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14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
15 **IN AND FOR THE COUNTY OF MARICOPA**

16 STATE OF ARIZONA,
17
18 Petitioner,
19
20 vs.
21
22 MICHAELA JOY KOERT,
23
24 Respondent.

Case No. LC 2025-000363-001

BRIEF OF AMICI CURIAE
ARIZONA CENTER FOR LAW IN
THE PUBLIC INTEREST, ARIZONA
ATTORNEYS FOR CRIMINAL
JUSTICE, AND AMERICAN CIVIL
LIBERTIES UNION OF ARIZONA
IN SUPPORT OF RESPONDENT
MICHAELA JOY KOERT (FILED
WITH CONSENT)

(Assigned to the
Honorable Kevin Wein)

25 **INTRODUCTION**

26 Amici Arizona Center for Law in the Public Interest, Arizona Attorneys for Criminal
27 Justice, and the American Civil Liberties Union of Arizona join other amici like Arizona
28 State Senate President and Speaker of the Arizona House of Representatives to urge this
Court to reject the Maricopa County Attorney's Office's request to nullify Arizona's anti-
SLAPP statute by holding that it is unconstitutional. While amici in this case likely span the

1 political and ideological spectrum, they agree that Arizona’s anti-SLAPP statute, which
2 applies to both private and governmental actions, including criminal prosecutions, is a
3 necessary bulwark against government tyranny and improper political prosecutions in the
4 state of Arizona.

5 In its Petition for Special Action, the Maricopa County Attorney’s Office (“MCAO”)
6 bemoans the fact that County Attorney Mitchell could “become the first elected prosecutor
7 in the country to be called to the stand to defend a prosecutorial charging decision in an
8 anti-SLAPP proceeding.” Pet. at 3. Similarly, the Arizona Attorney General appears
9 concerned that “Arizona is the only state in the country that applies an anti-SLAPP statute
10 to criminal prosecutions.” Brief of Amicus Curiae Arizona Attorney General in Support of
11 Petitioner State of Arizona at 1.

12 Although Arizona may be exceptional, MCAO’s past actions against peaceful
13 protesters are also exceptional. MCAO might be the only prosecuting agency in the country
14 to have created out of whole cloth a fictitious criminal street gang—the ACAB gang—for
15 the sole purpose of falsely charging peaceful protesters with serious felony offenses and
16 threatening those exercising their constitutional right to protest and assembly with decades
17 of prison time.¹ This history bears repeating when viewing MCAO’s current decision to
18 again prosecute peaceful protesters and the Legislature’s desire to protect Arizonans from
19 further improper political prosecutions. As the Arizona State Senate President and the
20 Speaker of the Arizona House of Representatives explain, “[w]eaponization of the criminal
21 law for political retribution corrodes the core of constitutional government.” Brief of Amici
22 Curiae Arizona State Senate President Warren Petersen and Speaker of the Arizona House
23 of Representatives Steve Montenegro (“Legislative Amici Brief”) at 2.

24 Here, the Justice Court correctly found that the accused satisfied their burden to show
25 “prima facie proof” that their continued prosecutions are “substantially motivated by a

26 _____
27 ¹ Dave Biscobing, Politically Charged: Officials create ‘fictional gang’ to punish Phoenix
28 protesters, ABC15 Arizona, (May 6, 2021), [https://www.abc15.com/news/local-
news/investigations/protest-arrests/politically-charged-officials-create-fictional-gang-to-
punish-phoenix-protesters](https://www.abc15.com/news/local-news/investigations/protest-arrests/politically-charged-officials-create-fictional-gang-to-punish-phoenix-protesters) (last visited Nov. 26, 2025).

1 desire to deter, retaliate against or prevent the lawful exercise of a constitutional right.”
2 A.R.S. § 12-751(B). Indeed, the Justice Court was presented with overwhelming evidence
3 that MCAO is yet again engaging in improper political prosecutions. Just a portion of the
4 evidence suggesting that these are retaliatory political prosecutions includes:

- 5 • MCAO’s refusal to follow its own written diversion policy for misdemeanor
6 prosecutions;
- 7 • The initial rush to handcuff, detain, and book into jail overnight peaceful
8 protesters based on “copy-and-paste” probable cause statements;
- 9 • MCAO’s violation of the Arizona Rules of Criminal Procedure by failing to
10 timely disclose video evidence in this case, then dumping 217 hours of
11 unindexed body-worn camera footage onto defense counsel;
- 12 • Assigning highly experienced Deputy County Attorneys with decades of
13 experience to prosecute criminal charges of the lowest level;
- 14 • MCAO’s collaboration with ASU Police for “mass arrests” based on
15 knowledge that campus protests were happening but prior to any alleged
16 illegal conduct occurring;² and
- 17 • Credible evidence of disparate treatment of individuals criminally charged
18 because of their actions around protests and counter-protests based on
19 viewpoint discrimination.

20 Given the voluminous evidence presented showing that MCAO is engaging in
21 retaliatory prosecutions, Respondents have clearly brought forth “sufficient evidence” to
22 establish a prima facie showing under A.R.S. § 12-751(B). *See, e.g., Kline v. Kline*, 221

23
24 ² MCAO has a history of collaborating with police to charge protesters with whom they
25 disagree with crimes. In 2020, MCAO falsely charged fifteen “protesters related to the
26 Black Lives Matter Movement march in the City of Phoenix” with gang related charges
27 after collaborating with the Phoenix Police Department (PPD) to create a fictitious criminal
28 street gang—the ACAB gang. *See* Review of Maricopa County Attorney’s Office’s
Policy, Procedures & Actions Involving the Protest Arrest on October 17, 2020,
Submitted by Ronald J. Steinle, Aug. 6, 2021, *4-42 (describing collaboration between
MCAO and PPD to falsely charge peaceful protesters),
<https://maricopacountyattorney.org/DocumentCenter/View/2057/Final-MCAO-Report-8621>
(last visited Nov. 26, 2025).

1 Ariz. 564, 573 ¶ 35 (App. 2009) (courts “review for an abuse of discretion a trial court’s
2 determination that there is sufficient evidence to establish a prima facie case) (citation
3 omitted). Should this court grant special action review, amici provide the following
4 arguments on the merits of the issues involved in this matter.

5 INTERESTS OF AMICI³

6 The Arizona Center for Law in the Public Interest (“ACLPI”) is a nonprofit public
7 interest law firm dedicated to defending the civil and legal rights of Arizonans, including
8 those exercising their constitutional right to assembly. Central to ACLPI’s mission is
9 ensuring governmental accountability, which includes ensuring government actors comply
10 with their constitutional and statutory duties. ACLPI frequently files amicus curiae briefs
11 in Arizona courts on a wide range of issues that impact individuals’ civil and legal rights
12 and on government accountability.

13 Arizona Attorneys for Criminal Justice (“AACJ”), the Arizona state affiliate of the
14 National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to
15 the rights of the criminally accused and to those attorneys who defend them. AACJ is a
16 statewide not-for-profit membership organization of criminal defense lawyers, law
17 students, and associated professionals dedicated to protecting the rights of the accused in
18 the courts and in the legislature, promoting excellence in the practice of criminal law
19 through education, training and mutual assistance, and fostering public awareness of
20 citizens’ rights, the criminal justice system, and the role of the defense lawyer.

21 The American Civil Liberties Union of Arizona (“ACLU of Arizona”) is a state-wide
22 nonpartisan organization and the state affiliate of the national American Civil Liberties
23 Union. The ACLU of Arizona is dedicated to protecting the constitutional and statutory
24 rights of everyone, including criminal defendants. The ACLU of Arizona frequently files
25 amicus curiae briefs in Arizona courts on a wide range of civil liberties and civil rights
26 issues.

27
28 ³ Pursuant to ARCAP 16(b)(3), no individual or entity has provided financial resources for
the preparation of this brief.

1
2 **ARGUMENT**

3 MCAO's analysis of and challenges to the anti-SLAPP statute are flawed. First,
4 MCAO fundamentally misreads the plain language of the statute. Second, MCAO's reading
5 would render the statute meaningless by allowing it to apply only after a criminal charge
6 has been dismissed for lack of probable cause. Third, MCAO fails to raise a constitutional
7 challenge based on the Victim's Bill of Rights because MCAO cannot even identify any
8 specific provision this statute violates. Finally, the anti-SLAPP statute is not
9 unconstitutionally vague or overbroad because it carefully spells out the conduct it prohibits
10 and employs standard legal terminology that has been faithfully applied by courts in a
11 variety of contexts.

12 **I. MCAO's argument misconstrues Arizona's anti-SLAPP statute.**

13 Arizona's anti-SLAPP statute places the burden on a person who files a motion
14 challenging a legal action or prosecution "of establishing prima facie proof that the legal
15 action was substantially motivated by a desire to deter, retaliate against or prevent the lawful
16 exercise of a constitutional right." A.R.S. § 12-751(B). Ignoring both the plain language
17 and thrust of this statute, MCAO instead argues that before a political prosecution can be
18 dismissed pursuant to Arizona's anti-SLAPP statute, an individual must first present
19 "prima facie proof" that the individual was engaging in activity that qualifies as "the lawful
20 exercise of a constitutional right." Pet. at 12.

21 This argument misconstrues the focus and purpose of the anti-SLAPP statute, which
22 requires an individual to establish prima facie proof of the *retaliatory motivations behind*
23 *the prosecution*, not whether the individual was lawfully engaging in constitutionally
24 protected behavior. A.R.S. § 12-751(B). Whether one's actions are lawful or, put another
25 way, whether those actions constitute a crime must be proven beyond a reasonable doubt
26 following a trial as required by the United States and Arizona constitutions. *See In re*
27 *Winship*, 397 U.S. 358, 362-65 (1970) (holding that the Due Process Clause of the
28 Fourteenth Amendment "protects the accused against conviction except upon proof beyond

1 a reasonable doubt of every fact necessary to constitute the crime with which he is
2 charged”).

3 MCAO’s argument ignores these constitutional guarantees and would require
4 findings of fact (not a prima facie showing) any time an individual seeks dismissal of their
5 prosecution under the anti-SLAPP statute. Such an approach makes no sense considering
6 the statute’s plain language that anticipates the dismissal of a prosecution prior to a trial on
7 the merits. A.R.S. § 12-751(A).

8 Assuming, *arguendo*, that individuals would still be required to make a *prima facie*
9 showing regarding their own “lawful exercise of a constitutional right,” MCAO gets that
10 analysis wrong as well. First, the statute prohibits not only retaliation against the lawful
11 exercise of First Amendment rights, but also using criminal prosecutions to “deter” the
12 exercise of First Amendment rights. Thus, the statute is not exclusively retrospective, it also
13 prohibits prosecutors from intentionally using prosecutions to chill speech rights
14 prospectively. So MCAO’s formulation that the underlying charged conduct must have
15 been lawful First Amendment conduct is inconsistent with the plain language of this
16 statutory prohibition.

17 Second, even within the context of these specific charges, MCAO relies on cases
18 that *fully adjudicated* First Amendment challenges to argue that the conduct at issue here—
19 alleged criminal trespass—is not protected by the First Amendment. Such cases are not yet
20 applicable at this stage of the proceedings. Indeed, even in a traditional First Amendment
21 challenge (which this is not) “the moving party bears the initial burden of making a
22 colorable claim that its First Amendment rights have been infringed, at which point the
23 burden shifts to the government to justify the restriction’ on speech.” *Cal. Chamber of Com.*
24 *v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022) (citation omitted).
25 Any purported justification by the government must be supported by “actual evidence.”
26 *Fed. Election Comm’n v. Cruz*, 569 U.S. 289, 310 (2022); *see also United States v. Playboy*
27 *Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) (“[w]hen the Government restricts
28 speech, the Government bears the burden of proving the constitutionality of its actions”)

1 (citations omitted). Thus, rather than support MCAO's request that Mx. Koert's motion to
2 dismiss be denied and that the § 12-751 evidentiary hearing be vacated, First Amendment
3 jurisprudence supports an evidentiary hearing as was ordered by the Justice Court.

4 **II. MCAO's argument would render Arizona's anti-SLAPP statute meaningless.**

5 MCAO argues that because the trial court found the existence of probable cause to
6 charge Mx. Koert and others with criminal trespass, that ends the inquiry into whether the
7 prosecutions here are motivated by an improper retaliatory motive requiring dismissal under
8 A.R.S. § 12-751. Such an argument would render the anti-SLAPP statute meaningless. *See*
9 *State v. Hoggatt*, 199 Ariz. 440, 444 ¶ 13 (App. 2001) (courts are "constrained to avoid"
10 a construction that would render certain portions of the statute superfluous and
11 meaningless); *St. Joseph's Hosp. and Med. Ctr. v. Maricopa County*, 130 Ariz. 239, 248
12 (1981) ("In interpreting statutes, courts are under a duty to give statutes operation and effect
13 and should avoid a construction that leaves the statute meaningless or of no effect.") (citing
14 *State v. Schoner*, 121 Ariz. 528 (App. 1979)).

15 First, as discussed *supra*, a prima facie showing under A.R.S. § 12-751 need not be
16 premised upon the charged conduct itself, because prosecutions intended to prospectively
17 deter the exercise of First Amendment rights are also prohibited. Second, in Arizona,
18 probable cause must exist to justify a criminal prosecution. Ariz. R. Crim. P. 2.4(a); Ariz.
19 R. Crim. P. 12.1(d)(4). Where no probable cause exists, the prosecution must be dismissed.
20 Ariz. R. Crim. P. 2.4(a). Thus, an individual charged with a crime not supported by probable
21 cause would not need the protections of Arizona's anti-SLAPP statute as the charges against
22 them would already, by rule, have to be dismissed. *See id.* For Arizona's anti-SLAPP statute
23 to have meaning, therefore, the existence of probable cause alone cannot defeat a motion to
24 dismiss a prosecution substantially motivated by government retaliation.

25 Third, MCAO's construction would profoundly invert the applicable burden here.
26 An individual seeking to make an anti-SLAPP claim must come forth with a prima facie
27 showing. But MCAO argues that such a showing necessarily includes proving the charges
28

1 lacked probable cause. That is a naked attempt to bootstrap an incredibly weighty burden –
2 complete proof of a lack of evidence for probable cause – in what is intended only to be an
3 initial, prima facie showing. Those two burdens are inapposite because they sit on opposite
4 sides of the evidentiary spectrum.

5 For all these reasons, MCAO’s attempt to tie A.R.S. § 12-751 to the absence of
6 probable cause for the underlying charges would neuter that statute’s application to criminal
7 prosecutions.

8 **III. The anti-SLAPP statute does not violate the Victim’s Bill of Rights.**

9 MCAO fails to demonstrate that the anti-SLAPP statute violates the Victim’s Bill of
10 Rights (“VBR”). MCAO brings a facial challenge, attempting to completely invalidate the
11 anti-SLAPP statute to the extent it applies to criminal prosecutions. “A facial challenge to
12 the constitutionality of a statute requires a showing that no set of circumstances exists under
13 which the statute would be valid.” *Fann v. State*, 251 Ariz. 425, 433 ¶ 18 (2021) (citing
14 *State v. Wein*, 244 Ariz. 22, 31 ¶ 34 (2018)). As the challenging party, MCAO bears the
15 “heavy burden” of making that showing. *See Wein*, 244 Ariz. at 26 ¶ 10 (2018) (citations
16 omitted). But MCAO merely refers generally to the VBR; it does not even attempt to
17 explain which particular provisions of the VBR are being violated. Nor could it, because
18 not every crime involves a victim. MCAO’s nebulous assertion is nowhere close to what is
19 necessary for a facial challenge.

20 For the same reasons, MCAO fails to explain how the anti-SLAPP statute violates
21 the VBR as-applied to this set of circumstances. Once again, MCAO fails to identify or cite
22 any particular victims’ right that is being violated. Though the VBR secures some rights,
23 such as the right “[t]o confer with the prosecution,” that right to confer “allows victims to
24 voice their views about pretrial deferred prosecution programs but ‘does not include the
25 authority to direct the prosecution of the case.’” *J.V. v. Blair in and for County of Maricopa*,
26 256 Ariz. 247, 252 ¶ 23 (App. 2023) (quoting A.R.S. § 13-4419.A, .C); *see also State v.*
27 *DiRienzo*, No. 1 CA-CR 14-0707, 2015 WL 6391321, at *4 ¶ 16 (Ariz. Ct. App. Oct. 22,
28 2015) (“[T]here is nothing in this or any other provision of the ‘bill of rights’ to suggest a

1 victim must consent or is entitled to give consent to the dismissal of a criminal
2 prosecution.”).

3 By way of example, it is not a victims’ rights violation when a criminal charge is
4 dismissed because an officer violated a suspect’s *Miranda* rights or obtained evidence in
5 violation of the Fourth Amendment. *See, e.g., State ex rel. Romley v. Superior Court*
6 (*Roper*), 172 Ariz. 232, 241 (App. 1992) (the VBR should not be used as “a fortress behind
7 which prosecutors may isolate themselves from their constitutional duty to afford a criminal
8 defendant a fair trial”). Likewise, protecting Arizonans from prosecutions that are brought
9 to suppress First Amendment activity does not infringe any victims’ rights, it merely
10 regulates the conduct of prosecutors. MCAO’s victims’ rights argument fails.

11 **IV. The anti-SLAPP statute is not impermissibly vague or overbroad.**

12 MCAO next charges the anti-SLAPP statute as impermissibly vague because it uses
13 the phrase “substantially motivated.” MCAO is incorrect. Recently, the Arizona Supreme
14 Court applied and interpreted that exact phrase in the context of Arizona’s Free Exercise of
15 Religion Act without hesitation. *See Brush & Nib Studio LC v. City of Phoenix*, 247 Ariz.
16 269, 298 ¶¶ 128-29 (2019) (citing A.R.S. § 41-1493(2), which defines the “[e]xercise of
17 religion” as “the ability to act or refusal to act in a manner substantially motivated by a
18 religious belief”). Transferring that phrase from the free exercise of religion context to the
19 free speech context does not render it vague.

20 Courts employ “a strong presumption that the statutory provision is constitutional.”
21 *State v. Lefevre*, 193 Ariz. 385, 390 ¶ 18 (App. 1998) (citation omitted). “A statute is not
22 unconstitutionally vague solely because it fails to explicitly define one of its terms or
23 because the provision is susceptible to more than one interpretation.” *Id.* (citing *State v.*
24 *Takacs*, 169 Ariz. 392, 394 (App. 1991)). The statutory language here is easily applicable,
25 as evidenced by the Arizona Supreme Court’s *Brush & Nib* decision. Indeed, MCAO
26 inexplicably argues that it is somehow impossible for judges to determine the dividing line
27 between permissible and impermissible restrictions on free speech. The entire history of
28 American jurisprudence says otherwise.

1 Nor does the phrase “substantially motivated” result in overbreadth (even assuming,
2 *arguendo*, that the overbreadth doctrine could apply to the creation of substantive rights).
3 To the contrary, the statute targets precisely the conduct it intends to prohibit: legal actions
4 that are “substantially motivated by a desire to deter, retaliate against or prevent the lawful
5 exercise of a constitutional right.” A.R.S. § 12-751(B). “Substantial” is defined as “being
6 largely but not wholly that which is specified.” *Substantial*, MERRIAM-WEBSTER
7 <https://www.merriam-webster.com/dictionary/substantially> (last visited Nov. 26, 2025).
8 Courts can reasonably apply that standard without extending it beyond its plain language.⁴

9 CONCLUSION

10 This Court should deny MCAO’s Petition for Special Action because Respondents
11 brought forth sufficient evidence to support a prima facie finding under A.R.S. § 12-751,
12 and because each of MCAO’s constitutional challenges fail as a matter of law.

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14 RESPECTFULLY SUBMITTED this 26th day of November, 2025.

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23 ⁴ The Legislature’s extension of the anti-SLAPP provisions to criminal prosecutions is the
24 *quintessential* example of substantive law. It creates the right to be free from such
25 prosecutions, and then provides a legal mechanism to enforce that right. It is hard to
26 imagine a clearer example of a statutory provision that “creates, defines and regulates
27 rights.” See *Krol v. Indus. Comm’n of Ariz.*, 259 Ariz. 261, 269 ¶ 32 (2025). MCAO’s
28 suggestion (at 36) that this clear source of substantive law should be viewed as
procedural—so that MCAO can constitutionally invalidate it—is absurd. The Speaker and
President’s Amici Brief ably explains why this is a substantive, not procedural, law (and
why, regardless, it does not infringe any existing procedural rules). Legislative Amici
Brief at 11-14. In the interest of judicial economy, Amici do not repeat that correct
analysis here.

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1 **CERTIFICATE OF COMPLIANCE**

2 The undersigned attorney states that this Amici Curiae Brief is in compliance with
3 Rule 14(i) of the Arizona Rules of Procedure for Special Actions, and with ARCAP 16.
4 This Brief uses Times New Roman font, and the text contains approximately 3,075 word.

5 RESPECTFULLY SUBMITTED this 26th day of November, 2025.

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