IN THE SUPREME COURT OF THE STATE OF NEVADA

MARSHAL S. WILLICK and WILLICK LAW GROUP, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, and THE HONORABLE NANCY BECKER, SENIOR JUDGE, Respondent, and STEVE W. SANSON; AND VETERANS IN POLITICS INTERNATIONAL, INC., Real Parties In Interest.	Electronically Filed May 03 2021 05:51 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO.: 82524

REAL PARTIES IN INTEREST STEVE W. SANSON AND VETERANS IN POLITICS INTERNATIONAL, INC.'S ANSWER TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

Petition For Writ to the Eighth Judicial District Court,
In and for the County of Clark
The Honorable Nancy Becker, District Senior Judge Presiding
District Court Case No.: A-17-750171-C

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NRAP 26.1 DISCLOSURE

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

Real Party In Interest Veterans in Politics International, Inc. is a domestic non-profit corporation registered in the State of Nevada. Veterans in Politics International, Inc. does not have any parent company, and no publicly held corporation owns ten percent or more of Veterans in Politics International, Inc.'s stock.

The law firm whose partners or associates have or are expected to appear for Real Parties In Interest Steve W. Sanson and Veterans in Politics International, Inc. is McLetchie Law.

DATED this 3rd day of May, 2021.

/s/ Margaret A. McLetchie

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I. INTRODUCTION

Before 2006, this Court construed NRCP 41(a)(1) as a formalistic rule, in that serving a notice of dismissal before the defendant serves an answer or motion for summary judgment automatically "closes the file," leaving the district court "no role to play." *Harvey L. Lerer, Inc. v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 111 Nev. 1165, 1170, 901 P.2d 643, 646 (1995). Previously, this Court held that voluntary dismissal was a "matter of right[1] running to the plaintiff" and could "not be extinguished or circumscribed by adversary or court." *Id*. However, in *Matter of Petition of Phillip A.C.*, 122 Nev. 1284, 149 P.3d 51 (2006), this Court—unanimously and sitting *en banc*—departed from this "bright-line" approach in favor of a functional interpretation of NRCP 41(a)(1)(A). There, the petitioners filed a notice of voluntary dismissal of claims three months after the district court held a hearing on petitioners' motion to intervene and to invalidate an adoption. *Id*. at 1290, 56. This Court first held that "the essential purpose" of NRCP 41(a)(1) "is to prevent arbitrary dismissals after extensive proceedings." *Id*. at 1290, 55. Based on this essential purpose, and the reasoning applied to analogous facts by the Second Circuit Court of Appeals in *Harvey Aluminum v. American Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir. 1953), this Court forbade petitioners from voluntarily dismissing their

[1] As argued below, even if voluntary dismissal were a "matter of right," Petitioners themselves—not merely the district court or Real Parties in Interest—explicitly waived it by stipulation.

claims after extensive proceedings: "[s]ince the proceedings had reached an advanced stage, and a decision had already been made, a literal application of NRCP 41(a)(1) in this case would not accord with its essential purpose." *Id*.

Here, Plaintiffs-Petitioners Marshal S. Willick and the Willick Law Group ("Petitioners") attempted to dismiss their case under NRCP 41(a)(1) not in accord with its essential purpose, but as a procedural ploy to avoid the consequences of attempting to silence Defendants-Real Parties in Interest Steve Sanson and Veterans In Politics International, Inc. (the "VIPI Parties") through a meritless SLAPP suit. Petitioners kept the VIPI Parties entangled in litigation not for months, but for years, forcing the district court and this Court—sitting *en banc*—to adjudicate the merits of the parties' arguments on the first prong of the anti-SLAPP analysis. Allowing Petitioners to abandon their lawsuit only when defeat is imminent—after forcing the VIPI Parties to incur the fees, costs, and stress of four years of litigation—is precisely what NRCP 41(a)(1) and Nevada's anti-SLAPP statutes are intended to prevent.

Nevada's anti-SLAPP statute provides immunity "from any civil action for claims based upon" a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern. NRS 41.650. To further deter such lawsuits, the statute also provides for mandatory fee shifting and discretionary statutory awards to prevailing anti-SLAPP defendants. NRS

41.670(1)(a)-(b). Facing the prospect of paying the VIPI Parties' fees under the anti-SLAPP statute, Petitioners attempted to abort this suit years too late. The district court saw through Petitioners' machinations and denied voluntary dismissal, correctly holding applying this Court's reasoning in *Phillip A.C.*

Now, Petitioners seek writ relief to escape the foreseeable consequences of filing a SLAPP suit and litigating it through several rounds of briefing and multiple decisions made by multiple courts in this matter. This Court should deny writ relief for several reasons.

First, this Court need not reconcile the purported conflicts in this Court's jurisprudence regarding voluntary dismissal under NRCP 41(a)(1), as the parties unambiguously stipulated to continue briefing this matter if a settlement was not reached in mediation on January 4, 2021. (Petitioners' Appendix ("PA") 007-9.) Although the district court held otherwise, this Court should recognize that that the stipulation's plain language estops Petitioners from taking any action—including attempting to notice voluntary dismissal under NRCP 41(a)(1)—which prevents the district court from performing the second prong of the anti-SLAPP analysis. Because this Court should not allow Petitioners to escape the obligations of their own stipulation, it should deny writ relief on these grounds.

Additionally, the law of the case doctrine bars Petitioners' attempt at voluntary dismissal. In adjudicating the VIPI Parties' appeal, this Court held: "We

REVERSE the district court's order denying the anti-SLAPP motion to dismiss, and ***REMAND for further proceedings consistent with this order and pursuant to NRS 41.660(3)(b)***." *Veterans in Politics Int'l v. Willick*, 457 P.3d 970, 2020 Nev. Unpub. LEXIS 197, *23 (Nev. 2020) (emphasis added). Voluntary dismissal under NRCP 41(a)(1) at this stage would be inconsistent with this order and with NRS 41.660(3)(b), which mandates that the district court "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on that claim." Thus, this Court should deny Petitioners' writ relief without even addressing the Petition's merits. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("this court will affirm the order of the district court if it reached the correct result, albeit for different reasons").

Should this Court reach the Petition's merits, it must still deny writ relief. This Court intentionally held that voluntary dismissal is ineffectual if it is filed "at an advanced stage of the proceedings." *Phillip A.C.*, 122 Nev. at 1290 149 P.3d at 55. While it may seem exceptional, *Phillip A.C.* is controlling precedent in Nevada and achieves more efficient and equitable ends than the bright-line rule favored by the federal courts. Presumably, when this Court decided *Phillip A.C.* in 2006, it was aware of the dicta which Petitioners argue provides plaintiffs an absolute right to voluntary dismissal until defendants serve a paper formally labeled "answer" or "motion for summary judgment." Yet, this Court rejected the rigid application of

NRCP 41(a)(1) (and the federal courts' rigid application of FRCP 41(a)(1)) in favor of the *Phillip A.C.* approach, which upholds the purpose of NRCP 41(a)(1) by preventing its inequitable application in cases—such as this one—where parties have expended significant time and resources in litigation even though a paper labeled "answer" or "motion for summary judgment" has not been served.

Thus, the district court did not err in concluding that "because this Court has recognized that a special motion to dismiss under the anti-SLAPP statute 'functions' like a summary judgment motion when considering the standard of review on appeal, an anti-SLAPP motion also constitutes a summary judgment motion for Rule 41 purposes." (Pet., p. 6.) Just as this Court must look beyond mere labels and titles in other contexts[2], it must—as the district court did—take a functional view of an anti-SLAPP motion to dismiss as being equivalent to a motion for summary judgment under NRCP 41(a)(1). Indeed, the language of NRCP 41(a)(1) itself, which subjects it to "any applicable statute," reflects that the district court was authorized to weigh the rationales behind NRCP 41(a)(1) and the procedural mechanisms of Nevada's anti-SLAPP statute, and correctly concluded that dismissal under NRCP 41(a)(1) at this stage was improper.

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[2] *Cf. Bowlby v. Bowlby*, 129 Nev. 1099, 2013 WL 3277157, *2 (2013) ("In determining whether a judgment is final, this court will typically look beyond the label and instead take a functional view of finality.").

Nor did the Court err in concluding that "a party may lose the right to dismiss pursuant to NRCP 41(a)(1)(A)(i) if the case has reached an 'advanced stage,' even if no answer or summary judgment motion has been filed." (Pet., p. 7.) This conclusion follows from this Court's holding in *Phillip A.C.* and the district court's determination that a special anti-SLAPP motion is the functional equivalent of a motion for summary judgment.

Finally, the Court did not err in "determining that this case has reached an advanced stage." (Pet., p. 7.) Petitioners' characterization of this case as being "in its infancy" (Pet., p. 16) is inconsistent with the reality of this matter, which has been litigated in district court and this Court for over four years, generated a voluminous record and a decision on appeal, and necessarily caused the litigants and the courts to expend significant resources. Determining that this matter is at anything other than an "advanced stage" flies in the face of the resource-saving rationales of NRCP 41(a)(1) and Nevada's anti-SLAPP statute. Thus, the district court correctly rejected Petitioners' attempt to voluntarily dismiss their case under NRCP 41(a)(1) and this Court must deny Petitioners' request for writ relief.

II. STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

In January 2017, Petitioners filed suit against, *inter alia*, the VIPI Parties for engaging in online speech critical of Petitioners. The VIPI Parties filed a special motion to dismiss under Nevada's anti-SLAPP statute, NRS 41.635 *et. seq*, which

consisted of hundreds of pages of briefing and exhibits. This was not the only effort the VIPI Parties expended defending themselves in this matter, as the VIPI Parties filed several other motions and oppositions: a motion to dismiss under NRCP 12(b)(5) (PA027), a motion to dismiss under NRCP 12(b)(1) (*id*.), a request for judicial notice (*id*.), a motion to strike and response to Petitioners' untimely supplemental briefing on the anti-SLAPP motion (PA029), a motion to stay pending appeal on an order shortening time (PA033-34), an opposition to Petitioners' motion to disqualify Judge Bailus (PA035-36), and an opposition to Petitioners' motion to disqualify the entire Eighth Judicial District Court Elected Judiciary (PA037-38.)

The anti-SLAPP statute provides a two-pronged procedural mechanism—akin to summary judgment—for expedient resolution of such lawsuits. *See generally* NRS 41.660. Although the district court denied the VIPI Parties' special motion to dismiss on March 30, 2017 (PA001-6), this Court reversed and remanded to the district court to perform the second prong of the anti-SLAPP analysis. *VIPI v. Willick*, 457 P.3d 970, 2020 Nev. Unpub. LEXIS 197 (Nev. Feb. 21, 2020). As before the district court, the VIPI Parties were forced to litigate additional matters, such as opposing Petitioners' motion to consolidate appeals, a reply in support of an amicus brief, and a response to supplemental briefing.

The parties agreed to mediation with the Honorable Jennifer Togliatti (Ret.) on January 4, 2021 and entered a stipulation in which the parties agreed to, *inter*

alia, "engage in supplemental briefing on the second prong of the anti-SLAPP Special Motion" if mediation was unsuccessful. (PA007-9.) The parties also waived "any argument regarding the timeliness of Supplemental Briefing or the Court's ability to consider the Supplemental Briefing if Defendants file their supplemental opening brief on remand by February 3, 2021 … or any other date as the parties may stipulate." (PA009.)

Despite protracted mediation, the parties did not reach a resolution. Shortly after midnight on the evening of January 4, 2021, Petitioners filed a notice of voluntary dismissal under NRCP 41(a)(1). (PA013-14.) Apparently, Petitioners—after doggedly pursuing this matter for nearly four years—suddenly decided that their claims were meritless after all.

On February 11, 2021, the district court entered an order rejecting Petitioners' attempt to escape potential adjudication under the anti-SLAPP statute and mandatory liability for the VIPI Parties' attorney's fees. (PA015-21.) Specifically, the district court concluded that

> balancing between treating an anti-SLAPP motion as one for summary judgment for purposes of NRCP 41 and the policy of encouraging early dismissal under the rule … the Legislature's strong preference for discouraging lawsuits involving the anti-SLAPP statute overrides the policy for early dismissal. Thus [Petitioners] may not voluntarily dismiss this case as a "summary judgment" had been filed under the rule.

(PA019-20.) The district court also held that

> [i]n the alternative, and as an independent ground supporting striking the Notice of Voluntary Dismissal … [Petitioners] impliedly waived their right to voluntarily dismiss and are estopped from voluntarily dismissing their case under Nev. R. Civ. P. 41(a)(1)(A)(i) at this advanced stage of the proceedings.

(PA020.) Thus, the district court struck the Notice of Voluntary Dismissal and allowed this matter to proceed under the anti-SLAPP statute. Petitioners filed the instant Petition on February 23, 2021 and the VIPI Parties now answer.

III. RESPONSE TO STATEMENT OF ISSUE PRESENTED AND RELIEF SOUGHT.

Although Petitioners characterize the continued litigation of this matter—which would be time and resources wasted if the district court indeed lacked jurisdiction—as "damages caused by not granting the writ," (Pet., pp. 2-3) such damages will not arise from this Court denying Petitioners' application for writ relief. Indeed, by denying writ relief and affirming that the district court retains jurisdiction over this matter, this Court will merely allow this matter to continue as contemplated by the parties themselves in their December 28, 2020 Stipulation (PA007-9), by the mandatory language of Nevada's anti-SLAPP statute,[3] and by this Court in reversing the district court's denial of the VIPI Parties' anti-SLAPP Motion

[3] "If a special motion to dismiss is filed pursuant to subsection 2, the court ***shall***: … (b) If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim[.]" NRS 41.660(3) (emphasis added).

to Dismiss and remanding this matter "consistent with this order and pursuant to NRS 41.660(3)(b)." *VIPI*, 457 P.3d 970, 2020 Nev. Unpub. LEXIS 197 at *23.

IV. RESPONSE TO STATEMENT OF FACTS.

Petitioners claim that "[o]n remand, the parties stipulated to defer further briefing on remand to allow them to engage in mediation." (Pet., p. 4.) However, the stipulation at issue did not merely "defer further briefing," but, as argued below, bound the parties to brief the second prong of the anti-SLAPP motion and the district court to rule on the same. Thus, while Petitioners are correct that when they "filed their notice of voluntary dismissal, the [VIPI] Parties had not filed an answer, had not filed a summary judgment motion, and the anti-SLAPP motion to dismiss was still pending because it had not been determined" they are wrong to conclude that their notice of voluntary dismissal was valid. (Pet., p. 5.) Even if Petitioners were not foreclosed from voluntarily dismissing this matter based on the plain language of their binding stipulation, the district court correctly struck Petitioners' notice of voluntary dismissal for the reasons articulated in its order.

V. STANDARD OF REVIEW

Petitioners note that "questions of law, including those regarding the scope of a district court's jurisdiction after the filing of a notice of voluntary dismissal, are reviewed de novo." (Pet., p. 5 (citing *Helfstein v. Eighth Jud. Dist. Ct.*, 131 Nev. 909, 913, 362 P.3d 91, 94 (2015); *Berberich on behalf of 4499 Weitzman Place Tr.*

v. S. Highlands Cmty. Ass'n, No. 72689, 2018 WL 2041492, at *2 (Nev. App. Apr. 20, 2018).) While de novo review is appropriate for questions of law such as this one, this Court must remain mindful that writs of mandamus are meant "to compel the performance of an act that the law requires as a duty resulting from an office" or to "control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Here, nothing was arbitrary or capricious about the district court's rejection of Petitioners' notice of voluntary dismissal, as the district court construed and administered the Nevada Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination" of this action. NRCP 1.

VI. ARGUMENT

A. Unilateral Dismissal Under NRCP 41(a)(1) Is Ineffective Because It Violates the Parties' Stipulation.

The district court rejected the VIPI Parties' argument that the parties' December 28, 2020 Stipulation and Order precluded dismissal of the matter under NRCP 41(a)(1). (PA020.) However, on review, this Court should affirm the district court's rejection of Petitioners' Notice of Dismissal on these grounds. *See Rosenstein*, 103 Nev. at 575, 747 at 233.

"[S]tipulations are of an inestimable value in the administration of justice, and valid stipulations are ***controlling and conclusive and both trial and appellate courts are bound to enforce them***." *Clark Cty. Office of the Coroner/Med. Exam'r v. Las*

Vegas Review-Journal, 459 P.3d 880, 2020 WL 1492843, *3 (Nev. Mar. 25, 2020) (quoting *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008)) (emphasis added). In construing a stipulation, a reviewing court may look to the language of the agreement along with the surrounding circumstances. *Taylor v. State Indus. Ins. Sys.*, 107 Nev. 595, 598, 816 P.2d 1086, 1088 (1991) (citing *Mann v. Fender*, 587 S.W.2d 188 (Tex. Civ. App. 1979)). This Court has long recognized that the trial court's failure to honor parties' stipulations is reversible error. *See Garaventa v. Gardella*, 63 Nev. 304, 323, 169 P.2d 540, 549 (1946) (holding that the "trial court should have continued to recognize the stipulation of the parties waiving the so-called 'dead man' rule."); *cf. Second Baptist Church v. Mount Zion Baptist Church*, 86 Nev. 164, 172, 466 P.2d 212, 217 (1970) (rejecting appellant's attempt to "extricate itself from the force and effect of" stipulating to be bound by the outcome of court-supervised election).

Here, Petitioners *twice* unambiguously stipulated to briefing the second prong of the anti-SLAPP analysis in this matter.[4] Further, the Petitioners *twice* explicitly waived any argument regarding the court's ability to consider said briefing.[5]

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[4] "Whereas, in the event that efforts to resolve the matter are unsuccessful, ***the parties agree to engage in supplemental briefing on the second prong of the anti-SLAPP Special Motion*** …" (PA008-9, PA009 (emphasis added).)

[5] "The parties ***waive any argument regarding the timeliness of Supplemental Briefing or the Court' s ability to consider the Supplemental Briefing*** …" (PA008, PA009 (emphasis added)).

Petitioners cannot contest the validity of the December 28, 2020 Stipulation and Order, and their attempt to voluntarily dismiss this matter under NRCP 41(a)(1) undoubtedly operates as an argument against the court's ability to consider supplemental briefing on the second prong.

Petitioners' attempt to voluntarily dismiss this matter is not only a breach of the stipulation's language, but a violation of its spirit when considered in the circumstances surrounding it. All the factors which allegedly spurred Petitioners' decision to voluntarily dismiss this suit—the prospect of expending time and money to fully litigate their purportedly meritorious claims (Pet., p. 4)—were present from the initiation of this SLAPP suit, not to mention nearly four years later when Petitioners explicitly stipulated to brief the second prong and waived any arguments against the district court's ability to do so. The circumstances thus indicate that the parties were committed to litigating this matter rather than permitting voluntary dismissal, notwithstanding the lack of a formal answer or motion for summary judgment. Petitioners should not be rewarded for entering into stipulations they have no intention of honoring, and this Court must therefore deny them writ relief.

B. The Law of the Case Doctrine Bars Voluntary Dismissal of this Matter.

The "[l]aw of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal." *Snow-Erlin v. United States*, 470 F.3d 804, 807 (9th Cir. 2006) (quotation omitted). The doctrine "is

designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest." *United States v. Real Prop. Located at Incline Vill.*, 976 F. Supp. 1327, 1353 (D. Nev. 1997) (citing *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1097 (9th Cir. 1994)). For the law of the case doctrine to apply, a reviewing court "must actually have decided the matter, explicitly or by necessary implication, in [a] previous disposition." *Id.* (citing *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir.1990)).

In this case, the VIPI Parties exercised their right to an interlocutory appeal of the district court's denial of their anti-SLAPP Motion to Dismiss. *See* NRS 46.670(4). This Court reviewed the district court's decision and reversed, intending to "put to rest" the "particular matter" of whether the VIPI Parties met their burden under NRS 41.660(3)(a) of establishing, by a preponderance of the evidence, that Petitioners' claims were based upon good faith communications in furtherance of the right to free speech in direct connection with an issue of public concern. This Court then explicitly remanded the matter to the district court "***for further proceedings consistent with this order and pursuant to NRS 41.660(3)(b).***" *VIPI*, 457 P.3d 970, 2020 Nev. Unpub. LEXIS 197 at *23 (emphasis added).

Voluntary dismissal under NRCP 41(a)(1)(A) is, on its face, inconsistent with this Court's order, which states that "[Petitioners] ***must be*** given the opportunity to

show, with prima facie evidence, a probability of prevailing on his claims as to each statement." *Id*. (emphasis added). Likewise, it is inconsistent with the mandatory nature of NRS 41.660(3), which mandates the district court perform the anti-SLAPP analysis. Thus, the district court did not err in rejecting Petitioners' attempt to voluntarily dismiss this matter, and this Court must deny writ relief.

C. NPRP 41(a)(1) Does Not Permit Voluntary Dismissal of this SLAPP Suit.

1. The District Court Correctly Weighed the Policies Behind NRCP 41(a)(1) and the Anti-SLAPP Statute.

This Court has "mediated the tension" between statutes and the NRCP "according to the perceived strength of the competing policies at stake." *Baxter v. Dignity Health*, 137 Nev. 759, 763, 357 P.3d 927, 929 (2015). In *Baxter*, this Court considered whether to dismiss a plaintiff's lawsuit for failure to comply with NRS 41A.071—which requires medical malpractice plaintiffs to provide an affidavit-of-merit with their complaint in addition to fulfilling their general pleading obligations—when the affidavit-of-merit was submitted the day after plaintiff submitted his complaint. *Id*. at 928-929, 761-762. To resolve this issue, this Court weighed the policy of NRS 41A.071 against the liberal notice pleading jurisprudence of NRCP 12 and determined that allowing the allowing the case to proceed past a motion to dismiss did "not disserve the substantive policies the Legislature established in NRS 41A.071 … to ensure that plaintiffs file non-frivolous medical

malpractice actions in good faith based upon competent expert medical opinion." *Id*. at 766, 931.

As its order reflects, the district court engaged in this balancing exercise here, concluding that "balancing between treating an anti-SLAPP motion as one for summary judgment for purposes of NRCP 41 and the policy of encouraging early dismissal under the rule … the Legislature's strong preference for discouraging lawsuits involving the anti-SLAPP statute overrides the policy for early dismissal." (PA019-20.) In the instant context, this is undoubtedly correct. As this Court articulated in *Phillip A.C.*, the essential purpose of NRCP 41(a)(1) "is to prevent arbitrary dismissals after extensive proceedings,"[6] *i.e.*, to give plaintiffs a chance to withdraw dubious claims ***before*** wasting the court's and the opponent's resources. Likewise, the essential purpose of Nevada's anti-SLAPP statute is to allow a defendant to "obtain prompt review of potential SLAPP lawsuits and have them dismissed ***before*** she is forced to endure the burdens and expense of the normal litigation process." *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 802 (9th Cir. 2012) (emphasis added)*; see also Walker v. Intelli-Heart Servs.*, No. 3:18-cv-00132-MMD-CBC, 2020 U.S. Dist. LEXIS 37005, at *7-8 (D. Nev. Mar. 4, 2020) ("The purpose of a special motion to dismiss a SLAPP lawsuit . . . is to filter out unmeritorious claims in an effort to protect citizens from costly retaliatory lawsuits

[6] *Phillip A.C.*, 122 Nev. at 1290, 149 P.3d at 55.

arising from their right to free speech under both the Nevada and Federal Constitutions.") (citation omitted).

Here, the Court correctly determined that voluntary dismissal under NRCP 41(a)(1) at this advanced stage serves neither statute's essential purpose. After four years of litigation, voluntary dismissal cannot spare the parties and the court the resources that have already been invested in this matter. And, allowing Petitioners to wash their hands of this meritless SLAPP after four years of putting the VIPI Parties through the burdens and expense of the litigation process is an affront to the anti-SLAPP statute's policy of making speakers immune from frivolous SLAPP suits. Thus, this Court must deny Petitioners' request for writ relief.

2. The District Court Correctly Determined that a Special Anti-SLAPP Motion to Dismiss Should Be Treated as a Motion for Summary Judgment for the Purposes of NRCP 41(a)(1).

Despite the label, anti-SLAPP motions are, in effect, a motion for summary judgment. Indeed, "[t]hough called motion[s] to dismiss, federal courts treat anti-SLAPP motions as a species of motion for summary judgment." *Walker*, 2020 U.S. Dist. LEXIS 37005, at *7 (citing *Haack v. City of Carson City*, Case No. 3:11-cv-00353-RAM, 2012 WL 3638767, *3-*5 (D. Nev. Aug. 22, 2012); *Las Vegas Sands Corp. v. First Cagayan Leisure & Resort Corp.*, Case No. 2:14-cv-424-JCM-NJK, 2016 WL 4134523, *3 (D. Nev. Aug. 2, 2016)). Here, the district court correctly recognized that, while not technically labeled a "motion for summary judgment," a

special anti-SLAPP motion to dismiss is functionally equivalent to a motion for summary judgment and therefore should be treated as such. Indeed, this Court has "made it abundantly clear that the current statute requires courts to treat anti-SLAPP motions as summary-judgment motions." *LHF Prods., Inc. v. Kabala*, No. 2:16-cv-02028-JAD-NJK, 2019 WL 4855139, at *4 (D. Nev. Sept. 30, 2019).[7] While Petitioners claim this Court's treatment of anti-SLAPP Motions to Dismiss as Motions for Summary Judgment have "nothing to do with Rule 41" (Pet., p. 9) they are wrong for several reasons.

3. This Court Abrogated the "Bright Line" Interpretation of Rule 41 in *Phillip A.C.*

Petitioners point to this Court's holding in *Harvey L. Lerer, Inc. v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 111 Nev. 1165, 901 P.2d 643 (1995) for the proposition that, absent an answer or motion for summary judgment, a notice of voluntary dismissal automatically divests the district court of jurisdiction (Pet., p. 5; *id.*, pp. 10-11.) Petitioners also cite to *Gallen v. Eighth Judicial Dist. Court In & For*

[7] Citing *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748–49 (2019) ("As amended, the special motion to dismiss again functions like a summary judgment motion procedurally"); *see also Taylor v. Colon*, 136 Nev. Adv. Op. 50, 468 P.3d 820, 824 (2020) ("[Nevada's anti-SLAPP statutes] function as a procedural mechanism, much like summary judgment, that allows the court to summarily dismiss claims with no reasonable possibility of success."); *Wynn v. Associated Press*, 136 Nev. Adv. Op. 70, 475 P.3d 44, 47, n.1 (2020) ("although the district court titled its decision an order granting a special motion to dismiss, the district court, in effect, rendered summary judgment").

Cty. of Clark, 112 Nev. 209, 911 P.2d 858 (1996), for the proposition that "NRCP 41(a), by its express terms, applies only to a motion for summary judgment or an answer, not to a motion to dismiss." (Pet., p. 10.) Finally, Petitioners cite to the Ninth Circuit's opinion in *Am. Soccer Co. v. Score First Enterprises, a Div. of Kevlar Indus.*, 187 F.3d 1108 (9th Cir. 1999) for the proposition that FRCP 41 provides an "absolute right" to dismiss before service of an answer or motion for summary judgment even though "the district court treated the motion like a summary judgment motion." (Pet., pp. 11-12.)

What these cases have in common is that they were determined years before this Court adopted the Second Circuit's *Harvey Aluminum* holding in *Phillip A.C.* This Court was well aware of these previous holdings (and their criticism of *Harvey Aluminum*) but consciously decided to deviate from them in the interests of preventing an inequitable outcome and upholding the purpose of Rule 41(a)(1). Also, *Lerer* and *Gallen* both predate the modern form of Nevada's anti-SLAPP statute, which did not provide for a special motion to dismiss using the current two-prong analysis until 1997.

4. *Padda* Is Distinguishable.

Petitioners point to this Court's unpublished decision in *Padda v. Hendrick*, 461 P.3d 160, 2020 WL 1903191 (Nev. Apr. 16, 2020) (unpublished) for the proposition that a voluntary dismissal filed under Rule 41(a)(1) during the pendency

of a defendant's anti-SLAPP motion must be given effect in the absence of a formal answer. (Pet., pp. 9-10.) However, in *Padda*, the putative SLAPP suit was voluntarily dismissed ***one day*** after an anti-SLAPP motion was filed. *Padda*, 2020 WL 1903191 at *1. Thus, there was no question that the *Padda* litigants had not reached an "advanced stage" of the proceedings. Here, by contrast, there ***was*** a hearing on the anti-SLAPP motion to dismiss and a subsequent appeal from denial of said motion, resulting in a voluminous record forged from litigation that has spanned over four years. Both the district court and this Court expended considerable effort analyzing the merits of the parties' arguments as to whether the VIPI Parties satisfied their burden of proof under the first prong of the anti-SLAPP statute.

Furthermore, the parties expended significant resources on the appeal in this matter. Not only were the VIPI Parties required to submit an opening brief, reply brief, and an appendix[8] as is normal in appellate proceedings, the VIPI Parties also had to engage in oral argument and subsequently submit a response to supplemental briefing requested during oral argument.[9] And far from conceding the appeal, Petitioners fought tooth-and-nail to preserve the district court's holding, even going so far as to petition this court for rehearing.[10] Even non-parties, such as amici curiae,

[8] The appendix was over 2,000 pages.
[9] *See generally* http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=43003
[10] *Id*.

expended resources in litigating this matter on appeal.[11]

Simply put, the voluntary dismissal in *Padda* effectuated the purposes of both NRCP 41(a)(1) and Nevada's anti-SLAPP statute by allowing the plaintiff to expeditiously abort his meritless SLAPP before the parties were forced to expend massive resources litigating it and the court was forced expend massive resources adjudicating it. Voluntary dismissal here, after years of proceedings before the district court and this Court, will not effectuate the purposes of NRCP 41(a)(1) as it cannot prevent the waste of resources NRCP 41(a)(1) is intended to fight. Voluntary dismissal here also runs counter to the purposes of Nevada's anti-SLAPP statute, which is to make speakers wholly immune from liability—including the hassle of litigation—for their good faith communications in direct connection with a matter of public interest.

5. Several Aspects of the Anti-SLAPP Statute Indicate It Should Be Treated as a Motion for Summary Judgment for All Purposes.

Plaintiffs contend that because the 2013 version of the anti-SLAPP statute expressly directed a district court to "treat the motion as a motion for summary judgment" but the current version does not, the Nevada Legislature intended to allow SLAPP plaintiffs to abort their suits mid-adjudication. (Pet., p. 9 (citing *Metz v. Metz*, 120 Nev. 786, 792, 101 P.3d 779, 784 (2004)).) However, this revision does

[11] *Id*.

not end the Court's inquiry as to the legislature's intent—indeed, the very same case that stands for the proposition that "substantive changes to a statute are indicative of legislative intent" also permits a court to "examine the context and spirit of the statute in question, together with the subject matter and policy involved" and cautions that statutes be interpreted "in line with what reason and public policy would indicate the legislature intended." *Metz*, 120 Nev. at 792, 101 P.3d at 783. In light of these mandates, this Court has continued to treat special anti-SLAPP motions to dismiss as motions for summary judgment; as argued below, this intent is apparent from several aspects the statute.

6. Adjudication Upon the Merits Implies an Anti-SLAPP Motion to Dismiss Is Equivalent to a Motion for Summary Judgment.

Nevada's anti-SLAPP statute provides that, like a grant of summary judgment, an anti-SLAPP "dismissal operates as an adjudication upon the merits." NRS 41.660(5). Thus, because anti-SLAPP motions to dismiss should be treated like motions for summary judgment, even if the mere filing of an anti-SLAPP motion to dismiss does not preclude voluntary dismissal under NRCP 41(a)(1), the fact that this Court has ***adjudicated*** the first prong of the anti-SLAPP analysis, specifically remanding it to the district court to perform analysis on the second prong, should.

7. Provision of an Interlocutory Appeal Implies an Anti-SLAPP Motion to Dismiss is Equivalent to a Motion for Summary Judgment.

"No part of a statute should be rendered nugatory, nor any language turned to

mere surplusage, if such consequences can properly be avoided … [s]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained." *Metz*, 120 Nev. at 792, 101 P.3d at 783. Nevada's anti-SLAPP statute provides that "interlocutory appeal lies to the Supreme Court" if the district court denies an anti-SLAPP motion to dismiss. NRS 41.670(4). The VIPI Parties exercised that right after the motion was denied on the first prong and expended significant resources to prevail on appeal and reach the second prong. Not only would it be inequitable to allow voluntary dismissal at this point, but it would also defeat the purpose of allowing an interlocutory appeal in the first place by giving SLAPP Petitioners an opportunity to escape liability even after anti-SLAPP motions to dismiss are granted on appeal. Thus, this Court must find that Petitioners' Notice of Voluntary Dismissal is ineffectual.

8. Immunity from Suit and Fee Shifting Imply that an Answer Is Unnecessary in the Context of Anti-SLAPP Motions to Dismiss.

Nevada's anti-SLAPP law provides immunity "from any civil action for claims based upon" a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern. NRS 41.650. Specifically, the law provides "a mechanism that allows a citizen to obtain prompt review of potential SLAPP lawsuits and have them dismissed before she is forced to endure the burdens and expense of the normal litigation process." *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 802 (9th Cir. 2012). To make such speakers

immune in practice—*i.e.*, so that they are spared not merely a judgment against them but spared the financial and practical burdens of litigation as well—Nevada's anti-SLAPP statute mandates that if the court grants a special motion to dismiss pursuant to NRS 41.660, the court "shall award reasonable costs and attorney's fees to the person against whom the action was brought." NRS § 41.670(1)(a).

In the instant case, filing a formal answer before the adjudication of an anti-SLAPP motion to dismiss would be a superfluous action that would only increase litigation costs for persons engaged in First Amendment activity in the public interest that the anti-SLAPP statute was intended to prevent. For instance, filing an answer—not necessarily a simple step—would trigger the 30-day period for the parties to make mandatory initial disclosures under NRCP 16.1(a)(1)(D) (or stipulate to or move the district court for an extension). Filing an answer also triggers the time to schedule an early case conference under NRCP 16.1(b)(2)(A)-(B). Because requiring a SLAPP defendant to file an answer with his special motion to dismiss to avoid dismissal under a rigid application of NRCP 41(a)(1) would increase the fees and practical burdens of litigation that Nevada's anti-SLAPP statute is intended to avoid, it should not be required in this instance.

Furthermore, allowing dismissal of NRCP 41(a)(1) would allow Petitioners to avoid adjudication of this matter under the anti-SLAPP statute, and creates the risk that the VIPI Parties will not be made whole for the significant expenses they have

already incurred in this matter. Thus, Petitioners should be denied writ relief.

9. The Anti-SLAPP Statute's Discovery Stay Militates Against Voluntary Dismissal.

In arguing that an anti-SLAPP motion should not be treated as a formal motion for summary judgment under NRCP 41(a)(1), Petitioners attempt to distinguish anti-SLAPP motions by noting that "the discovery stay triggered by an anti-SLAPP motion that does not exist when a summary judgment motion is filed" and that the "court can only allow discovery to oppose an anti-SLAPP motion under narrow circumstances." (Pet., p. 11, n. 2.) However, the anti-SLAPP statute's discovery stay is intended to constrain the scope of discovery—and thus reduce the practical burdens SLAPP defendants are subjected to—to the second prong of the anti-SLAPP statute. *See* NRS 41.660(3)(e)-(4). This, in turn, demonstrates that the Legislature intended that the district court deny the anti-SLAPP Motion—*i.e.*, determine that the suit is not a SLAPP— ***before*** subjecting the litigants to discovery. Thus, voluntary dismissal at this stage is improper, and writ relief must be denied.

10. This Case Cannot Be Dismissed as Proceedings Have Reached Advanced Stages.

a. The District Court Correctly Determined that Voluntary Dismissal Under NRCP 41(a)(1) Is Barred at Advanced Stages of Proceedings.

Voluntary dismissal is ineffectual if it is filed "at an advanced stage of the proceedings." *Phillip A.C.*, 122 Nev. at 1290, 149 P.3d at 55. In *Phillip A.C.*, this

Court held that the "essential purpose" of NRCP 41(a) is "to prevent arbitrary dismissals after extensive proceedings." *Id*. The Supreme Court adopted the holding of *Harvey Aluminum v. American Cyanamid Co.*, 203 F.2d 105, 108 (2d Cir.1953)—*i.e.*, that a plaintiff no longer possessed a right to dismiss an action by notice "because there had been an extensive hearing, lasting several days and resulting in a sizable record, in which the merits of the controversy were squarely raised." *Phillip A.C.*, 122 Nev. at 1290, 149 P.3d at 56. The *Harvey Aluminum* court "noted that although the voluntary dismissal had technically been attempted before any paper labeled 'answer' or 'motion for summary judgment' was filed, a literal application of the rule to the controversy would not have accorded with its essential purpose." *Phillip A.C.*, 122 Nev. at 1290, 149 P.3d at 56 (quoting *Harvey Aluminum*, 203 F.2d at 108).

The district court correctly applied this reasoning. Between 2017 and 2020, the parties fully briefed and argued the VIPI Parties' anti-SLAPP motion to dismiss, and following the district court's denial of that motion, fully briefed and argued the VIPI Parties' appeal. (PA015-16.) Due to the extensive procedural history of the case and this Court's decision in *Phillips AC*, the district court properly concluded that Petitioners could not voluntarily dismiss this matter.

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b. The District Court Correctly Determined this Matter Reached an Advanced Stage.

Petitioners attempt to distinguish this matter from *Phillip A.C.* and *Harvey Aluminum* on the grounds that the merits of the instant matter have not yet been decided, and therefore the matter has not reached "an advanced stage." (Pet., pp. 15-16.) Here, the correct metric is not whether the court has considered all the "merits" of the case, but the actual time and effort expended in this matter. As evidenced by the docket (PA023-46), the parties have engaged in protracted litigation before the district court and this Court, notwithstanding the fact that discovery has not yet begun.

In *Philip A.C.*, this Court found voluntary dismissal ineffectual when it "was filed three months after the district court had already held a hearing on" motions to intervene and to invalidate an adoption. *Id*. This Court continued: "[s]ince the proceedings had reached an advanced stage, and a decision had already been made, a literal application of NRCP 41(a)(1) in this case would not accord with its essential purpose." *Id*. at 56, 1291.

Moreover, Petitioners are incorrect that the district court has "neither considered nor ruled on the merits" of their claims. (Pet., p. 16.) Here, there has not been just one hearing over the span of months, which alone would be sufficient to preclude application of NRCP 41(a)(1). Rather, in the four years since its inception, this lawsuit has generated a robust record and several decisions, including a fully

briefed appeal. Thus, as the proceedings are even more advanced than those in *Phillip A.C.* or *Harvey Aluminum*, voluntary dismissal under NRCP 41(a)(1) is especially inappropriate here.

The merits of this matter have may not have been fully decided, but, contrary to Petitioners' representations, they have been "presented and considered" (Pet., p. 16.) Several decisions have been made, including the district court's denial of the anti-SLAPP motion to dismiss (PA001-006) and this Court's reversal of that decision after extensive appellate briefing. Accordingly, the district court correctly concluded that this matter has reached an advanced stage and that Petitioners were barred from seeking voluntary dismissal.

VII. CONCLUSION

Petitioners' conduct in seeking notice dismissal under NRCP 41(a)(1) is the slow-motion equivalent of getting an adverse ruling on prong one of the anti-SLAPP analysis during hearing, then interrupting the hearing to voluntarily dismiss the matter before the judge can rule on prong two. In this context—and in light of Petitioners' stipulation to litigate the second prong and waive any argument contesting the district court's ability to rule on the same—Petitioners' conduct is more like contempt of court than a permissible application of NRCP 41(a)(1) to abandon unmeritorious claims before parties waste time and resources litigating them. This gamesmanship should not be rewarded, and this Court need not address

the scope of NRCP 41(a)(1) by holding that the binding stipulation precludes the Willick Parties from voluntarily dismissing their case. In the alternative, this Court should bar voluntary dismissal under the law of the case doctrine as contrary to its order ***mandating*** that the district court perform the second prong of the anti-SLAPP analysis.

Even ignoring the parties' binding stipulation and this Court's explicit mandate that the district court adjudicate the remainder of the anti-SLAPP Motion, this Court should find that dismissal is not warranted here because this matter has reached an advanced stage. This Court's holding in *Phillip A.C.* is controlling precedent and requires this result. Thus, the district court correctly recognized that the VIPI Parties' anti-SLAPP Motion should be treated as a motion for summary judgment under NRCP 41(a)(1), and that voluntary dismissal at this advanced stage of the proceedings—like in *Phillip A.C.* and *Harvey Aluminum*—does not effectuate the purposes of NRCP 41(a)(1) and undermines the purposes of Nevada's anti-SLAPP statute, and therefore must not be given any effect.

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For each of these independently sufficient reasons, this Court must deny writ relief.

DATED this 3rd day of May, 2021.

/s/ Margaret A. McLetchie

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 21(e) and NRAP 32(a)(9):

I hereby certify that this ANSWER TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION 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 the ANSWER TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman font.

I further certify that this ANSWER TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION complies with the type-volume limitation of NRAP 21(d) as it is proportionally spaced, has a typeface of 14 points or more, and contains 6,978 words.

Finally, I hereby certify that I have read this 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.

DATED this 3rd day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REAL PARTIES IN INTEREST STEVE W. SANSON AND VETERANS IN POLITICS INTERNATIONAL, INC.'S ANSWER TO PETITION FOR WRIT OF MANDAMUS AND PROHIBITION was filed electronically with the Nevada Supreme Court on the 3rd day of May, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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