BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DAVID S. GINGRAS** Bar No. 021097 Respondent.	**No. PDJ 2026-9010** **REPLY IN SUPPORT OF RESPONDENT'S MOTION FOR LEAVE TO EXCEED PAGE LIMITS**

Respondent moved for leave to exceed the page limits of Rule 7.1(a)(3) with respect to the Motion to Dismiss/Motion for Summary Judgment filed in this case on April 14, 2026. The State Bar opposes this request.

Three brief comments – first, the bar appears to misunderstand the posture, nature and legal standards of the motion in question. Specifically, the bar argues:

> Respondent's Motion to Dismiss (and the affidavit and exhibits thereto) is lengthy in part because it addresses some matters that are irrelevant to determining whether dismissal is appropriate … [Respondent] also submitted 28 pages of disclosure statements as exhibits to his affidavit in support of his Motion to Dismiss, which are not, themselves, proof of the factual assertions in his motion. Furthermore, the Motion to Dismiss included assertions of fact that remain disputed (see *Coleman v. City of Mesa*, 230 Ariz. 352, 363, ¶ 46 (2012) ("In adjudicating a Rule 12(b)(6) motion to dismiss, . . . a court does not resolve factual disputes between the parties on an undeveloped record."))

These arguments reflect a serious misunderstanding of the legal nature of the pending motion. While the caption does bear the title "*Motion to Dismiss*", the motion is <u>not</u> made under Civil Procedure Rule 12(b)(6). As all lawyers know, a Rule 12(b)(6) motion cannot be based on matters outside the pleadings, nor can such a motion raise or resolve factual disputes, as the bar correctly notes.

That argument has no application here because Respondent' motion was *not* made under Rule 12(b)(6). Rather, it was made under Arizona's new anti-SLAPP law, A.R.S. § 12–751. This law has entirely different legal standards which the bar seems to ignore or misunderstand.

Because the bar appears to be unfamiliar with this new law and its application, attached as Exhibits A & B are a recent ruling from the Maricopa County Superior Court filed in *State of Arizona v. Koert*, LC2025-000363 which explains the anti-SLAPP law, and a news article discussing the case. *See Judge rejects Rachel Mitchell's bid to undo 1st Amendment protections* (available at: https://www.azcentral.com/story/news/local/arizona/2026/04/16/arizona-anti-slapp-law-upheld-by-judge-vs-rachel-mitchell/89626153007/

Unlike a Rule 12(b)(6) motion, an anti-SLAPP Motion to Dismiss made pursuant to A.R.S. § 12-751 specifically *allows* the court to consider evidence outside the pleadings:

> A person who files a motion pursuant to subsection A of this section has the burden of establishing prima facie proof that the legal action was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right. The moving person may submit evidence based on the record, a sworn affidavit or other evidence that is submitted with the motion to dismiss or quash.

A.R.S. § 12–751(B) (emphasis added).

As the Superior Court explained in *State of Arizona v. Koert*:

> ARS § 12-751, generally referred to as the "Anti-Strategic Lawsuit Against Public Participation Statute," was substantially amended in 2022. By its plain language, the law allows an individual to obtain

> dismissal of a legal action, including a criminal prosecution, if there is prima facie proof that the "legal action was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right."
>
> * * *
>
> [T]he statute gives a defendant—including one who may otherwise be guilty—a mechanism to argue that the charges must be dismissed **because of the unconstitutional motivations of the prosecutor**. This is true regardless of whether the [defendant's] conduct was lawful.

Ex. A at 2–3 (emphasis added).

Thus, despite having the same title, a Motion to Dismiss made pursuant to A.R.S. § 12–751 is nothing like a Rule 12(b)(6) motion. A.R.S. § 12–751 requires the dismissal of any legal proceeding, civil, criminal, or "any regulatory or administrative action by a state actor", A.R.S. § 12–751(j)(a)(iii), if the action is based on "the unconstitutional motivations of the prosecutor."

That inquiry requires the Court to consider whether the claims arise from the exercise of constitutional rights (clearly the case here). The Court must also consider whether the claims are based on "clearly established law". Finally, the state actor (the bar) must show it "has a consistent practice of pursuing similar legal actions against similarly situated persons …." A.R.S. § 12–751(B)(1)(b). Each of these points is relevant to prove, and stop, retaliatory proceedings where the prosecutor or state actor is proceeding in bad faith, as is the case here.

Because the anti-SLAPP law protects speakers from illegal harassment and retaliation, the law allows this Court to look beyond the pleadings and consider the

facts and the evidence. Thus, the State Bar is simply wrong when it cites a 12(b)(6) standard and suggests Respdonent's affidavit and supporting information is "irrelevant to determining whether dismissal is appropriate". That is simply incorrect as a matter of law.

Respondent's affidavit and supporting information (disclosure statements, etc.) were offered for the purpose of making a *prima facie* showing (as required by A.R.S. § 12–751(B)), that this proceeding involves claims which arise from constitutionally-protected speech/conduct, and that the bar's claims are "motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right." Given the complexity of the underlying case, making this showing requires a significant amount of information and evidence.

This leads to the second point – the State Bar argues this Court's order granting judgment on the pleadings renders the discussion of A.R.S. § 12–751 "moot". Just one problem – although Respondent's Answer plainly invoked A.R.S. § 12–751 as a defense, this Court never discussed that issue in the order granting judgment on the pleadings. The Court never ruled the defense was invalid, factually or legally. Indeed, A.R.S. § 12–751 is never mentioned anywhere in the Court's ruling.

Of course, as that ruling noted, judgment on the pleadings may only be granted where "the answer fails to assert a legally sufficient defense …." Because this Court never addressed the anti-SLAPP law, it did not find (nor could it have found) that the Answer raised *no* valid defenses. As such, Respondent has no choice

but to continue making a record on this issue, despite the Court issuing an order which was legally erroneous on its face (because the Court never found the anti-SLAPP defense to be inapplicable).

This leads to the third and final point, and since there is no way to say this politely, let's just be blunt – bar counsel lied to this Court about the facts. Counsel lied to the Court by affirmatively making claims known to be false (and/or known to have zero evidentiary basis), such as the 100% false and defamatory allegation in ¶ 134 of the Amended Complaint. Bar counsel also lied by omission, by intentionally excluding large amounts of relevant information from the Complaint in an effort to create a blatantly false and misleading picture of what occurred.

Responding to and correcting such extensive and deliberate falsehoods requires significant additional pages to explain the true facts and the complete story. Understandably, bar counsel does not want the truth to come to light, which explains the bar's objection. But the truth always comes to light, and this Court must, as a matter of due process required by the Fourteenth Amendment, allow Respondent to create as detailed a record as necessary to expose the truth.

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CERTIFICATE OF SERVICE

COPY of the foregoing emailed
this 22nd day of April 2026 to:
Jim Lee
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Senior Bar Counsel

Exhibit A

Clerk of the Superior Court
*** Electronically Filed ***
04/15/2026 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2025-000363-001 DT 04/14/2026

HONORABLE KEVIN B. WEIN

CLERK OF THE COURT
A. Rowe
Deputy

STATE OF ARIZONA

PHILIP DANIEL GARROW

v.

MICHAELA JOY KOERT (001)

ALEXANDER R ARPAD

STEPHEN DOMINIC BENEDETTO
RUSSELL B FACENTE
CHRISTINA GRIFFIN CARTER
SUSAN ALI BASSAL
JARED G KEENAN
JUDGE WEIN
REMAND DESK-LCA-CCC
UNIVERSITY LAKES JUSTICE COURT

UNDER ADVISEMENT RULING

The Court has received and reviewed the State of Arizona's Petition for Special Action, Defendant's Response, and the State's reply. The Court has also received and reviewed amici briefs from various interested parties. The Court held oral argument on February 27, 2026, and then took the matter under advisement. For the reasons discussed below, the Court accepts jurisdiction but denies relief.

Background and Procedural History

This action arises from a case in which a group of protestors on ASU's campus, including Respondent Michaela Koert, were charged with misdemeanor trespassing. On June 10, 2025, in Justice Court, Koert filed a Motion to Dismiss and a Motion to Set for Evidentiary Hearing Pursuant to ARS § 12-751(C). The parties fully briefed the issue. The Justice Court ruled that the "defense ha[d] met their burden as to the potential prima facie case warranting an evidentiary

hearing …" (State's Motion to Supplement the Record, Exhibit P at 6). The State filed a Motion for Reconsideration, which the Justice Court denied on October 2, 2025. The State then filed this Special Action.

In its Special Action, the State broadly makes two arguments. First, the State argues that the Justice Court abused its discretion when it found that Koert satisfied her prima facie burden to prove that the prosecution was "substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right." The State contends that the Justice Court misapplied the plain language of the statute. Specifically, the State argues that Koert did not make the required showing. The State argues that Koert had the burden of making a prima facie pre-trial showing that the trespassing she allegedly engaged in was lawful (or, as phrased in the Petition, that the ASU time, place, and manner restrictions were unreasonable). The State also argues that ARS § 12-751 is unconstitutional for various reasons.

Analysis

1. The Justice Court Correctly Applied the Plain Language of the Statute

ARS § 12-751, generally referred to as the "Anti-Strategic Lawsuit Against Public Participation Statute," was substantially amended in 2022. By its plain language, the law allows an individual to obtain dismissal of a legal action, including a criminal prosecution, if there is prima facie proof that the "legal action was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right." ARS § 12-751(B).

The State argues that, to invoke this statute, a criminal defendant must bring forth prima facie proof that the defendant is not guilty of the charged offense. The State frames this slightly differently in its pleadings, but at oral argument it agreed that "the only way this statute comes into play is if, at the motion to dismiss stage … the defense can make a prima facie showing that the conduct … was lawful." This position has no support in the statute's plain language and undermines its application to criminal proceedings.

As Koert correctly notes, the statute merely requires prima facie proof that the prosecution was substantially motivated by an improper and unconstitutional purpose. Nowhere does the statute require proof that the defendant's conduct was lawful. And, as several amici note, the statute protects against prosecutions aimed at both past and future conduct, further undermining the State's interpretation.

The statute plainly applies to criminal proceedings, but the State's interpretation is inconsistent with that application. If a defendant is factually innocent and can establish that innocence (notwithstanding the fact that under our criminal justice system a defendant is deemed

innocent until proven guilty) then a motion under ARS § 12-751 would be unnecessary. And the State's argument that Koert cannot invoke this statute because probable cause was already found, and not challenged, runs contrary to the legislature's expressed intent.

Instead, the statute gives a defendant—including one who may otherwise be guilty—a mechanism to argue that the charges must be dismissed because of the unconstitutional motivations of the prosecutor. This is true regardless of whether the conduct was lawful. The Justice Court correctly applied the statute when it found that Koert had met her burden to bring forth prima facie evidence of the unconstitutional motivations of the prosecutor. Whether her conduct was lawful is irrelevant to an Anti-SLAPP motion.

2. ARS § 12-751 Does Not Violate the Constitution

A. The Statute Does Not Infringe on Executive Authority

The scope of the powers of the three branches of government is well-settled. As cases cited by the State acknowledge, "the legislative department has the power to define what conduct constitutes a crime." *State v. Ramsey*, 171 Ariz. 413 (App. 1992). The Executive branch "has the power to enforce the law." *Id.* But that power may be restricted by the legislature. *Andrews v. Wllrich*, 200 Ariz. 533, 537 (App. 2001). The judiciary, in its authority, should not exercise oversight of prosecutorial discretion. *Carson v. Gentry in and for the County of Maricopa*, 574 P.3d 205 (Ariz. 2025). But it's the legislature that defines the bounds of that discretion and a judiciary that enforces these boundaries does not overstep its authority.

Here, the legislature limited the authority of prosecutors by prohibiting prosecutions substantially motivated by a desire to deter, retaliate against, or prevent the exercise of constitutional rights. This falls squarely within the legislature's powers to define what conduct constitutes a crime, and the State cites no contrary authority.

The State concedes that there are already existing permissible limitations on prosecutorial charging decisions, namely selective prosecution claims and vindictive prosecution claims. The State argues that these limitations are the only permissible ones that may address prosecutorial intent. The State offers no case law or other binding authority to support this. The Court agrees with the State Senate President and the Speaker of the Arizona House of Representatives that this statute permissibly supplements and strengthens constitutional protections against vindicative prosecutions. As that brief argues, the legislature is free to create a process that "shifts the burden of proof to the government after adducing only a *prima facie* showing of an improper motive." Brief of *Amici Curiae* Arizona State Senate President Warren Petersen and Speaker of the Arizona House of Representatives Steve Montenegro at p. 10. There is no support for the State's argument

that §12-751 must strictly adhere to the governing principles set forth by selectivity and vindictiveness claims to pass constitutional muster.

B. The Statute Does Not Violate the Victims' Bill of Rights

It is true that this statute does not mention victims or victims' rights. But this silence does not mean that the statute somehow violates a victim's rights or any of the statutes or constitutional provisions protecting victims' rights. Nothing in the statue suggests that victim's rights do not apply and victims retain all their rights as outlined in Arizona law.

C. The Statute Does Not Conflict With the Rules of Criminal Procedure

The legislature may not abrogate judicially-created rules of procedure. *Seisinger v. Siebel*, 220 Ariz. 85 (2009). To determine whether a statute impermissibly infringes on our Supreme Court's procedural rulemaking authority, courts evaluate whether (1) there is a conflict between the statute and the rule, and (2) the statute is a substantive or a procedural law. *State v. Brearcliffe*, 254 Ariz. 579, 585, (2023). "Substantive law creates, defines and regulates rights" whereas a procedural law "prescribes the method of enforcing such rights or obtaining redress."

This statute creates an affirmative defense to otherwise meritorious criminal actions where the motivations behind those actions are constitutionally impermissible. This is a substantive rather than procedural law and therefore this statute is not an unconstitutional infringement on the Supreme Court's procedural rulemaking authority.

D. The Statute Is Neither Vague nor Overbroad

The State argues that the term "substantially motivated" is both vague and overbroad. It is not. "The United States Supreme Court long ago recognized that vagueness challenges fail when a statute employ[s] words or phrases having ... a well-settled common-law meaning." *Arizona Creditors Bar Ass'n v. State*, 257 Ariz. 406, 413 (2024). The term "substantially motivated" appears in both statutes and case law, both Arizona and federal. The Court finds that the phrase has a well-settled common law meaning and is, therefore, not vague.

Similarly, the statute is not subject to an overbreadth challenge. As the legislative amici note, courts "have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.' *United States v. Salerno*, 481 U.S. 739, 745 (1987). The State does not assert a First Amendment interest here, and the doctrine does not apply.

Conclusion

For all the reasons discussed, the Court finds that the Justice Court did not err in concluding that Koert made a prima facie showing that the prosecution was substantially motivated by a desire to deter, retaliate against, or prevent the lawful exercise of a constitutional right. The Court also finds that ARS § 12-751 is constitutional. The Court accepts jurisdiction of the State's Petition for Special Action but denies relief.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

Exhibit B

azcentral.

ARIZONA

Judge rejects Rachel Mitchell's bid to undo 1st Amendment protections

Taylor Seely
Arizona Republic

Updated April 16, 2026, 3:20 p.m. MT

Key Points

- A judge rejected an effort by Maricopa County Attorney Rachel Mitchell to overturn Arizona's anti-SLAPP law.
- The ruling upholds protections for the public against lawsuits or prosecutions intended to stifle free speech.
- The County Attorney's Office has stated it plans to appeal the court's decision.

A Maricopa County Superior Court judge rejected an effort by the county's top prosecutor to overturn a law that protects the public from lawsuits that stifle the public's exercise of First Amendment rights.

The five-page ruling from Judge Kevin Wein on April 14 denied a series of arguments by Maricopa County Attorney Rachel Mitchell's office against what's known as Arizona's "anti-SLAPP" law.

Most notably, Wein said defendants wanting to invoke Arizona's anti-SLAPP law did not need to first prove their innocence — a primary argument by the county attorney — and that the law did not overstep into prosecutors' authority but rather "strengthens constitutional protections against vindicative prosecutions."

The ruling also denied Mitchell's effort to overturn a lower Justice Court's ruling in a case related to pro-Palestinian protesters whom her office criminally charged at Arizona State University in 2024.

The "SLAPP" acronym stands for strategic lawsuit against public participation, and members of the public can invoke it as a defense if they believe they're being sued or facing prosecution that's substantially motivated by retaliation or an intent to silence disfavored expression.

The outcome is a win for the protesters but also activists and media outlets that filed letters to the court opposing Mitchell's challenge. It is a significant loss for Mitchell and also Arizona Attorney General Kris Mayes who, in a filing to the court, said she supported Mitchell's challenge.

Steve Benedetto, an attorney representing the protesters, said in a statement that the case represented "a hard line that tells our prosecutors that if you attempt to criminalize dissent, you'll have to answer for it in court."

Erin Pellett, a spokesperson for Mitchell's office, said Mitchell would appeal the decision. A spokesperson for Mayes' office declined to comment.

An appeal would further delay the prospect of Mitchell and her top prosecutors having to testify on the witness stand and defend their criminal charges against the pro-Palestinian protesters.

It also would continue the battle over the constitutionality of Arizona's one-of-a-kind anti-SLAPP law.

Why is Arizona's anti-SLAPP law different than in other states?

Though most states in the nation offer a similar protection, Arizona is the only one to apply it to criminal, not just civil, actions — putting prosecutors in the unprecedented position of having to testify about their prosecutorial decisions.

Lola N'sangou, executive director of Mass Liberation Arizona, an anti-incarceration advocacy group that has supported the protesters, said the fate of Arizona's law will ripple beyond state lines.

The case is "the first real test of whether courts can compel prosecutors to account for their motives when they use the legal system to target protest," N'sangou said.

"What happens here will not stay here," she added.

Why Rachel Mitchell challenged the anti-SLAPP law

Mitchell filed the special action in October 2025 to avoid having to testify in a hearing over her office's criminal trespassing charges against a pro-Palestinian protester at ASU in 2024, Mikey Koert. The charges affected 68 protesters, though.

The protester's attorneys claimed Mitchell's charges were retaliatory and intended to silence viewpoints she disagreed with, in violation of the law.

After a Justice Court judge agreed the protester had shown enough surface-level evidence of retaliation, Mitchell was supposed to testify to prove otherwise.

Mitchell's office told the Superior Court it would be the first known instance in the nation of a prosecutor defending their prosecutorial charging decisions on the stand, and called it unjustifiable.

What the judge said about Rachel Mitchell's arguments

Invoking Arizona's anti-SLAPP law triggers a two-step process. First, Koert's attorneys had to show the county's charges were "substantially motivated" by a desire to retaliate or suppress viewpoints. If the judge agreed, the county would then have to prove otherwise.

Mitchell's office argued that the Justice Court made a mistake in allowing Koert to move past phase one because the protester was not "lawfully" protesting.

The county attorney's argument also hinged largely on the notion that she had "probable cause" to charge Koert and that efforts by the Arizona Legislature or the judiciary to wade into a prosecutor's discretion was a violation of the separation of powers.

But, Wein said, "Whether (Koert's) conduct was lawful is irrelevant to an anti-SLAPP motion," and arguing that Koert could not invoke the law in defense because Mitchell had probable cause ran directly against the intent of state lawmakers when they crafted the law.

The law didn't violate the separation of powers, Wein said, because it "falls squarely within the Legislature's powers to define what conduct constitutes a crime."

Mitchell's office had no argument otherwise, he said.

Taylor Seely is a First Amendment Reporting Fellow at The Arizona Republic / azcentral.com. Do you have a story about the government infringing on your First Amendment rights? Reach her at tseely@arizonarepublic.com or by phone at 480-476-6116.

Seely's role is funded through a collaboration between the Freedom Forum and Journalism Funding Partners. Funders do not provide editorial input.

What to know: Most Arizona schools ban 'offensive' speech. It cost a district $200K