judicial proceedings from defamation claims arising from their statements relating to the proceeding. *Jacobs v. Adelson*, 130 Nev. 408, 413, 325 P.3d 1282, 1285 (2014) (setting forth privilege test for participants in judicial proceedings). The fair report privilege, in contrast, applies to third parties, including news organizations and members of the public, to enable them to report on or discuss official documents or proceedings without fear of defamation liability. *Wynn*, 117 Nev. at 14. The discussion of the fair report privilege in *Wynn* is a clear and definitive statement, even if Mr. Wynn urges that it be ignored as *dictum*:

> We agree that the [fair report] privilege should not be limited to judicial proceedings like those at issue in *Sahara Gaming*. It should apply to all public, official actions or proceedings.

Id. [17] Mr. Wynn's only response to this Court's even more recent recognition in *Adelson* that the privilege applies to "an official document or proceeding[]," 402

[17] Mr. Wynn also urges that the Police Report—a public record released to multiple news organizations and members of the public pursuant to the Nevada Open Records Act—is nevertheless somehow of a "confidential nature," Br. at 23 n.9, thus making it akin to the Scotland Yard report at issue in the earlier *Wynn* case. The contention does not withstand even cursory examination. The two police complaints, the existence of which was announced by police in a press statement and copies of which were widely distributed to the public, clearly are not "confidential." The fact that police redacted certain victim-identifying information does not make the documents confidential, any more than the redaction of the names of minors or social security numbers from a publicly filed memorandum in a judicial proceeding somehow converts that publicly brief into confidential document.

P.3d at 668, is to suggest that the only guidance that can be drawn from the Court's analysis in *Adelson* is with regard to the "attribution" requirement. Br. at 24-25.

Ultimately, Mr. Wynn's own authority best underscores the fallacy of his proffered equivalency between the two privileges. Br. at 22 (discussing *Pope v. Motel 6*, 121 Nev. 307, 114 P.3d 277 (2005)). In *Pope v. Motel 6*, this Court considered a defamation claim against a person who actually submitted a police complaint. 121 Nev. at 315-16. Mr. Wynn's contention that this Court in *Pope* rejected the "absolute privilege," Br. at 22, is technically accurate but nevertheless misleading. The Court in *Pope* held that the police complaint *did* fall within a judicial proceedings privilege—but that, in the context of direct communications to police (here, as would be applied to the complainant and AP's co-defendant Ms. Kuta), the privilege was *qualified* and therefore could be defeated by a showing of "actual malice" fault on the part of the individual actually submitting the police complaint. 121 Nev. at 317. Under the separate fair report privilege, in contrast, the privilege's protection is *absolute*, and *cannot* be overcome by a showing of actual malice. *Adelson*, 402 P.3d at 667-68; *Sahara Gaming*, 115 Nev. at 213; *Circus Circus Hotels*, 99 Nev. at 60-61. Thus, *Pope*, to the extent it is relevant at all to the fair report privilege, supports rather than undercuts the application of a privilege to the

AP Article concerning the Police Report.[18]

B. The Privilege Applies to the Police Report Under the Restatement

Mr. Wynn next argues that the Police Report does not fall within the privilege as defined by the Restatement. As he did below, Mr. Wynn misconstrues the meaning of the Restatement by selectively quoting certain provisions out of context, while asking the Court to ignore other provisions altogether. In this regard, Mr. Wynn primary relies on comment (h), which provides, in pertinent part:

> An arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege covered by this Section. On the other hand statements made by the police or by the complainant or other witnesses or by the prosecuting attorney as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding or of the arrest itself and are not privileged under this Section.

Restatement (Second) of Torts § 611 cmt. h.

First, comment (h) is of dubious relevance for the simple reason that Mr. Wynn was not arrested. *See, e.g., Whiteside v. Russellville Newspapers, Inc.*,

[18] Indeed, an irony of Mr. Wynn's reliance on *Pope* is that he continues to pursue a defamation claim in the District Court against Ms. Kuta arising from the Police Report, despite the fact that he solicited an affidavit from her (the affidavit appears on his counsel's letterhead and is witnessed by an employee of Mr. Wynn's counsel) in which Ms. Kuta swears that she believed her own allegations. 1 J.App. 173 at ¶¶ 22-24. Thus, the evidence in the record supports immunity for Ms. Kuta as well. *Pope*, 121 Nev. at 317 ("Actual malice is a stringent standard that is proven by demonstrating that 'a statement is published with knowledge that it was false or with reckless disregard for its veracity.'" (citation omitted)).

295 S.W.3d 798, 802 (Ark. 2009) (rejecting application of comment (h) to witness allegations in police report that did not result in arrest). But setting that point aside, comment (h) is widely understood to apply to *unofficial* statements extraneous to an arrest, and not the type of *official* police records at issue here. *See*, *e.g.*, *Furgason v. Clausen*, 785 P.2d 242, 245-46 (N.M. Ct. App. 1989) (holding that news report was not privileged under comment (h) because it is reported on statements made *outside* of official police report, while noting that reports on "official statements or records" unquestionably fall within privilege); *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 286-87 (Tenn. Ct. App. 2007) (applying comment (h) to hold that broadcast based on statements from "anonymous informants" and "private conversation" with officer were not protected by privilege, but that broadcast on an "official action, *report*, or proceeding" would be protected (emphasis added)); *Ormrod v. Hubbard Broad., Inc.*, No. CIV 17-0706 JB/KK, 2018 WL 1444857, at *16 n. 13 (D.N.M. Mar. 22, 2018) (applying comment (h) in holding that accusations in letter from school principle were not covered by privilege, but that privilege would have applied if defendant had reported on police report, regardless of whether plaintiff was actually arrested); *Wright v. Grove Sun Newspaper Co.*, 873 P.2d 983, 998 (Okla. 1994) (Summers, J., dissenting) (opining that comment (h) precludes application of privilege to informal law enforcement statements to press, but that privilege surely would apply to "a formal report filed by the police"); *Larson v.*

Gannett Co., 915 N.W.2d 485, 495 (Minn. Ct. App. 2018) ("Comment (h) should be understood to mean that the privilege does not apply to *unofficial* police comments" (emphasis added)).[19]

Mr. Wynn's contention also is flatly contradicted by comment (d) to the Restatement, which provides that "[t]he filing of a report by an officer or agency of the government is an action bringing a reporting of the government report within the scope of the privilege." Restatement (Second) of Torts § 611 cmt. d. Comment (d) by its plain and unambiguous language therefore brings the Police Report comfortably within the privilege—as the "filing of [the Police Report] by [LVMPD] is an action bringing a reporting of [the Police Report] within the scope of the privilege." *Id*.

Perhaps recognizing as much, Mr. Wynn complains that this straightforward interpretation of comment (d) would somehow "nullify" comment (h). Br. at 27. But that simply is not true. As confirmed by the decisions cited above, and explained by one state's highest court, comment (h) declines to extend the privilege to "some

[19] Mr. Wynn criticizes AP for citing *Larson* because that case involved accusations a private citizen made at an "official meeting." Br. at 29 & n.15. That misses the point. *Larson* holds that comment (h)'s limitation on the fair report privilege does not apply to statements made in the course of an *official* government proceeding *or* action, whether it be an official meeting or, as here, an official government report. *See Larson*, 915 N.W.2d at 493-94 (expressly holding that, under Restatement, "the fair-report privilege applies to official written statements by law enforcement" (citing Restatement (Second) of Torts § 611 cmt. d)); *see also infra* at 41.

unofficial version of events furnished by a policeman at a crime scene, or ... offhand prediction," whereas comment (d) provides that "*official* police records, such as official blotters, official reports, and so forth, fall within the privilege." *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993, 1011 (N.H. 2007) (agreeing that official police reports fall within fair report privilege under comment (d)).[20]

For this reason, Mr. Wynn finds scant actual authority for his claimed "rule"—that the privilege will apply to a police report only if the police take official action *in addition to* the official act of filing the report itself. He relies primarily on two cases, both from the same intermediate appellate court in Massachusetts. *See*. Br. at 29-32 (citing *Butcher v. Univ. of Mass.*, 94 Mass App. Ct. 33, 40 (2018), *review granted*, 481 Mass. 1105 (2019), and *Reilly v. Associated Press*, 59 Mass. App. Ct. 764 (2003)). Those two decisions import into the privilege's coverage of official police records a version of the hoary 'judicial action limitation,' which once held that the fair report privilege only applied to a civil complaint after a court had acted

[20] It is thus telling that several cases cited by Mr. Wynn involve informal communications and not the type of official government report at issue here. *See Bufalino v. Associated Press*, 692 F.2d 266, 272 (2d Cir. 1982) (no privilege where defendant did not rely on "reports of *official* statements or records made or released by a public agency"); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 89 (D.C. 1980) (no privilege where defendant relied on informal oral communications made over police "hotline," but privilege would have applied if defendant had relied on "official record"); *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 70 (2d Cir. 1980) (no privilege where defendant relied on informal statements witness gave to reporter, and not reaching issue of whether privilege applied to statements recorded in official police report).

on it. *Solaia Tech., LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825, 588-89 (Ill. 2006). This outdated doctrine has been rejected in courts throughout the country, *id.* at 589, and—most importantly—is not the law in Nevada. *Sahara Gaming*, 115 Nev. at 213 (applying privilege to summary of civil complaint, without inquiring whether any further judicial action had been taken); *see also Salzano*, 993 A.2d at 789 (adopting modern view and rejecting older judicial action limitation); *Bull v. LogEtronics, Inc.*, 323 F. Supp. 115, 135 (E.D. Va. 1971) (same); *Cox v. Lee Enters., Inc.*, 723 P.2d 238, 240 (Mont. 1986) (same); *First Lehigh Bank v. Cowen*, 700 A.2d 498, 502 (Pa. Super. Ct. 1997) (same).[21]

But even if the Court were to join the minority view advanced in *Butcher* and *Reilly*—a view that the Massachusetts Supreme Court is now considering in the pending appeal in *Butcher*—and thereby break from its prior descriptions of the fair report privilege and the Restatement, the Police Report would nonetheless fall squarely within the scope of the privilege. Importantly, neither of those

[21] Mr. Wynn's reliance on *Stone v. Banner Publ'g Corp.* is therefore unavailing, as that case expressly rested its holding on an outdated judicial action limitation that is no longer good law in a majority of jurisdictions. 677 F. Supp. 242, 246 (D. Vt. 1988) (citing Restatement § 611 cmt. (e)). His reliance on the Illinois intermediate appellate decision in *Snitowsky v. NBC Subisidiary (WMAQ-TV), Inc.*, 297 Ill. App. 3d 304, 313-14 (1998), is even more misplaced considering that a more recent decision from that state's highest court rejected the judicial action limitation. *See Solaia*, 221 Ill. 2d at 589 (rejecting judicial action limitation and holding that privilege applied to allegations made in private citizen's complaint, even if no further official action was taken).

Massachusetts decisions stand for the extreme proposition for which Mr. Wynn advocates here—that the privilege should apply only to police reports that result in "an arrest, investigation, or criminal proceeding." Br. at 31. Rather, the courts in *Butcher* and *Reilly* only declined to apply the privilege to police reports that resulted in *no additional police action whatsoever*.

Indeed, the Massachusetts court in both of those cases recognized that the privilege would apply if the police reports at issue had been the subject of additional public statements from law enforcement. *See Butcher*, 94 Mass. App. Ct. at 40-41 (privilege did not apply where there "was no official police statement" after police report was filed); *Reilly*, 59 Mass. App. Ct. at 776-77 (privilege did not apply where "no police action was taken" following report). Here, the LVMPD not only issued an official press statement announcing the Police Report, it also (1) explained publicly that LVMPD could not prosecute Mr. Wynn because of the statute of limitations in Nevada, (2) encouraged other women to come forward if they had similar experiences with Mr. Wynn, and (3) announced it would forward the report to authorities in Chicago, where the alleged assault took place. 1 J.App. 72-74, 93.

Mr. Wynn has no good response to this, instead offering the *non sequitur* that "the AP Article did not report on the LVMPD's statements to the press." Br. at 36. That entirely misses the point—the point both of (1) the Massachusetts cases, which held that an official police statement about the reports would be sufficient official

action to bring the reports themselves within the scope of the privilege; and (2) AP's point here, which is that, *even if* the Court were inclined to impose an additional "official act" requirement for news publications on official police reports (which it should not), that requirement would be satisfied here because of LVMPD made precisely such a public statement about the Police Report at issue.

C. Mr. Wynn Misstates the Weight of Authority

Mr. Wynn also wrongly asserts that AP cannot cite *any* authority applying the privilege to an official police report that did not result in criminal charges or subsequent investigatory activity. Br. 34. Presumably because most complaints to police are in fact investigated, there is, admittedly, a paucity of cases squarely on point. But, for example, in *Wilson v. Birmingham Post Co.*, 482 So. 2d 1209, 1212 (Ala. 1986), the Alabama Supreme Court applied the privilege to a news article summarizing witness statements memorialized in an official incident report. *See id.* at 1210. Like Mr. Wynn, the plaintiff argued that the privilege should not apply because the act of recording witness statements and filing them in a police report was not sufficiently "investigatory" to bring that police report within the privilege. *See id*. at 1212. The court disagreed:

> Wilson argues that the Alabama privilege should not apply to the news report at issue because the actions of the Birmingham Police Department "can hardly be considered an investigation." This contention is incorrect. The weight of authority makes it clear that the Birmingham Police Department's interview of the Cuban refugees did constitute an investigation. The police incident report

> subsequently filed by Officer Morgado confirms the existence of an investigation, and the Post-Herald news report accurately reflects the contents of that investigation.

Id.

Wilson makes clear that once a witness statement is memorialized in an official police report, it is imbued with an official governmental character that brings it within the privilege. Whether Mr. Wynn thinks LVMPD conducted an "investigation" into Ms. Kuta's allegation is beside the point. The salient fact is that LVMPD undertook an official government act by formally interviewing Ms. Kuta and filing her allegations in an official police report (even putting aside the press release and the forwarding of the report to Chicago authorities). The privilege applies for that simple reason. *Id.*; *see also, e.g., Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922, 924 (8th Cir. 2001) (holding that privilege naturally applies to statements memorialized in "official police documents" that did not result in arrest or prosecution, without inquiring whether any subsequent investigation followed); *Northland Wheels Roller Skating Ctr., Inc. v. Detroit Free Press, Inc.*, 213 Mich. App. 317, 324-26 (1995) (applying privilege to information recorded in police report, without assessing whether police report spurred any subsequent investigation or criminal prosecution).[22]

[22] Mr. Wynn's reliance on *Rouch v. Enquirer News of Battle Creek*, 137 Mich. App. 38 (1984), *see* Br. at 32, can therefore be rejected out of hand, as that case came before Michigan expanded the privilege to cover "police reports of criminal

While Mr. Wynn argues that the other cases AP cited in briefing before the District Court involved arrests, prosecutions, or other additional police activity, Br. at 34-36, those facts had no relevance to the holdings for which AP cited those cases. *See, e.g.*, *Thomas*, 929 A.2d at 1011 ("We agree that official police records, such as official blotters, official reports, and so forth, fall within the privilege" (citing Restatement § 611 cmt. d)); *Trainor*, 924 A.2d at 772 ("Police reports have often been held to constitute the sort of official report to which the fair report privilege may attach."); *DMC Plumbing & Remodeling, LLC v. Fox News Network, LLC*, No. 12-cv-12867, 2012 WL 5906870, at *4 (E.D Mich. Nov. 26, 2012) (stating, without qualification, that "the privilege encompasses newspaper articles based upon police reports of criminal incidents" (citation omitted)); *Erickson v. Pulitzer Publ'g Co.*, 797 S.W.2d 853, 857 (Mo. Ct. App. 1990) (concluding that privilege applies to law enforcement "incident reports," without holding that additional police action is required); *Porter v. Guam Publ'ns, Inc.*, 643 F.2d 615, 617 (9th Cir. 1981) (privilege applied to "Police Blotter," without stating that outcome would be different if no additional official action were taken); *Imig v. Ferrar*, 70 Cal. App. 3d 48, 56-57 (1977) (privilege applied so long as complaint was made "to appropriate authority in the police department").

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incidents," including reports that did not result in an arrest, prosecution or subsequent investigation, *Northland Wheels*, 213 Mich. App. at 326-27 (concluding that *Rouch* is no longer good law).

Because the Nevada fair report privilege applies to the official police "case reports" on which the AP Article was based, the only question is whether the AP Article fairly summarized the rape allegation contained in the Police Report. It did.

II. THE AP ARTICLE WAS A "FAIR ABRIDGEMENT" OF THE ALLEGATIONS CONTAINED IN THE POLICE REPORT.

The republication of allegedly defamatory statements contained in a government record or proceeding is privileged "if the report is accurate and complete or a fair abridgement of the occurrence reported." *Wynn*, 117 Nev. at 14 (quoting Restatement (Second) of Torts § 611). Put another way, a "fair" report need not be a verbatim recitation; it simply needs to be a substantially correct summary of the allegedly defamatory content. Restatement (Second) of Torts § 611 cmt. f; *see also* 1 *Sack on Defamation* § 7:3.5[B][6] (5th ed. 2018) (for privilege to apply, "only the report of defamatory material must be substantially true" (citation omitted)). Because there is no dispute as to the relevant contents of the Police Report or the AP Article, the question of whether AP provided a fair abridgement of the rape allegation contained within the Police Report is a question of law for the court to decide. *Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (citing *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992)). Thus, it is not a question of what a "reasonable jury could reasonably find," Br. at 41, but a question of law. The District Court correctly found the rape allegation in the Police Report to have been fairly summarized in the AP Article.

Mr. Wynn argues both that the AP Article was not "fair," Br. at 39-44, and that it was not "impartial," *id.* at 44-46. He misapprehends both terms. To be "fair," a publication must accurately describe what has taken place to date *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 particular proceeding or document. *See, e.g.*, *Adelson*, 402 P.3d at 670 n.4 (agreeing that report summarizing allegations in declaration that casino owner permitted prostitution in his Macau casinos satisfied "fairness, accuracy and neutrality" requirement because, in absence of responsive pleading, "'it cannot be seriously maintained that the [challenged campaign petition] unfairly presented a one-sided view of the action"); *Sahara Gaming*, 115 Nev. at 218-19 (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). "Impartial," for fair report privilege purposes, recognizes that the privilege will not protect a publication that both recounts allegations made in a judicial proceeding *and* independently endorses their accuracy. In *Lubin v. Kunin*, for example, this Court concluded that defendants, a group of parents, "arguably went beyond fair, accurate, and impartial reporting" 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.

117 Nev. at 110. As the Court explained, "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.

Here, the AP Article accurately described the rape allegations in the Police Report, *i.e.*, that "[a] woman told police she had a child with casino mogul Steve Wynn after he raped her," that "a woman told officers that Wynn raped her at least three times around 1973 and 1974 at her Chicago apartment. She reported she got pregnant and gave birth to a girl in a gas station restroom[,]" and that "[i]n one instance, the woman claimed that Wynn pinned her against the refrigerator and raped her. She said he then made a phone call, kissed her on the cheek and left." *See* 1 J.App. 107-08. These statements are all drawn directly from the Police Report, described clearly as allegations, and not endorsed with any language even remotely akin to that used by the parents in *Lubin*. *Id*.; *see also* 1 J.App. 102-03. Certainly, Mr. Wynn states a preference for a 26-paragraph ABC News report that focused on the Police Report—and quoted it more extensively—over the 13-paragraph AP Article summarizing both police reports provided by authorities. Br. at 2 (citing 1 J.App. 165-69). But the fair report privilege does *not* require verbatim quotations, only a fair abridgment of the allegedly defamatory statement.

Mr. Wynn cannot, and does not, argue that the AP Article was in any way inaccurate in summarizing the sexual assault allegations made in the two police case reports. Nor does he argue that AP affirmatively endorsed those accusations. This should end the inquiry.

On appeal as below, Mr. Wynn's principal response is to argue that inclusion in the AP Article of the rape allegation was unfair because it did not provide a *verbatim quotation* of the complainant's description of the gas station birth. (The AP Article, as noted, does report that the complainant claimed to have given birth to Mr. Wynn's child in a gas station.) The law, however, is clear that a defendant does not abuse the privilege even if, unlike the AP here, it *wholly omits* portions of the government document that are *collateral* to the defamatory statement at issue. In *Rosenberg v. Helinski*, for example, the defendant summarized court testimony accusing the plaintiff of sexually abusing his daughter. 616 A.2d 866, 869 (Md. 1992). The plaintiff argued that the defendant abused the privilege because he had failed to describe other aspects of the child custody hearing, including that the plaintiff's ex-wife was held in contempt. *Id.* at 874. Rejecting that argument, the court held that the "omissions" alleged by the plaintiff did not defeat the privilege because they were "collateral" to the defamatory gist of the report—*i.e.*, that the plaintiff had been accused of sexual abuse. *Id.* at 874-75.

Similarly, in *Oney v. Allen*, the defendant reported on an indictment that mistakenly named the plaintiff. 529 N.E.2d 471, 473-74 (Ohio 1988). The court held that the defendant did not abuse the privilege by failing to mention that the indictment referred to a nickname the plaintiff had never used. *Id*. at 474. In so holding, the court observed that "[t]he pivotal fact is that [the plaintiff] . . . was indicted and that is what the publisher reported." *Id*. Here, the allegedly defamatory fact is that Mr. Wynn was accused of sexual assault, and that is what the AP (accurately) reported.

In an effort to evade this authority, Mr. Wynn repeatedly characterizes the birth language as "exculpatory." Were that the case, it would not be collateral. Thus, for example, if elsewhere in the Police Report the complainant admitted that the rape allegation was false, it would be inaccurate to report the rape charge while omitting that clearly exculpatory disclaimer. That was the situation in *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988), upon which Mr. Wynn relies. Br. at 40. That case involved a news article suggesting that the plaintiff had mob connections because, according to a government memorandum, his name appeared several times in reports concerning the notorious disappearance of union boss Jimmy Hoffa. 847 F.2d at 1073-74. What the challenged news report neglected to mention, however, was that the government memorandum *expressly disavowed* that suggestion, stating that "none of these [appearances in the reports] suggested

any criminality, or organized crime associations." *Id*. at 1072, 1074-75. Thus, the defamatory "gist" of the news article—that the plaintiff had mob ties—was the opposite of what was actually stated in the government memorandum.

The other authorities cited by Mr. Wynn similarly involve reports that omitted key information relating to the allegedly defamatory allegation. In *Freedom Communications v. Coronado*, for example, the challenged report, which allegedly implied prosecutors failed successfully to prosecute cases involving children, omitted key aspects of a government chart of cases and went beyond the chart to assert that "suspects 'would commit' the crimes of which they were accused." 296 S.W.3d 790, 799 (Tex. App. 2009), *review granted, judgment vacated*, 372 S.W.3d 621 (Tex. 2012). In *Brown & Williamson Tobacco Corp. v. Jacobson*, the challenged publication similarly mischaracterized the key aspects of an FTC report relating to a tobacco company's marketing toward children—the alleged defamatory statement. 713 F.2d 262, 271-72 (7th Cir. 1983). Unlike the memorandum at issue in *Schiavone*, the Police Report contains no statement by LVMPD expressing its view that the allegation against Mr. Wynn was false. Unlike the reports in *Coronado* and *Jacobson*, the AP Article does not omit or exaggerate aspects of the rape claim. The defamatory "gist" of the Police Report is that Mr. Wynn was accused of a sexual assault in the 1970s and that the statute of limitations prevented the LVMPD from investigating the accusation, and that is precisely what the AP reported.

Courts have, expressly and repeatedly, rejected efforts by plaintiffs to pierce the fair report privilege through arguments, like Mr. Wynn's here, that other, collateral aspects of the underlying government report should have been included. *Lawton v. Georgia Television Co.*, for example, arose out of a news broadcast concerning an official government report accusing the plaintiff, a lieutenant in the National Guard, of sexual harassment. 456 S.E.2d 274, 275-76 (Ga. Ct. App. 1995). Much like Mr. Wynn here, the plaintiff in that case argued that the defendant had abused the fair report privilege because it "enhanced the integrity of the victims" by failing to sufficiently detail the "psychiatric problems" of one of the accusers. *Id*. at 276. Rejecting that argument, the court concluded that the defendant "accurately depicted" the defamatory "gist" of the government report. *Id.* at 278.

Dorsey is similarly instructive. In that case, the *National Enquirer* reported that a former romantic partner of the plaintiff filed court papers stating that the plaintiff tested positive for AIDS. 973 F.2d at 1433. The plaintiff argued that the Enquirer had abused the privilege by failing to include facts from the proceeding that undermined the litigant's credibility—including that, in a separate court filing, she wrote "unknown" next to a box asking for information about the plaintiff's health. *Id*. at 1435-38. The court rejected that argument as "unpersuasive" because it was possible for the romantic partner to believe that the plaintiff had AIDS while still lacking knowledge about the current state of his health. *Id*. at 1438. Put

differently, while the omitted information perhaps offered some support to the plaintiff's side of the story, it was not so "obviously exculpatory" that its exclusion from the news article fundamentally altered the "gist" or "sting" of the judicial proceeding. *Id*. The parallels here are obvious. Even if a graphic description of a birth experience implies, as Mr. Wynn apparently contends, that Ms. Kuta currently suffers from some mental illness, that is not "obviously exculpatory" as to her allegation of a rape decades earlier. Mentally ill people are the victims of rape, too—and, indeed, according to most studies suffer the crime with *greater* frequency.[23] Moreover, the occurrence of erratic behavior after suffering the trauma of a violent crime, including rape, is an acknowledged phenomenon. *E.g.*, *People v. Bledsoe*, 681 P.2d 291, 297-300 (Cal. 1984) (discussing rape trauma syndrome).

Cases such as *Lawton* and *Dorsey* appropriately recognize a difference between "*obviously* exculpatory material" in an official record or proceeding—

[23] *See, e.g.*, Hind Khalifeh et al., *Domestic and sexual violence against patients with severe mental illness*, 45 Psychological Med. 875, 882 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4413870/pdf/S0033291714001962a.pdf (of women with severe mental illness surveyed for study, 40 percent had been victims of rape or attempted rape, compared to 7 percent of general population); *see also* Karen Hughes et al., *Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies*, 379 Lancet 1621 (2012), https://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(11)61851-5.pdf; J. Shapiro, *How Prosecutors Changed The Odds To Start Winning Some Of The Toughest Rape Cases*, NPR (Jan. 16, 2018), https://www.npr.org/2018/01/16/577063976/its-an-easy-crime-to-get-away-with-but-prosecutors-are-trying-to-change-that.

which, as in *Schiavone*, 847 F.2d at 1089, effectively exonerates the plaintiff—and other collateral details that may have some bearing on credibility but that do not fundamentally change the defamatory gist or sting of the government report at issue. Failure to include the latter category of information does *not* result in forfeiture of the privilege. *See, e.g.*, *Cobin v. Heart-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 558-59 (D.S.C. 2008) (failure to report details undermining credibility of wife who accused defendant of domestic violence in police report did not result in forfeiture of privilege because privilege does not require defendant to be "arbiters of the truth of the incident"); *Ricci v. Venture Magazine, Inc*., 574 F. Supp. 1563, 1568 (D. Mass. 1983) (no abuse of privilege where article reported that plaintiff threatened witness in court but did not disclose that plaintiff's attorney denied any threats were made); *Sciandra v. Lynett*, 187 A.2d 586, 605-06 (Pa. 1963) (no abuse of privilege where defendant reported that plaintiff had been stopped and searched by police but failed to indicate that no charges were filed).

This result is necessary for the privilege to serve its function of enabling public discussion of government records and activities without incurring defamation liability. Were the news media responsible for reporting verbatim every collateral matter potentially relevant to the credibility of allegations contained within public records or made at public proceedings, it is hard to imagine how a news organization could ever report on a government report or court filing, or how the television news

could report on a witness's testimony at a trial. Indeed, in *Adelson*, the defendant accurately referenced a single allegation contained within a longer declaration, which this Court agreed was fair and thus privileged—without the need to parse through the reliability of all of the other, collateral statements within the declaration. *Adelson*, 402 P.3d at 667, 670 n.4 (adopting analysis in *Adelson v. Harris*, 973 F. Supp. 2d 467, 486 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413 (2d Cir. 2017)). This would not be the result under Mr. Wynn's constricted view of the fair report privilege.

Nor does Mr. Wynn's complaint that "Respondents also forfeited the fair report privilege by increasing and reinforcing the defamatory sting by publishing accusations extraneous to the False Police Report," Br. at 42, merit consideration. Mr. Wynn is referring here to the AP's *accurate* summary of the broader news context at the time the LVMPD issued its press release about these two case reports alleging sexual assault—*i.e.*, that multiple published reports of alleged sexual misconduct by Mr. Wynn over multiple decades had prompted him to resign from his prominent roles at Wynn Resorts. These statements were all *true*, and Mr. Wynn does not allege otherwise. *Id.* As such, they simply have no place in a defamation action. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 57 P.3d 82, 88 (2002) (statement is not defamatory if it is "absolutely true, or substantially true"); *see also* 118 Nev. at 715 n.17 (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496,

517 (1991), for requirement that "gist" or "sting" of allegedly defamatory statement must be materially false for statement to be actionable).

III. THE DISTRICT COURT PROPERLY APPLIED THE NEVADA ANTI-SLAPP STATUTE GIVEN THE PARTIES' STIPULATION

Mr. Wynn finally suggests that there are "pressing questions" of a procedural nature to be addressed, including whether the fair report privilege properly can be raised through an Anti-SLAPP motion, citing to this Court's decision in *Patin v. Ton Vinh Lee*, 429 P.3d 1248, 1252 (Nev. 2018). Br. at 47. But the Anti-SLAPP motion in *Patin* was denied because the defendant failed to meet its burden under the *first prong* of the statute, and the Court thus expressly declined to decide whether the fair report privilege properly could be raised through an Anti-SLAPP motion, as that issue would bear only on the statute's second prong—probability of success. 429 P.3d at 1252. The Court in *Patin* also noted that the defendant failed to cite any relevant authority on the fair report question, which provided an additional reason to leave the issue for another day. *See id*.

Here, AP is providing to the Court the authority the defendant failed to supply in *Patin*: Scores of California decisions—which Nevada courts properly consider when construing this state's Anti-SLAPP statute, *Coker*, 432 P.3d at 749—expressly hold that an affirmative defense is properly raised "in connection with the second prong of the analysis of an anti-SLAPP motion." *Bentley Reserve LP v. Papaliolios*,

218 Cal. App. 4th 418, 434 (2013) (considering affirmative defense of substantial truth). This reflects a plain reading of the requirement that a plaintiff show a "probability of success": "In order to demonstrate a probability of prevailing on the merits of the claims, the plaintiff must present evidence that, if credited, is sufficient to overcome the defendant's affirmative defense." *Dwight R. v. Christy B.*, 212 Cal. App. 4th 697, 715-16 (2013) (considering affirmative defense of immunity). Thus, the fair report privilege is routinely considered by courts applying California's analogous Anti-SLAPP statute. *See, e.g.*, *Rall v. Tribune 365 LLC*, 31 Cal. App. 5th 479, 492-500 (granting Anti-SLAPP motion on fair report privilege grounds), *review granted, further action deferred pending disposition of appeal involving related issues*, 438 P.3d 238 (Cal. 2019); *Healthsmart Pac., Inc. v. Kabateck*, 7 Cal. App. 5th 416, 437-38 (2016) (same); *Sipple v. Found. For Nat'l Progress*, 71 Cal. App. 4th 226, 241-43 (1999) (same); *Braun v. Chronicle Publ'g Co.*, 52 Cal. App. 4th 1036, 1049-52 (1997) (same).

This is precisely what the District Court did, based on the joint stipulation by the parties: It considered whether, in light of the fair report privilege, Mr. Wynn could meet his burden under the second prong of the anti-SLAPP Statute to demonstrate a "probability of prevailing on the claim." *Coker*, 432 P.3d at 749 (citation omitted); *see also supra* at 18-22. There was no error.

CONCLUSION

For all of the foregoing reasons, AP respectfully requests that the Court affirm the judgment of the District Court in its and its reporter's favor, and remand the action to the District Court for resolution of AP's motion for attorney's fees (including fees incurred by AP on this appeal).

Dated: June 21, 2019

Respectfully submitted,

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NRAP 32(A)(7) CERTIFICATE OF COMPLIANCE

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 it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7)(B)(i) because it contains 13,924 words, excluding the portions of the brief that are exempted under NRAP 32(a)(7)(B)(iii).

Finally, I hereby certify that I have read this appellate 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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.

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CERTIFICATE OF SERVICE

I certify that on June 21, 2019, I electronically filed the foregoing **RESPONDENTS' ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's e-filing system. The following participants in the case who are registered users will be served by the appellate system.

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