

JOHN L. MARSHALL
Nevada State Bar No. 6733
570 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 303-4882
johnladuemarshall@gmail.com

Electronically Filed
Jun 02 2019 05:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Luke Andrew Busby, Ltd.
Nevada State Bar No. 10319
316 California Ave #82
Reno, NV 89509
775-453-0112
luke@lukeandrewbusbyltd.com

IN THE SUPREME COURT OF THE STATE OF NEVADA

SAM TOLL,

Petitioner,

vs.

THE HONORABLE JAMES E. WILSON,
DISTRICT JUDGE; AND THE FIRST JUDICIAL
DISTRICT COURT FOR THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF
STOREY,

Docket No. 78333

Dist Ct. 18TRT00001

Respondents,

and

LANCE GILMAN,

Real Party in Interest,

**REPLY TO REAL PARTY IN INTEREST'S ANSWERING BRIEF TO
PETITION FOR WRIT OF PROHIBITION OR MANDAMUS**

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Sam Toll is an individual whose primary place of residence is Storey County, Nevada.
2. Mr. Toll is represented in the District Court and this Court by John L. Marshall, Esq. and Luke A. Busby, Esq.

Dated this Sunday, June 2, 2019:

By: 
JOHN L. MARSHALL
Nevada State Bar No. 6733
570 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 303-4882
johnladuemarshall@gmail.com

Luke Andrew Busby, Ltd.
Nevada State Bar No. 10319
316 California Ave #82
Reno, NV 89509
775-453-0112
luke@lukeandrewbusbyltd.com

TABLE OF CONTENTS

	Page
Table of Contents	iii
Table of Authorities	iv
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND.....	2
III. ARGUMENT	7
A. The News Media Privilege Protects Mr. Toll's Confidential Sources as a Reporter for an Online News Site.....	8
1. Mr. Gilman fails to undermine the District Court's findings that Mr. Toll is a reporter who disseminates news via an online news site	8
2. The Nevada Media Privilege Applies to Online News Sites.....	13
B. Mr. Gilman Fails to Demonstrate Disclosure of Mr. Toll's Confidential Sources is permitted under Anti-SLAPP Procedures or Relevant Given Gilman's Admission that his Primary Residence is in Washoe County.....	21
IV. CONCLUSION.....	28
NRAP 28.2 ATTORNEY'S CERTIFICATE.....	29
CERTIFICATE OF SERVICE.....	31

TABLE OF AUTHORITIES

Statutes	Page
NRS 41.650	25
NRS 41.660.....	22, 23, 24, 26
NRS 49.275.....	1, 7, 16
Cases	
<i>Aspen Fin. Services v. Dist. Ct.</i> 128 Nev. 635, 289 P.3d 201 (2012).....	24
<i>Carroll v. United States</i> , 267 U.S. 132, 45 S. Ct. 280 (1925)	20
<i>Chevron U.S.A. Inc. v. Echazabal</i> , 536 U.S. 73, 122 S. Ct. 2045 (2002).....	16
<i>Citizens United v. Fed. Election Comm'n</i> , 558 U.S. 310, 130 S. Ct. 876 (2010).....	11
<i>Comstock Residents Assoc. v. Lyon County</i> , 134 Nev.Adv.Op. 19 (2018).....	20
<i>Coker v. Sassone</i> , 135 Nev. Adv. Op. 2, 432 P.3d 746 (2019).....	24
<i>Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark</i> , 116 Nev. 88 (2000)	15, 18, 27
<i>Double Diamond v. Second Jud. Dist. Ct.</i> , 131 Nev. Adv. Op. 57, 354 P.3d 641 (2015).....	24
<i>Fed. Election Comm'n v. Wisconsin Right To Life, Inc.</i> , 551 U.S. 449, 127 S. Ct. 2652 (2007).....	11
<i>Katz v. United States</i> , 389 U.S. 347, 88 S. Ct. 507 (1967).....	20
<i>Kyllo v. United States</i> , 533 U.S. 27, 121 S. Ct. 2038 (2001).....	20
<i>Metabolic Research, Inc. v. Ferrell</i> , 693 F.3d 795, 797 (9th Cir. 2012)	26
<i>McKay v. Board of Supervisors</i> , 102 Nev. 644, 648 (Nev. 1986).....	15
<i>N.L.R.B. v. SW Gen., Inc.</i> , 137 S. Ct. 929, 940 (2017)	16

<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254, 84 S.Ct. 710 (1964).....	11
<i>Obsidian Fin. Group, LLC v. Cox</i> , No. CV–11–57–HZ, 2011 WL 5999334 at *1 (D. Or. Nov. 30, 2011)	18
<i>O’Grady v. Superior Court</i> , 139 Cal.App.4th 1423, 44 Cal.Rptr. 3d 72 (2006).....	11, 19
<i>Pension Benefit Guaranty Corporation v. LTV Corp.</i> , 496 U.S. 633, 110 S.Ct. 2668 (1990).....	17
<i>People v. Von Villas</i> , 10 Cal. App. 4th 201, 231-32, 13 Cal. Rptr. 2d 62 (1992)...	19
<i>Playboy Enterprises, Inc. v. Superior Court</i> , 154 Cal. App. 3d 14, 28-29, 201 Cal. Rptr. 207 (1984).....	19
<i>Shoen v. Shoen</i> , 5 F.3d 1289, 1293 (9th Cir. 1993)	19
<i>Star Athletica, L.L.C. v. Varsity Brands, Inc.</i> , 137 S. Ct. 1002 (2017).....	17
<i>Stubbs v. Strickland</i> , 129 Nev. 146, 150, 297 P.3d 326, 329 (2013)	23
<i>Too Much Media, LLC v. Hale</i> , 206 N.J. 209, 20 A.3d 364 (2011)	18
<i>United States v. Jones</i> , 565 U.S. 400, 132 S. Ct. 945 (2012).....	20
<i>U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.</i> , 190 F.3d 963 (9th Cir. 1999)	26
<i>United States v. Wise</i> , 370 U.S. 405, 82 S.Ct. 1354 (1962).....	17
<i>Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark</i> , 127 Nev. 167, 252 P.3d 676, 678 (2011).....	24
<i>Wardleigh v. Second Judicial Dist. Court In & For County of Washoe</i> , 111 Nev. 345, 891 P.2d 1180 (1995).....	24
<i>Xcentric Ventures, L.L.C. v. Borodkin</i> , 934 F. Supp. 2d 1125, 2013 WL 1149917 (D. Ariz. 2013).....	18
Court Rules	
NRAP 28.....	7

I. INTRODUCTION

The District Court found as a matter of fact that Petitioner Sam Toll is a reporter who writes articles that, “. . . contain reports of facts or alleged facts, opinions, commentary and/or satire related to events in Storey County . . .” on his online news site the storeyteller.online (“Storey Teller”). Appx. Vol. 12 at 2483-2484. Despite these facts, the District Court concluded that because Mr. Toll does not print his news articles, he cannot protect the confidentiality of his news sources under Nevada’s News Media Privilege (NRS 49.275). *Id.* at 2484.

In the underlying Petition for Writ of Prohibition or Mandamus (“Petition”) to overturn the District Court’s Order compelling the disclosure of his sources, Mr. Toll set forth the expansive language and purpose of the News Media Privilege statute and how application of the privilege to online news sites such as the Storey Teller furthers the legislative objectives of the statute and is consistent with case law from both Nevada and other jurisdictions where similar facts have been presented. In Respondent Lance Gilman’s Answering Brief (“Ans. Brief”), Mr. Gilman ignores the factual findings of the District Court and refuses to address the plain language of NRS 49.275 or its purpose as specifically addressed by this Court. Instead, Mr. Gilman launches into discursions on

irrelevant topics such as whether the News Media Privilege applies to anyone who chooses to “blog”, Mr. Tolls’ integrity, and Mr. Gilman’s interpretation of Mr. Toll’s motives for his writings. Mr. Gilman never addresses the implication of his arguments - that the numerous journalists in this State who only publish online would instantly be stripped of the critical protection from the forced disclosure of the identity of news sources provided in the News Media Privilege.

II. FACTUAL BACKGROUND

The record before the District Court support its findings regarding Mr. Toll is a reporter and investigates and publishes newsworthy articles in the Storey Teller. Prior to starting his online news site, Mr. Toll was a reporter for the Comstock Chronicle and authored numerous articles. *See* Appx. Vol. 11 at 2232 to 2244. Once Mr. Toll began publishing the Storey Teller, he continued to investigate and report on local news stories and author editorials and satire about a range of topics, including Mr. Gilman’s conflict of interest presented by his ownership of the Mustang Ranch Brothel and a principle in Tahoe Reno Industrial Center (“TRIC”) both located in Storey County, while being one of only three Storey County Commissioners. *See* Declaration of Sam Toll at Appx. Vol. 1 at 79: “While Gilman is a frequent topic of my writing in the Teller, this

is the case because of his stature in the County and his frequent participation in newsworthy events.”

Mr. Toll started to publish the Storey Teller as an alternative news source to the Comstock Chronicle. *See* Declaration of Sam Toll at Appx. Vol. 1 at 78. The Petitioner’s Appendix at Vol. 11 at 2166 to 2229 contains an index by title of the articles published by Mr. Toll in the Storey Teller from February of 2017 to June of 2018, which clearly shows that Mr. Toll has been actively writing on a wide variety of news topics in Storey County since the inception of the Storey Teller. Although Mr. Gilman claims that the central focus of Mr. Toll’s writings, “...seems to be ridiculing, insulting and defaming [Mr. Gilman]...” a passing review of the Storey Teller shows that Mr. Toll wrote stories on a range of newsworthy events in Storey County. For example, see a March 18, 2017 Article entitled, *Obamacare and Dodd-Frank Have the same Fatal Flaw* (See Appx. Vol. 9 at 2168); a March 25, 2017 article entitled, *The Pro-Art Case for Defunding the National Endowment of the Arts* (*id.* at 2169); an April 17, 2017 article entitled, *Easter Egg Hunt in Lockwood* (*id.* at 2180); and an April 23, 2017 article entitled, *Lockwood Cleanup Day. Community comes together to Fill Dumpsters and a potluck BBQ* (*id.* at 2183).

Around April of 2017, Mr. Toll began investigating a rumor in the Storey County community that Mr. Gilman did not actually reside in Storey County, which Mr. Toll describes as “the conclusion of the community” (Appx. Vol. 6 at 1142). His investigation as detailed in his October 16, 2017 article (Appx. Vol. 1 at 108) included obtaining public records and discussions with public officials that established:

- (1) The location of Mr. Gilman’s claimed residence in Storey County: 5 Wild Horse Canyon Drive;
- (2) The location of that residence: adjacent to the swimming pool behind the Mustang Ranch brothel;
- (3) The type of residence: a double-wide trailer;
- (4) The claimed residence of Mr. Kris Thompson, a Storey County Planning Commissioner and business associate of Mr. Gilman: 5B Wild Horse Canyon Drive;
- (5) That Mr. Thompson’s different address was in fact the same double-wide trailer Mr. Gilman claimed to reside in;
- (6) The applicable zoning for the location of the double-wide trailer was not residential but either industrial or agricultural; and

(7) That the applicable zoning did not permit multi-family structures.

Appx. Vol. 1 at 108-125.

Based on these facts, Mr. Toll believed that Mr. Gilman, a wealthy and successful businessman, would not likely live in a double-wide trailer on the backside of a brothel with his girlfriend and a business associate when he owns multiple residential properties in Washoe County. Mr. Toll then compiled these facts and published an article on October 16, 2017 in the Storey Teller in which he also included names of persons he consulted during his investigation. *See* Second Declaration of Sam Toll at Appx. Vol. 3 at 504, and October 16, 2017 article by Mr. Toll at Appx. Vol. 2 at 337-357. In the article, Mr. Toll did not cite or report on any confidential source of information for his news story or associated letter, but did state in the September 28, 2017 Criminal Complaint letter to Storey County District Attorney Anne Langer (Appx. Vol. 1 at 110-111) that:

It is common knowledge to anyone paying attention that Lance Gilman, who has multiple residence properties in Washoe County and is extremely wealthy, does not bunk with Kris Thompson in a doublewide trailer.

Id. at 111.

Mr. Toll's October 16, 2017 Storey Teller article incorporating the

September 28, 2017 Criminal Complaint letter forms the primary basis for Mr. Gilman's sole remaining defamation claim. *See* Ans. Brief at 9. After reviewing Mr. Toll's investigative efforts, the District Court concluded Mr. Toll possessed a good faith belief that Mr. Gilman did not reside at the Mustang Ranch Brothel, his claimed address.¹ Nevertheless, without explaining why such discovery was necessary, the District Court allowed Mr. Gilman to conduct discovery into the basis of Mr. Toll's good faith belief. *Id.* Vol. 3 at 533-534.

Mr. Gilman thereafter deposed Mr. Toll, questioned him extensively regarding his investigation as reported in October 17, 2017 article as well as information from confidential sources disclosed after the October 17 article – that Mr. Gilman departed the Mustang Ranch brothel every night and drove west towards Washoe County where he kept his “toys” at some other location. *See* Appx. Vol. 3 at 681. Because Mr. Toll would not disclose the name of this source and the names of other persons he consulted, Mr. Gilman moved to compel disclosure and the District Court ruled the News Media Privilege

¹ The Court found: “Toll did conduct some research on Gilman's residence before he published the resident communications and that the information he received as a result of that research caused him to disbelieve that Gilman lives in a trailer behind the Mustang Ranch pool.” Appx. Vol. 3 at 533.

inapplicable because the Storey Teller is not physically printed. Appx. Vol. 4 at 690.

Finally, Mr. Gilman does not dispute that at the time Mr. Toll published his news article, Mr. Gilman continue to represent to Washoe County tax officials that his primary residence was 199 Steptoe Lane, Washoe County, Nevada, in order to obtain a lower tax rate. Appx. Vol 12 at 2470.

III. ARGUMENT

As argued below, the writ should issue reversing the District Court's Order because the News Media Privilege as codified in NRS 49.275 protects reporters, like Mr. Toll, from forced disclosure of confidential news sources whether printed or online. Further, this Court should order the District Court to dismiss this action outright or rule on Mr. Toll's Anti-SLAPP Motion to Dismiss as submitted.²

² Pursuant to NRAP 28(e)(1), assertions of fact in briefs regarding matters in the record are required to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on, is found. Mr. Gilman serially violates this rule in his Ans. Brief. On page 4 of the Ans. Brief, a claim is made that Mr. Toll did not answer questions on what measures he took to verify Mr. Gilman's residency. As described at length in the Petition, Mr. Toll only refused to answer questions that would reveal his sources, but explicitly stated why he does not believe that Mr. Gilman lives at the Mustang Ranch. *See* Appx. Vol. 3 at 640. On page 7 of the Ans. Brief, Mr. Gilman claims that the "central focus" of the Storyteller, "seems to be ridiculing, insulting, and

A. The News Media Privilege Protects Mr. Toll's Confidential Sources as a Reporter for an Online News Site

1. Mr. Gilman fails to undermine the District Court's findings that Mr. Toll is a reporter who disseminates news via an online news site

The District Court reviewed the record before it and concluded, based on Mr. Toll's clear record of reporting of newsworthy topics, investigation, reporting, and publication on the Storey Teller, that Mr. Toll is a reporter who disseminates news on topics relevant to his Storey County readers. Appx. Vol. 12 at 2483.

In his Answering Brief, Mr. Gilman does not address the factual basis for the District Court's finding that Mr. Toll is a reporter. Mr. Gilman instead tacks another direction: that Mr. Toll's news gathering and dissemination were for "selfish" political purposes. Ans. Brief at 31-33. Mr. Gilman contends that Mr. Toll was "just a blogger and nothing more," and applying the News Media

defaming" Mr. Gilman. On page 7 of the Ans. Brief, Mr. Gilman claims Mr. Toll was a candidate for public office in Storey County in the 2018 election, without any citation to the record. On page 14 of the Ans. Brief, Mr. Gilman makes the extraordinary claim that: "Virtually every single one of the Defendant's published statements in the Storyteller show Defendant having a deep dislike for Plaintiff." Passing review of the contents of Mr. Toll's writing in the Teller show that this claim by Mr. Gilman is false and that Mr. Toll writes about a variety of topics not involving Mr. Gilman. *See* Appx. Vol. 11 at 2166 to 2229.

Privilege to Mr. Toll would allow any “blogger” to operate with impunity. *Id.* These arguments all rest on inaccurate, dismissive, and pejorative characterizations of Mr. Toll’s work on the Storey Teller. Review of the body of Mr. Toll’s writing in the Storey Teller, which Mr. Gilman refuses to acknowledge or discuss, shows that this claim by Mr. Gilman is false and that Mr. Toll is plainly providing a source of news to residents of Storey County, as found by the District Court. *See* Appx. Vol. 11 at 2166 to 2229, which is an index of Mr. Toll’s writing by title, and Appx. Vol(s), 8-11 at 1515 2413, which is the Joint Hearing Statement that contains a large amount of Mr. Toll’s writings in the Storey Teller.

Mr. Toll fills the traditional role and performs the same function that a print newspaper reporter performed when the News Media Privilege became law in the late 1960s.³ As found by the District Court, the extensive evidence presented to the District Court shows that Mr. Toll is a reporter. *See* Appx. Vol.

³ Mr. Gilman argues that the District Court erred in concluding that Mr. Toll is a reporter for a press association. Ans. Brief at 33. While Toll is not a reporter employed by a press association, the fact that Toll is a member of the Nevada Press Association supports the District Court’s finding that Mr. Toll is a reporter.

12 at 2483-2484. Throughout Mr. Gilman's Ans. Brief, Mr. Gilman uses the straw-man term "blogger," i.e., one who "blogs" or writes a "blog," pejoratively to refer to anyone who posts online content, as if all content that is posted online should be treated as a single category by this Court and excluded from any protection under the News Media Privilege. In the context of this case, the term "blog" is meaningless as no party is advancing any argument that any "blogger," no matter the content of what they write or the function they perform, is covered by the News Media Privilege.

Mr. Gilman contends that Mr. Toll's motivations for initially starting the Storey Teller are relevant to application of the News Media Privilege. Ans. Brief at 31-32. This argument lacks legal support and, not surprisingly, Mr. Gilman cites none. Such an inquiry would require this Court to evaluate the political inclinations of any particular news source would be eligible for protection under the News Media Privilege. Such a subjective test is entirely unworkable lest the courts start to actively engage in determinations involving which opinions on the political spectrum are valid and invalid.

We decline the implicit invitation to embroil ourselves in questions of what constitutes "legitimate journalis[m]." The shield law is intended to protect the gathering and dissemination of *news*, and that is what petitioners did here. We can think of no workable test

or principle that would distinguish "legitimate" from "illegitimate" news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace.

O'Grady v. Superior Court, 139 Cal.App.4th 1423, 1457, 44 Cal.Rptr. 3d 72, 97.

(2006). This Court should likewise decline Mr. Gilman's invitation to wade into questions related to what is and what is not legitimate journalism and what is and is not a valid motivation for engaging in journalism: "First Amendment standards, 'must give the benefit of any doubt to protecting rather than stifling speech.'" *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 327, 130 S. Ct. 876, 891 (2010) quoting *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 469, 127 S. Ct. 2652, 2666 (2007) citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

On page 31 of the Ans. Brief, Mr. Gilman claims that when Mr. Toll started the Storey Teller, he was, "... just a blogger and nothing more," "At the time, there was nothing to even remotely in existence that would allow Defendant to claim his Blog was a newspaper or periodical." Mr. Gilman then states in footnote 9 that Mr. Toll "improved his Blog over time" but that at

the time the “defamatory” statements were made Mr. Toll was “. . . just another person with a computer spewing his false opinions as facts.” *Id.* Mr. Gilman never explains exactly when Mr. Toll transitioned from “blogger” to being an online news source. A “blog” is defined by Merriam Webster's dictionary as, “a website that contains online personal reflections, comments, and often hyperlinks, videos, and photographs provided by the writer,” or “a regular feature appearing as part of an online publication that typically relates to a particular topic and consists of articles and personal commentary by one or more authors.” *See* <https://www.merriam-webster.com/dictionary/blog>, accessed on May 27, 2019. A passing review of the contents of Mr. Toll’s writing in the Teller, (even around the time when it was first started) show that this claim by Mr. Gilman that Toll was “...just a blogger and nothing more” is inconsistent with the facts and that Mr. Toll wrote about a wide variety of news topics of interest in Storey County from the beginning. *See* Appx. Vol. 11 at 2166 to 2229.

It is only by ignoring the District Court’s factual findings that Mr. Gilman constructs his strawman, i.e. applying the News Media Privilege to Mr. Toll will result in its application to not just reporters but any, “...person with a computer

spewing his false opinions as facts.” Ans. Brief at 32 fn. 9. As found by the District Court, Mr. Toll is a reporter and his online news site disseminates newsworthy articles. Appx. Vol. 12 at 2483-2484. This Petition therefore does not present the extreme question posed by Mr. Gilman. Rather, the primary issue is narrow and straightforward: whether Nevada’s News Media Privilege protects confidential sources of a reporter for an online news site, the modern-day version of a newspaper.

2. The Nevada Media Privilege Applies to Online News Sites

As set forth in Mr. Toll’s Petition, the Legislature used broad language covering all of the media sources for mass dissemination of news available in 1969: “any” newspaper, periodical, radio, television, or wire service. Mr. Toll also demonstrated the purpose of News Media Privilege, to protect news gathering and dissemination, would be served by including the internet forms of these news functions. Mr. Toll presented relevant case law applying similarly worded news media shield statutes to news sites published exclusively online. *See* generally, Petition at 17-34; *See* also Brief of Amici Curiae from The Nevada Press Association, The Reporters Committee for Freedom of the Press, the News Media Alliance, the Online News Association, the Media Institute, the

Society of Professional Journalists, and Reporters Without Borders (filed March 25, 2019)(“Brief of Amici”).

In his Answering Brief, Mr. Gilman ignores these basic points and argues that although that online news sites “need” protection of the News Media Privilege (Ans. Brief at 30), the Legislature must address the issue. Mr. Gilman’s argument is founded on several statutory construction principles that make no sense in application to NRS 49.275.

First, Mr. Gilman argues that the “plain language” of the News Media Privilege precludes application to online news sites because “nothing contained in NRS 49.275 that would apply[] to online . . .” news sites. Ans. Brief at 24. In making this assertion, Mr. Gilman ignores the Legislature’s use of the term “any” when it described the newspapers, periodicals, press associations, and radio or television stations covered by the privilege. Mr. Gilman only addresses the Legislature’s choice of such a broad and inclusive adjective in a short footnote (Ans. Brief at 27, n.7) where he summarily dismisses its relevance as “unsupported,” despite the extensive argument presented in both Mr. Toll’s Petition (at 23-24) and the Brief of Amici (at 5-8); demonstrating that through the use of the term “any,” the Legislature chose not to distinguish between

different printed or online journalistic forms. Further, this Court has repeatedly cautioned that the intent of a statute will prevail over the literal sense and that words in a statute should be given their plain meaning *unless* this violates the spirit of the act. *McKay v. Board of Supervisors*, 102 Nev. 644, 648 (Nev. 1986).

Applying the News Media Privilege to reporters who print stories but not to reporters who post stories on online news sites is plainly inconsistent with the spirit of the law, i.e. it applies to “journalists” who gather “...information within his or her professional capacity for the purposes of dissemination.” *See Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 88, 99 (2000).

Second, Mr. Gilman tortures the statutory construction maxim “*expressio unius est exclusio alteria*” to argue the Legislature must have intended to exclude online “blogs” (and presumably, online news media) when in 1969 it listed all then available news media types that were subject to the News Media Privilege. In order to divine such a legislative intent, the internet and online news sources must have then existed or that the Legislature excluded other common forms of mass news dissemination. Since the internet did not exist at that time and the Legislature used expansive terms encompassing an inclusive list of the then available news dissemination services, Mr. Gilman’s resort to this maxim is

baseless. The United States Supreme Court recently ruled that, “...the *expressio unius* canon applies only when ‘circumstances support[] a sensible inference that the term left out must have been meant to be excluded.’” *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) *quoting Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045 (2002). It is not sensible, much less within the realm of logical possibility, to infer from the terms of the News Media Privilege that in 1969 the Nevada Legislature intended to exclude the then non-existent internet news industry from coverage.

Next, Mr. Gilman derives an intent to exclude online news sites from legislative inaction, contending that since the Legislature was aware of the advent of online news sites and did not amend NRS 49.275 to expressly include them, it intend to exclude them. Ans. Brief at 27. However, exactly the opposite intent could be just as easily derived: the Legislature assumed that online news site would be covered because the broad purposes of the statute would be served and the statutory language included “any” of an inclusive list of then existing media types. Moreover, simple legislative inaction absent some express choice presented indicates nothing. The United States Supreme Court has recently ruled that “. . . [c]ongressional inaction lacks persuasive

significance” in most circumstances. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015, (2017) quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668 (1990). In *Pension Benefit Guaranty*, the Supreme Court held that because several equally tenable inferences could be drawn from legislative inaction, including the inference that the existing legislation included the term at issue, the canon was unhelpful. *Id.* at 650 citing *United States v. Wise*, 370 U.S. 405, 411, 82 S.Ct. 1354, 1358 (1962).

Fourth, Mr. Gilman claims that applying the News Media Privilege to online news sites would violate separation of powers principles. Ans. Brief at 28-31. Mr. Gilman argues application of the News Media Privilege in this case “revolves around policy choices and value determinations” best left to the Legislature. *Id.* at 28. Mr. Gilman asserts that without legislative direction, no “bright line” exists for online news sites. *Id.* As this Court has recognized, the Legislature has already set the basic policy and applicability of the News Media Privilege.

The [News Media] privilege arises when a journalist gathers information within his or her professional capacity for the purposes of dissemination. NRS 49.275. The policy rationale behind this privilege is to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution.

Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev. 88, 99 (2000).

Further policy direction is unnecessary.

And, courts have applied the News Media Privilege to a range of online circumstances. For example, courts find that where no news gathering and dissemination functions exist, such as posting comments in online chat rooms or comment sections, the privilege is inapplicable. *See Too Much Media, LLC v. Hale*, 206 N.J. 209, 20 A.3d 364 (2011), holding that online journalists qualify for protection under New Jersey's shield law, but those who post comments on online news sites do not qualify.

Mr. Gilman cites to *Xcentric Ventures, L.L.C. v. Borodkin*, 934 F. Supp. 2d 1125, 1145, 2013 WL 1149917 (D. Ariz. 2013) in support of the proposition that a blogger, who was not a reporter and unaffiliated with a news outlet, is not covered by California shield law. The *Xcentric Ventures, L.L.C.* case, a Federal District Court decision from the District of Arizona interpreting California's news media privilege, cites to another District Court decision in support of its finding, *Obsidian Fin. Group, LLC v. Cox*, No. CV-11-57-HZ, 2011 WL 5999334 at *1 (D. Or. Nov. 30, 2011), which interpreted a similar Oregon law to not apply to a nonreporter, "unaffiliated blogger." However, as was the case in

O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72, 79 (2006), California courts that interpret California's shield law⁴ consistently hold that the phrase "newspaper, magazine, or other periodical publication," as used in the statute is applicable to a news-oriented website that gather news. California Courts have also found that their news media privilege applies to freelance reporters: See *People v. Von Villas*, 10 Cal. App. 4th 201, 231-32, 13 Cal. Rptr. 2d 62 (1992) and *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14, 28-29, 201 Cal. Rptr. 207 (1984).

Where news gathering and dissemination functions occur, courts find -- even without express legislative direction -- the privilege applies to online news sites. *O'Grady v. Superior Court*, supra; *Too Much Media, LLC v. Hale*, supra. In other words, "[w]hat makes journalism journalism is not the format but its content." *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993).

Mr. Toll is asking no more than judicial application of the law to technology unanticipated by 50-year old legislation where the essential function is the same thereby serving the underlying purpose of the statute. See e.g.,

⁴ Article I, section 2(b) of the California Constitution and California Evidence Code section 1070

Comstock Residents Assoc. v. Lyon County, 134 Nev.Adv.Op. 19 (2018) (application of the Nevada Public Records Act to public records created and stored on new mobile and internet technologies).

The search and seizure case law surrounding the Fourth Amendment to the U.S. Constitution is also instructive of how courts apply basic policy enunciations to new technologies. In *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925), the U.S. Supreme Court applied Fourth Amendment protections to a bootlegger's motor vehicle. See also *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967) (Fourth Amendment provided protection from warrantless wiretaps where a person has a reasonable expectation of privacy, such as in a public phone booth); *Kyllo v. United States*, 533 U.S. 27, 27, 121 S. Ct. 2038, 2039 (2001) (use of thermal imaging equipment by police); *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945 (2012) (installation of Global-Positioning-System tracking device on a vehicle). The U.S. Supreme Court did not require an update to the Fourth Amendment upon the advent of motor vehicles, telephones, thermal imaging, and GPS technology even though the 4th Amendment specifically refers only to "persons, houses, papers, and effects."

Gilman's argument -- that the Court must interpret the terms of the News

Media Privilege to apply only to the types of media illustratively listed in the 1969 statute -- would commit this Court to the proposition that it could not apply the principles or spirit of any existing law to a new technology, an untenable and unreasonable result. Here, the District Court found that Mr. Toll is a reporter who investigates newsworthy topics -- such as whether an elected politician actually lives in the jurisdiction he is elected to represent⁵ -- and disseminates them via an online news site. Since Mr. Gilman fails to overcome his burden to demonstrate these findings are an abuse of discretion, the application of the News Media Privilege in this case is straightforward: the confidential sources of a reporter for an online news outlet should be protected as it supports the essential functions served by the privilege.

Finally, Mr. Gilman contends, but does not actually explicate, that the Legislature defined the “term” newspaper elsewhere in the NRS to require newspapers to be printed. Ans. Brief at 22-23 (e.g., simply quoting paragraphs

⁵ See the District Court’s April 9, 2019 Order Granting Anti-SLAPP Motion at Appx. Vol. 3 at 525-526: “The Court finds the focus of Toll's resident communications was the public interest in whether Storey County Commissioner Gilman lives or resides in Storey County, and was not a mere effort to gather ammunition for another round of private controversy. The Court concludes this guiding principle weighs in favor of finding the communications were made in direct connection with an issue of public interest.”

from the District Court's order). As demonstrated in both Mr. Toll's Petition (at 22) and Brief of Amici (at 8-12), the printing of newspapers required elsewhere in the NRS does not define the newsgathering and dissemination function, but rather the qualifications necessary to provide statutory legal notice. Mr. Gilman's Answering Brief is entirely silent in response, in essence admitting that his cramped interpretation contradicts both the purpose and language of NRS 49.275.

B. Mr. Gilman Fails to Demonstrate Disclosure of Mr. Toll's Confidential Sources is permitted under Anti-SLAPP Procedures or Relevant Given Gilman's Admission that his Primary Residence is in Washoe County

This case arrived before this Court some 13 months after Mr. Toll filed his February 18, 2018 Anti-SLAPP special motion to dismiss under NRS 41.660. Appx. Vol. 1 at 21. During this period Mr. Toll has been required to engage in protracted and expensive litigation against Mr. Gilman. As discussed in Mr. Toll's Petition, discovery under NRS 41.660 should be allowed only when a SLAPP suit plaintiff can demonstrate the necessity of discovery *prior* to opposing an anti-SLAPP special motion to dismiss. Petition at 26-29. The District Court, contrary to the express terms of the anti-SLAPP statute, has allowed one round of discovery and then a second round (by compelling

disclosure) even after an express finding Mr. Gilman failed to carry his *mandatory* burden under NRS 41.660(3)(b) of showing a *prima facie* evidence of a defamation claim. *See* Appx. Vol. 1 at 533: “The Court concludes Gilman failed to produce prima facie evidence that Toll published the resident communications with actual malice.”

Moreover, Mr. Gilman seeks disclosure of Mr. Toll’s confidential sources to support a defamation claim where, extraordinarily, Mr. Gilman himself has represented under penalty of perjury to Washoe County tax officials that his primary residence is located in Washoe County. Appx. Vol. 12 at 2476. Despite this unrefuted evidence, Mr. Gilman persists in asserting that Mr. Gilman claimed that his residence in Washoe County is false.

No defamation claim can lay as a matter of law in this case because Mr. Gilman’s own representations that he lived in Washoe County mirror that of the allegedly defamatory statements made by Mr. Toll for which Mr. Gilman has sued Mr. Toll. Petition at 29-32. Mr. Gilman’s suit is clearly intended to silence a reporter who is critical of Mr. Gilman, not a case where Mr. Gilman can legitimately claim that he was defamed by Mr. Toll for making a statement that Mr. Gilman has made about himself. Mr. Gilman’s claim fails to meet the

“minimal merit” requirement of proceeding with an anti-SLAPP suit under NRS 41.660:

Nevada’s anti-SLAPP statutes aim to protect First Amendment rights by providing defendants with a procedural mechanism to dismiss “meritless lawsuit[s] that a party initiates primarily to chill a defendant’s exercise of his or her First Amendment free speech rights” before incurring the costs of litigation.

Coker v. Sassone, 135 Nev. Adv. Op. 2, 432 P.3d 746, 748 (2019) quoting *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 329 (2013).

Mr. Gilman attempts to sidestep these procedural and legal deficiencies by objecting to Mr. Toll raising them in his Petition. However, this Court routinely reviews via petitions for writ of prohibition or mandamus the threatened compelled disclosure of privileged information. See e.g., *Aspen Fin. Services v. Dist. Ct.*, 128 Nev. 635, 639–40, 289 P.3d 201, 204, (2012) citing *Valley Health Sys., LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 127 Nev. 167, 170, 252 P.3d 676, 678, 127 (2011) and *Wardleigh v. Second Judicial Dist. Court In & For County of Washoe*, 111 Nev. 345, 349, 891 P.2d 1180, 1183, (1995). The Court may also hear all issues raised in Mr. Toll’s Petition because the handling of Anti-SLAPP special motions to dismiss is an important area of statewide importance without Supreme Court precedent. See *Double Diamond v. Second Jud. Dist. Ct.*, 131 Nev. Adv. Op. 57, 354 P.3d 641, 643, 2015 WL 4598332 (2015). In contrast to these authorities cited in Mr. Toll’s Petition, Mr. Gilman neither

cites case law or distinguishes these precedents, but rather simply asserts that such issues are inappropriate for writ relief. Ans. Brief at 35-37.

Mr. Gilman next asserts public figure plaintiffs must be allowed discovery in **every** defamation case because evidence of actual malice allegedly “is in the possession of [the defendant] or a third party and is not reasonably available without discovery.” Ans. Brief at 37. “In virtually[] every defamation action involving malice, as in this case, Plaintiff knows the statements are false . . . and is therefore entitled to learn the basis of Defendant’s assertions for purposes of proving malice.” *Id.*

Mr. Gilman overreaches and this case demonstrates why. First, Mr. Gilman’s position undermines the entire purpose of the Anti-SLAPP legislation to efficiently dispose of lawsuits filed to suppress the free exercise of First Amendment rights to freedom of speech. *See* NRS 41.650, granting immunity from suit for good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern. Here, the District Court has already dismissed the vast bulk of Mr. Gilman’s claim based allegedly defamatory statements by Mr. Toll. Under Mr. Gilman’s theory, he would automatically be entitled to discovery on any and all such

statements prior to filing of an opposition to an Anti-SLAPP motion to dismiss (or as in this case, even after opposing such a motion). Subjecting a journalist to the time and cost of such an expansive discovery accomplishes the SLAPP plaintiff's purpose. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 797 (9th Cir. 2012) citing *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970 (9th Cir. 1999).

Moreover, in this case Mr. Gilman does not need discovery as the basis for Mr. Toll's good faith belief as to where Mr. Gilman resides because it appears on the face of Mr. Toll's October 16, 2019 article described above (Appx. Vol. 1 at 108-125), which did not rely on any confidential sources of information and for which the District Court found constituted *prima facie* evidence of Mr. Toll's lack of any actual malice. By suggesting that every public figure plaintiff is entitled to discovery, Mr. Gilman seeks to avoid the burden he must carry to avoid dismissal of a SLAPP lawsuit under NRS 41.660 and why, in the case at hand, disclosure of privileged information is necessary. Because the District Court unequivocally found that Mr. Gilman failed to carry his burden to

show a *prima facie* case (Appx. Vol. 3 at 533) in response to Mr. Toll's anti-SLAPP motion, dismissal was required under the anti-SLAPP statute and any subsequent discovery should have been denied. Permitting any discovery in this matter was clear error.

Furthermore, Mr. Gilman does not dispute that he filed the tax forms in Washoe County identifying a house in Washoe County as his primary residence and that he has not filed any form as required by law to change that preferred tax status. Ans. Brief at 38-39. Instead, Mr. Gilman contends that there is a factual dispute as to where his actual primary residence is located. *Id.*

Mr. Gilman misses the point. The truth of Mr. Gilman's representation to Washoe County (that his primary residence is in Washoe) is irrelevant. There is no factual dispute that he made the representation; Mr. Gilman only offers evidence that he contends proves otherwise. As set forth in Mr. Toll's Petition, Mr. Gilman cannot sue Mr. Toll for defamation for writing the same thing, regardless of the veracity of Mr. Gilman's representations to Washoe County.⁶

⁶ Gilman argues as "utterly ludicrous" (Ans. Brief at 38) Mr. Toll's contention that the District Court improperly relied upon *Diaz v. District Court*, *supra*, and *Las Vegas Sun v. District Court*, 104 Nev. 13 (1988) when it ordered that Mt. Toll could not rely upon information obtained from confidential sources without disclosing those sources (Petition at 32-33). Notwithstanding his outrage, Mr. Gilman fails to address the fact that these cases stand for the common sense

IV. CONCLUSION

For the foregoing reasons, Mr. Toll asks this Court to issue a writ of prohibition or mandamus directing the District Court to vacate the District Court's order requiring disclosure of his confidential sources and dismiss this action outright or order the District Court to rule on Mr. Toll's Motion to Dismiss as submitted.

Respectfully submitted June 2, 2019:

By: 
JOHN L. MARSHALL
Nevada State Bar No. 6733
570 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 303-4882
johnladuemarshall@gmail.com

Luke Andrew Busby, Ltd.
Nevada State Bar No. 10319
316 California Ave #82
Reno, NV 89509
775-453-0112
luke@lukeandrewbusbyltd.com
Attorneys for the Defendant

principle that a defendant cannot invoke the News Media Privilege to protect the confidentiality of a source and then later call that source as a witness at trial. Here, Mr. Toll seeks to only apply that rule, not the District Court's erroneous evidentiary ruling on the admissibility of evidence obtained from undisclosed sources, not the later disclosure and use of such confidential sources themselves.

NRAP 28.2 ATTORNEY'S CERTIFICATE

I, Luke Busby, counsel to Sam Toll, do hereby certify that:

(1) I have read the foregoing document;

(2) To the best of my knowledge, information and belief, the foregoing document is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) To the best of my knowledge, information and belief, the foregoing document complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion regarding matters in the record be supported by a reference to the page and volume number, if any and if available, of the appendix where the matter relied on is to be found as applicable;

(4) The foregoing document complies with the formatting requirements of Rule 32(a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7) as applicable as the document contains 6659 words and 632 lines of text in Garamond 15 pt. font.

///

///

///

///

(signature of following page)

Respectfully submitted June 2, 2019:

By: 
JOHN L. MARSHALL
Nevada State Bar No. 6733
570 Marsh Avenue
Reno, Nevada 89509
Telephone: (775) 303-4882
johnladuemarshall@gmail.com

Luke Andrew Busby, Ltd.
Nevada State Bar No. 10319
316 California Ave #82
Reno, NV 89509
775-453-0112
luke@lukeandrewbusbyltd.com
Attorneys for the Defendant

CERTIFICATE OF SERVICE

Pursuant to NRCP 25(c), I certify that on the date indicated below, I caused service to be completed by:

_____ personally delivering;
_____ delivery via Reno/Carson Messenger Service;
_____ sending via Federal Express (or other overnight delivery service);
_____ depositing for mailing in the U.S. mail, with sufficient postage affixed thereto; or,

 x delivery via electronic means (fax, eflex, NEF, etc.)
a true and correct copy of the foregoing pleading addressed to:

GUS W. FLANGAS
JESSICA K. PETERSON
Flangas Dalacas Law Group
3275 South Jones Blvd. Suite 105
Las Vegas, NV 89146
702-307-9500
F - 702-382-9452

The First Jud. Dist. Ct. - Storey County:(Served Via USPS)
Honorable James Wilson
26 S. B St.
Virginia City, NV 89440
775-847-0969

Margaret A. McLetchie, SBN 10931
McLetchie Law
701 E. Bridger Ave., Suite 520
Las Vegas, NV 89101
Tel: 702-728-5300
maggie@nvlitigation.com

By: *Luke A. Busby*
Luke Busby

Dated: 6/2/2019