**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| STEVE WYNN,<br><br>Appellant,<br>v.<br><br>THE ASSOCIATED PRESS, and REGINA GARCIA CANO,<br><br>Respondents. | Case No. 85804 |



# STEVE WYNN'S PETITION FOR EN BANC RECONSIDERATION

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## I. INTRODUCTION

"Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts *and arguments* entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) (emphasis added). Indeed, "the crucible of adversarial testing is crucial to sound judicial decisionmaking" because it '"yield[s] insights (or reveal[s] pitfalls) [that courts] cannot muster guided only by [their] own lights.'" *Sessions v. Dimaya*, 584 U.S. 148, 190 (2018) (Gorsuch, J., concurring in part and concurring in judgment) (quoting *Maslenjak v. United States*, 582 U.S. 335, 354 (2017)); *see also Pelkola v. Pelkola*, 137 Nev. 271, 273, 487 P.3d 807, 809 (2021). Or, in other words, "[C]ourts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) (alterations in original) (internal citations and quotations omitted).

But here, the Panel disregarded those foundational principles, sallying forth to resolve this case on an argument AP Respondents did not make. The Panel concluded that the clear-and-convincing actual-malice standard from *New York*

*Times Co. v. Sullivan*[1] applied to the second prong of Nevada's anti-SLAPP statutes because California applies that test to its anti-SLAPP statutes. But to reach that conclusion, the Panel relied on an argument AP Respondents did not make and cases they did not cite. AP Respondents argued only that general First Amendment principles required the application of the *Sullivan* test and its burden of proof here. While Wynn addressed AP Respondents' argument, the Panel did not. Such a violation of party presentation principles effectively punished Wynn for addressing the argument AP Respondents made instead of the argument the Panel constructed.

In formulating this new argument, the Panel's Opinion fractures this Court's precedent. By applying the clear-and-convincing actual-malice standard to the second prong, the Panel eviscerated the rationale of *Taylor v. Colon*,[2] once again putting the constitutionality of Nevada's anti-SLAPP statutes in question. The Panel's Opinion also ignores the Legislature who expressly lowered all plaintiffs' burden at the second prong from clear and convincing to prima facie, as well as this Court's prior recognition of the lowered burden of proof in *Coker v. Sassone*.[3] Finally, the Panel's application of a constitutionally dubious standard to Nevada's anti-SLAPP statutes grafts the well-established errors of *Sullivan* onto Nevada law

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1 376 U.S. 254 (1964).

2 136 Nev. 434, 482 P.3d 1212 (2020).

3 135 Nev. 8, 432 P.3d 746 (2019).

and, as such, raises several substantial constitutional and public policy issues warranting en banc reconsideration. Accordingly, this Court should grant this Petition to correct the Panel's errors, re-establish the uniformity of this Court's precedent, and avoid several substantial constitutional and public policy issues in Nevada's anti-SLAPP statutes.

## II. RELEVANT FACTUAL HISTORY

### A. Background.

In January 2017, Respondent Regina Garcia Cano ("Garcia Cano") joined Respondent the Associated Press' ("AP") (collectively "AP Respondents") Las Vegas office. (3 JA 427.) Even though Garcia Cano had no experience in gaming, AP assigned her to the Las Vegas gaming and tourism beat. (*Id.* at 427-28.) In January 2018, several of AP's competitors published articles accusing Wynn of sexual misconduct. (4 JA 628-29.) A few weeks later, the Las Vegas Review Journal published a story stating that LVMPD had taken two statements from two women who accused Wynn of sexual assault. (2 JA 262-63.) As the Review Journal made clear, the allegations dated from the 1970s, some 40 years prior to the citizens' complaints being made. (*Id.* at 316.) Sensing a potential scoop – and desperate for any original story she could publish – Garcia Cano submitted a records request for the documents. (*Id.* at 333-34.)

Shortly before noon on February 27, 2018, LVMPD informed Garica Cano that copies of the citizens' complaints were available. (2 JA 265.) Aware that both the Review Journal and the WSJ had filed similar record requests for the citizens' complaints (3 JA 462-63), Garcia Cano "dropped everything" and raced over to pick up the records. (*Id.* at 437.) Unable to wait, Garcia Cano sat in her car and read the citizens' complaints in LVMPD's parking lot. (2 JA 240.) One of the complaints spun a fantastical tale: After alleging that Wynn sexually assaulted the complainant in 1973 or 1974, it continued:

> She ended up pregnant. It was a hot steamy afternoon and she need to go to the restroom. She saw a gas station and went in to the restroom. She was in pain standing by the wall and gave birth. The baby was laying on her feet inside the water bag. She slid down and said a doll is inside the water bag, the blood falling down, and she wanted to open, but the water bag was thick. She used her teeth to make a small opening then with her finger, opened the water bag and saw that the doll was purple. She started to blow on her and in a short time her cheeks were turning pink and she opened her eyes. She looked so much like her.

(*Id.* at 337-38.) The complaint explained that the child still lives in Las Vegas and knows Wynn is her father. (*Id.* at 338.)

Once she reached the office, Garcia Cano informed her supervisor that "[o]ne of [the citizens' complaints] is crazy." (*Id.* at 342.) Even though the stale allegations dated back forty years, Garcia Cano rushed to publish the story. (*Id.*) And within an hour of obtaining the citizens' complaints, AP Respondents published an article accusing Wynn of "Rape" with no fact-checking of any kind. (*Id.* at 265-689;

3 JA 447.) Indeed, Garcia Cano admits that she did not attempt to reach out to a representative of Wynn until at least an hour after publication (2 JA 267-78), despite the AP's standards to the contrary. (*See* 3 JA 469.)

**B. Procedural History.**

While the district court initially dismissed Wynn's complaint pursuant to the fair report privilege, this Court reversed, concluding that the fair report privilege did not apply. *Wynn v. Associated Press*, 136 Nev. 611, 620, 475 P.3d 44, 52 (2020). This Court remanded the case, instructing the district court to engage in the two-prong anti-SLAPP analysis. *Id.*

Before the district court, AP Respondents argued that they satisfied the first prong because the Article focused on "serious alleged incidents and raised questions about a powerful man's alleged serial abuse of that power by preying on women." (2 JA 386.) Next, they argued that general first amendment principles required Wynn to prove actual malice by clear and convincing evidence – not the prima facie standard that NRS 41.660(3)(b) actually imposes. (*Id.* at 389-90.) Finally, they contended Wynn failed to show any evidence of actual knowledge that the allegations in the citizens' complaint were false or that AP Respondents acted with reckless disregard in publishing the Article. (*Id.* at 390-93.) Despite Wynn's opposition, the district court granted the motion in a perfunctory order that concluded the Article related to an issue of public concern because of Wynn's status

as a public figure and, without any analysis or citation to any applicable law, that Wynn did not meet the prima facie burden to "establish[ ] a likelihood of prevailing on the merits." (3 JA 552-53.)

On appeal, AP Respondents reiterated their prior arguments. They argued only that general First Amendment principles required this Court to apply the clear-and-convincing actual-malice standard to the second prong of the anti-SLAPP statutes. *See* RAB 41-43. AP Respondents did not ask this Court to look to California law to determine whether the clear-and-convincing actual-malice standard applies at the second prong of Nevada's anti-SLAPP statutes. *See id.* Nor did they cite any case from California so holding. *See id.* Yet again, Wynn explained how applying the clear-and-convincing actual-malice standard at this early stage of litigation conflicted with both this Court's precedent and violated Wynn's constitutional rights. AOB 21 n.8; ARB 12-13.

The Panel, in a published opinion, concluded that the clear-and-convincing actual-malice standard applies to public figure plaintiffs at the second prong of Nevada's anti-SLAPP analysis. Op. at 10. Yet, the Panel did not apply the general First Amendment principles that AP Respondents argued; rather, the Panel constructed a new argument absent from any briefing. Specifically, the Panel concluded that it would look to California law, which applies the clear-and-

convincing actual-malice standard to public figure plaintiffs at the second prong of the anti-SLAPP analysis. *Id.* at 8-10.

Once the Panel announced the new standard, it had to try and reconcile this standard with this Court's prior opinion – *Taylor v. Colon* – which specifically found Nevada's anti-SLAPP statutes did not violate a plaintiff's right to a civil jury trial because Nevada courts do not apply the clear-and-convincing standard. Op. at 10-11. The Panel then proceeded to weigh evidence and make factual findings – declaring the AP Respondents' inferences "more" reasonable than Wynn's – to determine that Wynn did not meet this atextual, formerly rejected standard. *See id.* at 12-14.

Wynn petitioned for rehearing, explaining how the Panel's Opinion misapprehended or ignored governing law and misapprehended or overlooked the parties' arguments. The Panel summarily denied the petition.

## III. ARGUMENT

### A. Legal Standard.

While "[e]n banc reconsideration is disfavored," this Court will entertain it "when necessary to preserve precedential uniformity or when the case implicates important precedential, public policy, or constitutional issues." *Huckabay Props., Inc. v. NC Auto Parts, LLC*, 130 Nev. 196, 201, 322 P.3d 429, 432 (2014); *see also* NRAP 40A(a).

### B. The Panel's Opinion Violated the Principle of Party Presentation.

This Court follows "the principle of party presentation" where the parties "frame the issues for decision" and the Court acts as a "neutral arbiter of the matters" presented. *State v. Eighth Jud. Dist. Ct.*, 138 Nev., Adv. Op. 90, 521 P.3d 1215, 1221 (2022) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). In other words, the "judicial role is not to research or construct a litigant's case or arguments for him or her." *State v. Bristol*, 654 S.W.3d 917, 924 (Tenn. 2022) (citations and internal quotation marks omitted); *cf. In re Marriage of Kahn*, No. A128001, 2012 WL 1079579, at *9 (Cal. Ct. App. Apr. 2, 2012) ("While the trier of fact may from time to time credit a party's presentation but adjust certain portions to make it more reasonable, it is an entirely different matter to use a party's presentation as a tool kit to construct whatever result seems 'just.'").

Here, the Panel departed from the principle of party presentation by constructing a legal argument that AP Respondents never made. The Panel concluded that the clear-and-convincing actual-malice standard applies at the second prong by "turn[ing] to California law," which applies the clear-and-convincing actual-malice standard to the second prong of its anti-SLAPP analysis, in contravention of the actual words of NRS 41.660(3)(b). Op. at 8-11. But this was not an argument AP Respondents made. AP Respondents never urged this Court to look to California law when interpreting Nevada's anti-SLAPP statute, nor did they

cite any California case holding that the clear-and-convincing-evidence standard applies to the second prong of the anti-SLAPP analysis. *See* RAB 41-43. Indeed, AP Respondents did not cite a single case from any court applying the clear-and-convincing actual-malice standard to the actual malice determination at the second prong of the anti-SLAPP analysis. *See id.*

Rather, AP Respondents simply asserted that general First Amendment principles required the Court to apply the clear-and-convincing actual-malice standard to the second prong of Nevada's anti-SLAPP analysis. *See id.* Yet the Panel "construct[ed]" AP Respondents' argument by relying on its own extraneous research and the resulting cases and principles the Panel found that AP Respondents never offered. *Compare id.*, *with* Op. at 8-10. Such a violation warrants en banc reconsideration to address the arguments the parties actually made. *See Lee v. Patin*, No. 83213, at *8 (Order of Reversal Mar. 9, 2023) (Cadish, J., dissenting) ("I cannot agree with the court's *sua sponte* reversal based on an issue never raised by any party."), *en banc recons. granted Patin*, No. 83213 (Order Granting En Banc Reconsideration Aug. 28, 2023).

### C. En Banc Reconsideration is Necessary to Preserve the Uniformity of this Court's Precedent as the Panel's Opinion Conflicts with both *Taylor v. Colon*, 136 Nev. 434, 482 P.3d 1212 (2020), and *Coker v. Sassone*, 135 Nev. 8, 432 P.3d 746 (2019).

The Panel's application of *Sullivan*'s clear-and-convincing actual-malice standard to the second prong of Nevada's anti-SLAPP analysis directly conflicts with *Taylor*. There, this Court addressed whether "Nevada's anti-SLAPP statutes . . . violate the constitutional right to a jury trial," *Taylor*, 136 Nev. at 434, 482 P.3d at 1213, a right that arises under both the state and federal constitutions, *id.* at 436, 482 P.3d at 1215; *Ross v. Bernhard*, 396 U.S. 531, 533 (1970). This Court explained that the second prong does not violate the right to a civil jury trial because "[t]he court does not make any findings of fact" or otherwise weigh evidence. *Taylor*, 136 Nev. at 437, 482 P.3d at 1216. But when addressing other courts that have concluded that their states' anti-SLAPP statutes violated the right to a jury trial, this Court looked solely at the burden of proof. *See id.* at 438-39, 482 P.3d at 1216. Specifically, this Court explained that neither *Leiendecker v. Asian Women United of Minnesota*,[4] nor *Davis v. Cox*,[5] applied because "[b]oth Minnesota's and

[4] 895 N.W.2d 623, 636 (Minn. 2017) (holding, among other things, that the application of the clear-and-convincing-evidence standard at the second prong of the anti-SLAPP statutes violated the right to a jury trial).

[5] 351 P.3d 862, 871, 874-75 (Wash. 2015) (concluding that requiring the plaintiff to show "by clear and convincing evidence a probability of prevailing on the claim" violates the right to a jury trial), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 423 P.3d 223 (Wash. 2018).

Washington's anti-SLAPP statutes included the higher burden of 'clear and convincing evidence' under prong two of the anti-SLAPP analysis, whereas Nevada's anti-SLAPP statutes in their current form only require a plaintiff to demonstrate 'with prima facie evidence a probability of prevailing on the claim.'" *Id.* Thus, the different burdens of proof plaintiffs faced at the second prong of the anti-SLAPP analysis was ***the*** distinguishing feature upon which *Taylor* relied. *See id.*

Despite the *Taylor* court's clear analysis, the Panel nonetheless imposed the clear-and-convincing actual-malice standard at the second prong. The Panel concluded that Wynn failed at the second prong "because he *failed to meet the clear and convincing evidence standard under the second prong* that is applicable to his public figure defamation claim." Op. at 14-15 (emphasis added). Of course, this is the same standard the *Taylor* court explicitly rejected. *See Taylor*, 136 Nev. at 438-39, 482 P.3d at 1216. The Panel's explanation that *Taylor* "did not preclude" requiring clear and convincing evidence in certain instances, Op. at 11, is, at best, a misreading of the case, as *Taylor* explicitly relied on the absence of such a standard to find that Nevada's anti-SLAPP statutes do not violate a plaintiff's right to a civil jury trial, *Taylor*, 136 Nev. at 438-39, 482 P.3d at 1216.

Moreover, the Panel's Opinion similarly ignores the Legislature's amendment of the anti-SLAPP statute, which lowered all plaintiffs' burden of proof at the second prong, and conflicts with this Court's recognition of the Legislature's actions. Prior

to 2015, Nevada's anti-SLAPP statutes expressly applied the higher clear-and-convincing standard to the second prong. But "[t]he Legislature amended the anti-SLAPP statute in 2015" to "require a plaintiff in the second step of the anti-SLAPP analysis to demonstrate with 'prima facie evidence,' instead of 'clear and convincing evidence,' a probability of prevailing on the claim." *Patin v. Tom Vinh Lee*, 134 Nev. 722, 724 n.1, 429 P.3d 1248, 1250 n.1 (2008). As this Court previously explained, the Legislature's 2015 amendments "*decreased* the plaintiff's burden of proof." *Coker*, 135 Nev. at 10, 432 P.3d at 748 (emphasis in original). While the Panel recognized this change, Op. at 11 n.6, it proceeded to rewrite the clear-and-convincing standard back into Nevada's anti-SLAPP statutes for Wynn.

The Panel's disclaimer that it did "not rewrite the statute to return the plaintiff's burden of proof to a clear and convincing standard" but rather "merely recognize[d] that evidence of actual malice must meet the clear and convincing standard to sufficiently demonstrate with prima facie evidence a probability of prevailing," Op. at 11 n.6, is a distinction without a difference to impose a result. While the Panel hid the clear-and-convincing standard within the prima facie standard, a public figure plaintiff—or, really, any individual who happens to be a "public" figure for even a limited purpose—must satisfy the clear-and-convincing actual-malice standard to succeed under Nevada's anti-SLAPP statutes. *See* Op. at 14-15 ("Wynn . . . did not establish with prima facie evidence a probability of prevailing

on the merits of his defamation claim *because he failed to meet the clear and convincing evidence standard under the second prong . . . .*" (emphasis added)).

Thus, the Panel applied a higher burden of proof, directly contravening both the Legislature's intent and this Court's caselaw recognizing the lower burden of proof for *all* plaintiffs under Nevada law. Accordingly, en banc reconsideration is necessary.

### D. En Banc Reconsideration is Necessary as the Panel's Opinion Raises Important Constitutional Issues Involving Both the Seventh Amendment and First Amendment.

#### *1. The Panel's Opinion engages in fact finding and, thus, violates a plaintiff's right to a civil jury trial.*

By disregarding *Taylor*, the Panel's Opinion once again puts the constitutionality of Nevada's anti-SLAPP statutes at issue. The Seventh Amendment preserves the right to a jury trial that "existed under the English common law when the amendment was adopted." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935). Thus, the "Seventh Amendment . . . entitle[s] the parties to a jury trial in actions for damages to a person or property, [or] for libel and slander." *Ross*, 396 U.S. at 533. The Nevada Constitution similarly provides a right to a civil jury trial. *Taylor*, 136 Nev. at 436, 482 P.3d at 1215. "Neither the Congress nor the courts can deprive a litigant of [the] right [to a civil jury trial]." *Raytheon Co. v. RCA*, 76 F.2d 943, 947 (1st Cir. 1935), *aff'd* 296 U.S. 459 (1935); *see also Connell*

*v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1547 (Fed. Cir. 1983) ("So long as the Seventh Amendment stands, the right to a jury trial should not be rationed.").

"The right to a trial by jury . . . is preserved in the Seventh Amendment and that guarantee includes assigning fact-finding to the jury and law giving to judges." *Sanders v. New York City Hum. Res. Admin.*, 361 F.3d 749, 753 (2d Cir. 2004). Similarly, the Nevada Constitution "guarantees the right to have factual issues determined by a jury." *Taylor*, 137 Nev. at 436, 482 P.3d at 1215 (quoting *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 796, 358 P.3d 234, 238 (2015)). Under both constitutions, the right to a civil jury trial is violated when a judge weighs competing interpretations of evidence and makes factual determinations. *See id.* at 436-39, 482 P.3d at 1215-16; *Snead v. New York Cent. R.R. Co.*, 216 F.2d 169, 172 (4th Cir. 1954) ("[U]nder the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility.").

Here, the Panel's Opinion requires courts to weigh evidence and find facts to resolve the second prong of NRS 41.660. In "public figure" cases, courts must now use the clear-and-convincing actual-malice standard, which "invades the jury's essential role of deciding debatable questions of fact." *Davis*, 351 P.3d at 874; *see also Leiendecker*, 895 N.W.2d at 636. Indeed, the Opinion itself confesses this violation as the Panel weighed competing interpretations of the evidence and made its own credibility determinations:

> Looking at Wynn's evidence in the light most favorable to him does not require us to assume that by "crazy" Garcia Cano meant "not believable" or "unreliable." *A more reasonable inference* from her characterization is that she believed the complaint to be "shocking," "disturbing," or, *as Garcia Cano put it in her testimony*, "explosive and impactful."

Op. at 13 n.8 (emphases added).[6] Because "[w]eighing evidence and resolving factual disputes is precisely what a jury does and what a judge is forbidden from doing . . . when resolving pretrial motions directed at the merits based on evidence in the record," the Panel violated Wynn's right to a civil jury trial. *Unity Healthcare, Inc. v. Cnty. of Hennepin*, 308 F.R.D. 537, 549 (D. Minn. 2015) (holding that applying Minnesota's anti-SLAPP statute "[w]ould deprive plaintiffs in this case of their constitutional right to a jury trial for their defamation and tortious interference claims").

The Panel's blanket statement that actual-malice determinations are questions of law that "goes to the jury *only* if there is sufficient evidence for the jury, *by clear and convincing evidence*, to reasonably infer that the publication was made with actual malice," Op. at 11 (emphases in original) (quoting *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 721-22, 57 P.3d 82, 92 (2002)), misstates the law. While courts determine whether the evidence may support a finding of actual

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[6] Of course, Garcia Cano claimed that both reports were "explosive" and "impactful." (4 JA 609-11). But she labeled only one as "crazy" precisely because it was crazy, and a jury could conclude that she substantially doubted its truth, which is why she called it truly crazy. (*See id.*).

malice as a question of law, the question of actual malice becomes a jury question if the determination involves making factual findings or credibility determinations. *See Hunt v. Liberty Lobby*, 720 F.2d 631, 646 (11th Cir. 1983) (recognizing that while newspaper employees "said they believed the information was plausible," "the jury was under no obligation to credit this testimony," and thus, a jury question on actual malice existed where "the jury could have . . . inferred actual malice from the inherent improbability of the story"); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 690-93 (1989) (concluding that the district court appropriately allowed the jury to weigh competing evidence regarding the newspaper's actual malice in publishing an inaccurate story); *cf. Posadas v. City of Reno*, 109 Nev. 448, 453, 851 P.2d 438, 442 (1993) (recognizing that while the question of whether "a statement is capable of a defamatory construction" is generally a legal question for the court, if the statement is "susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury").

Because the Panel engaged in improper fact-finding, it violated Wynn's right to a civil jury trial. And because the Panel issued an opinion directing other courts to engage in similar fact-finding when analyzing anti-SLAPP motions involving public figures, en banc reconsideration is necessary to resolve this constitutional issue.

### *2. The Panel's Opinion inserts a constitutionally dubious standard into Nevada's anti-SLAPP statutes.*

The Panel's Opinion also grafts a constitutionally dubious standard into Nevada's anti-SLAPP statute. Such a standard – itself the product of puzzling judicial decision-making – is rife with well-established harms that now impact all Nevadans. *Sullivan*'s viability has been called into question, its underpinnings critiqued, and its flaws exposed. This Court should not needlessly import those harms into Nevada's anti-SLAPP analysis, particularly when rejected by the Legislature.

As Justice Kagan explained, the *Sullivan* court's "puzzling adoption of the actual malice standard" has long frustrated observers. Elena Kagan, A *Libel Story: Sullivan Then and Now*, 18 L. & SOC. INQUIRY 197, 199 (1993). The Supreme Court did not need to adopt this standard to resolve the case: "[o]ne of the great puzzles of *Sullivan* concerns why the Court adopted the actual malice rule rather than decide the case on one of numerous available grounds based on common law principles." *Id.* at 203. In fact, the actual malice standard "occasioned almost no debate" among the justices, who failed "during deliberations to criticize, debate, or question the majority opinion's adoption of the actual malice standard." *Id.* at 201-02. This lack of debate is of all the more concern considering that the "dark side of the *Sullivan* standard" is "obvious": "it allows grievous reputational injury to occur without monetary compensation or any other effective remedy." *Id.* at 205.

One need only peruse case law to see this "obvious dark side" in full force. The *Sullivan* standard "has evolved . . . into an effective immunity from liability," creating a perverse incentive where "publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy." *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from the denial of certiorari) (emphasis in original). Under *Sullivan*, "private citizens can become 'public figures' on social media overnight" or obtain "notoriety in certain channels of our now-highly segmented media even as they remain unknown in most." *Id.* at 2429. As such, *Sullivan*'s harms are not limited to the rich and famous or the influential and powerful.

Courts "have long made clear that one may occasionally become a public figure even if 'one doesn't choose to be.'" *Berisha v. Lawson*, 973 F.3d 1304, 1311 (11th Cir. 2020) (quoting *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978)). A private citizen may become a public figure by taking steps to defend himself from a defamatory statement. *See id.* A victim of a sexual assault may become a public figure if she or he chose to confront their assailant – especially if the assailant is rich or famous. *See McKee v. Cosby*, 874 F.3d 54, 62 (1st Cir. 2017). And one may become a public figure by operating a Facebook group with 55,000 members specializing in a niche interest. *Smith v. Zilverberg*, 137 Nev. 65, 68-69, 481 P.3d 1222, 1227-28 (2021). Indeed, under *Sullivan* and its

progeny, "voluntarily or not, we are all public [figures] to some degree." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 364 (1974) (Brennan, J., dissenting) (brackets and internal quotation marks omitted).

This Court should not perpetuate this constitutionally dubious standard by needlessly incorporating it into Nevada's anti-SLAPP statute. Rather, it should heed its own counsel in *Taylor* – as well as the counsel of cascading cases and commentators questioning *Sullivan*[7] – and not impose the clear-and-convincing actual-malice standard at the anti-SLAPP stage.

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[7] *See, e.g.*, *Berisha*, 141 S. Ct. at 2430 (Gorsuch, J., dissenting from the denial of certiorari) (calling for the Supreme Court to revisit *Sullivan*); *McKee v. Cosby*, 139 S. Ct. 675, 682 (2019) (Thomas, J., concurring in the denial of certiorari) (stating that the Supreme Court "should reconsider [its] jurisprudence in this area"); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 106 S. Ct. 2927, 2928 (1986) (Burger, C.J., joined by Rehnquist, J., dissenting from the denial of certiorari) (reiterating that *Sullivan* "should be reexamined" and dissenting "from the Court's refusal to grant certiorari and give plenary attention to this important issue"); *Gertz*, 418 U.S. at 370, 398-99 (White, J., dissenting) (explaining that "[m]y quarrel with the Court stems from its willingness 'to sacrifice good sense to a syllogism' – to find in the *New York Times* doctrine an infinite elasticity" and that "this expansion is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme").

## IV. CONCLUSION

For these reasons, this Court should grant Wynn's Petition for En Banc Reconsideration.

DATED this 22nd day of April, 2024.

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## CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 40 AND 40A

I hereby certify that this petition for en banc reconsideration complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 4,591words.

DATED this 22nd day of April, 2024.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 22nd day of April, 2024, I electronically filed and served the foregoing **STEVE WYNN'S PETITION FOR EN BANC RECONSIDERATION** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court E-Filing system (Eflex), addressed to the following:

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