In the
Supreme Court of the State of Nevada

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JACKY ROSEN, AN INDIVIDUAL; AND ROSEN FOR NEVADA, A 527 ORGANIZATION, Appellants, vs. DANNY TARKANIAN, Respondent.	**Case No. 73274** District Court Case No.: A746797

Appellants' Reply Brief

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N.R.A.P. 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

The following law firms have appeared and/or are expected to appear in this Court on behalf of Appellants.

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INTRODUCTION

Candidates enter the political arena "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan, Co.*, 376 U.S. 254, 270 (1964). It has thus been long understood that the First Amendment "[provides] its fullest and most urgent application" to speech in the context of political campaigns, *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989), including speech relevant to a candidate's qualifications and character. *See, e.g.*, *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 52 (1st Cir. 2012) ("[C]riticizing public officials and hopefuls for public office, is a core freedom protected by the First Amendment and probably presents the strongest case for applying the *New York Times* rule.") (quotation marks and citation omitted); *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1016 (Cal. Ct. App. 2005) ("Public discussion about the qualifications of those who hold or wish to hold positions of public trust presents the

strongest possible case for applications of the safeguards afforded by the First Amendment.") (citations and quotation marks omitted).

The statements at issue in this case—made during a 30-second political advertisement (the "Political Advertisement") aired at the height of the 2016 race between Danny Tarkanian and Congresswoman Jacky Rosen to represent Nevada's Third Congressional District—fall squarely within these core First Amendment protections. Indeed, even Tarkanian has not argued otherwise.[1] The First Amendment's protections in this area are so significant, that, "[p]rovided that they do not act with actual malice, [candidates] can badmouth their opponents, hammering them with unfair and one-sided attacks . . . [as] more speech, not damages, is the right strike-back against superheated or false rhetoric." *Schatz*, 669 F.3d at 52 (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686-87 (1989)).

Here, however, Congresswoman Rosen and her campaign committee were not just well within their rights to make the statements in the Political Advertisement because they were protected First

[1] Tarkanian does not dispute that the statements are political speech and, as such, would come within Nevada's Anti-SLAAP Statute and the First Amendment; he argues only that they were not made in good faith, which, as discussed herein, is incorrect.

Amendment speech, but also because they are demonstrably *true*. They are supported by numerous reliable, public sources which Tarkanian—despite having ample opportunity through at least two rounds of briefing—has yet to refute.

The truth of these statements is further supported by Tarkanian's admission that *substantially identical statements* made by political opponents during his prior failed bids for office are not defamatory and "do, in fact, state the truth." (I AA 229). The fatal consequences of this admission are evident, not just through the well-established law on defamation, but also through Tarkanian's own actions. That he now attempts to walk it back is a telling sign of how detrimental it is to his claims. Opp. Br. 17. But his admission is printed in the record in black and white, and cannot now be credibly retracted. Moreover, the law is clear that, where substantially similar statements are not actionable as defamation, mere semantic differences cannot render them so. The same is obviously true about Tarkanian's claim for "intentional infliction of emotional distress" ("IIED"). The District Court's decision denying the Anti-SLAPP Motion to Dismiss should be reversed.

ARGUMENT

I. ROSEN HAS DEMONSTRATED THAT THE STATEMENTS WERE MADE IN GOOD FAITH

Tarkanian's argument that the statements in the Political Advertisement were not made in good faith because they imply a false statement of fact is without merit.

First, as explained in Rosen's Opening Brief ("Br."), Br. 4, 10, 22, 30-34, 38-46; *see also* (I AA 229), Tarkanian stated that substantially identical statements made by his previous political opponents, Ross Miller and Steven Horsford ("Miller and Horsford Statements"), "do, in fact, state the truth." (I AA 229). An Anti-SLAPP communication is made in "good faith" where it is "truthful or is made without knowledge of its falsehood." N.R.S. 41.637(4); *Shapiro v. Welt*, 133 Nev. Adv. Opp. 6, 389 P.3d 262, 267-268 (2017). And it is well-settled that in the context of a defamation action, courts do not look at the literal truth of "each word or detail used in a statement … rather, the determinative question is whether the 'gist or sting' of the statement is true or false." *Oracle USA, Inc. v. Rimini St., Inc.*, 6 F. Supp. 3d 1108, 1131 (D. Nev. 2014) (quoting *Ringler Assocs. v. Md. Cas. Co.*, 80 Cal. App. 4th 1165, 1180–82 (Cal. Ct. App. 2000)), *order clarified*, No. 2:10-CV-00106-LRH-

PAL, 2014 WL 5285963 (D. Nev. Oct. 14, 2014). Thus, where Tarkanian has admitted that substantially identical statements are true, it follows that the statements at issue here "do, in fact, state the truth," and consequently were made in good faith.

This admission and its ramifications are so detrimental to his case, that Tarkanian's response is to attempt to walk it back in his briefing before this Court, stating that he "never admitted that the statements in these articles are true." Opp. Br. 17. But Tarkanian's plainly stated admission in the District Court—"the [Horsford and Miller] statements above . . . do, in fact, state the truth[,]" (I AA 229)—speaks for itself, and he cannot disown it now because it is legally inconvenient.[2] Moreover, Tarkanian's argument that the context of the

[2] Tarkanian asserts that, while the Miller and Horsford Statements "provide an unsavory implication, they do not lead the average reader to believe that Mr. Tarkanian was personally involved with setting up and operating telemarketing schemes." Opp. Br. 17 n.6. As explained, "the type of parsing of words that is necessary" to accept this argument is inappropriate as a matter of law. Br. 31-34. Furthermore, it is perhaps more likely that the average reader would actually infer that Tarkanian had *more* involvement with the "fraudulent telemarketing organizations," "scammers," and "fraudulent charities" based on the Miller and Horsford Statements' assertions that Tarkanian "served as the . . . attorney," "worked for," and was "involved, as a businessman and a lawyer," with the same. Br. 31-33. Although Tarkanian argues that the Political Advertisement could have been understood to infer

Miller and Horsford Statements differed from the statements in the Political Advertisement so as to make the former true and the latter false, is equally unavailing. Opp. Br. 17-18. As explained *infra*, the relevant context in all three instances is that of a political campaign, *see also* Br. 41-46, and the "gist" of the statements is the same. *See* Br. 33-34. There are no material differences in wording or context between the Miller and Horsford Statements and the statements in the Political Advertisement, and Rosen has more than demonstrated that the latter were made in good faith.

Second, even without Tarkanian's admission, Rosen has shown that there was and is ample evidence to prove that the statements are true or, at a minimum, were made without knowledge of any falsehood. Br. 33-35; *see also* (I AA 42-68, 84-87, 92-95, 110-20, 187-91). To date, nearly two years after filing suit, Tarkanian has not so much as attempted to refute that evidence. These sources include articles from

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that Tarkanian was actually involved in "*operating* telemarketing schemes," Opp. Br. 17 n.6 (emphasis added), the Political Advertisement contains no such language. In contrast, the Horsford Statements in particular—which stated that "Tarkanian *worked for* telemarketing scammers," and "has been *involved, as a businessman and lawyer*, with at least 13 fraudulent charities," (I AA 228) (emphases added)—used expansive language that could easily be understood to include involvement in the "operations" of the schemes.

reputable newspapers published over the course of more than a decade, direct admissions from Tarkanian, an open letter from an Assistant U.S. Attorney published in 2006, and court pleadings from multiple cases. They set out unrebutted evidence that Tarkanian incorporated, was a registered agent, or served as an attorney for at least 13 entities that were fraudulent telemarketing schemes that stole millions of dollars from seniors.[3]

Rather than rebut the evidence that the statements in the Political Advertisement were true, Tarkanian's only response is to assert that there is no indication that Rosen actually relied on these sources at the time. But that is not what is required. While a defendant may demonstrate that a statement was made "without knowledge of its falsehood," N.R.S. 41.637(4), she can also demonstrate good faith by presenting evidence that the statements are actually or substantially true, which is exactly what the foregoing submissions demonstrate regardless of whether each was specifically reviewed when the Political

[3] Tarkanian admitted "I did legal work for these companies" (I AA 61-64); "Tarkanian admitted he was a registered agent for several telemarketing companies that were indicted on fraud charges," (I AA 86); "Tarkanian testified at trial today that he helped set up 75 to 100 businesses" at least four of which were involved in fraud (I AA 188-89).

Advertisement was approved. *Id.* (good faith statements are "truthful *or* made without knowledge of its falsehood" (emphasis added)). *Shapiro*, 389 P.3d at 267.

Notwithstanding, Rosen *has* presented evidence of at least two sources that she and her campaign committee relied on in forming these statements: a 2006 Las Vegas Sun and 2009 Las Vegas Review Journal article. (I AA 61-65, 84-87). These are cited in the Political Advertisement, and demonstrate not only the truth of the statements, but also that Rosen lacked knowledge of the statements' falsity and published them in good faith.[4] *See* discussion *infra* at 12-14; *see also* (I AA 311-12).

[4] There is also no requirement that disseminators of political speech identify all of the sources for the truth of the statements asserted in the speech itself. In some defamation cases, the declarant is specifically protected from revealing their sources. *Cf. Mitchell v. Super. Ct.*, 37 Cal. 3d 268, 276 (Cal. 1984) (discussing reporters' qualified privilege from revealing confidential sources and stating there is "neither an absolute duty to disclose nor an absolute privilege to withhold"). As demonstrated by the numerous documents submitted in support of Rosen in the record, there was ample support for the statements in the Political Advertisement. To require candidates to list each and every source for statements made in an advertisement would turn such speech into little more than a listing of sources, severely hampering the ability of the speakers to communicate their message. *Cf. Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790–91, 795 (1988) ("The First Amendment mandates that we presume that speakers …

Third, Tarkanian's argument that the statements are false because, even if technically true, they *imply* a false fact is equally unavailing. Specifically, Tarkanian asserts that the statements (1) that Tarkanian "set up 13 fake charities that preyed on vulnerable seniors," and that (2) "[s]eniors lost millions from scams Danny Tarkanian set up," were falsely presented as quotes from a 2009 Las Vegas Review Journal article, making them seem like objective facts, *see* Opp. Br. 12, but that is incorrect. The statements do not appear in quotation marks. (II AA 392-93).

Moreover, as Tarkanian recognizes, Opp. Br. 22-23, in a defamation case, the statement is measured by its "probable effect upon the mind of the average reader." *MacLeod v. Tribune Pub. Co.*, 52 Cal. 2d 536, 547 (Cal. 1959). *See also Weller v. Am. Broad. Cos., Inc.*, 232 Cal. App. 3d 991, 1002–03 (Cal. Ct. App. 1991). It is implausible that the average reader would assume that these statements were direct quotes, where they did not appear in quotation marks (particularly

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know best both what they want to say and how to say it … The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion … Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." (citations omitted)).

where the Political Advertisement *does* include other language in quotation marks, which Tarkanian admits are accurately quoted from one of the articles cited). (II AA 392-93). Tarkanian's argument on this point is also inconsistent, as he admits elsewhere that the statements "paraphras[e]" the cited article, which confirms that even Tarkanian does not think they are direct quotes, nor do they purport to be. Opp. Br. 13.

More importantly, even if some viewers had the impression that these statements were quotes, or if the paraphrasing was not exact, the well-established standards applicable to Tarkanian's claims would make this irrelevant. As explained, Br. 33-34, 39, the key question is whether "the gist of the story, or the portion of the story that carries the 'sting' of the [statement], is true." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715 n.17, 57 P.3d 82, 88 (2003) (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)); *see also Oracle USA*, 6 F. Supp. 3d at 1131. Thus, "'slight inaccuracy in the details" or a "'slight discrepancy' of facts . . . [do] not defeat a substantial truth defense." *Reed v. Gallagher*, 248 Cal. App. 4th 841, 860-61 (Cal. Ct. App. 2016) (quoting *Masson*, 501 U.S. at 516-17, and *Gilbert v. Sykes*, 147 Cal. App.

4th 13, 28 (Cal. Ct. App. 2007)), *reh'g denied* (July 27, 2016), *review denied* (Sept. 14, 2016). *See also Wellman v. Fox*, 108 Nev. 83, 88, 825 P.2d 208, 211 (1992).

In *Issa v. Applegate*, Case No. 37-2016-39144-CU, slip Opp. Br. at 2 (Cal. Super. Ct. 2017), for example, the court dismissed, pursuant to an anti-SLAPP motion, a defamation case brought by one political candidate against another, finding that, even where a political advertisement contained language presented *in quotes* that did not actually appear in the article expressly cited in the advertisement, the plaintiff failed to establish falsity because the gist of the statement was factually accurate.[5] Specifically, the defendant asserted that the plaintiff had "line[d] his own pockets" while in office and cited a New York Times article as the source for that language, which appeared in quotations. The plaintiff argued that this statement was false, or had a defamatory implication, because the quoted language was not actually in the cited article. *Id.* The court rejected this argument, finding it was sufficient that there was evidence that the plaintiff's net worth had

[5] This decision (a tentative decision incorporated by reference into the Court's final judgment) was attached for the Court's reference as Schrager Decl. 2, Ex. C to the Reply at the District Court. (I AA 394-404).

increased while in office (even though the quote did not appear in the article). *Id.* The court also dismissed the plaintiff's challenge to an allegedly "doctored quote" from an article that the damage from 9/11 "simply was an aircraft." *Id.* at 2-3. The plaintiff asserted that the quote smeared his reputation, and that its full context was not provided. *Id.* The court concluded that, although not an exact quote, the statement was substantially similar to a quote in the article (i.e., "simply was a plane crash"), and that the challenge was not actionable. *Id.* at 3.

Here, the "gist" of the statements is not just true (a fact sufficient on its own to defeat Tarkanian's argument), the truth of the statements is directly supported by the 2009 Las Vegas Review Journal article, which reports that Tarkanian "did work for telemarketing firms accused of scamming the elderly," "Tarkanian admitted he was a registered agent for several telemarketing companies that were indicted on fraud charges," and further reports that a former prosecutor stated of Tarkanian's involvement, "there is a significant difference between not being indicted for illegal activity and not being involved at all." (I AA 84-87). Thus, the gist of the statements that Tarkanian "set up" "fake charities" that "preyed on vulnerable seniors," is plainly in line

with the assertions in the article.[6] Moreover, the 2006 Las Vegas Sun article also cited in the Political Advertisement states that: "Tarkanian incorporated at least four business entities later found by state and federal authorities to be fronts for telemarketing schemes," the businesses "bilked millions of dollars from hundreds of victims across the country," and Tarkanian admitted he "did legal work for those companies." (I AA 60-65). Together, these sources amply meet Rosen's burden of demonstrating, by a preponderance of the evidence, that the statements were true or based on reliable evidence (and thus made in good faith) and did not, as Tarkanian argues, create or imply false facts.

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[6] Tarkanian also argues that the statements do not relay the entirety of the article, which discusses the 2009 defamation trial. This argument is contrary to Nevada precedent and federal First Amendment jurisprudence. There is no requirement that the statements report the content of the full article; they need only reflect the gist of the "*portion of the story* that carries the 'sting' of the [statement]." *Pegasus*, 118 Nev. at 715 n.17 (quoting *Masson*, 501 U.S. at 517) (emphasis added); *see also Brown v. Hartlage*, 456 U.S. 45, 61 (1982) ("[W]e depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas") (citation omitted); *id.* ("In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent[,]" and "[t]he preferred First Amendment remedy of 'more speech, not enforced silence,' thus has special force.") (citations omitted); *see also Issa*, Case No. 37-2016-39144-CU, slip Opp. Br. at 2 (rejecting claim that advertisement was defamatory because it did not relate the full context of the article).

See, e.g., *Conroy v. Spitzer*, 70 Cal. App. 4th 1446, 1448-49 (Cal. Ct. App. 2015).

With respect to the remaining statement that Tarkanian challenges—that the companies he incorporated were "fronts for telemarketing schemes"—Tarkanian's argument that this statement was not made in good faith because it is only a partial quote from the cited 2006 Las Vegas Sun article similarly fails. As a threshold matter, Tarkanian admits that the statement "'fronts for telemarketing schemes'" appears in the article. Opp. Br. 13. Thus, it is plainly true on its face and is certainly sufficient to support a finding of good faith. It also accurately portrays the full gist of the statement from which it is excerpted, which reports that "[i]n 1994, Tarkanian incorporated at least four business entities later found by state and federal authorities to be *fronts for telemarketing schemes*." (I AA 60-65); Opp. Br. 13-14 (emphasis added).

Tarkanian's argument, therefore, boils down to his frustration that the Political Advertisement does not highlight that he was never charged with a crime or found to be a participant in the underlying telemarketing scheme. But Tarkanian has produced no authority that

says a political candidate must spend her resources to paint her opponent more favorably. This lack of authority is unsurprising, given that "defamation by omissions" is not actionable. *Paterno v. Super. Ct.*, 163 Cal. App. 4th 1342, 1352–53 (Cal. Ct. App. 2008). A plaintiff cannot force a defendant "'to write an objective account' of the dispute or to tell [the other side] of the story." *Id.* at 1353 (quoting *Reader's Digest Ass'n v. Sup. Ct.*, 37 Cal.3d 244, 252 (Cal. App. Ct. 1984)).

Similarly, Tarkanian argues that the Political Advertisement must have made false statements because it would have had "no impact" and "no bearing on Mr. Tarkanian's qualifications for public office" if it had "accurately portrayed the fact that [he] provided routine legal work for companies that ended up operating telemarketing scams but had no involvement in the operation of the scams." Opp. Br. 14-15. This makes an assumption about what voters may view as pertinent to Tarkanian's qualifications for office that the First Amendment does not entitle him to make. It also ignores that, in virtually every one of Tarkanian's campaigns, this topic has been an issue of discussion both by his political opponents and Tarkanian himself. *See, e.g.*, (I AA 46-69). That is the way that the First Amendment is meant to work. It does not

require, as Tarkanian seems to insist, that his political opponent tell the story exactly as he would like them to tell it. But it anticipates that Tarkanian will respond with the facts as he views them. *See* Br. 28-30; *see also Brown v. Hartlage*, 456 U.S. 45, 61 (1952). And that is precisely what happened. Br. 29-30.

It is not only possible but highly probable that voters are both convinced that Tarkanian's involvement with a significant number of companies that turned out to be fraudulent fronts for scams that preyed on the elderly was limited to that of a mere "lawyer," "businessman" or "registered agent," but nevertheless view that involvement as problematic for his holding public office. What Tarkanian plainly hopes to do is obtain a court judgment that will effectively scare off his future political opponents from discussing this issue with voters at all. This is precisely the type of chilling of protected First Amendment speech that the Anti-SLAPP statute is meant to guard against. If Tarkanian is successful, the ultimate losers will be Nevada's electorate, who will be deprived of a robust and meaningful debate over the qualifications of those who would seek to represent them.

II. TARKANIAN CANNOT DEMONSTRATE A PROBABILITY OF SUCCESS ON THE MERITS

Because Tarkanian's claims fall squarely within the Anti-SLAPP statute, he bears the burden of making a prima facie showing that the statements in the Political Advertisement satisfy the elements of at least one of his claims for either defamation or IIED. *See* N.R.S. § 41.660 (3)(b). As a public figure, he must also demonstrate that he can prove actual malice for both claims.[7] *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1054 (Cal. Ct. App. 2008); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). He cannot do so.

A. Tarkanian Has Not Made a Prima Facie Case for Defamation

Tarkanian's argument that the Political Advertisement contains defamatory statements because they imply a defamatory meaning is misguided and cannot save his claims. Much like Tarkanian's argument with respect to good faith, he contends that the context of the statements (e.g., place of the word, juxtaposition of pictures, etc.) creates a defamatory implication and, therefore, is actionable. Opp. Br. 21-29. While it is true that in certain circumstances defamation can be

[7] Tarkanian does not dispute that for the purposes of this suit he is a public figure. Opp. Br. 29-30.

found by implication, that is not so in a case like this where the plaintiff has all but admitted that the alleged statements are true. *See* discussion *supra* at 2-6.

Truth is an absolute defense to defamation and, as the Nevada Supreme Court explained in *Wellman*, 108 Nev. at 88, "factual assertions are not actionable unless they have no basis in truth." *Id.* at 88 (citing *Milikovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)); *see also Pegasus*, 118 Nev. at 715 ("Nor is a statement defamatory if it is absolutely true, or substantially true."). Likewise, as explained, Br. 42, the mere existence of some ambiguity in the meaning of a statement will not carry a defamation plaintiff's burden of demonstrating that the statement was false; thus, it cannot create an issue of material fact or question for a jury as Tarkanian has argued. *See, e.g.*, *Vogel,* 127 Cal. App. 4th at 1021-22; *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1167-68 (Cal. Ct. App. 2004); *Conroy*, 70 Cal. App. 4th at 1453.[8]

[8] For similar reasons, Tarkanian's contention that the font, background, or accompanying photo of Tarkanian render the statements defamatory is without merit. The average viewer would easily understand the Advertisement to be a political ad, in which similar presentation is commonplace. *See, e.g.*, *Reed*, 248 Cal. App. 4th at 860 (rejecting argument by candidate that "the image of the … ad, which, when viewed in combination with the voiceover narration,

Moreover, Tarkanian's argument, which focuses on the individual elements in the Political Advertisement, rather than the context as a whole, misunderstands the law. The central "context" to his defamation by implication argument is *not* the individual elements of the advertisement. Rather, it is that the statements were made in a clearly-marked advertisement sponsored by a political opponent during a political campaign. It is well-settled that, "[w]here potentially defamatory statements are published in a setting . . . in which the audience may anticipate efforts by the parties to persuade others to their positions by the use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.'" *Reed*, 248 Cal. App. 4th at 859 (quoting *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (Cal. Ct. App. 1976)) (alteration in original).

This is particularly true for statements made during a political campaign, a context in which "hyperbole, distortion, invective, and tirades are as much a part of American politics as kissing babies." *Beilenson v. Sup. Ct.*, 44 Cal. App. 4th 944, 954 (Cal. Ct. App. 1996); *see*

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implies [an actionable falsity]").

also, e.g., *Desert Sun Publ'g Co. v. Sup. Ct.*, 97 Cal. App. 3d 49, 53 (Cal. Ct. App. 1979) (finding no libel action for statements in a letter "of the kind typically generated in a spirited dispute in which the loyalties and subjective motives of rivals are attacked and defended" (citation and quotation marks omitted)); *Reed*, 248 Cal. App. 4th at 859 (finding explicit statements that candidate was a "crook" made in the context of a political campaign did not imply defamatory meaning given that "a political campaign, [is] a context in which the audience would naturally anticipate the use of rhetorical hyperbole"); *Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 264–65 (Cal. Ct. App. 2001) ("In the context of a heated confrontation at a shopping center between political opponents, a foe's charge of 'thief' would be reasonably interpreted as loose figurative language and hyperbole, not a claim that the plaintiff actually had a criminal past."). Indeed, given the broad First Amendment protections applicable to political speech in the context of campaigns, "[p]rovided that they do not act with actual malice, [candidates] can badmouth their opponents . . . ." *Schatz*, 669 F.3d at 52 (citing *Harte–Hanks ghton*, 491 U.S. at 686-87). *See also Beilenson*, 44 Cal. App. 4th at 955 ("It is abhorrent that many political campaigns are mean-spirited affairs that

shower the voters with invective instead of insight. . . . But to ensure the preservation of a citizen's right of free expression, we must allow wide latitude.").

As explained, Br. 44-46, this principle was recognized by the Nevada Supreme Court in *Wellman v. Fox*, where the Court found that statements at issue there were the type of "exaggerated statements [that] are permissible in contexts in which the statements would be interpreted by a reasonable person as mere rhetorical hyperbole" and were therefore not actionable as defamatory, even by implication. 108 Nev. at 88. The Court specifically found that the relevant "context" was that "of a union *election*." *Id.* (emphasis added).[9] Tarkanian's only

[9] Rosen is aware of only one Nevada case finding that statements made by a political opponent in the context of a political advertisement could have an implied defamatory meaning. In *Miller v. Jones*, 114 Nev. 1291, 1302, 970 P.2d 571, 579 (1998), the Court found that the statement that a mayoral candidate "was driving" a car in which cocaine had been found could have an implied defamatory meaning where the candidate was not actually driving the car at the time that the cocaine was discovered but, rather, had driven the car prior to that. *Miller* is distinguishable for several reasons. First, it did not involve a case where the plaintiff conceded that virtually identical statements were true. Second, *Miller* pre-dated Nevada's Anti-SLAPP statute and is a clear outlier, as the vast majority of defamation cases brought by political actors are routinely dismissed as unsustainable under either the First Amendment or, where available, anti-SLAPP statutes. *See* Br. 24-28, 43-46. Moreover, as Justice Shearing's dissent in *Miller* notes,

response is to assert that the *Wellman* Court did not find the relevant context to be an election but, rather, the "inflammatory tenor of the flyer on which the statements appeared." Opp. Br. 28-29. *Wellman*, however, does not discuss the "inflammatory tenor" or any other characteristic of the flyer, and the Court plainly states, as noted above, that the relevant "context" is that of an "election." 108 Nev. at 88. Further, the *Wellman* Court's finding is entirely in line with the wide latitude that the First Amendment has long been recognized to give to campaigns engaging in political speech, Br. 43-46, the importance of protecting First Amendment privileges in campaigns for public office, Br. 24-28, and the expectation that the political arena is the proper place to respond to challenges. Br. 28-30. *See also supra* at 14-16.

The cases that Tarkanian relies upon also demonstrate his misunderstanding of the law on this point. Tarkanian relies primarily on *Hawran v. Hixson*, 209 Cal. App. 4th 256 (Cal. Ct. App. 2012), and *Weller v. American Broadcasting Cos., Inc.*, 232 Cal. App. 3d 991 (Cal. Ct. App. 1991). Opp. Br. 23-24. But these **cases are not applicable, as**

Miller is out of line with the Court's decision in *Wellman*, which is strikingly analogous to the instant case, has no dissents, and which this Court is bound to follow.

neither involves statements made in a political campaign, a context which, as has been discussed, is one where the First Amendment necessarily accords particularly wide latitude for speech. Moreover, to the extent that *Hawran* and *Weller* are relevant, they actually support *Rosen's* position. The key finding in both cases was that the mechanisms by which the statements were presented were "usually intended to be factual, as opposed to rhetorical, persuasive, or evaluative." *Hawran*, 209 Cal. App. 4th at 292; *see also Weller*, 232 Cal. App. 3d at 1004 (noting presentation in form of neutral broadcast would almost certainly be understood as factual, unlike hyperbole or satire). To the contrary, and as courts have universally recognized, in the context of a political campaign, neither the general public nor the candidate has the expectation that statements made against opponents will be factual. Rather, the rhetorical and persuasive are understood and anticipated, and must be broadly protected by the First Amendment to ensure that free discourse to advocate for political and social change are not impermissibly chilled by overzealous policing of the spirited discourse that often accompanies important efforts to do just that. Tellingly, outside of the limited attempt to distinguish

Wellman discussed above, Tarkanian does not even attempt to address the myriad of cases cited by Rosen in the Opening Brief which make such latitude and expectation abundantly clear.

Finally, Rosen is not arguing that the Court adopt a "categorical bar on defamation claims in the context of" political speech, as Tarkanian asserts. Opp. Br. 27. Rosen simply asks that the Court confirm that Nevada's judiciary must do what the Anti-SLAAP law and the First Amendment have always required: ensure that only truly meritorious cases move forward where First Amendment rights are at stake. The instant case—one in which the Plaintiff has openly admitted that the statements at issue are, at the very least, substantially true—is precisely the type of case for which the Anti-SLAPP statute should be applied to permit the defendant a quick early exit from the litigation.

B. Tarkanian Has Not Made a Prima Facie Case for Actual Malice

Tarkanian's arguments regarding actual malice are also without merit.[10] As an initial matter, because Tarkanian cannot make a prima

[10] "Because [Tarkanian] was . . . a candidate . . . he was a public figure at the relevant time and, therefore, must show that [Rosen] published [the alleged defamatory statements] with either knowledge of

facie case that the statements were false, *see* discussion *supra* at 2-16, Br. 38-46, the Court does not have to reach the question of whether Tarkanian would also be able to show (as he must, to prevail on his claims) that, by clear and convincing evidence, the statements were made with actual malice. *Nygard, Inc.*, 159 Cal. App. 4th at 1054; *see also Paterno*, 163 Cal. App. 4th at 1345-46. But even if the Court were to reach this part of the analysis, Tarkanian also fails to carry his burden here.

First, Tarkanian argues that he can demonstrate actual malice because he claims the statements at issue are falsely presented as quoting newspapers. As explained *supra* at 9-16, this argument is factually inaccurate and cannot be used as a basis for showing actual malice. Likewise, contrary to Tarkanian's bald and unsupported statement, even if there was a factual basis for this assertion, it is not "textbook" actual malice. Opp. Br. 35. Indeed, in the *Issa* case, where the defendant actually *did* misrepresent quoted material, the court did

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[their] falsity or reckless disregard as to whether the statement[s were] true or not." *Miller*, 114 Nev. at 1298–99; *see also Rosenaur*, 88 Cal. App. 4th at 274 (quoting *Beilenson*, 44 Cal. App. 4th at 950) (striking defamation claim under Anti-SLAPP statute brought in local initiative campaign).

not even discuss it when finding unequivocally that the plaintiff had failed to meet his burden of showing actual malice at the Anti-SLAPP motion to dismiss stage. Case No. 37-2016-39144-CU, slip Opp. Br. Although this case was discussed in Rosen's briefing before the District Court, Tarkanian does not even attempt to address it. And, in general, courts require far more clearly egregious behavior and much higher standards of proof to meet this element. *See, e.g., Reed*, 248 Cal. App. 4th at 862 (Cal. App. Ct. 2016) (finding no proof of actual malice where plaintiff argued that statements "must have been made with actual malice because they were so obviously false"); *id.* ("There is a 'significant difference between proof of actual malice and mere proof of falsity.'"); *Wynn v. Smith*, 117 Nev. 6, 17, 16 P.3d 424, 431 (2001); *see also Rattray v. City of Nat'l City*, 51 F.3d 793, 801 (9th Cir. 1994) ("We also note that the types of evidence necessary to prove actual malice will often be very different from evidence of falsity.").

Second, Tarkanian continues to rest the weight of his actual malice argument on the existence of the Schneider Litigation. Opp. Br. 31-34. As explained, there are numerous reasons—not the least of which is that Tarkanian has admitted that substantially similar

statements published *after* the Schneider statements are true—that this argument fails. Br. 13-18, 48-49, 51. For example, Tarkanian asserts that Rosen acted with actual malice because she must have known about the verdict in the Schneider Litigation, given that the allegations and outcome of the case were discussed in the articles cited in the Political Advertisement. Opp. Br. 31-32. Yet, neither article (nor the cease and desist letter that Tarkanian sent Rosen) identify the specific statements that were found to be defamatory in the Schneider Litigation. Moreover, *both* articles identified in the Political Advertisement and the article *cited in the cease and desist letter* discuss statements that are materially *different* from the statements at issue here. Thus, if anything, these sources provide further evidence that the statements in the Political Advertisement—which were virtually identical to the non-actionable Miller and Horsford Statements and supported by several other reputable news sources that post-dated the Schneider verdict, a public letter from a former assistant U.S. Attorney that was never the subject of any legal action by Tarkanian, and several other public records, *see* discussion *supra* at 6-8, in addition to the

media cited in the Political Advertisement itself—were distinguishable from those found by the jury to be false in the Schneider Litigation.

In fact, as discussed, the Schneider Litigation was a markedly different case than the present one and included several statements that bear no resemblance whatsoever to the statements at issue here. Br. 13-18. This is objectively and demonstrably true. *See* Br. 14-15 (discussing case's consideration of statements indicating that Tarkanian "turned state evidence" and "was under Grand Jury Investigation" and its grouping of these statements such that it is impossible to determine which were deemed false). Thus, mere knowledge about the verdict in the Schneider Litigation cannot support a finding of actual malice, which requires clear and convincing evidence that Rosen knew the statements were false or "in fact entertained *serious doubts* as to the truth of [the] publication." *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 414, 664 P.2d 337, 344 (1983) (quoting *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968)) (emphasis in original); *see also Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 84 (Cal. Ct. App. 2007) (dismissing claim of defamation under Anti-SLAPP statute for failure to show "actual malice") (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466

U.S. 485, 511 (1984)).[11] This is particularly so given the ample evidence that followed that supported the truth of the statements in the Political Advertisement. *See* Br. at 49 (discussing additional grounds for reasonably not relying on Schneider Litigation).

Third, Tarkanian again argues that the evidence of the truthfulness of the statements submitted by Rosen does not help stave off an actual malice argument because there is no evidence in the record that Rosen actually relied upon it. Here, Tarkanian makes the same error that he made in arguing good faith—at this stage of the litigation, Rosen does not bear the burden of demonstrating that she did not act with actual malice. Rather, it is Tarkanian's burden to present a prima facie case that he can prove actual malice with clear and convincing evidence. N.R.S. § 41.660(3)(b). The mere existence of so many sources supporting the statements in the Political Advertisement—none of

[11] Tarkanian argues that Rosen should have assumed that the jury gave all of the statements equal weight in making its final determination. The bulk of the testimony at trial, however, was about statements markedly different from the statements at issue here and, given that all statements were grouped together on the jury verdict form, it is just as plausible that they based their determination on these differing statements, not the allegedly similar ones. (II AA 334-391).

which he has yet to refute—demonstrate that he has failed to carry that burden.

In sum, Tarkanian's argument continues to leave "substantial doubt" on the actual malice front and is not "sufficiently strong to command the unhesitating assent of every reasonable mind," the required showing for actual malice. *Reed*, 248 Cal. App. 4th at 861-62 (citations and quotation marks omitted). Accordingly, Tarkanian's defamation claim also fails for this reason and should be dismissed.

C. Tarkanian's Has Not Made A Prima Facie Case on Intentional Infliction of Emotional Distress

Tarkanian's arguments in support of his IIED claim are legally incorrect and, in some cases, wholly unsupported. They provide no reason for this Court to maintain this claim.

Tarkanian presents only two arguments in support. *First*, he argues that he can state a claim for IIED because he can satisfy the first element of the claim, actual malice. Tarkanian has presented no evidence indicating that he can make out a prima facie case, much less present clear and convincing evidence, that Rosen acted with actual malice in publishing the statements. Tarkanian has not only admitted that substantially similar statements are true, but ample sources

supporting the statements demonstrates that it was neither intentional nor reckless but, instead, entirely reasonable for Rosen to believe that they were true. Consequently, he cannot prove a critical element of his IIED claim and his claim (as well as his argument) fails.

Second, Tarkanian asserts—without citation to any authority—that the statements are extreme and outrageous because they were published "for the purpose of deceiving voters mere days before a national election." Opp. Br. 36. But this is not well-founded. It is well established that "[e]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community." *Chehade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1121 (D. Nev. 2009) (quoting *Maduike v. Agency Rent–A–Car,* 114 Nev. 1, 953 P.2d 24, 26 (1998) (per curiam)). Conduct in the context of political campaign advertisements is highly unlikely to rise to that level given that courts have repeatedly found that accusations of wrong doing, criminality, and fraud are not only tolerable, but are to be expected and must be permitted to maintain the protections of free speech. Br. 52-53; *see, e.g.*, *Harte-Hanks*, l U.S. at 637; *Schatz*, 669 F.3d at 52; *Desert Sun Publ'g.*, 97 Cal. App. 3d at 54. That Tarkanian has

presented essentially no response to this argument is telling, only underscoring the correctness of Rosen's position and the weight of the case law against him and his IIED claim.

Finally, Tarkanian's Brief makes no argument with respect to the remaining two elements of an IIED claim: (1) "that the plaintiff actually suffered extreme or severe emotional distress; and [2] causation." *Miller*, 114 Nev. at 1299–300 (citations omitted). Accordingly, he has provided no indication that he can make a prima facie case on these elements. This is a particularly egregious omission, where evidence that he suffered emotional distress is wholly and only within his possession. Accordingly, Tarkanian bears the burden of making a prima facie showing that he can prevail on this claim as well as his defamation claim. He has failed to carry this burden.

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CONCLUSION

For all of the reasons set forth above, as well as the reasons set forth in Rosen's Opening Brief, this Court should promptly order dismissal of Tarkanian's Complaint.

Dated: October 8, 2018 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 6,994 words.

3. Finally, I hereby certify that I have read this Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate

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I hereby certify that on this 8th day of October, 2018, a true and correct copy of the foregoing **Appellants' Reply Brief** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system and by depositing a true copy of the same for mailing, postage pre-paid, in the U.S. Mail at Las Vegas, Nevada, said envelope addressed to:

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