No. 24-

IN THE

Supreme Court of the United States

STEVE WYNN,

Petitioner,

v.

THE ASSOCIATED PRESS; AND
REGINA GARCIA CANO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *New York Times Co. v. Sullivan*,[1] this Court "overturn[ed] 200 years of libel law" to constitutionalize an actual-malice standard for public-official defamation plaintiffs.[2] This Court extended this actual-malice innovation to public figures in *Curtis Publishing Co. v. Butts*.[3]

Compelled by this Court's constitutional decisions in *Sullivan* and *Curtis Publishing Co.*, States, like Nevada, have incorporated the actual-malice standard into their anti-SLAPP statutes. As a result, those States require public figure plaintiffs to prove the merits of their case—including actual malice—before any discovery occurs (or with only "limited" discovery). State courts are split over the application of the actual-malice standard's clear and convincing evidence burden to public figure plaintiffs in anti-SLAPP cases and whether it violates a plaintiff's right to a civil jury trial.

These are the questions presented:

1. Whether this Court should overturn *Sullivan*'s actual-malice standard or, at a minimum, overrule *Curtis Publishing Co.*'s expansion of it to public figures.

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1. 376 U.S. 254 (1964).

2. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring in the judgment).

3. 388 U.S. 130 (1967).

2. Should this Court decline to overturn or otherwise cabin *Sullivan* and *Curtis Publishing Co.*, whether the Seventh Amendment's right to a civil jury trial is incorporated against the States and, if yes, whether the application of the clear-and-convincing actual-malice standard at the early anti-SLAPP stage of litigation violates a plaintiff's Seventh Amendment right to a civil jury trial.

PARTIES TO THE PROCEEDING

Petitioner is Steve Wynn. Petitioner was the plaintiff in the district court and appellant in the Nevada Supreme Court.

Respondents are The Associated Press and its reporter, Regina Garcia Cano. Respondents were the defendants in the district court and respondents in the Nevada Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner has no parent or publicly held company.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Wynn v. Associated Press*, No. 85804 (Nev.) (opinion granting en banc reconsideration and affirming district court order, filed Sept. 5, 2024);

- *Wynn v. Associated Press*, No. 85804 (Nev.) (opinion affirming district court order, subsequently withdrawn, filed Feb. 8, 2024);

- *Wynn v. Associated Press*, No. A-18-772715-C (Nev. Dist. Ct.) (order granting Defendants' renewed anti-SLAPP motion to dismiss, filed Oct. 26, 2022);

- *Wynn v. Associated Press*, No. A-18-772715-C (Nev. Dist. Ct.) (findings of fact, conclusions of law, and judgment finding that Defendant Kuta defamed Wynn, filed March 26, 2020);

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Constitutional Provisions

Statutes and Other Authorities

Page

Page

Page

PETITION FOR WRIT OF CERTIORARI

In 2018, Respondent The Associated Press published an article accusing Petitioner Steve Wynn of committing "rape" in the 1970s. This article relied on two citizen complaints asserting decades-old sexual assault allegations. One complaint spun a fantastic tale about giving birth to a purple doll in a gas station restroom that even the Associated Press reporter who authored the article—Respondent Regina Garcia Cano—called "crazy." The district court eventually found the allegations that formed the basis of Respondents' article to be "clearly fanciful or delusional, and therefore, clearly false and defamatory."

Even though Respondents rushed to publish this "clearly false and defamatory" story, Wynn's defamation claim failed. It did not fail because the story's allegations were true or because the defamatory story was otherwise privileged. Rather, Wynn's defamation claim failed solely because of the supposed lack of evidence of Respondents' actual malice.

The actual-malice standard is a relatively new feature of libel law. It arose from *New York Times Co. v. Sullivan* and was extended to public figures in *Curtis Publishing Co. v. Butts*.

But as Justice White explained, *Sullivan*'s actual-malice standard "overturn[ed] 200 years of libel law," not because that law was wrong but because this Court concluded the common law was inadequate. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring in the judgment).

In the decades since, the "dark side of the *Sullivan* standard" became "obvious": "it allow[s] grievous reputational injury to occur without monetary compensation or any other effective remedy." Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & Soc. Inquiry 197, 205 (1993). In effect, *Sullivan* encourages individuals to libel first and question never, promising them near-absolute immunity should they do so. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting from the denial of certiorari) (explaining that 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" (emphasis in original)).

Sullivan's mischief is not limited to the common conception of "public" figures. As Justice Brennan—the author of *Sullivan*—explained, "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). Thus, particularly with the speed of today's media and internet age, a private citizen becomes a public figure simply by trying to defend himself from a defamatory statement. *Berisha v. Lawson*, 973 F.3d 1304, 1311 (11th Cir. 2020). Or a victim of a sexual assault becomes a public figure if she or he chooses to confront their assailant—especially if the assailant is rich or famous. *McKee v. Cosby*, 874 F.3d 54, 62 (1st Cir. 2017). Unfortunately, this forced notoriety (and corresponding loss of rights) is a feature, not a bug, of *Sullivan*'s "infinite elasticity." *Gertz*, 418 U.S. at 399 (White, J., dissenting).

But this Court need not continue to "sacrifice good sense to a syllogism" to perpetuate this faulty precedent.

Id. at 398-99. There comes a time when this Court must correct its past mistakes. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411 (2024) ("The Court has jettisoned many precedents that Congress likewise could have legislatively overruled."); *see also* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 443 (1826) ("If . . . any solemnly adjudged case can be shown to be founded in error, it is no doubt the right and the duty of the judges who have a similar case before them, to correct the error."). "Judicial humility" requires the Court to "admit[] and in certain cases correct[] [its] mistakes, especially when those mistakes are serious." *Loper Bright Enters.*, 603 U.S. at 411 (internal citations omitted).

Indeed, several Justices have called for this Court to revisit *Sullivan* or have otherwise identified its flaws. Justice Thomas has said, "*New York Times* and the Court's opinions extending it were policy-driven decisions masquerading as constitutional law," and charged that this Court "should reconsider [its] jurisprudence in this area." *McKee v. Cosby*, 139 S. Ct. 675, 676, 682 (2019) (Thomas, J., concurring in the denial of certiorari). Justice Gorsuch has agreed, noting that the actual-malice doctrine "evolved into a subsidy for published falsehoods on a scale no one could have foreseen" that "leave[s] far more people without redress than anyone could have predicted," and he called for this Court to "return[] its attention" to *Sullivan*. *Berisha*, 141 S. Ct. at 2429-30 (Gorsuch, J., dissenting from the denial of certiorari). And Justice Kagan has described "[t]he obvious dark side of the *Sullivan* standard": it "allows grievous reputational injury to occur without monetary compensation or any other effective remedy." Kagan, *supra*, at 205.

It is time for *Curtis Publishing Co.*, if not *Sullivan*, to be overruled.

Even so, should this Court leave *Sullivan* and *Curtis Publishing Co.* undisturbed, it still should resolve the second question: whether state anti-SLAPP statutes as applied to public figure plaintiffs violate the Seventh Amendment's right to a civil jury trial. The Seventh Amendment's right to a civil jury trial remains one of three rights not yet incorporated against the States. This Court should incorporate it and hold that the Seventh Amendment's right to a civil jury trial applies to the States, and recognize that their application of the clear-and-convincing-evidence standard at the pleading stages of a defamation claim through anti-SLAPP statutes violates the Seventh Amendment.

This case is an ideal vehicle to resolve the questions presented. The Nevada Supreme Court recognized that only the "actual malice" element was "reasonably in controversy on appeal." Moreover, Nevada itself only applies this standard because of this Court's decisions about federal, not state, law. *See Nev. Indep. Broad. Corp. v. Allen*, 664 P.2d 337, 344 (Nev. 1983). There is no independent state law actual-malice standard.

Sullivan is not equipped to handle the world as it is today—media is no longer controlled by companies that employ legions of factcheckers before publishing an article. Instead, everyone in the world has the ability to publish any statement with a few keystrokes. And in this age of clickbait journalism, even those members of the legacy media have resorted to libelous headlines and false reports to generate views. This Court need not further this golden era of lies.

Accordingly, a writ of certiorari should be granted.

OPINIONS BELOW

The district court's March 26, 2020 findings of fact, conclusions of law, and judgment finding that Respondents' underlying article was clearly defamatory is not reported and is reproduced in the appendix ("App.") at App. 41a. The district court's October 26, 2022 order granting Respondents' renewed anti-SLAPP motion to dismiss is not reported and is reproduced at App. 34a.

The Nevada Supreme Court's February 8, 2024 opinion affirming the district court's October 26, 2022 order, reproduced at App. 18a, is reported at 542 P.3d 751. The Nevada Supreme Court's September 5, 2024 opinion granting en banc reconsideration, withdrawing its February 8, 2024 opinion, and affirming the district court's order is reproduced at App. 1a and reported at 555 P.3d 272.

BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Nevada entered judgment on en banc reconsideration on September 5, 2024. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, the Seventh Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and NRS 41.660, are reproduced at Addendum App. 55a.

STATEMENT OF THE CASE

A. Respondents Published a Defamatory Article Based on a "Clearly Delusional" Complaint.

In early 2018, several of Respondent the Associated Press's competitors published news articles accusing Petitioner Steve Wynn of sexual misconduct. And in February 2018, a local paper—the Las Vegas Review Journal—published an article, stating that the Las Vegas Metropolitan Police Department had taken two statements from women accusing Wynn of sexual misconduct in the 1970s, forty years earlier. Seeking a scoop, Respondent Regina Garcia Cano submitted a records request for the citizens' complaints.

What appeared to be Garcia Cano's lucky break came a few days later. Shortly before noon on February 27, 2018, LVMPD told Garcia Cano that copies of the citizens' complaints were available. Garcia Cano "dropped everything" and raced over to LVMPD's office to obtain copies of the complaints. In a rush to publish, unable to wait, Garcia Cano read the citizens' complaints in LVMPD's parking lot.

One of the complaints spun an unbelievable tale: After alleging that Wynn sexually assaulted the complainant, Halina Kuta,[4] in 1973 or 1974, it continued,

4. Although the initial citizens' complaint redacted Kuta's name, later versions released to Respondents identified Kuta as the complainant.

> She ended up pregnant. It was a hot steamy afternoon and she needed 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.

App. 54a.

Garcia Cano recognized the absurdity of that citizens' complaint. She told her supervisor, "One of them is crazy." 2 S.C. App. 344. But the absurdity of the citizens' complaint did not cause Respondents to complete even The Associated Press' standard reporting for allegations of sexual assault. Within an hour of obtaining the citizens' complaints, Respondents published an article accusing Wynn of "Rape" without (1) factchecking the allegations, (2) investigating the allegations, or (3) reaching out to Wynn for a comment before publication. 2 S.C. App. 265-68. Troublingly, the article omitted any of the "crazy" details:

> HEADLINE: APNewsBreak: Woman tells police Steve Wynn raped her in '70s
>
> . . .

> A woman has told police she had a child with casino mogul Steve Wynn after he raped her, while another reported she was forced to resign from a Las Vegas Job after she refused to have sex with him.
>
> The Associated Press on Tuesday obtained copies of the police reports recently filed by the two women over allegations dating to the 1970s.
>
> One report shows a woman told police she gave birth to a girl after Wynn raped her at her Chicago apartment around 1973 or 1974.
>
> The other says she had consensual sex with Wynn while she worked as a casino dealer at the Golden Nugget but was fired when she told him no in summer 1976.
>
> Wynn has resigned as chairman and CEO of Wynn Resorts amid sexual misconduct allegations.

2 S.C. App. 344.

B. The Lawsuit.

After Respondents refused to retract the defamatory article, Wynn brought a defamation claim against Respondents and Kuta. Respondents filed an anti-SLAPP special motion to dismiss.[5] The district court granted the

5. In the late twentieth century, the public became concerned with what it perceived to be a rise in SLAPP suits—Strategic

motion, concluding that the fair report privilege applied since the defamatory article repeated allegations in a citizen's complaint. *Wynn v. Associated Press*, 475 P.3d 44, 47 (Nev. 2020). The Nevada Supreme Court reversed, holding the fair report privilege did not apply because an "article reporting on the contents of a citizen's complaint to the police—*which was neither investigated nor evaluated by the police*—is not a report of an official action or proceeding for which the fair report privilege provides an absolute defense." *Id.* at 46 (emphasis added). The Nevada Supreme Court remanded with instructions for the district court to perform the anti-SLAPP analysis.

Meanwhile, in the district court, Wynn's defamation claim against Kuta proceeded. After a bench trial, the district court found that Kuta's citizen complaint "conveyed clearly fanciful or delusional allegations about a surreal birth scenario involving a 'purple doll' and 'water bag.'" App. 44a. The district court held that Kuta's allegations

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Litigation Against Public Participation. Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & Soc'y Rev. 385, 386 (1988). Thus, the States began to adopt anti-SLAPP statutes. While the statutes are not uniform, they all create a "procedural mechanism" where "a defendant can seek early dismissal of a suit that arises from protected petitioning activity, free speech, or both." Andrew R. Dennington, *Do Anti-SLAPP Statutes Protect Bloggers?*, DRI For the Defense 36 (July 2017), https://www.connkavanaugh.com/wp-content/uploads/2020/08/Do-Anti-SLAPP-Statutes-Protect-Bloggers.pdf. While there is no federal anti-SLAPP law, over half of the States and territories have some form of an anti-SLAPP statute. *See Anti-SLAPP Legal Guide*, Reporters Committee for Freedom of the Press, https://www.rcfp.org/anti-slapp-legal-guide/ (last visited Dec. 12, 2024).

(which formed the basis of Respondents' defamatory article) were "clearly fanciful or delusional, and therefore, clearly false and defamatory." App. 47a-48a. No party has challenged those factual findings or legal conclusions.

After the Nevada Supreme Court's remand, Respondents and Wynn engaged in limited discovery regarding Respondents' actual malice. Following the limited discovery, Respondents filed a renewed anti-SLAPP special motion to dismiss. In Nevada, the anti-SLAPP statute creates a two-step process for determining whether a claim may proceed. First, the moving party (the defendant) must "show[], by a preponderance of the evidence, that the claim is based on 'a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern.'" *Smith v. Zilverberg*, 481 P.3d 1222, 1227 (Nev. 2021) (quoting NRS 41.660(3)(a)). If the defendant meets her burden, the plaintiff then must show "with prima facie evidence, a probability of prevailing on the claim." *Id.* The district court granted the motion, finding, with minimal explanation, that Wynn failed to show actual malice. App. 38a-39a.

On appeal, a panel of the Nevada Supreme Court affirmed, applying—for the first time—*Sullivan*'s clear-and-convincing-evidence actual malice standard to the second step of the anti-SLAPP analysis. App. 19a-20a, 26a. The panel rejected Wynn's argument that applying that standard would violate his right to a civil jury trial. App. 28a-29a. While the panel acknowledged that other state supreme courts had reached a contrary conclusion, it did not meaningfully address those holdings. *See id.*

After the panel denied rehearing, Wynn petitioned for en banc reconsideration. Wynn asserted, among other arguments, that the panel's opinion violated his right to a civil jury trial under the Seventh Amendment. Wynn also contended that the panel wrongfully applied the constitutionally dubious *Sullivan* standard through Nevada's anti-SLAPP statute.

The en banc Nevada Supreme Court "considered the petition for en banc reconsideration . . . , as well as the response thereto," "determined that reconsideration is warranted," and "granted" Wynn's petition for en banc reconsideration. App. 2a. The en banc court withdrew the panel opinion, but the opinion it issued was virtually identical to the panel's opinion. *Compare* App. 1a-17a (en banc opinion), *with* App. 18a-33a (panel opinion). The en banc court made minor cosmetic changes to the panel opinion, but functionally reaffirmed its prior *Sullivan*-based holding that public-figure plaintiffs must present "sufficient" evidence "for a jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice." App. 3a.

The en banc court, much like the panel, concluded that such a standard does not violate Wynn's right to a civil jury trial. App. 11a-13a. And just like the panel, the en banc court did not address the contrary conclusions from the highest courts of other states. *Id.* On the merits, the en banc court recognized that "the only element [of Wynn's defamation claim] reasonably in controversy on appeal is Wynn's ability to establish actual malice." App. 9a. While the en banc court concluded that Wynn did not show sufficient evidence of actual malice, the court never

addressed the details of Kuta's delusional and defamatory citizen's complaint. *See* App. 4a, 14a-15a.

Instead—like the Associated Press—the en banc court sanitized the allegations and omitted all the "crazy" details. In a vast understatement, the en banc court merely described the citizen's report as about "a pregnancy and the birth of a child in a gas station under unusual circumstances." App. 3a-4a. Tip-toeing around the actual facts, the en banc court concluded Wynn showed only evidence that Respondents "held *some* doubt," but not "*serious* doubt" about the truth of Kuta's "clearly delusional" allegations. App. 15a. (emphasis in original).

After the decision, Wynn moved to stay remittitur pending this Petition for a Writ of Certiorari. Consistent with Nevada Supreme Court rules, Wynn explained that the petition would (1) ask this Court to overturn *Sullivan* and *Curtis Publishing Co.*, as only this Court may do; and (2) whether the anti-SLAPP statutes, as construed, violate Wynn's right to a civil jury trial under the Seventh Amendment.

Respondents opposed, arguing that *Sullivan* "has remained a bedrock of federal constitutional law" that this Court would likely not revisit. They also contended that the Seventh Amendment does not apply to the States, but that the anti-SLAPP statute does not violate the Seventh Amendment because it functions like summary judgment. Notably, Respondents did not assert that Wynn's appeal is an inadequate or improper vehicle for these arguments—arguments with which Respondents admit Wynn is "entitled to try to persuade the United States Supreme Court." The Nevada Supreme Court stayed remittitur pending this Court's disposition of the proceedings.

REASONS FOR GRANTING THE PETITION

Sullivan is an admittedly ahistorical precedent, divorced from any understanding of the law when the First Amendment was enacted. Not only does it fail to adhere to history and tradition, it is unfit for the modern era where any person or corporation may, with the push of a button, publish defamatory material for the billions of people around the world to see—defamatory material that, like everything else on the internet, will exist forever.

Moreover, Nevada's anti-SLAPP statute—as interpreted and applied by the Nevada Supreme Court—requires judges to engage in improper fact-finding and invade the jury's provenance in violation of the Seventh Amendment's right to a civil jury trial. This Court need not allow the Seventh Amendment to linger, unincorporated.

I. *Sullivan* was wrong from the start and is ill-suited to address defamation in the modern day.

A. The Pre-*Sullivan* common law.

Justice White explained that in *Sullivan*, the Court "overturn[ed] 200 years of libel law." *Dun & Bradstreet, Inc.*, 472 U.S. at 766 (White, J., concurring in the judgment). In its immediate wake, individuals began to grasp *Sullivan*'s implications. As Lester Markel, a principal editor of the New York Times during the *Sullivan* saga, worried, "we may be opening the way to complete irresponsibility in journalism." A. Lewis, Make No Law: The Sullivan Case and the First Amendment 219 (1991). His reticence was understandable; before *Sullivan*, publishers often celebrated defamation verdicts

as necessary to ensure journalists engaged in thoughtful review and fact-checking before publishing an article.[6] *Id.* at 227 (recounting instances of a pre-*Sullivan* press celebrating libel judgments as restoring a cautious media). After all, as this Court recognized, "the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Gertz*, 418 U.S. at 344 n.9.

Mr. Markel's concerns reflected the well-established libel law before *Sullivan*'s seismic shift. Indeed, "liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability." *Herbert v. Lando*, 441 U.S. 153, 158 (1979). "The accepted view" was defamation liability did not "abridge[] freedom of speech or freedom of the press, and a majority of jurisdictions made publishers liable civilly for their defamatory publications *regardless of their intent*." *Id.* at 158-59 (emphasis added). Or as Justice Story aptly explained, "the liberty of the press do[es] not authorize malicious and injurious defamation." *Dexter v. Spear*, 7 F. Cas. 624, 624 (CCDRI 1825).

This rule long predated the Founding. Blackstone summarized: while "[e]vey freeman has an undoubted right to lay what sentiments he pleases before the public," he "must take the consequences of his own temerity" should

6. That's if newspapers paid anything in libel judgments. For example, the Baltimore American claimed that it paid only $500 in libel damages despite plaintiffs seeking $2 million in libel damages. Samantha Barbas, *The Press and Libel Before* New York Times v. Sullivan, 44 COLUM. J.L. & ARTS 511, 521 (2021). Similarly, the Associated Press bragged that libel judgments cost "less than the expenditure for lead pencils." *Id.*

he publish falsehoods. 4 W. Blackstone, Commentaries on the Laws of England 151-52 (1769). The Founders took a similar view. As Thomas Jefferson explained, the First Amendment simply provided that "[t]he people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty or reputation of others." F. Mott, Jefferson and the Press 14 (1943).

The Founders understood that the First Amendment merely precluded pre-publishing restraints: it did not abrogate the common-law of defamation. As James Wilson—a soon-to-be justice of this Court—described the First Amendment at the Pennsylvania ratifying convention:

> I presume it was not in the view of the honorable gentleman to say that there is no such a thing as a libel, or that the writers of such ought not to be punished. The idea of the liberty of the press is not carried so far as this in any country. What is meant by the liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.

2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 449 (J. Elliot ed., 1836).

And as Justice Thomas has pointed out, pre-*Sullivan* defamation law did not increase a public figure's burden

in defamation actions. Rather, it "deemed libels against public figures to be, if anything, *more* serious and injurious than ordinary libels." *McKee*, 139 S. Ct. at 679 (emphasis in original).

Historically, "[w]ords also tending to scandalize a magistrate, or person in a public trust, *are reputed more highly injurious than when spoken of a private man*." 3 W. Blackstone, Commentaries on the Laws of England 124 (1769) (emphasis added). Defamation of public officials was considered "'most dangerous to the people, and deserv[ing of] punishment, because the people may be deceived and reject the best citizens to their great injury, and it may be to the loss of their liberties.'" M. Newell, Defamation, Libel and Slander 533 (1890) (quoting *Commonwealth v. Clap*, 4 Mass. 163, 169-70 (1808)).

Early American courts recognized as much. For instance, the Pennsylvania Supreme Court explained when interpreting its analogous constitutional provision, which provided that "the freedom of the press shall not be restrained,"[7]:

> The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society, to inquire into the motive of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which

7. Pa. Const. of 1776, art. XII, *reprinted in* 5 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 3083 (F. Thorpe ed., 1909).

> are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity.

Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788).

And this Court long recognized the insidious nature of defamatory remarks and that, originally understood, the freedom of press did not protect libel. "[T]he common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715 (1931). Indeed, "it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public." *Id.* Thus, libel remained one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942); *see also Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952) ("In the first decades after the adoption of the Constitution . . . nowhere was there any suggestion that the crime of libel be abolished.").

As a result, public officials and public figures brought civil libel suits for unprivileged statements without having to show actual malice. *See*, *e.g.*, *Root v. King*, 7 Cow. 613, 628 (N.Y. 1827) (lieutenant governor); *White v. Nicholls*, 3 How. 266, 291 (1845) (customs collector); *Hamilton v. Eno*, 81 N.Y. 116, 126 (N.Y. 1880) (assistant health inspector); *Royce v. Maloney*, 5 A. 395, 400 (Vt. 1886) (chief judge and chancellor); *Wheaton v. Beecher*, 33 N.W. 503, 505-06

(Mich. 1887) (candidate for city comptroller); *Prosser v. Callis*, 19 N.E. 735, 737 (Ind. 1889) (county auditor).

In sum, the law before *Sullivan* was clear, as Mr. Markel explained, media "publish[ed] the truth, if there's an occasional error we lose and that's one of the vicissitudes of life." LEWIS, *supra*, at 107.

B. The ahistorical change starts with *Sullivan* and continues.

Despite this Nation's clear history and tradition, the *Sullivan* court posited that it was "writing upon a clean slate," 376 U.S. at 299 (Goldberg, J., concurring in result), free to "substantial[ly] abridge[]" the common law of libel, *Gertz*, 418 U.S. at 343. Unmoored from history, the *Sullivan* court held that public officials—meaning government officials—must show "actual malice" to recover in defamation actions. 376 U.S. at 279-80. This rule was driven solely by policy considerations: that the free flow of information necessary for the public to make informed political decisions required the Court to protect some falsehoods. *See generally id.* at 268-83.

This policy-based reasoning expanded in *Curtis Publishing Co.* There, the Court held that non-governmental "public figures" must also show actual malice in defamation cases. 388 U.S. at 155. And just like *Sullivan*, the *Curtis Publishing Co.* court relied on policy, not history. It simply declared that public figures have "sufficient access to the means of counterargument" in the public sphere to "expose . . . the falsehood" of the statements such that public figures must also satisfy the actual-malice standard. *See id.* at 154-55. But, as the Court

later recognized, the "truth rarely catches up with a lie." *Gertz*, 418 U.S. at 344 n.9.

These changes were drastic. *Sullivan* "overturn[ed] 200 years of libel law." *Dun & Bradstreet, Inc.*, 472 U.S. at 766 (White, J., concurring in the judgment). Even Justice White, a member of the *Sullivan* majority, later recognized that "there are wholly insufficient grounds for scuttling the libel laws of the states in such wholesale fashion, to say nothing of depreciating the reputation interest of ordinary citizens and rendering them powerless to protect themselves." *Gertz*, 418 U.S. at 370 (White, J., dissenting).

These changes were divorced from history. As noted First Amendment scholar Rodney A. Smolla explained, "[i]f Blackstone's view of free speech was the real original meaning of the First Amendment, then arguably 90 percent of modern free speech jurisprudence—which goes well beyond Blackstone's prohibition against prior restraints—is intellectually dishonest and historically illegitimate." Rodney A. Smolla, Free Speech in an Open Society 32 (1992). Or, as Justice Thomas put it, "*New York Times* and the Court's decisions extending it were policy-drive decisions masquerading as constitutional law" that disregarded the understanding of those who enacted the First Amendment. *McKee*, 139 S. Ct. at 676 (Thomas, J., concurring in the denial of certiorari).

Sullivan and *Curtis Publishing Co.* are inconsistent with the First Amendment's history and tradition. Thus, they were wrong when they were decided and should be reconsidered.

C. *Sullivan* is not fit for the modern day.

What's more, as Justice Gorsuch has emphasized, *Sullivan* (and *Curtis Publishing Co.*) are not fit for the modern day.

Sullivan and its progeny rest primarily on two grounds. First, *Sullivan* decided that the First Amendment demanded breathing space and heightened protection to allow for the full exchange of ideas necessary for citizens to engage in democratic governance. 376 U.S. at 269-71 (collecting cases illustrating, among other things, that "public discussion is a political duty" and that free speech is essential "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

Second, the Court concluded the heightened standard on public officials (later extended to a variety of public figures) did not matter because they allegedly had, through their status, "sufficient access to the means of counterargument" to challenge the false or misleading information. *Curtis Publ'g Co.*, 388 U.S. at 155. But neither ground has stood the test of time.

1. The modern media environment, blessed by *Sullivan*, harms democracy by spreading vast amounts of misinformation or lies without consequence.

The modern media environment, buoyed by *Sullivan*'s standard, corrodes public discourse and weakens our democracy. "Since 1964 . . . our Nation's media landscape has shifted in ways few could have foreseen." *Berisha*,

141 S. Ct. at 2427 (Gorsuch, J., dissenting from the denial of certiorari). When *Sullivan* was decided, the press was "dominated" by "large companies" that "employ[ed] legions of investigative reporters, editors, and fact-checkers." *Id.* Yet now, with the advance of the internet, "virtually anyone in this country can publish virtually anything for immediate consumption virtually anywhere in the world." *Id.* The rise of social media dramatically changed the landscape: As one prominent personality declared to the (social media) world, "You are the media now. [Legacy media corporations] are the past." Elon Musk (@elonmusk), X (Dec. 8, 2024, 9:11 PM), https://x.com/elonmusk/status/1865987535563903234; *see also* David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 Ohio St. L.J. 759, 803 (2020) (noting that in 2020 there was close to 4 billion active social media users).

Social media undercuts the central tenets of *Sullivan*. Social media outlets "are exponentially more likely to sensationalize and use sophisticated algorithms to separate users by ideology, amplifying one side of a story and creating echo-chambers laced with falsehoods, with scant fact-checking, let alone contextualizing." Logan, *supra*, at 800. These fast spreading lies "sow confusion and erode trust." *Id.* at 804-05 (citing Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 Wash. L. Rev. 445, 472 (2012)).

The constant siege of misinformation and outright falsities "erode belief in anything" and "undermin[es] the very possibility of a socially validated reality." *Id.* at 805. Or, in other words, the prevalence of lies, blessed by the S*ullivan* standard, "creat[es] a nihilistic

and disengaged electorate that is unable to appreciate accurate information when it is presented to them," *id.*, threatening the foundation of our Republic, Benjamin Barron, *A Proposal to Rescue* New York Times v. Sullivan *by Promoting a Responsible Press*, 57 Am. U. L. Rev. 73, 101 (2007) ("[A] press that lies to the public or negligently publishes falsehoods vitiates its role in facilitating democracy-enhancing speech and thereby harms the populace's ability to effectively govern itself."); *see also* Hannah Arendt, The Origins of Totalitarianism 474 (1966) ("The ideal subject of totalitarian rule is not the convinced Nazi or convinced Communist, but people for whom the distinction between fact and fiction . . . and the distinction between true and false . . . no longer exist.").

Chief Justice Roberts too has recognized the harm that social media and misinformation pose to modern society. Chief Justice John Roberts, 2019 Year-End Report on the Federal Judiciary (2019) ("In our age, when social medica can instantly spread rumor and false information on a grand scale, the public's need to understand our government, and the protections it provides, is ever more vital.").

Sullivan and *Curtis Publishing Co.* also encourage rampant falsehoods. Under *Sullivan*, "[i]t seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy." *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from the denial of certiorari) (emphasis in original). These media tactics, as well as financial incentives stack the deck "against those with traditional (and expensive) journalistic standards and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth." *Id.*

As this case illustrates, even those companies that purport to maintain "traditional (and expensive) journalistic standards" abuse *Sullivan*. Respondents published an article accusing Wynn of "rape" some forty years prior within an hour of obtaining the citizens' complaint. 2 C.A. App. 265-67. They did not investigate the allegations, nor did they wait to obtain a statement from Wynn. *Id.* at 267-68. They simply published a provably false story, sanitized to prevent readers from questioning it.

In the end, "[w]hat started in 1964 with a decision to tolerate the occasional falsehood . . . has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable." *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from the denial of certiorari). It has become apparent—*Sullivan* and *Curtis Publishing Co.* are unsuited for the modern day and harm citizens' debate and faith in this Country. Gabriel R. Sanchez & Keesha Middlemass, *Misinformation is eroding the public's confidence in democracy*, Brookings (July 26, 2022), https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ (collecting sources documenting that "[o]ne of the drivers of decreased confidence in the political system has been the explosion of misinformation deliberately aimed at disrupting the democratic process."); *see also Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from the denial of certiorari) ("If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?").

2. In the modern environment, public figures are unable to effectively challenge false statements.

A public figure's purported ability to respond to defamatory or false statements is meaningless in today's media environment. Even later refuted, the lies "persist, and . . . belief in these and many other falsehoods appears to increase without regard to the actual truth of the matter." Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. Rev. 897, 898 (2010) (noting the continued belief that President Obama was born in Kenya, President Bush had advance notice of the September 11 attacks, AIDS was created by pharmaceutical companies to "reduce the size of the African and African American populations," and that the Holocaust is "a myth fabricated by Zionists and their supporters").

Indeed, "the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Gertz*, 418 U.S. at 394 (White, J., dissenting). And without judicial vindication, defamation plaintiffs cannot defend themselves against an unrepentant defamer.

This case is perfect example of these ills. Respondents refused to retract the story or offer an apology even though a court found the underlying statements to be "clearly fanciful or delusional, and therefore, clearly false and defamatory." App. 47a-48a. The allegations were, as Garcia Cano admitted, "crazy." 2 S.C. App. 342. Yet she rushed to publish the article because she was eager for a headline, believing that *Sullivan* would shield her defamatory statements.

The "persistent factual falsity should be an occasion for pause or embarrassment to the free speech tradition, and equally so for any country that has embraced strong protections for speech and press." Schauer, *supra*, at 898.

Neither the First Amendment nor democracy are served by this golden age of lies where someone may obtain functional immunity by libeling first and questioning never. This corrosive effect on public discourse need not be encouraged any longer.

II. Anti-SLAPP statutes violate the Seventh Amendment.

A. The Seventh Amendment, which protects a right to a civil jury trial on defamation claims, should be incorporated.

Through selective incorporation, the Bill of Rights only applies to States to the extent a specific right has been incorporated through the Fourteenth Amendment. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 758-59 (2010). This Court incorporates a right only if it "is fundamental to *our* scheme of ordered liberty" or is "'deeply rooted in this Nation's history and tradition.'" *Id.* at 767 (internal citations omitted) (emphasis in original) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

Over time, this Court has "eventually incorporated almost all of the provisions of the Bill of Rights." *id.* at 764, even those it previously concluded did not apply to the States, *see id.* at 766 (collecting cases) ("Employing this approach, the Court overruled earlier decisions in which

it had held that particular Bill of Rights guarantees or remedies did not apply to the States.").

Now only three rights remain unincorporated: (1) "the Third Amendment's protection against quartering of solders; (2) the Fifth Amendment's grand jury indictment requirement; [and] (3) the Seventh Amendment's right to a jury trial in civil cases."[8] *Id.* at 765 n.13.

The Seventh Amendment's Right to a Civil Jury Trial is fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition. This Court has recognized that

> [t]he right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. *A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.*

Jacob v. City of New York, 315 U.S. 752, 752-53 (1942) (emphasis added); *cf. Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 565 (1990)

8. The *McDonald* court also noted that the Sixth Amendment's right to a unanimous jury verdict and the Eighth Amendment's prohibition on excessive fines had not been incorporated. *McDonald*, 561 U.S. at 765 n.13. However, this Court has subsequently incorporated those rights. *See Ramos v. Louisiana*, 590 U.S. 83, 93 (2020) (incorporating the Sixth Amendment's unanimity jury verdict requirement); *Timbs v. Indiana*, 586 U.S. 146, 150 (2019) (incorporating the Eighth Amendment's Excessive Fines Clause).

("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

The right to a civil jury trial strongly influenced the adoption and ratification of the Constitution. The anti-Federalists challenged the Constitution for its failure to include a right to a civil jury trial. For example, Richard Henry Lee charged:

> The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation, as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of society; and to come forward, in turn, as the centinels and guardians of each other.

See Richard Henry Lee, *Letters of the Federal Farmer* in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, 277, 315-16 (Paul L. Ford ed., 1888).

The Federalists recognized the potency of this argument. Alexander Hamilton responded, "[t]he objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is *that relative to the want of a constitutional provision* for the trial by jury in civil cases." THE

FEDERALIST NO. 83 (Alexander Hamilton) (emphasis in original). Ultimately, even the Federalists agreed on the importance of the right to a civil jury trial. Hamilton continued, "[t]he friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury." *Id.* And when the Constitution was finally ratified, several States explicitly noted the importance of the right to a civil jury trial. *See*, *e.g.*, RATIFICATION OF THE CONSTITUTION BY THE STATE OF NORTH CAROLINA § 11 (Nov. 21, 1789) ("Resolved. . . . That in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.").

A right so fundamental to our ordered scheme of liberty, and deeply rooted in our Nation's history and tradition, that its omission nearly scuttled the adoption of the Constitution should not linger unincorporated.[9]

B. There is a split among state supreme courts regarding whether the application of the clear-and-convincing evidence standard in anti-SLAPP cases violates the right to a civil jury trial.

In *Wynn*, the Nevada Supreme Court held that the application of the clear and convincing standard to anti-

9. Even though this Court previously concluded the Seventh Amendment's civil jury requirement is not incorporated against the States, those decisions "long predate the era of selective incorporation," and this Court has consistently reversed those old lines of cases when applying the selective incorporation doctrine. *McDonald*, 561 U.S. at 765-66 & n.13.

SLAPP motions—often without any discovery[10]—does not violate the right to a civil jury trial. App. 11a-13a. Specifically, the court reasoned that because a public figure plaintiff must show clear and convincing evidence of actual malice at summary judgment, it does not violate the right to a jury trial to force a public figure plaintiff to show clear and convincing evidence of actual malice at the anti-SLAPP stage even though, depending on the State, little or no discovery has occurred. *See id.*

Further, the Nevada Supreme Court stated that it did not "replace the prima facie evidence standard; rather, the requirement that evidence of actual malice if viewed favorably could meet the clear and convincing standard is merely a part of the plaintiff's prima facie showing." App. 13a. Respectfully, despite the court's wordsmithing, it requires any public figure plaintiff to meet the clear and convincing evidence standard to survive an anti-SLAPP motion.

The Nevada Supreme Court's decision here creates a split among state court decisions on the issue. Both the

10. Nevada, like other States, requires an anti-SLAPP motion be promptly filed at the beginning of a case, and otherwise stays discovery absent court order. NRS 41.660(2) (noting an anti-SLAPP motion "must be filed within 60 days after service of the complaint"); NRS 41.660(4) (allowing limited discovery only "[u]pon a showing . . . that information necessary [to the motion or opposition] is in the possession of another party or a third party"); *see also* Dan Greenberg et al., *Anti-SLAPP Statutes: 2023 Report Card*, Institute for Free Speech (Nov. 2, 2023), https://www.ifs.org/anti-slapp-report/ ("But anti-SLAPP statutes generally have a procedural aspect that many conventional defenses lack—an opportunity for the defendant to file a motion that forces judicial consideration of certain issues at an early stage in litigation (known as an anti-SLAPP motion).").

Minnesota and Washington supreme courts have held that the application of the clear-and-convincing-evidence standard to anti-SLAPP motions violates the right to a jury trial.

The Washinton Supreme Court has reasoned that the application of the clear-and-convincing-evidence standard "invades the jury's essential role of deciding debatable questions of fact," and thus violates the right to a jury trial.[11] *Davis v. Cox*, 351 P.3d 862, 874 (Wash. 2015), *abrogated in part on other grounds by Maytown Sand & Gavel, LLC v. Thurston Cnty.*, 423 P.3d 223 (Wash. 2018).

The Minnesota Supreme Court agrees with Washington. It has explained that the application of the clear-and-convincing-evidence standard violates the right to a civil jury trial by invading the jury's fact-finding role. *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 636 (Minn. 2017).

Such a split over a fundamental right must be resolved. Currently, 34 States and the District of Columbia have anti-SLAPP statutes. *Anti-SLAPP Legal Guide*, *supra* note 5. And while the States have differing statutes, the actual malice standard (and its associated burden of proof) must be applied consistently across the Nation.

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11. While *Davis* focused on the Washington constitution's right to a jury trial, that right is similar to that under the Seventh Amendment. *Compare* WASH. CONST. art. 1, § 21 ("The right of trial by jury shall remain inviolate. . . ."), *with* U.S. CONST. amend. VII ("In suits at common law, . . . , the right of trial by jury shall be preserved. . . .").

Accordingly, this Court should resolve the split among State courts and clarify that applying the clear and convincing evidence standard at the anti-SLAPP stage—with or without discovery—violates the Seventh Amendment right to a civil jury trial. This Court should not allow States to infringe on this fundamental right.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 31, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED SEPTEMBER 5, 2024

SUPREME COURT OF NEVADA

No. 85804

STEVE WYNN, AN INDIVIDUAL,

Appellant,

vs.

THE ASSOCIATED PRESS, A FOREIGN CORPORATION; AND REGINA GARCIA CANO, AN INDIVIDUAL,

Respondents.

September 5, 2024, Filed

Appeal from a district court order granting an anti-SLAPP special motion to dismiss. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Affirmed.

BEFORE THE SUPREME COURT, EN BANC.

Appendix A

OPINION[1]

By the Court, PARRAGUIRRE, J.:

In designing its anti-SLAPP statutes, Nevada recognized the essential role of the First Amendment rights to petition the government for a redress of grievances and to free speech, and the danger posed by civil claims aimed at chilling the valid exercise of those rights. 1997 Nev. Stat., ch. 387, at 1363-64 (preamble to bill enacting anti-SLAPP statutes). To limit that chilling effect, the statutes provide defendants with an opportunity—through a special motion to dismiss—to obtain an early and expeditious resolution of a meritless claim for relief that is based on protected activity. NRS 41.650; NRS 41.660(1)(a). District courts resolve such motions based on the two-prong framework laid out in NRS 41.660(3). Under the first prong, the court must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If the moving party makes this initial showing, the burden shifts to the plaintiff under the second prong to show "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

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1. Having considered the petition for en banc reconsideration in this matter, as well as the response thereto, we have determined that reconsideration is warranted. *See* NRAP 40A(a). Accordingly, the petition for en banc reconsideration is granted. This court's previous opinion in this matter, *Wynn v. Associated Press*, 140 Nev., Adv. Op. No. 6, 542 P.3d 751 (Feb. 8, 2024) is hereby withdrawn.

In this appeal, we consider the proper burden a public figure must carry to show a probability of prevailing on a defamation claim at the second prong of the anti-SLAPP framework. We clarify that, under the second prong, a public figure defamation plaintiff must provide sufficient evidence for a jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice. Because respondents met their respective burden under prong one, and the public figure plaintiff in the underlying defamation action failed to meet his burden under prong two, we affirm the district court's order granting respondents' renewed special motion to dismiss.

FACTS AND PROCEDURAL HISTORY

This appeal arises out of a defamation claim brought by appellant Steve Wynn—a prominent figure in Nevada gaming and politics—against respondents the Associated Press and one of its reporters, Regina Garcia Cano (collectively, AP Respondents).[2] Following national reports alleging years of misconduct by Wynn, Garcia Cano obtained from the Las Vegas Metropolitan Police Department (LVMPD) redacted copies of two separate citizens' complaints alleging sexual assault by Wynn in the 1970s. She wrote an article describing the allegations in the complaints, one of which alleged that Steve Wynn had raped the complainant three times at her Chicago apartment between 1973 and 1974, resulting

2. This case returns to us on appeal following our reversal of the district court's grant of AP Respondents' motion to dismiss based on the fair report privilege. *See generally Wynn v. Associated Press*, 136 Nev. 611, 475 P.3d 44 (2020).

in a pregnancy and the birth of a child in a gas station bathroom under unusual circumstances (the Chicago complaint).[3] The Associated Press published the article.

Wynn filed a defamation complaint against AP Respondents, asserting that the allegations of sexual assault contained in the Chicago complaint were false and improbable on their face, and that AP Respondents published the article with actual malice. AP Respondents filed a special motion to dismiss pursuant to Nevada's anti-SLAPP statutes. Following limited discovery on the issue of actual malice, the district court granted a renewed version of AP Respondents' special motion to dismiss, finding that the article was a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern and that Wynn failed to meet his burden of establishing a probability of prevailing on the merits of his claim. Wynn now appeals that decision. He argues that the district court, erred in finding both that AP Respondents met their burden under the first prong and that he failed to meet his burden under the second prong. Specifically, he argues that the district court misapplied the actual malice standard relevant to public figures under the second prong.

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3. Following a bench trial on a defamation claim brought by Wynn against the complainant, a district court found that the Chicago complaint allegations were, in fact, false. *Wynn v. Associated Press*, No. A-18-772715-C (Nev. 8th Jud. Dist. Ct. Mar. 25, 2020) (Findings of Fact, Conclusions of Law, and Judgment).

Appendix A

DISCUSSION

"We review a decision to grant or deny an anti-SLAPP special motion to dismiss de novo." *Smith v. Zilverberg*, 137 Nev. 65, 67, 481 P.3d 1222, 1226 (2021). As explained above, the anti-SLAPP framework demands a two-prong analysis when considering a special motion to dismiss. The first prong requires the court to "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If the moving party makes this initial showing, the burden shifts to the plaintiff under the second prong to show "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). Because Wynn challenges the district court's rulings under both prongs, we will discuss each in turn.

AP Respondents met their burden under the first prong

To meet the burden under the first prong, the defendant must show "that the comments at issue fall into one of the four categories . . . enumerated in NRS 41.637." *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020). The relevant category here is found under NRS 41.637(4), which protects a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood." Wynn argues that the district court erred in concluding that the article by AP Respondents satisfies this category.

Specifically, he asserts that the article does not discuss an issue of public interest and that it was not truthful or made without knowledge of its falsehood.

In *Shapiro v. Welt*, we adopted guidelines for district courts to consider in distinguishing issues of private and public interest.[4] 133 Nev. 35, 39, 389 P.3d 262, 268 (2017). Here, the article and its surrounding context point to an issue of clear public interest. The article discusses two new allegations of sexual misconduct by

4. Those guidelines are:

> (1) "public interest" does not equate with mere curiosity;
>
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro, 133 Nev. at 39, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)).

Wynn on the heels of national reports alleging a pattern of misconduct spanning decades. In the weeks preceding publication of this article, Wynn resigned as CEO of Wynn Resorts and as Finance Chair of the Republican National Committee due to the national reports of alleged misconduct; and contemporaneously, Wynn Casinos, the Nevada Gaming Control Board, and other regulators launched investigations into his conduct. The allegations undoubtedly affected his public business and political affairs, and additional reports of sexual misconduct would be of concern to a substantial number of people, including consumers, voters, and the business and governmental entities investigating precisely this kind of behavior. The public had an interest in understanding the history of misconduct alleged to have been committed by one of the most recognized figures in Nevada, and the article directly relates to that interest.

Wynn further argues that, even if the article relates to an issue of public interest, the district court erred in concluding the communication was published without knowledge of its falsehood (i.e., that it was published in "good faith," NRS 41.637; NRS 41.660(3)(a)). "[A]n affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record." *Stark*, 136 Nev. at 43, 458 P.3d at 347. Here, AP Respondents filed such an affidavit.

In rebuttal, Wynn points to what he claims to be contradictory evidence in the record. Most notably, he

asserts that the Chicago complaint was absurd on its face, and therefore, AP Respondents must have known it was false. He also points to a text sent by Garcia Cano to a coworker shortly after reviewing the complaint in which she wrote "[o]ne of [the complaints] is crazy." However, we agree with the district court that this evidence is not sufficient to establish, by a preponderance of the evidence, that AP Respondents were aware of the complaint's falsity. While the narrative contained in the complaint is unusual, it was not so unrealistic as to put AP Respondents on notice as to its falsity, and Garcia Cano's characterization of the complaint as "crazy" is not persuasive evidence that she knew it to be false.[5] Importantly, because the identifying information in the complaint received by Garcia Cano was redacted, it would have been fruitless for AP Respondents to investigate further at the time, and nothing in LVMPD's response to the unredacted complaint would have put AP Respondents on notice that the story was false.

Therefore, we agree with the district court that the article was a good faith communication in furtherance of the right to free speech in direct connection with an issue of public importance. Because AP Respondents met their burden under the first prong, we now turn to the second prong of the anti-SLAPP analysis, first discussing the burden required of a public figure plaintiff to establish actual malice.

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5. We have considered the additional evidence Wynn points to in this regard and are not persuaded that it demonstrates that AP Respondents knew the complaint was false.

Appendix A

A public figure plaintiff's burden under the second prong

As noted, under the second prong of the relevant framework, the court must determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim. NRS 41.660(3)(b). Because Wynn is a public figure, to prevail at trial on his defamation claim, he must prove by clear and convincing evidence that the publication at issue was made with *actual malice*.[6] *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 82, 90 (2002). Wynn argues that his evidence of actual malice at this stage need not meet the clear and convincing standard in order to establish a probability of prevailing on his claim because prong two merely requires a "prima facie" probability of prevailing on the claim. AP Respondents, however, assert that Wynn's evidence of actual malice must meet the clear and convincing standard. We have never directly discussed a plaintiff's burden under the second prong when that prong requires "prima facie" evidence of success but the plaintiff's claim requires "clear and convincing" evidence to prevail at trial.

We have described the second prong of an anti-SLAPP analysis as requiring the plaintiff to show that his claim

6. To prevail on his defamation claim, Wynn is also required to show "(1) a false and defamatory statement by [the] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault . . . ; and (4) actual or presumed damages." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). However, the only element reasonably in controversy on appeal is Wynn's ability to establish actual malice.

has at least "minimal merit." *Abrams v. Sanson*, 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020). Minimal merit exists when the plaintiff makes "a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 123 Cal. Rptr. 2d 19, 50 P.3d 733, 739 (Cal. 2002) (quoting *Matson v. Dvorak*, 40 Cal. App. 4th 539, 46 Cal. Rptr. 2d 880, 886 (Ct. App. 1995)). But a favorable judgment in a public figure defamation claim may only be sustained if the evidence is sufficient for the jury, *by clear and convincing evidence*, to infer that the publication was made with actual malice. *Pegasus*, 118 Nev. at 721-22, 57 P.3d at 92.

The Legislature has declared that "[w]hen a plaintiff must demonstrate a probability of success of prevailing on a claim pursuant to NRS 41.660, . . . the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's [anti-SLAPP] law." NRS 41.665(2). Thus, we turn to California law to resolve the issue at hand.

California caselaw regarding a plaintiff's burden of putting forth prima facie evidence supports the conclusion that, under the second prong, a plaintiff must provide evidence that would be sufficient for a jury, *by clear and convincing evidence*, to reasonably infer that the publication was made with actual malice. *See, e.g., Padres L.P. v. Henderson*, 8 Cal. Rptr. 3d 584, 594 (Ct. App. 2003) ("The plaintiff must make a prima facie showing of facts that would be sufficient to sustain a favorable judgment under the applicable evidentiary standard.");

Robertson v. Rodriguez, 42 Cal. Rptr. 2d 464, 470 (Ct. App. 1995) (holding that where an element of a claim must be proven by clear and convincing evidence at trial, the sufficiency of the plaintiff's prima facie showing on an anti-SLAPP motion is determined with the higher standard of proof in mind); *Looney v. Superior Ct.*, 20 Cal. Rptr. 2d 182, 192-93 (Ct. App. 1993) (concluding that at the "summary judgment [stage] in a case where plaintiff's ultimate burden of proof will be by clear and convincing evidence . . . the evidence and all inferences which can reasonably be drawn therefrom must meet that higher standard" (internal quotation marks omitted)).

We therefore hold that to demonstrate by prima facie evidence a probability of success on the merits of a public figure defamation claim, the plaintiff's evidence must be sufficient for a jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice. In other words, while the plaintiff at this prong must prove only that their claim has minimal merit, a public figure defamation claim does not have minimal merit, as a matter of law, if the plaintiff's evidence of actual malice would not be sufficient—even if credited—to sustain a favorable verdict under the clear and convincing standard.

Wynn argues that requiring him to meet a clear and convincing evidence standard at this stage of the proceedings would violate his constitutional right to a civil jury trial. *See Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 635 (Minn. 2017) (holding that

a portion of Minnesota's anti-SLAPP law violated the constitutional right to a jury trial because it required the nonmoving party to produce "clear and convincing [evidence] . . . that the moving party's acts are not immune" (internal quotation marks omitted)). To be sure, in *Taylor v. Colon*, we previously upheld the second prong of Nevada's anti-SLAPP statutes as constitutional, partly because the prima facie standard does not interfere with a jury's fact-finding abilities. 136 Nev. 434, 439, 482 P.3d 1212, 1216 (2020).[7] But importantly, "whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989). And even outside of the anti-SLAPP context, "[t]he question of actual malice 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." *Pegasus*, 118 Nev. at 721-22, 57 P.3d at 92 (emphases added). Because actual malice is a question that does not go to a jury unless the evidence is sufficient for a jury to conclude that it meets the clear and convincing standard, requiring the plaintiff's evidence to satisfy that showing at the second prong of an anti-SLAPP

7. In a previous version of NRS 41.660, plaintiffs bore a clear and convincing burden of proof standard at the second prong. The Legislature amended that statute in 2015 to require only prima facie evidence. 2015 Nev. Stat., ch. 428, § 13, at 2455. Our holding does not rewrite the statute to return the plaintiff's burden of proof to a clear and convincing standard; it merely recognizes that evaluating whether plaintiff has presented prima facie evidence of actual malice must take into account the clear and convincing standard required to prevail on this type of claim.

analysis does not deny a plaintiff their constitutional right to a civil jury trial. Our holding in *Taylor* did not preclude a requirement that when an element of a particular claim requires the plaintiff to satisfy a clear and convincing evidence standard at trial, the plaintiff's evidence at the second prong must be sufficient for a jury to conclude that standard has been satisfied if the evidence is credited. In holding today that such a requirement exists, we do not replace the prima facie evidence standard; rather, the requirement that evidence of actual malice if viewed favorably could meet the clear and convincing standard is merely a part of the plaintiff's prima facie showing.

Wynn failed to meet his burden under the second prong

"[A]ctual malice is proven when a statement is published with knowledge that it was false or with reckless disregard for its veracity." *Pegasus*, 118 Nev. at 722, 57 P.3d at 92. "Reckless disregard for the truth may be found when the 'defendant entertained serious doubts as to the truth of the statement, but published it anyway.'" *Id.* (quoting *Posadas v. City of Reno*, 109 Nev. 448, 454, 851 P.2d 438, 443 (1993)).

This court has routinely looked to California courts for guidance in the area of anti-SLAPP law. *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019). California courts treat this prong as they do a motion for summary judgment; thus, under comparable Nevada law regarding motions for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in

[the] light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).[8] Here, even when the evidence is considered in the light most favorable to him, Wynn has failed to present sufficient evidence to sustain a favorable verdict finding actual malice. His attempts to establish AP Respondents' knowledge of falsity or reckless disregard for the veracity of the complaint fall short of a prima facie showing that could meet the heightened clear and convincing standard. *See Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890) (describing clear and convincing evidence as satisfactory proof that is "so strong and cogent as to satisfy the mind and conscience of a common man").

Similar to his arguments under prong one, Wynn argues that the Chicago complaint was implausible and points to the failure by AP Respondents to investigate further before publishing as evidence of actual malice. Again, while the complaint contained unusual elements, that does not necessarily mean that the gist of the allegations reported by AP Respondents—that Wynn sexually assaulted a woman in Chicago in the 1970s—was untrue or that AP Respondents held serious doubt about

8. We note that prior to 2013, NRS 41.660 required the district court to treat a special motion to dismiss as a motion for summary judgment. *See* 2013 Nev. Stat., ch. 176, § 3, at 623. Though the Legislature removed this language in 2013, subsequent amendments in 2015 restructured the statute in a way that once again tracks the procedural standards that apply to a motion for summary judgment. *See Coker*, 135 Nev. at 10, 432 P.3d at 748 (recognizing that "[a]s amended, the special motion to dismiss again functions like a summary judgment motion procedurally").

those allegations. As explained, because all identifying information in the complaint was redacted, it was not possible to meaningfully investigate further as long as that information was unknown. Wynn again points to Garcia Cano's text describing the complaint as "crazy" to establish her subjective doubt. But even considered in the light most favorable to Wynn, calling the complaint "crazy" could not meet the required clear and convincing standard that Garcia Cano believed the allegation to be false or that she recklessly disregarded whether it was true. Wynn also attempts to establish reckless disregard by highlighting AP Respondents' motivation to publish the story quickly. But news organizations often have a motivation to publish stories before their competitors, and in the absence of serious doubt regarding the veracity of the statement, such a desire could not establish a reckless disregard for the truth.[9] *Pegasus*, 118 Nev. at 722, 57 P.3d at 92.

This evidence would not be sufficient for a jury to find, by clear and convincing evidence, that AP Respondents published the story with knowledge that it was false or with reckless disregard for its truth.[10] Because Wynn did

9. At most, the evidence could show that AP Respondents may have held *some* doubt as to the veracity of the complaint. But that does not constitute a prima facie showing for actual malice, which requires a finding the defendant held *serious* doubt. *See Wynn v. Smith*, 117 Nev. 6, 17, 16 P.3d 424, 431 (2001) (reversing a jury verdict finding actual malice because the jury instructions omitted "serious" before "doubt," leading the jury to apply a lower standard).

10. Wynn points to some additional evidence of actual malice not discussed in this opinion, but we are not convinced that it is sufficient to meet his burden under this prong.

not produce sufficient evidence of actual malice, he failed to establish with prima facie evidence a probability of prevailing on his claim, requiring dismissal.

CONCLUSION

Nevada's anti-SLAPP statutes were designed to limit precisely the type of claim at issue here, which involves a news organization publishing an article in a good faith effort to inform their readers regarding an issue of clear public interest. AP Respondents met their burden under the first prong to establish, by a preponderance of the evidence, that their article was a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern. Wynn, on the other hand, 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 that is applicable to his public figure defamation claim. We therefore affirm the district court's order granting the renewed special motion to dismiss the complaint.

/s/ Parraguirre, J.
Parraguirre

We concur:

/s/ Cadish, C.J.
Cadish

/s/ Stiglich, J.

Appendix A

Stiglich

/s/ Pickering, J.
Pickering

/s/ Herndon, J.
Herndon

/s/ Lee, J.
Lee

/s/ Bell, J.
Bell

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF NEVADA, FILED FEBRUARY 8, 2024

IN THE SUPREME COURT
OF THE STATE OF NEVADA

No. 85804
140 Nev., Advance Opinion

STEVE WYNN, AN INDIVIDUAL,

Appellant,

vs.

THE ASSOCIATED PRESS,
A FOREIGN CORPORATION; AND
REGINA GARCIA CANO, AN INDIVIDUAL,

Respondents.

Filed February 8, 2024

Appeal from a district court order granting an anti-SLAPP special motion to dismiss. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Affirmed.

BEFORE THE SUPREME COURT, HERNDON, LEE, and PARRAGUIRRE, JJ.

Appendix B

OPINION

By the Court, PARRAGUIRRE, J.:

In designing its anti-SLAPP statutes, Nevada recognized the essential role of the First Amendment rights to petition the government for a redress of grievances and to free speech, and the danger posed by civil claims aimed at chilling the valid exercise of those rights. 1997 Nev. Stat., ch. 387, at 1363-64 (preamble to bill enacting anti-SLAPP statutes). To limit that chilling effect, the statutes provide defendants with an opportunity—through a special motion to dismiss—to obtain an early and expeditious resolution of a meritless claim for relief that is based on protected activity. NRS 41.650; NRS 41.660(1)(a). District courts resolve such motions based on the two-prong framework laid out in NRS 41.660(3). Under the first prong, the court must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If the moving party makes this initial showing, the burden shifts to the plaintiff under the second prong to show "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

In this appeal, we consider the proper burden a public figure must carry to show a probability of prevailing on a defamation claim at the second prong of the anti-SLAPP framework. We clarify that, under the second prong, a public figure defamation plaintiff must provide sufficient evidence for a jury, by clear and convincing evidence,

to reasonably infer that the publication was made with actual malice. Because respondents met their respective burden under prong one, and the public figure plaintiff in the underlying defamation action failed to meet his burden under prong two, we affirm the district court's order granting respondents' renewed special motion to dismiss.

FACTS AND PROCEDURAL HISTORY

This appeal arises out of a defamation claim brought by appellant Steve Wynn—a prominent figure in Nevada gaming and politics—against respondents The Associated Press and one of its reporters, Regina Garcia Cano (collectively, AP Respondents).[1] Following national reports alleging years of misconduct by Wynn, Garcia Cano obtained from the Las Vegas Metropolitan Police Department (LVMPD) redacted copies of two separate citizens' complaints alleging sexual assault by Wynn in the 1970s. She wrote an article describing the allegations in the complaints, one of which alleged that Steve Wynn had raped the complainant three times at her Chicago apartment between 1973 and 1974, resulting in a pregnancy and the birth of a child in a gas station bathroom under unusual circumstances (the Chicago complaint).[2] The Associated Press published the article.

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1. This case returns to us on appeal following our reversal of the district court's grant of AP Respondents' motion to dismiss based on the fair report privilege. *See generally Wynn v. The Associated Press,* 136 Nev. 611, 475 P.3d 44 (2020).

2. Following a bench trial on a defamation claim brought by Wynn against the complainant, a district court found that the

Appendix B

Wynn filed a defamation complaint against AP Respondents, asserting that the allegations of sexual assault contained in the Chicago complaint were false and improbable on their face, and that AP Respondents published the article with actual malice. AP Respondents filed a special motion to dismiss pursuant to Nevada's anti-SLAPP statutes. Following limited discovery on the issue of actual malice, the district court granted a renewed version of AP Respondents' special motion to dismiss, finding that the article was a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern and that Wynn failed to meet his burden of establishing a probability of prevailing on the merits of his claim. Wynn now appeals that decision. He argues that the district court erred in finding both that AP Respondents met their burden under the first prong and that he failed to meet his burden under the second prong. Specifically, he argues that the district court misapplied the actual malice standard relevant to public figures under the second prong.

DISCUSSION

"We review a decision to grant or deny an anti-SLAPP special motion to dismiss de novo." *Smith v. Zilverberg,* 137 Nev. 65, 67, 481 P.3d 1222, 1226 (2021). As explained above, the anti-SLAPP framework demands a two-prong analysis when considering a special motion to dismiss. The first prong requires the court to "[d]etermine whether

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Chicago complaint allegations were, in fact, false. *Wynn v. The Associated Press,* No. A-18-772715-C (Nev. 8th Jud. Dist. Ct. Mar. 25, 2020) (Findings of Fact, Conclusions of Law, and Judgment).

the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If the moving party makes this initial showing, the burden shifts to the plaintiff under the second prong to show "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b). Because Wynn challenges the district court's rulings under both prongs, we will discuss each in turn.

AP Respondents met their burden under the first prong

To meet the burden under the first prong, the defendant must show "that the comments at issue fall into one of the four categories . . . enumerated in NRS 41.637." *Stark v. Lackey,* 136 Nev. 38, 40, 458 P.3d 342, 345 (2020). The relevant category here is found under NRS 41.637(4), which protects a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood." Wynn argues that the district court erred in concluding that the article by AP Respondents satisfies this category. Specifically, he asserts that the article does not discuss an issue of public interest and that it was not truthful or made without knowledge of its falsehood.

In *Shapiro v. Welt,* we adopted guidelines for district courts to consider in distinguishing issues of private and

public interest.[3] 133 Nev. 35, 39, 389 P.3d 262, 268 (2017). Here, the article and its surrounding context point to an issue of clear public interest. The article discusses two new allegations of sexual misconduct by Wynn on the heels of national reports alleging a pattern of misconduct spanning decades. In the weeks preceding publication of this article, Wynn resigned as CEO of Wynn Resorts and as Finance Chair of the Republican National Committee due to the national reports of alleged misconduct; and contemporaneously, Wynn Casinos, the

3. Those guidelines are:

> (1) "public interest" does not equate with mere curiosity;
>
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro, 133 Nev. at 39, 389 P.3d at 268 (quoting *Piping RockPartners, Inc. v. David Lerner Assocs., Inc.,* 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013)).

Nevada Gaming Control Board, and other regulators launched investigations into his conduct. The allegations undoubtedly affected his public business and political affairs, and additional reports of sexual misconduct would be of concern to a substantial number of people, including consumers, voters, and the business and governmental entities investigating precisely this kind of behavior. The public had an interest in understanding the history of misconduct alleged to have been committed by one of the most recognized figures in Nevada, and the article directly relates to that interest.

Wynn further argues that, even if the article relates to an issue of public interest, the district court erred in concluding the communication was published without knowledge of its falsehood (i.e., that it was published in "good faith," NRS 41.637; NRS 41.660(3)(a)). "[A]n affidavit stating that the defendant believed the communications to be truthful or made them without knowledge of their falsehood is sufficient to meet the defendant's burden absent contradictory evidence in the record." *Stark*, 136 Nev. at 43, 458 P.3d at 347. Here, AP Respondents filed such an affidavit.

In rebuttal, Wynn points to what he claims to be contradictory evidence in the record. Most notably, he asserts that the Chicago complaint was absurd on its face, and therefore, AP Respondents must have known it was false. He also points to a text sent by Garcia Cano to a coworker shortly after reviewing the complaint in which she wrote "[o]ne of [the complaints] is crazy." However, we agree with the district court that this evidence is not sufficient to establish, by a preponderance of the evidence,

that AP Respondents were aware of the complaint's falsity. While the narrative contained in the complaint is unusual, it was not so unrealistic as to put AP Respondents on notice as to its falsity, and Garcia Cano's characterization of the complaint as "crazy" is not persuasive evidence that she knew it to be false.[4] Importantly, because the identifying information in the complaint received by Garcia Cano was redacted, it would have been fruitless for AP Respondents to investigate further at the time, and nothing in LVMPD's response to the unredacted complaint would have put AP Respondents on notice that the story was false.

Therefore, we agree with the district court that the article was a good faith communication in furtherance of the right to free speech in direct connection with an issue of public importance. Because AP Respondents met their burden under the first prong, we now turn to the second prong of the anti-SLAPP analysis, first discussing the burden required of a public figure plaintiff to establish actual malice.

A public figure plaintiff's burden under the second prong

As noted, under the second prong of the relevant framework, the court must determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on the claim. NRS 41.660(3)(b). Because Wynn is a public figure, to prevail at trial on his

4. We have considered the additional evidence Wynn points to in this regard and are not persuaded that it demonstrates that AP Respondents knew the complaint was false.

defamation claim, he must prove by clear and convincing evidence that the publication at issue was made with *actual malice*.[5] *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 82, 90 (2002). Wynn argues that his evidence of actual malice at this stage need not meet the clear and convincing standard in order to establish a probability of prevailing on his claim because prong two merely requires a "prima facie" probability of prevailing on the claim. AP Respondents, however, assert that Wynn's evidence of actual malice must meet the clear and convincing standard. We have never directly discussed a plaintiff's burden under the second prong when that prong requires "prima facie" evidence of success but the plaintiffs claim requires "clear and convincing" evidence to prevail at trial.

We have described the second prong of an anti-SLAPP analysis as requiring the plaintiff to show that his claim has at least "minimal merit." *Abrams v. Sanson,* 136 Nev. 83, 91, 458 P.3d 1062, 1069 (2020). Minimal merit exists when the plaintiff makes "a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilson v. Parker, Covert & Chidester,* 50 P.3d 733, 739 (Cal. 2002) (quoting *Matson v. Dvorak,* 46 Cal. Rptr. 2d 880, 886 (Ct.

5. To prevail on his defamation claim, Wynn is also required to show "(1) a false and defamatory statement by [the] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault . . . ; and (4) actual or presumed damages." *Pegasus v. Reno Newspapers, Inc.,* 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). However, the only element reasonably in controversy on appeal is Wynn's ability to establish actual malice.

App. 1995)). But a favorable judgment in a public figure defamation claim may only be sustained if the evidence is sufficient for the jury, *by clear and convincing evidence,* to infer that the publication was made with actual malice. *Pegasus,* 118 Nev. at 721-22, 57 P.3d at 92.

The Legislature has declared that "[w]hen a plaintiff must demonstrate a probability of success of prevailing on a claim pursuant to NRS 41.660, . . . the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's [anti-SLAPP] law." NRS 41.665(2). Thus, we turn to California law to resolve the issue at hand.

California caselaw regarding a plaintiff's burden of putting forth prima facie evidence supports the conclusion that, under the second prong, a plaintiff must provide evidence that wou1d be sufficient for a jury, *by clear and convincing evidence,* to reasonably infer that the publication was made with actual malice. *See, e.g., Padres L.P. v. Henderson,* 8 Cal. Rptr. 3d 584, 594 (Ct. App. 2003) ("The plaintiff must make a prima facie showing of facts that would be sufficient to sustain a favorable judgment under the applicable evidentiary standard."); *Robertson v. Rodriguez,* 42 Cal. Rptr. 2d 464, 470 (Ct. App. 1995) (holding that where an element of a claim must be proven by clear and convincing evidence at trial, the sufficiency of the plaintiff's prima facie showing on an anti-SLAPP motion is determined with the higher standard of proof in mind); *Looney v. Superior Ct.,* 20 Cal. Rptr. 2d 182, 192-93 (Ct. App. 1993) (concluding that at the "summary judgment [stage] in a case where plaintiff's ultimate burden of proof

will be by clear and convincing evidence . . . the evidence and all inferences which can reasonably be drawn therefrom must meet that higher standard" (internal quotation marks omitted)).

We therefore hold that to demonstrate by prima facie evidence a probability of success on the merits of a public figure defamation claim, the plaintiffs evidence must be sufficient for a jury, by clear and convincing evidence, to reasonably infer that the publication was made with actual malice. In other words, while the plaintiff at this prong must prove only that their claim has minimal merit, a public figure defamation claim does not have minimal merit, as a matter of law, if the plaintiff's evidence of actual malice would not be sufficient to sustain a favorable verdict under the clear and convincing standard. If a public figure plaintiff could prevail on an anti-SLAPP special motion to dismiss by putting forth only minimal evidence of actual malice, the statutes' mechanism for providing an early and expeditious resolution of meritless claims would be rendered ineffectual.

Wynn argues that requiring him to meet a clear and convincing evidence standard at this stage of the proceedings would violate his constitutional right to a civil jury trial. *See Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 635 (Minn. 2017) (holding that a portion of Minnesota's anti-SLAPP law violated the constitutional right to a jury trial because it required the nonmoving party to produce "clear and convincing [evidence] . . . that the moving party's acts are not immune" (internal quotation marks omitted)). To be sure,

in *Taylor v. Colon*, we previously upheld the second prong of Nevada's anti-SLAPP statutes as constitutional, partly because the prima facie standard does not interfere with a jury's fact-finding abilities. 136 Nev. 434, 439, 482 P.3d 1212, 1216 (2020).[6] But importantly, "whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Commc'ns, Inc. u. Connaughton*, 491 U.S. 657, 685 (1989). And even outside of the anti-SLAPP context, "[t]he question of actual malice 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." *Pegasus*, 118 Nev. at 721-22, 57 P.3d at 92 (emphases added). Because actual malice is a question that does not go to a jury unless the evidence is sufficient to meet the clear and convincing standard, requiring the plaintiff's evidence to meet that standard at the second prong of an anti-SLAPP analysis does not deny a plaintiff their constitutional right to a civil jury trial. Our holding in *Taylor* did not preclude a requirement that when an element of a particular claim requires the plaintiff to satisfy a clear and convincing evidence standard before the claim goes to a jury, the plaintiff's

6. In a previous version of NRS 41.660, plaintiffs bore a clear and convincing burden of proof standard at the second prong. The Legislature amended that statute in 2015 to require only prima facie evidence. 2015 Nev. Stat., ch. 428, § 13, at 2455. Our holding does not rewrite the statute to return the plaintiff's burden of proof to a clear and convincing standard; it merely recognizes that evidence of actual malice must meet the clear and convincing standard to sufficiently demonstrate with prima facie evidence a probability of prevailing on this type of claim.

evidence at the second prong must satisfy that standard. In holding today that such a requirement exists, we do not replace the prima facie evidence standard; rather, the requirement that evidence of actual malice meet the clear and convincing standard is merely a part of the plaintiff's prima facie showing.

Wynn failed to meet his burden under the second prong

"[A]ctual malice is proven when a statement is published with knowledge that it was false or with reckless disregard for its veracity." *Pegasus,* 118 Nev. at 722, 57 P.3d at 92. "Reckless disregard for the truth may be found when the 'defendant entertained serious doubts as to the truth of the statement, but published it anyway.'" *Id.* (quoting *Posadas v. City of Reno,* 109 Nev. 448, 454, 851 P.2d 438, 443 (1993)).

This court has routinely looked to California courts for guidance in the area of anti-SLAPP law. *Coker v. Sassone,* 135 Nev. 8, 11, 432 P.3d 746, 749 (2019). California courts treat this prong as they do a motion for summary judgment; thus, under comparable Nevada law regarding motions for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in [the] light most favorable to the nonmoving party." *Wood v. Safeway, Inc.,* 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).[7] Here, even when the evidence is considered in the

7. We note that prior to 2013, NRS 41.660 required the district court to treat a special motion to dismiss as a motion for summary judgment. *See* 2013 Nev. Stat., ch. 176, § 3, at 623. Though the Legislature removed this language in 2013, subsequent

light most favorable to him, Wynn has failed to establish actual malice by sufficient evidence to sustain a favorable verdict. His attempts to establish AP Respondents' knowledge of falsity or reckless disregard for the veracity of the complaint fall short of the heightened clear and convincing standard. *See Gruber u. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890) (describing clear and convincing evidence as satisfactory proof that is "so strong and cogent as to satisfy the mind and conscience of a common man").

Similar to his arguments under prong one, Wynn argues that the Chicago complaint was implausible and points to the failure by AP Respondents to investigate further before publishing as evidence of actual malice. Again, while the complaint contained unusual elements, that does not mean that the gist of the allegations reported by AP Respondents—that Wynn sexually assaulted a woman in Chicago in the 1970s—was untrue or that AP Respondents should have held serious doubt about those allegations. As explained, because all identifying information in the complaint was redacted, it was not possible to meaningfully investigate further as long as that information was unknown. Wynn again points to Garcia Cano's text describing the complaint as "crazy" to establish her subjective doubt. But calling the complaint "crazy" is not clear and convincing evidence that Garcia Cano believed it to be false or that she

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amendments in 2015 restructured the statute in a way that once again tracks the procedural standards that apply to a motion for summary judgment. *See Coker*, 135 Nev. at 10, 432 P.3d at 748 (recognizing that "[a]s amended, the special motion to dismiss again functions like a summary judgment motion procedurally").

recklessly disregarded whether it was true.[8] Wynn also attempts to establish reckless disregard by highlighting AP Respondents' motivation to publish the story quickly. But news organizations often have a motivation to publish stories before their competitors, and in the absence of serious doubt regarding the veracity of the statement, such a desire does not establish a reckless disregard for the truth.[9] *Pegasus,* 118 Nev. at 722, 57 P.3d at 92.

This evidence would not be sufficient for a jury to find, by clear and convincing evidence, that AP Respondents published the story with knowledge that it was false or with reckless disregard for its truth.[10] Because Wynn did not produce sufficient evidence of actual malice, he failed to establish with prima facie evidence a probability of prevailing on his claim, requiring dismissal.

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8. 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."

9. At most, the evidence shows that AP Respondents may have held *some* doubt as to the veracity of the complaint. But that is not enough to meet the standard; the defendant must hold *serious* doubt. *See Wynn v. Smith,* 117 Nev. 6, 17, 16 P.3d 424, 431 (2001) (reversing a jury verdict finding actual malice because the jury instructions omitted "serious" before "doubt," leading the jury to apply a lower standard).

10. Wynn points to some additional evidence of actual malice not discussed in this opinion, but we are not convinced that it is sufficient to meet his burden under this prong.

Appendix B

CONCLUSION

Nevada's anti-SLAPP statutes were designed to limit precisely the type of claim at issue here, which involves a news organization publishing an article in a good faith effort to inform their readers regarding an issue of clear public interest. AP Respondents met their burden under the first prong to establish, by a preponderance of the evidence, that their article was a good faith communication in furtherance of the right to free speech in direct connection with an issue of public concern. Wynn, on the other hand, 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 that is applicable to his public figure defamation claim. We therefore affirm the district court's order granting the renewed special motion to dismiss the complaint.

/s/ Parraguirre, J.
Parraguirre

We concur:

/s/ Herndon, J.
Herndon

/s/ Lee, J.
Lee

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CLARK COUNTY, NEVADA, FILED OCTOBER 26, 2022

EIGHTH JUDICIAL DISTRICT COURT OF NEVADA, CLARK COUNTY

Case No.: A-18-772715-C
Dept. No.: XXVIII

STEVE WYNN, AN INDIVIDUAL,

Plaintiff,

v.

THE ASSOCIATED PRESS, A FOREIGN CORPORATION; REGINA GARCIA CANO, AN INDIVIDUAL; AND HALINA KUTA, AN INDIVIDUAL; DOES I-X,

Defendants.

October 26, 2022, Decided;
October 26, 2022, Filed

Ronald J. Israel, District Court Judge
Eighth Judicial District Court
Department 28
Regional Justice Center
200 Lewis Avenue, 15th Floor
Las Vegas, Nevada 89155

Appendix C

ORDER GRANTING DEFENDANTS THE ASSOCIATED PRESS AND REGINA GARCIA CANO'S RENEWED SPECIAL MOTION TO DISMISS

This matter came before the Court on Defendants The Associated Press ("AP") and Regina Garcia Cano's ("Garcia Cano"), and together with AP, the ("Defendants") Renewed Special Motion to Dismiss Plaintiff Steve Wynn's ("Wynn") Complaint pursuant to Nev. Rev. Stat. § 41.660 (the "Renewed Motion"), filed July 1, 2022. On August 9, 2022, Wynn filed his Opposition to the Motion. Defendants filed their Reply in support of their Motion on August 23, 2022.

On September 8, 2022, the Court heard the matter in-chambers. Having considered the Motion, Opposition, and Reply, the Court hereby finds and orders as follows:

FACTS & PROCEDURE

This case stems from an article published by the Associated Press and written by Regina Garcia Cano on February 27, 2018. The AP article was based on the police report entered on February 7, 2018, by two (2) individuals alleging prior conduct that occurred in the 1970s by Plaintiff, Steve Wynn. A copy of the article was attached as Exhibit # 3 to the complaint. Plaintiff filed a Complaint against AP, Regina Cano and Halina Kuta alleging various causes of action including, Defamation by all parties. The Article outlines the allegations made to the police by the two complainants, including one made by Defendant Kuta against Plaintiff Wynn.

Appendix C

This matter originally came before this Court on Defendants The Associated Press ("AP") and Regina Garcia Cano's ("Garcia Cano"), and together with AP, the ("Defendants") Special Motion to Dismiss Plaintiff Steve Wynn's ("Wynn") Complaint pursuant to Nev. Rev. Stat. § 41.660 (the "Motion"), filed May 31, 2018.

On July 5, 2018, Wynn and Defendants entered into a Stipulation and Order Regarding Defendants' Special Motion to Dismiss Pursuant to N.R.S. 41.660 (the "Stipulation"). The Stipulation included modifications both to this Court's scheduling for the hearing and to the Court's consideration of the grounds argued by Defendants in their Motion.

The Stipulation was entered between the parties prior to the Hearing specifically setting forth that Defendants argued in their Motion "that N.R.S. § 41.660 [the 'Nevada Anti-SLAPP Statute'] applies and that Wynn cannot demonstrate a likelihood of success, as required under the statute, for two separate reasons: first, that the reporting by the Defendants is privileged; and second, that Wynn cannot demonstrate fault." Stipulation at 2 (citations omitted). Wynn and the Defendants stipulated "that discovery is not necessary to resolve the first basis for the motion, i.e., whether the challenged news report is subject to the fair report privilege as a matter of law." Id. Wynn and the Defendants further stipulated and the Court ordered that, at the hearing on the Motion (then set for July 31, 2018, but later moved to August 14, 2018), "the Court shall consider the fair report privilege under the Nevada Anti-SLAPP Statute, a question of law." Id.

at 3. Wynn and the Defendants further stipulated and the Court ordered that, "[i]f the Court finds the reporting in this case not to be covered by the fair report privilege, the Court shall continue to a second hearing to consider the issue of fault[.]" Id. (emphasis added).

On July 18, 2018, Wynn filed his Opposition to the Motion. Defendants filed their Reply in support of their Motion on August 7, 2018. On August 14, 2018, the Court heard oral argument on the Motion. L. Lin Wood, Esq. of L. Lin Wood, P.C., and Támara Beatty Peterson, Esq., and Nikki L. Baker, Esq. of Peterson Baker, PLLC appeared on behalf of Wynn; Jay Ward Brown, Esq. and Justin A. Shiroff, Esq. of Ballard Spahr LLP appeared on behalf of Defendants.

This court issued an Order on August 23, 2018, granting the Motion and found that the news article fairly reported information that was found in the police reports filed by the two (2) complainants and that the article was a "[g]ood faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public interest." *See* Aug. 23, 2018 Order Granting Defendants' Special Mot. to Dismiss at 3.

Wynn appealed this Court's ruling regarding the fair report privilege and the Nevada Supreme Court addressed whether the filing of a report documenting allegations to police constitutes an official action under the fair report privilege. The Court held that the complainant's statement did not fall within the fair report privilege because it was a statement of facts about a case rather than an official

action or proceeding, such as an arrest or the bringing of charges. *Wynn v. Associated Press*, 136 Nev. 611, 617, 475 P.3d 44, 50 (2020). Ultimately, the Court found that while the report privilege shields a defendant from liability for publication of defamatory content, the district court erred by extending the fair report privilege to the AP article because law enforcement did not take any official action concerning the allegations and they were not investigated, evaluated, or pursued by law enforcement. *Id.* at 619.

Accordingly, the Court reversed and remanded for determination of application of the Anti-SLAPP statute and "whether Wynn, as a public figure, could demonstrate a probability of prevailing on his defamation claim." *Id.* at 620. On remand, Wynn was permitted to take written, document, and deposition discovery on the limited issue of actual malice. That discovery period has ended and AP Defendants re-filed the Motion as a Renewed Motion.

FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ANALYSIS

This Court finds Mr. Wynn was a public figure and the sexual assault allegations are a matter of public concern given his ownership and title with Wynn Casinos, as well as the prior ongoing investigation and claims concerning female employees and other regarding inappropriate behavior. Wynn argued additional information should have been included in the news article and a thorough investigation by Defendants was needed to verify the police reports. However, Wynn ignores the fact that the reporter used two redacted complaints and there was no way to verify the truthfulness of the complaints.

This Court finds the news article clearly states that the information was obtained from copies of recently filed police reports. While the article referred to two complaints, the first complaint has never been addressed while the second complainant was not disclosed in the AP report. Consequently, no additional information could have been obtained through further investigation. It was only after Metro police disclosed the alleged victim's name that contact could be made with Ms. Kuta and it became apparent her allegations were without merit. Defendants could not have known that Ms. Kuta's allegations were false when the article was published and there's nothing in the record to suggest that Defendants knew or should have known that the allegations were false.

Further, the case was remanded to allow discovery for Wynn to substantiate actual malice to prevail on his defamation claim. To prevail on the defamation claim, the Plaintiff must show actual malice by clear and convincing evidence. Here, the Plaintiff has not established a likelihood of prevailing on the merits and there is nothing in the record to show Defendants published information knowing of its falsehood or that it was established with reckless disregard of the truth and therefore Wynn cannot prevail.

For the above reasons, Defendants' Renewed Special Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

Dated this 26th day of October, 2022

Appendix C

/s/ Ronald J. Israel
District Court Judge
Ronald J. Israel
Case No. A-18-772715-C
Order Granting Defendant's The Associated Press And Regina Garcia Cano's Renewed Special Motion To Dismiss

APPENDIX D — FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT OF THE DISTRICT COURT OF CLARK COUNTY, NEVADA, FILED MARCH 26, 2020

DISTRICT COURT

CLARK COUNTY, NEVADA

Case No.: A-1 8-7727 15-C
Dept. No.: XXVIII

STEVE WYNN, AN INDIVIDUAL,

Plaintiff,

v.

THE ASSOCIATED PRESS, A FOREIGN CORPORATION; REGINA GARCIA CANO, AN INDIVIDUAL; AND HALINA KUTA, AN INDIVIDUAL; DOES I-X,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Trial date: March 9, 2020

This matter having come on for a non-jury trial before the Honorable Ronald J. Israel on March 9, 2020; Plaintiff Steve Wynn ("*Mr. Wynn*"), being represented by Tamara Beatty Peterson, Esq. and Nikki L. Baker, Esq., of the law firm of Peterson Baker, PLLC; and Defendant Halina

Kuta ("*Ms. Kuta*"), appearing pro se. The Court having read and considered the pleadings and papers filed by the parties, having reviewed the evidence admitted during the trial, having heard and carefully considered the testimony of the witnesses called to testify, and having considered the oral and written arguments of Mr. Wynn's counsel and of Ms. Kuta, and with the intent of deciding all claims against Ms. Kuta in this case, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On August 28, 2017, Ms. Kuta filed a civil lawsuit against Mr. Wynn in the action styled *Kuta v. Wynn et al.*, Case No. 2: 17-02285-RFB-CWH (D. Nev. Aug. 28, 2017) (the "*Federal Action*").

2. The Court takes judicial notice of the allegations in Ms. Kuta's Complaint in the Federal Action. In the Federal Action, Ms. Kuta declared, among other things, that she "is the biological mother of Kevyn Wynn," that "the alleged kidnapping that of [sic] Kevyn Wynn . . . was not an actual kidnapping," that "two kidnappers brought Kevin [sic] to [Ms. Kuta's] motel . . . in Texas in an old car," that "Kevyn indicated that the man was hypnotizing [Ms. Kuta] causing Ms. Kuta to wake up,", that "Kevyn called 911" but that the police report went missing after "the police department received a multimillion dollar donation," and that Mr. Wynn "was fully aware that Kevyn Wynn was not kidnapped" but was instead an "arranged" kidnapping by Mr. Wynn, with the ultimate "plot to have [Ms. Kuta] and [Kevyn Wynn] killed, but tremendously failed."

3. The Honorable United States Magistrate Judge C.W. Hoffman, Jr. (Ret.) screened Ms. Kuta's Complaint and *sua sponte* recommended dismissal with prejudice because it was "incoherent, describing a clearly fanciful or delusional scenario." Thereafter, Ms. Kuta voluntarily dismissed the Federal Action.

4. On February 7, 2018, Ms. Kuta submitted a statement to the Las Vegas Metropolitan Police Department ("*LVMPD*") concerning Mr. Wynn (the "*False Report*"), wherein Ms. Kuta accused Mr. Wynn of raping her in the 1973 or 1974— a rape which she claimed resulted in her giving birth to Kevyn Wynn in a gas station restroom in Las Vegas.

5. Although she misspelled Mr. Wynn's first name, Ms. Kuta identified the alleged suspect as "Stephan Wynn", who lived in Las Vegas and was seventy-five (75) years old. She also listed his business/work number as 702.770.7000, which is the local contact number listed for the Wynn Las Vegas and Encore Hotels.

6. In the False Report, Ms. Kuta claimed that she was Mr. Wynn's spouse and that, in 1973 and/or 1974, "she was exercising in her old apartment and when she stood up, Stephan [sic] Wynn was standing in front of her and said a word that she didn't understand, and then he pinned her up against the refrigerator and raped her as she was standing holding onto the refrigerator."

7. According to the False Report, Mr. Wynn "then called someone for a few minutes then came and kiss [sic]

her on the cheek and said he had to go and then added I [sic] call you later," Ms. Kuta further stated that, a "few days later, after her shower, [Ms. Kuta] wrapped herself in the towel and was going to the bedroom and there was Stephan [sic], sitting at the kitchen table. He got up and says [sic] some words, pinned her to the wall forcing himself on her then just like before, he called someone, kissed her on the cheek and said he would call her later and left." The False Statement then recounted that Ms. Kuta "remembers that Stephan [sic] said 'you make me horny' then raped her twice."

8. In the False Report, Ms. Kuta also conveyed clearly fanciful or delusional allegations about a surreal birth scenario involving a "purple doll" and "water bag":

> She ended up pregnant. It was a hot steamy afternoon and she needed 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. The gas station attendant opened the door to the restroom and when he saw her with a baby, he

> ran to the office and called an ambulance. Her name is [Kevyn Wynn] and she lives in Las Vegas – Stephan [sic] and my child. [Kevyn] knows me as her mother and has her own family now.

9. On February 27, 2018, The Associated Press and Regina Garcia Cano published an article titled "APNewsBreak: Woman tells police Steve Wynn raped her in '70s" ("the *AP Article*"), about Ms. Kuta's False Report. Ms. Cano understood the False Report to be about Mr. Wynn as evidenced by the very first sentence of, and the photograph of Mr. Wynn included in, the AP Article.

10. The Certificate of Live Birth establishes a presumption that Kevyn Wynn was born on September 6, 1966, at 9:29 p.m. at the Columbia Hospital for Women in Washington, D.C. to Mr. Wynn and Elaine Wynn, six to seven years before Ms. Kuta claims the rape occurred.

11. Mr. Wynn's trial testimony was credible.

12. Ms. Kuta's trial testimony lacked veracity in numerous areas.

13. Ms. Kuta claimed that Picasso's painting *Le Réve* was painted of her while Picasso was in the United States and then in France, and that Mr. Wynn stole the painting from her family in Poland. However, the provenance of the painting, as given by Mr. Wynn, is more in line with the history of the painting than Ms. Kuta's story.

14. Ms. Kuta's witness, Tia Gibson, totally contradicted Ms. Kuta's testimony. While Ms. Kuta could argue that Ms. Gibson potentially could be biased because she is a current employee of the Wynn Las Vegas Hotel and Casino, the Court finds that there is no reason why Ms. Gibson would deny that Mr. Wynn was at the portrait studio, as claimed by Ms. Kuta, especially since Ms. Gibson's children were present.

15. There is no evidence to support Ms. Kuta's accusations against Mr. Wynn, other than Ms. Kuta's testimony, which, as the Court has found, lacks credibility, particularly given that the evidence establishes that Kevyn was born years prior to the alleged rape.

16. Ms. Kuta's accusations in the False Report that Mr. Wynn raped her and that she bore a child, Kevyn Wynn, as a result, are clearly false and defamatory statements concerning Mr. Wynn.

17. Ms. Kuta has not claimed that her false statements to the LVMPD and to the media were privileged. Even if Ms. Kuta were to make such a claim, her intentionally false statements to the LVMPD and to the media would not be privileged.

18. Ms. Kuta's clearly false and defamatory statements concerning Mr. Wynn involved a violent and horrendous crime.

19. Ms. Kuta has not asserted mental incapacity as a defense to Mr. Wynn's defamation claim. She also claims she is not delusional.

20. Other than the clearly fanciful accusations she has made against Mr. Wynn, Ms. Kuta seems intelligent and rational in her thought process on other matters. During trial, she did an adequate job of questioning witnesses and demonstrated she could deal with reality.

21. Therefore, Ms. Kuta intentionally and knowingly made the false accusations of rape concerning Mr. Wynn to the LVMPD.

22. The serious nature of the false accusations made by Ms. Kuta against Mr. Wynn clearly and unequivocally warrant an award of $1.00 in damages, as requested by Mr. Wynn.

23. If any Findings of Fact are properly Conclusions of Law, they shall be treated as though appropriately identified and designated.

CONCLUSIONS OF LAW

1. "To prevail on a defamation claim, the plaintiff must show: '(1) a false and defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.'" *Rosen v. Tarkanian*, 135 Nev. Adv. Op. 59, 453 P.3d 1220, 1225 (2019) (citation omitted). "Where, as here, the plaintiff is a public figure, the statements must be made with 'actual malice.'" *Id.*

2. The accusations made by Ms. Kuta in her False Report to the LVMPD are clearly fanciful or delusional,

and therefore, clearly false and defamatory accusations concerning Mr. Wynn, and third parties understood Ms. Kuta's accusations to be concerning Mr. Wynn. *See e.g., SDV/ACCI, Inc. v. AT&T Corp.*, 522 F.3d 955, 959 (9th Cir. 2008) ("To proceed with their suit as individuals, the Metzes must show not only that the statement could reasonably be understood as referring to them as individuals, but also that some third party understood the statement in this way.").

3. Ms. Kuta's knowingly false accusations are not privileged because she does not have any constitutional right of free speech to submit a knowingly false report to the LMVPD. *See e.g.*, Nev. Const, art. 1, § 9 ("Every citizen may freely speak, write and publish his sentiments on all subjects *being responsible for the abuse of that right*; and no law shall be passed to restrain or abridge the liberty of speech or of the press.") (emphasis added); *see also Coburn v. Holper*, 131 Nev. 1265, 2015 WL 4512045, *1 (Nev. July 22, 2015) (Unpublished opinion) (holding that "false statements made to police officers are not 'protected activity' within the meaning of the anti-SLAPP statute").

4. The evidence clearly and convincingly establishes that Ms. Kuta's fanciful or delusional accusations were intentionally made by her with knowledge that the accusations were false. *See Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 82, 90 (2002) (stating that actual malice requires a showing that the defendant published the defamation "with knowledge that it was false or with reckless disregard of whether it was false or not.") (quoting *New York Times Co. v. Sullivan*, 376

U.S. 254, 279-80 (1964)); *see also St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (stating that "malice may be inferred where, for example, 'a story is fabricated by the defendant, [or] is the product of his imagination...."); *Chastain v. Hodgdon*, 202 F. Supp. 3d 1216, 1222 (D. Kan. 2016) ("If defendant knew that the events were false, and nonetheless wrote the detailed narrative describing exactly how plaintiff sexually assaulted or attempted to rape her when it actually never occurred, it is axiomatic that she wrote the narrative with actual malice, or actual knowledge that it was false.").

5. Ms. Kuta's rape accusations are defamatory *per se* because her accusations involved "(1) the imputation of a crime; (2) the imputation of having a loathsome disease; (3) imputing the person's lack of fitness for trade, business, or profession; and (4) imputing serious sexual misconduct." *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1192, 866 P.2d 274, 282 (1993); *see also Tonnessen v. Denver Pub. Co.*, 5 P.3d 959, 964 (Colo. App. 2000) ("The imputation of rape is defamatory *per se*."). Thus, damage to Mr. Wynn is presumed as a matter of law. *See K-Mart Corp.*, 109 Nev. at 1195, 866 P.2d at 284 ("Proof of the defamation [*per se*] itself establishes the fact of injury and the existence of damage to the plaintiff's reputation.") (citation omitted).

6. Mr. Wynn is unequivocally entitled to an award of compensatory damages.

7. Mr. Wynn has requested, and should therefore be awarded, the nominal amount of $1.00 in damages.

8. Having proved each of the elements required for a defamation claim, Mr. Wynn is entitled to judgment in his favor.

9. If any Conclusions of Law are properly Findings of Fact, they shall be treated as though appropriately identified and designated.

JUDGMENT

Based on the foregoing, the Court hereby enters Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered in favor of Mr. Wynn and against Ms. Kuta on Mr. Wynn's claim for defamation; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Mr. Wynn is awarded the nominal amount of $1.00 in compensatory damages on his defamation claim.

IT IS SO ORDERED

DATED this 25 day of March, 2020

/s/ Ronald J. Israel
DISTRICT COURT JUDGE RONALD J. ISRAEL
Case No. A-18-772715-C
Findings of Fact, Conclusions of Law, and Judgment

APPENDIX E — LAS VEGAS METROPOLITAN POLICE DEPARTMENT CASE REPORT, DATED FEBRUARY 27, 2018

Las Vegas Metropolitan Police Department
400 S. Martin Luther King Blvd.
Las Vegas, NV 89106

Case Report No.: **LLV180207001836**

Administrative

Location **UNKNOWN ADDRESS CHICAGO Chicago, IL**
Sector/Beat **OJ – Other Jurisdiction**
Occurred On (Date/Time) **Friday 6/1/1973 12:00:00 AM**
Or Between (Date/Time) **Saturday 8/31/1974 12:00:00 AM**
Reporting Officer **07027 – Chavez, Irma M**
Reported On **2/7/2018**
Entered by **07027 – Chavez, Irma M**
Entered On **2/7/2018 11:26:37 AM**
Related Cases
Jurisdiction **Other Jurisdiction**

Traffic Report **No**
Place Type
Accident Involved

Offenses:
Sex Assault(F)-NRS 200.366.2B
Completed **Yes**
Domestic Violence **No**
Hate/Bias **Unknown (Offenders Motivation Not Known)**
Entry Premises Entered
Type Security Tools
Weapons **None**
Location Type **Residence/ Home**
Criminal Activities **None/ Unknown**

Appendix E

Victims:

Name: [redacted]

Victim Type **Individual** Can ID Suspect **Yes**
Written Statement **Yes**
Victim of **50095 – Sex Assault(F)-NRS 200.366.2B**
DOB [redacted] Age **27** Sex **Female** Race **White**
Ethnicity **Unknown**
Height **5' 0"** Weight **115** Hair Color **Blond** Eye Color **Green**
Employer/School
Occupation/Grade Work Schedule
Injury **Not Provided** Injury Weapons **None**

Addresses
Residence [redacted]

Phones
Cellular [redacted]

Offender Relationships
S – Wynn, Stephan [redacted]
Notes:

Suspects:

Name: **Wynn, Stephan**
Alias:

Scope ID DOB Age **76** Race **White**
Ethnicity **Not Hispanic or Latino**

Sex **Male Height 5' 6"** Weight **145** Hair Color **Brown**
Eye Color **Brown**

Appendix E

Employer/School Occupation/Grade

Addresses
Phones
Business/Work [redacted]
Notes:

Narrative

[redacted] came to NWAC to report that in 1973-1974, in Chicago, IL, she was exercising in her old apartment and when she stood up, Stephan Wynn was standing in front of her and said a word that she didn't understand, and then he pinned her up against the refrigerator and raped her as she was standing holding onto the refrigerator. Stephan then called someone for a few minutes then came and kiss her on her cheek and said he had to go and then added I call you later.

When he left she was still standing holding onto the refrigerator and looked at the window and saw her reflection, crying, and asking herself what just happened, what did he say?

A few days later, after her shower, she wrapped herself in the towel and was going to the bedroom and there was Stephan, sitting at the kitchen table. He got up and says some words, pinned her to the wall forcing himself on her then just like before, he called someone, kissed her on the cheek and said he would call her later and left. She was standing holding onto the wall and the towel was on the floor, and she was crying, saying to herself, why her, what did she do to be treated so badly, and why is he coming to

her apartment. She didn't give him a key to her apartment. She remembers that Stephan said "you make me horny" then raped her twice.

She ended up pregnant. It was a hot steamy afternoon and she needed 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.

The gas station attendant opened the door to the restroom and when he saw her with a baby, he ran to the office and called an ambulance.

Her name is [redacted] and she lives in Las Vegas—Stephan and my child. [redacted] knows me as her mother and has her own family now.

Report taken per Det K. McCaffery, P#8731.

APPENDIX F — STATUTORY ADDENDUM

NRS 41.660 Attorney General or chief legal officer of political subdivision may defend or provide support to person sued for engaging in right to petition or free speech in direct connection with an issue of public concern; special counsel; filing special motion to dismiss; stay of discovery; adjudication upon merits.

1. If an action is brought against a person based upon a 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:

(a) The person against whom the action is brought may file a special motion to dismiss; and

(b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.

2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) Determine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern;

(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;

(c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:

(1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or

(2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;

(d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);

(e) Except as otherwise provided in subsection 4, stay discovery pending:

(1) A ruling by the court on the motion; and

(2) The disposition of any appeal from the ruling on the motion; and

(f) Rule on the motion within 20 judicial days after the motion is served upon the plaintiff.

4. Upon a showing by a party that information necessary to meet or oppose the burden pursuant to paragraph (b) of subsection 3 is in the possession of another party or a third party and is not reasonably available without discovery, the court shall allow limited discovery for the purpose of ascertaining such information.

5. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

6. The court shall modify any deadlines pursuant to this section or any other deadlines relating to a complaint filed pursuant to this section if such modification would serve the interests of justice.

7. As used in this section:

(a) "Complaint" means any action brought against a person based upon a 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, including, without limitation, a counterclaim or cross-claim.

(b) "Plaintiff" means any person asserting a claim, including, without limitation, a counterclaim or cross-claim.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FOURTEENTH AMENDMENT

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Appendix F

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.