IN THE SUPREME COURT OF THE STATE OF NEVADA

JENNIFER V. ABRAMS; AND THE ABRAMS & MAYO LAW FIRM, Appellants, vs. STEVE W. SANSON; AND VETERANS IN POLITICS INTERNATIONAL, INC., Respondents.	CASE NO.: 73838
JENNIFER V. ABRAMS; AND THE ABRAMS & MAYO LAW FIRM, Appellants, vs. LOUIS C. SCHNEIDER; AND THE LAW OFFICES OF LOUIS C. SCHNEIDER, LLC, Respondents.	CASE NO.: 75834

RESPONDENTS STEVE W. SANSON AND VETERANS IN POLITICS INTERNATIONAL, INC.'S ANSWER TO APPELLANTS' PETITION FOR EN BANC RECONSIDERATION

Appeal from Eighth Judicial District Court, Clark County

The Honorable Michelle Leavitt, District Judge

District Court Case No. A-17-749318-C

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NRAP 26.1 DISCLOSURE

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

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

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

DATED this 5th day of August, 2020.

/s/ Margaret A. McLetchie

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I. INTRODUCTION

This Court unanimously affirmed dismissal of Appellants Jennifer Abrams' and her law firm's ("Abrams") claims pursuant to Nevada's anti-SLAPP statute. *Abrams v. Sanson*, 136 Nev. Adv. Op. 9, 458 P.3d 1062 (2020) (the "Decision").[1] The panel denied Abrams' Petition for Rehearing. Now, this Court must deny the disfavored[2] relief Abrams requests in her Petition for En Banc Reconsideration (the "Petition"). Reconsideration of the Decision is unnecessary to maintain uniformity of this Court's decisions or resolve any substantial issues. Indeed, adopting Abrams' positions—rather than the Decision—would conflict with Nevada and California precedent and undermine anti-SLAPP protections.

First, Abrams' contention that allegations of extortion are sufficient to strip Sanson's communications of anti-SLAPP protection (Petition, pp. 2-5, 9-11) misrepresents case law. Abrams ignores that California's *Flatley*[3] exception—the principle that criminal speech, such as the extortion letter in *Flatley*, is unprotected by anti-SLAPP law—is narrowly tailored and Abrams cannot carry the heavy burden to apply it. To invoke *Flatley*, allegations of illegality are insufficient; plaintiffs must demonstrate defendants' communications constitute "conduct [that is] illegal ***as a***

[1] The panel reversed dismissal of portions of claims based on communications allegedly made in a private telephone call. *Id.* at 1068.
[2] "En banc reconsideration of a decision of a panel of the Supreme Court is not favored and ordinarily will not be ordered…" NRAP 40A(a).
[3] *Flatley v. Mauro*, 39 Cal. 4th 299, 139 P.3d 2 (2006).

matter of law," *i.e.*, that the defendant conceded the illegality of his conduct or the illegality is conclusively shown by the evidence. *City of Montebello v. Vasquez*, 1 Cal. 5th 409, 424, 376 P.3d 624, 634 (2016) (emphasis in original).

Here, none of the communications constitute illegal speech. Nor have Respondents "conceded" they are illegal, and Abrams fails to point to any portion of the record reflecting so. Abrams' allegations—which are not "conclusive evidence" and are contradicted on the record—cannot turn Sanson's non-actionable criticism[4] into criminal conduct under *Flatley* or Nevada law. Accepting Abrams' position—that merely alleging a communication's "criminality" suffices to prevent a SLAPP defendant from meeting his burden under NRS 41.660(3)(a)—"would eviscerate the anti-SLAPP statute's protections because the plaintiff could preclude the statute's application simply by alleging criminal conduct by the defendant." *Safari Club Int'l v. Rudolph*, 845 F.3d 1250, 1259 (9th Cir. 2017).

Second, Abrams' arguments regarding the fair report privilege are an exercise in misrepresentation. The Decision reflects that Sanson's communications were non-actionable opinions, and quotes regarding Abrams' in-court behavior were taken verbatim from the "visual recordings of actual court proceedings." *Abrams*, 458 P.3d at 1068. Abrams' argument relies on unsupported misrepresentations of Sanson's

[4] Because Abrams attempted to hold Respondent Schneider liable for Sanson's non-actionable communications, the district court correctly dismissed him. *Abrams*, 458 P.3d at 1070, n.6.

communications and runs afoul of this Court's directive in *Rosen v. Tarkanian* against parsing the truth or falsity of individual words and phrases instead of evaluating the "gist or sting" of the communications. Contrary to Abrams' argument, Sanson did not "falsely report" anything by publishing his opinions and accurate transcriptions of what was undeniably said in court.

Third, Abrams' arguments regarding the second anti-SLAPP prong—recitations of arguments raised in prior briefing—again fail. Abrams has not demonstrated with prima facie evidence that any of her claims have minimal merit.

Finally, Abrams' hypothetical is distinguishable from this matter and would survive an anti-SLAPP motion to dismiss under the Decision's precedent. Another hypothetical scenario demonstrates how adoption of Abrams' positions would render Nevada's anti-SLAPP statute a toothless tiger incapable of protecting political speech, which is undeniably communication that demands robust anti-SLAPP protection. The Decision properly upheld the letter and spirit of Nevada's anti-SLAPP statute: defendants are ***immune***[5] from lawsuits like Abrams' which attempt to enlist the courts as censors to silence speech on matters of public concern. This Court must deny Abrams' Petition.

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[5] "A person who engages in a good faith communication … is immune from any civil action for claims based upon the communication." NRS 41.650.

II. ARGUMENT

A. *En Banc* Reconsideration Standard.

Petitions for *en banc* reconsideration "shall demonstrate that the panel's decision is contrary to prior, published opinions … and shall include specific citations to those cases." NRAP 40A(c). Petitions contending that the proceeding involves a substantial issue "shall demonstrate the impact of the panel's decision beyond the litigants involved." *Id.* Finally, "[m]atters presented in the briefs and oral arguments may not be reargued in the petition." *Id.*

Abrams' Petition fails to demonstrate that this is the exceptional case meriting *en banc* reconsideration, and the Petition regurgitates arguments already rejected by this Court. Thus, it must be denied.

B. Allegations of Criminal Conduct Are Insufficient to Strip Communications of Anti-SLAPP Protection.

The Decision comports with this Court's and California courts' interpretations of the anti-SLAPP statute's first prong—specifically, that Abrams' allegations of extortion, which are disputed by Sanson's declaration and attached exhibits (III AA 406-469)—are insufficient to strip his good faith communications of anti-SLAPP protection.

1. Abrams' Position Conflicts With Nevada Precedent.

Overturning the Decision would radically depart from this Court's mandate that an issue of public interest be defined broadly. *Coker v. Sassone*, 135 Nev. 8, 14,

432 P.3d 746, 751 (2019).[6] Abrams' position—that communications are not protected if plaintiffs merely allege criminal conduct—narrows the universe of "issues of public interest" in an amount limited only by plaintiffs' imaginations, an impermissible result.

Overturning the Decision would also depart from *Coker*'s reaffirmation that "a moving party seeking protection under NRS 41.660 ***need only demonstrate*** the … conduct falls within one of four statutorily defined categories of speech, rather than address difficult questions of First Amendment law." *Id*. at 12, 749 (citing *Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017)) (emphasis added). Exempting communications from anti-SLAPP protection because the plaintiff alleges they are "criminal conduct" would abrogate *Delucchi*, because speech would be rendered unprotected even if the defendant otherwise demonstrates by a preponderance of the evidence that it falls within one of the four categories enumerated in NRS 41.637.

While Abrams ignores that Sanson's declaration (III AA 406-410) constitutes a showing of good faith, the panel correctly did not. This Court recently held that a defendant's declaration can support a showing of good faith, and "[h]olding otherwise would make it nearly impossible for a defendant to make a showing of

[6] The communications at issue in *Coker*—undisputedly false misrepresentations that lithographs were "originals" (*Id*. at 12, 750)—are distinguishable from Sanson's non-actionable opinions.

good faith when the parties dispute what was actually said." *Taylor v. Colon*, 136 Nev. Adv. Op. 50, at *5 (July 30, 2020). Because the Decision comports with *Coker*, *Rosen*, and *Taylor*, it must be adopted.

2. Abrams' Position Conflicts with California Precedent.

Abrams argues that "[t]he California Supreme Court has held that extortion is not protected by the anti-SLAPP statute and a defendant who engages in extortion cannot meet its burden under the first prong of the analysis." (Petition, p. 9 (citing *Flatley*, 39 Cal. 4th at 320, 139 P.3d at 15.) However, Abrams elides that courts interpreting California's anti-SLAPP law have repeatedly rejected her arguments, emphasizing that the "*Flatley* exception is narrow—it applies only where 'the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence.'" *Sameer v. Benett*, No. F071888, 2019 WL 168579, at *8 (Cal. Ct. App. Jan. 11, 2019) (unpublished), *reh'g denied* (Feb. 11, 2019) (citing *Flatley*, 39 Cal. 4th at 316; *Mendoza v. ADP Screening & Selection Servs., Inc.*, 182 Cal.App.4th 1644, 1654, 107 Cal. Rptr. 3d 294 (2010)). Under *Flatley*, "'conduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage ... simply because it is ***alleged*** to have been unlawful or unethical.'" *Sameer*, 2019 WL 168579, at *8 (quoting *Kashian v. Harriman*, 98 Cal.App.4th 892, 910–911, 120 Cal. Rptr. 2d 576 (2002)) (emphasis in original).

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In *City of Montebello v. Vasquez*, 1 Cal. 5th 409, 376 P.3d 624 (2016), Montebello sued its former councilmembers for allegedly voting to award a waste hauling contract in exchange for campaign contributions. *Id*. at 412-415, 626-628. The councilmembers moved to strike under California's anti-SLAPP law. *Id*. at 413, 626. In discussing whether the *Flatley* exception applied to the councilmembers' allegedly unlawful votes, the California Supreme Court reiterated that "conduct must be illegal ***as a matter of law*** to defeat a defendant's showing of protected activity," *i.e.*, the "defendant must concede the point, or the evidence conclusively demonstrate it, for a claim of illegality to defeat an anti-SLAPP motion at the first step." *Id*. at 424, 634 (emphasis in original).

In *Vasquez*, the defendants denied "any quid pro quo in connection with [votes]" and Montebello conceded "that its claim depend[ed] on inferences to be drawn from circumstantial evidence of the council member defendants' advocacy and votes in favor of the [waste] contract, followed by their receipt of the campaign contributions." *Id*. This completely "foreclos[ed] a resolution at the first step of the anti-SLAPP inquiry." *Id*.

Since *Vasquez*, California courts have emphasized that the type of allegations offered by Abrams are insufficient to invoke the *Flatley* exception. *See Thomas v. Peddie*, No. B291513, 2019 WL 2950161, at *6 (Cal. Ct. App. July 9, 2019) (unpublished), *reh'g denied* (Aug. 8, 2019) (plaintiff's "evidence of illegality cannot

avoid the factual dispute created by" defendant's denial of illegal conduct submitted in declaration in support of anti-SLAPP motion); *Shelhamer v. Towfigh*, No. B292421, 2019 WL 4302206, at *5 (Cal. Ct. App. Sept. 11, 2019) (unpublished), *reh'g denied* (Sept. 30, 2019) (plaintiff's allegations of illegality "are not evidence, and defendants were not required to submit evidence to refute those allegations" to avoid *Flatley* exception); *Mardeusz v. Lace*, No. A151819, 2018 WL 3194271, at *6–7 (Cal. Ct. App. June 29, 2018) (unpublished), *reh'g denied* (July 24, 2018) ("Mere talismanic invocation of 'illegality' or 'unlawful' conduct is not alone sufficient to defeat the protections of [anti-SLAPP law]"); *San Diegans for Open Gov't v. San Diego State Univ. Research Found.*, 13 Cal. App. 5th 76, 106, 218 Cal. Rptr. 3d 160, 182 (2017), *as modified on denial of reh'g* (June 1, 2017) (citing *Birkner v. Lam*, 156 Cal. App. 4th 275, 285, 67 Cal. Rptr. 3d 190 (2007)) ("The mere fact the plaintiff alleges the defendant engaged in unlawful conduct does not cause the conduct to lose its protection under the anti-SLAPP statute.")

Here, Abrams' claims not only improperly depend on inferences[7] to be drawn from circumstantial evidence, but upon "evidence" which amounts to Abrams' own disputed allegations. It is disputed that "Schneider solicited the assistance of Sanson who began a vicious online falsely accusing Abrams of misconduct" (Petition, p. 2)

[7] *See Tuszynska v. Cunningham*, 199 Cal.App.4th 257, at 269, 131 Cal.Rptr.3d 63 (Cal. App. 2011) (analysis of motive is "untenable and is at odds with the language and purpose of anti-SLAPP statutes")

and it is controverted that "both Schneider and Sanson admitted the attacks underlying this lawsuit were made in retaliation for Abrams' refusal to withdraw that sanctions motion." (Petition, p. 11.)[8] In his declaration supporting the anti-SLAPP Motion to Dismiss, Sanson not only explained the bases for his good faith beliefs in his opinions and their connection to the public interest (III AA 406-409) but unequivocally stated that "VIPI has never accepted payment from anyone in exchange for publishing articles or disseminating a particular news story to its members or the public." (III AA 410.) Thus, the Decision correctly recognized that—Abrams' allegations notwithstanding—Sanson demonstrated by a preponderance of the evidence that his communications were protected under prong one.

C. The Decision Comports With This Court's Precedent in *Rosen*.

Abrams' Petition is premised on the unsupported notion that, by looking to the purported implications of individual words and phrases of Sanson's communications, opinions are transformed into "statements of fact" capable of being proven true or false. Abrams' invitation to strip Sanson's "opinions and hyperbole"

[8] These assertions are not supported by any citation to the record on appeal, which violates Abrams' counsel's certification. (*See* Petition, pp. 24-25.) Abrams' repeated uncited factual assertions, misrepresentations of the record and misstatements of applicable law constitute grounds to sanction Abrams and her counsel under NRAP 40A(g).

away to turn his protected communications into "false statements of fact" (Petition, p. 5) is at odds with this Court's holding that "in a defamation action, 'it is not the literal truth of each word or detail used in a statement which determines whether or not it is defamatory; rather, the determinative question is whether the 'gist or sting' of the statement is true or false.'" *Rosen v. Tarkanian*, 135 Nev. 436, 440, 453 P.3d 1220, 1224 (2019) (citations omitted).

The panel correctly rejected "Abrams' argument that some statements are false assertions of fact that impute malfeasance" because the proper "analysis does not single out individual words in Sanson's statements." *Abrams*, 458 P.3d at 1068. The "'gist and sting' of the communications—as demonstrated by Sanson's declaration, emails to Judge Elliott and Abrams, and articles—are that Sanson believes Abrams misbehaves in court and employs tactics that hinder public access to courts [which] constitute Sanson's opinions that, as mentioned above, are not knowingly false and thus satisfy the third element of protected good-faith communications." *Id.* at 1069; *see also Taylor*, 136 Nev. Adv. Op. 50, *5 (reversing denial of anti-SLAPP motion because "gist or sting" of defendant's public presentation on casino cheating was truthful or made without knowledge of falsehood even though defendant played video of plaintiff and allegedly called plaintiff a "cheater").

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Accepting that the "false factual statements" claimed by Abrams (*see, e.g.*, Petition, p. 12) even exist[9] requires deliberate misreading[10] of the communications at issue and an inappropriate parsing of the communications' individual words and phrases to the exclusion of their "gist" or "sting." This is counter to *Rosen*, and must be rejected.

D. The Panel's Decision Is Consistent With The Fair Report Privilege.

Abrams' argument regarding the fair report privilege erroneously presupposes that Sanson made "false factual statements" by publishing his opinions and verbatim quotes of Abrams' and Judge Elliot's courtroom exchanges.[11] As argued *supra*, this is not so.

The application of the fair report privilege— provides protection to a person who fairly and accurately reports defamatory content asserted in an official proceeding[12]—to Sanson's verbatim quotes of Abrams' and Judge Elliot's exchanges in court would not, as Abrams suggests, "forgive[] a person's knowing

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[9] Abrams again fails to support her factual assertions regarding "false factual statements" with citations to the record.

[10] For instance, Abrams' counsel in district court ***conceded*** that the "Attack Article" does not call Abrams unethical:

"THE COURT: . . . I'm just – there's nowhere in here does it say Ms. Abrams is unethical.

MR. GILMORE: Point blank, you're right." (VI AA 924.)

[11] Abrams' contention that the fair report privilege should not apply because the "hearing was closed to the public" (Petition, p. 16, n.14) is meritless, as the matter was not sealed at the time of the communications. (III AA 501.)

[12] *Wynn v. Smith*, 117 Nev. 6, 14, 16 P.3d 424, 429 (2001).

and intentional defamatory statements" (Petition, p. 6) or "immunize [defendants] from liability by including a link to a video that actually proves they were lying." (Petition, p. 15.) Rather, the linked-to video reflects that Abrams and Judge Elliot ***actually did*** make the assertions quoted in the communications. That Judge Elliot later decided she was mistaken about those assertions does not eliminate the fact that they were said, nor does it obligate Sanson to change his opinions about Abrams. Indeed, obligating speakers thusly would be exactly what this Court cautioned against in *Wynn v. Smith*, 117 Nev. 6, 14, 16 P.3d 424, 429 (2001) ("If accurate reports of official actions were subject to defamation actions, reporters would be wrongly discouraged from publishing accounts of public proceedings"). Linking to the video "makes it apparent to an average reader" that the quotes were accurately transcribed "from judicial proceedings." *Adelson v. Harris*, 133 Nev. 512, 516, 402 P.3d 665, 668 (2017). Thus, the Decision must stand.

E. Abrams Failed to Meet Her Prong Two Burden.

As a threshold matter, the prong two arguments raised in Abrams' Petition are extremely similar to those raised in her petition for rehearing,[13] which was denied by this Court under NRAP 40(c). *See* April 24, 2020 Order Denying Rehearing.

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[13] *Compare* Petition, pp. 17-22 to Abrams' April 6, 2020 Petition for Rehearing, pp. 8-20.

"The court may consider rehearings … [w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2). The panel's summary denial of rehearing under Rule 40(c) implies that it did not make any such oversights or misapprehensions; the full Court should agree.

1. Civil Conspiracy

The panel held that "Abrams did not show minimal merit supporting her claim for civil conspiracy because she did not show an intent to commit an unlawful objective." *Abrams*, 458 P.3d at 1070. This is correct: as argued at length, Sanson's criticism of Abrams—even if unflattering and unfriendly—cannot constitute an "unlawful objective."

Abrams' argument that Sanson should be liable "***[e]ven if*** none of Sanson's publications were defamatory or otherwise tortious" (Petition, p. 18 (emphasis in original)) is an invitation for this Court to hold speakers liable for their negative opinions if a plaintiff can allege that another person shares said opinions. This expansion of civil conspiracy to make non-actionable communication tortious by virtue of two or more people engaging in it would be a *de facto* abrogation of tort law, not to mention a severe burden on speech which must be rejected.

2. Defamation

The panel held that "Abrams' defamation claim lacked minimal merit because Sanson's statements were opinions that therefore could not be defamatory." *Abrams*, 458 P.3d at 1069 (citing *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 715, 718, 57 P.3d 82, 88, 90 (2002)). As argued at length, *supra*, the panel correctly determined that Sanson demonstrated by a preponderance of the evidence that the communications at issue were non-actionable opinions and verbatim quotes of courtroom proceedings which could not be defamatory as a matter of law, and therefore Abrams failed to demonstrate her defamation claim had minimal merit.

3. False Light

The panel held that "Abrams did not show minimal merit supporting her claim for false light invasion of privacy because she failed to show that she was placed in a false light that was highly offensive or that Sanson's statements were made with knowledge or disregard to their falsity." *Abrams*, 458 P.3d at 1070. The panel was correct: Sanson's negative opinions of Abrams' courtroom demeanor and litigation tactics are not "false statements of ethical misconduct" and need not, as Abrams argues, be based on her having an official disciplinary record. (Petition, p. 20.) Furthermore, Abrams failed to demonstrate Sanson's communications were "highly offensive to a reasonable person," let alone a seasoned litigator such as herself.

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4. Business Disparagement

As the panel noted, "Abrams did not show minimal merit supporting her business disparagement claim because she did not show that Sanson's statements were false or provide evidence of economic loss that was attributable to the disparaging remarks." *Abrams*, 458 P.3d at 1070. Abrams' argument that Sanson's opinions—an alleged mischaracterization of the sealing law and speculation that lawyers "seal cases to cover their own bad behaviors"— somehow hurt her business (Petition, pp. 20-21) is unsupported by the record. Abrams' declaration nakedly claimed: "I believe that Abrams & Mayo (and therefore I) have suffered economic damages … in the form of lost time, lost business, etc." (V AA 755.) The district court and this Court correctly recognized this is inadequate under NRCP 9(g) and prong two of the anti-SLAPP statute.

5. Emotional Distress

As the panel noted, "Sanson's use of a vitriolic tone was insufficient to support" claims of emotional distress. *Abrams,* 458 P.3d at 1070 (citing *Candelore v. Clark Cty. Sanitation Dist.*, 975 F.2d 588, 591 (9th Cir. 1992) (considering claim for IIED under Nevada law and observing that "[l]iability for emotional distress will not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities'"). Contrary to Abrams' argument (Petition, p. 21) harsh criticism and negative opinions communicated in a vitriolic tone fall well short of meeting the

"extreme and outrageous" conduct constituting IIED. *See also Tuggle v. Las Vegas Sands Corp.*, No. 2:15-CV-01827-GMN-NJK, 2016 WL 3456912, at *2 (D. Nev. June 16, 2016) (workplace misconduct including insults and retaliation not "extreme and outrageous" enough for IIED claim to survive dismissal).

Likewise, the panel correctly determined that because Abrams' "IIED claim lacked minimal merit and she did not demonstrate negligence, her claim for negligent infliction of emotional distress also lacked minimal merit." *Abrams*, 458 P.3d at 1070. As the Petition does not argue otherwise, the Decision regarding NIED must be upheld.

6. Harassment

The panel held that "Abrams' … harassment … claim [was] voluntarily dismissed and [is] not at issue." *Abrams*, 458 P.3d at 1065, n.1. Abrams' allegations, largely unsupported by citations to the record (Petition, p. 22), are not prima facie evidence of prevailing on this nonexistent, already-dismissed claim.

F. Unintended Consequences of Reconsideration.

1. Abrams' Hypothetical is Distinguishable From the Instant Case, Would Not Be Protected Under the Decision's Precedent.

Unlike the communications at issue here—non-actionable opinions accompanied by verbatim quotes of a court proceeding—Defendant Smith's article contains a clearly false statement of fact that can disproven by watching the attached video of the courtroom proceedings: that Judge Doe accepted a bribe in open court.

(Petition, p. 7.) One needs not "parse every word" of Smith's communications to determine the "gist or sting" of that unambiguous allegation is a knowingly false statement of fact rather than a non-actionable opinion.

Thus, under the Decision, Smith's conduct—unlike Sanson's—would not be protected by the anti-SLAPP statute. Defendant Smith's videotaped extortionate threat in open court, which provides incontrovertible proof of an "extortionate scheme" beyond plaintiff's allegations and speculation, would meet the *Flatley* exception's burden. Because a point-blank allegation of bribery is unambiguously a statement of fact—not opinion—Smith would fail to demonstrate good faith by a preponderance of the evidence under the Decision.

2. Hypothetical Abuse of Abrams' Precedent.

Abrams' positions would leave substantial amounts of speech vulnerable to SLAPPs. For instance, a wronged customer who demands a refund (or, as a SLAPP plaintiff pleads, "executes an extortionate scheme") would not be entitled to anti-SLAPP protection if she shares her opinion online, even though consumer advocacy is plainly good faith communication.

Another hypothetical demonstrates how, under Abrams' precedent, a SLAPP plaintiff could enlist the courts to stifle political speech. Judge Roe is running for reelection. Activist Andy—who learned that Judge Roe has been credibly accused of racial bias—campaigns for Lawyer Lisa, who is running against Judge Roe. On

his public blog, Andy claims that Judge Roe sentences Black defendants harsher than White defendants for similar crimes and treats Black attorneys less respectfully than he treats White attorneys in his courtroom. Andy posts two public records of sentences for possession of similar amounts of narcotics issued by Judge Roe—one in which a Black defendant was sentenced to prison and another in which a White defendant received probation. Andy also posts video of a heated exchange between Judge Roe and a Black attorney in his courtroom, and transcribes verbatim quotes that he believes demonstrate Judge Roe's bias. Andy ends his post with an exhortation: "Clark County, we must remove bigoted Judge Roe from the bench by any means necessary! Donate to Lawyer Lisa's campaign today!"

Judge Roe calls Lisa, whom he believes is behind Andy's blog, demanding Lisa take down the offending post. Lisa responds: "Quit being a baby. If you don't want me running for your seat and don't want activists campaigning for me, you should rethink how you treat Black people in your court."

Judge Roe could "litigate" this matter for free in the court of public opinion by explaining how Andy is mistaken and his conduct reflected sound jurisprudence rather than racial bias. Instead, Judge Roe sues Lisa and Andy claiming defamation and conspiracy.

It is beyond cavil that Andy's political opinions are "communication that is aimed at procuring any governmental or electoral action, result or outcome" under

NRS 41.637(1) or "communication made in direct connection with an issue of public interest" under NRS 41.637(4) which is truthful or made without knowledge of its falsehood. Voters should be exposed to a wide variety of opinions regarding judicial candidates—including negative opinions based on allegations of bias that had never been officially investigated or sanctioned. Under the Decision's precedent, Judge Roe's lawsuit—a transparent attempt to abuse the legal system to silence detractors and hurt his opponent's campaign—would be dismissed as the exact type of litigation anti-SLAPP law exists to deter.

Under Abrams' standard—and contrary to this Court's precedent in *Coker* and *Rosen*—Judge Roe's frivolous suit would survive an anti-SLAPP Motion to Dismiss. Why? Because although Andy's speech fits the statutorily protected categories of speech enumerated in NRS 41.637, Judge Roe alleges that Lisa was "extorting him" by seeking a "thing of value" (favorable treatment of Lisa's clients—many of whom are Black—in his court) in exchange for Lisa (impliedly) dropping out of the race and silencing her alleged co-conspirator, Andy. Further, Judge Roe ignores the "gist" or "sting" of the blog (political advocacy) and alleges Andy's rhetorical invocation of Malcolm X—"by any means necessary"—is a threat against him and advocacy of "criminal anarchy" or "criminal syndicalism," a felony under NRS 203.115-117. Judge Roe has no evidentiary support for these pretextual allegations that transform criticism into crimes, but under the standard urged by

Abrams he needs none.

Without the ability to extricate themselves from this meritless suit under Nevada's anti-SLAPP statute—and the prospect of fee-shifting to attract qualified counsel to defend them—Lisa and Andy must choose between litigating themselves into bankruptcy against powerful Judge Roe or waiving their constitutional rights to free speech and participation in the political process of judicial elections. Allowing a SLAPP plaintiff to game the system so easily—dragging political rivals into court on any pretext—would be an affront to the principles of free speech and open debate embodied by anti-SLAPP law.

III. CONCLUSION

This Court has twice rejected Abrams' contentions that their lawsuit was more than a pretext to silence a vocal critic—a paradigmatic SLAPP. This Court should not depart from Nevada and California precedent to create a loophole allowing powerful or clever SLAPP plaintiffs to silence their detractors merely by alleging—without support other than their own allegations—that said communications somehow constitute a crime. Nor should this Court depart from its precedents under *Coker* and *Rosen* that issues of public interest be construed broadly and that courts should not nitpick individual words to determine a communication's truth or falsity. The panel correctly held that "gist or sting" of the communications at issue is Sanson's unflattering (but non-actionable) opinions about Abrams' conduct in court

and litigation strategies, issues of public concern. *Abrams*, 458 P.3d at 1068. The panel correctly determined that the fair report privilege protects Sanson's right to transcribe ***verbatim*** quotes from a hearing, particularly when the video of said hearing was linked to, allowing readers to judge for themselves the veracity of the quotes and the validity of Sanson's opinions. *Id*.

Abrams and her firm are capable of defending themselves against Sanson's negative opinions in the court of public opinion. The First Amendment keeps the court of public opinion open and free; Nevada's anti-SLAPP statute exists to keep disputes like this out of the courts. Adopting Abrams' positions would invite a deluge of SLAPP litigation to flood the courts and stifle speech on matters of public concern. This Court must deny *en banc* reconsideration.

DATED this 5th day of August, 2020.

/s/ Margaret A. McLetchie

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CERTIFICATE OF COMPLIANCE

Pursuant to NRAP 40(b)(4):

I hereby certify that this ANSWER TO PETITION FOR EN BANC RECONSIDERATION complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the ANSWER TO PETITION FOR EN BANC RECONSIDERATION has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman font.

I further certify that this ANSWER TO PETITION FOR EN BANC RECONSIDERATION complies with the type-volume limitation of NRAP 40A is proportionally spaced, has a typeface of 14 points or more, and contains 4,666 words.

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

/ / /

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of August, 2020.

/s/ Margaret A. McLetchie

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing RESPONDENTS STEVE W. SANSON AND VETERANS IN POLITICS INTERNATIONAL, INC.'S ANSWER TO APPELLANTS' PETITION FOR EN BANC RECONSIDERATION was filed electronically with the Nevada Supreme Court on the 5th day of August, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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