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11 *Communications of Phoenix, Inc. d/b/a FOX 10*  
12 *Phoenix*

ARIZONA SUPERIOR COURT  
MARICOPA COUNTY

12 THE STATE OF ARIZONA,  
13  
14                   Petitioner,  
15  
16                   vs.  
17  
18 MICHAELA JOY KOERT,  
19  
20                   Respondent.

Case No.: LC2025-000363-001  
No. JC2024-148377-001  
University Lakes Justice Court

**BRIEF OF AMICI CURIAE  
ARIZONA MEDIA ASSOCIATION;  
KPNX-TV CHANNEL 12, A  
DIVISION OF MULTIMEDIA  
HOLDINGS CORP.; PHOENIX  
NEWSPAPERS, INC.; SCRIPPS  
MEDIA, INC., D/B/A KNXV-TV AND  
KGUN-TV; AND NW  
COMMUNICATIONS OF PHOENIX,  
INC. D/B/A FOX 10 PHOENIX**

(Before the Hon. Kevin Wein)

24 Pursuant to this Court's November 7, 2025 Minute Entry, the Arizona Rules of  
25 Procedure for Special Actions and Rule 16 of the Arizona Rules of Civil Appellate  
26 Procedure, the following news organizations respectfully submit this brief as *amici curiae*:  
27 (1) the Arizona Media Association, (2) KPNX-TV Channel 12, a division of Multimedia  
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1 Holdings Corporation, (3) Phoenix Newspapers, Inc., (4) Scripps Media, Inc. d/b/a KNXV-  
2 TV and KGUN-TV, and (5) NW Communications of Phoenix, Inc. d/b/a FOX 10 Phoenix  
3 (collectively, the “Arizona Media Amici”). The Arizona Media Amici submit this brief for  
4 the sole purpose of ensuring the preservation of Arizona’s Anti-SLAPP Law, A.R.S. § 12-  
5 751 (the “Anti-SLAPP Law”), in all *civil* cases. Arizona Media Amici take no position  
6 regarding the Anti-SLAPP Law’s application in criminal proceedings, including but not  
7 limited to this case.

### 8 **Introduction**

9 The Anti-SLAPP Law provides critical free speech protections in civil cases  
10 consistent with the well-defined policies of this State and similar laws throughout the  
11 country. Under the Anti-SLAPP Law, if a civil litigant files a legal action “substantially  
12 motivated by a desire to deter, retaliate against or prevent the lawful exercise of a  
13 constitutional right,” and if the action is not “justified by existing law or supported by a  
14 reasonable argument for extending or modifying existing law,” the court is obliged to  
15 promptly dismiss the claim – and may award attorneys’ fees to a prevailing defendant.  
16 A.R.S. § 12-751(B), (F). Through this procedural mechanism, the law protects Arizonans  
17 from meritless lawsuits seeking to impose liability for the content of their speech.

18 This statutory mechanism provides vital protections for Arizona news organizations  
19 and their audiences. Without these protections, critical reporting about important issues  
20 would be jeopardized by those persons who aim to silence the press by threatening and  
21 filing insupportable lawsuits against them. And even when such lawsuits are plainly  
22 meritless, in the absence of anti-SLAPP protections, they require considerable time, effort  
23 and money to defend before they are eventually dismissed. The Anti-SLAPP Law  
24 effectively provides Arizona Media Amici with procedural protections that enable their  
25 reporting on matters of public concern without fear of being dragged into a meritless  
26 lawsuit aimed at draining their newsrooms’ limited resources and muzzling their reporting.  
27 When Arizona Media Amici can publish news without fear or favor, the general public  
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1 benefits from access to information with which they can make informed decisions  
2 concerning everything from personal health and safety to upcoming elections and the  
3 performance of government officials.

4 Arizona Media Amici take no position on the underlying application of the Anti-  
5 SLAPP Law in this criminal case or in criminal proceedings in general. However, as  
6 explained below, they appear before this Court to advocate for a ruling on the State's  
7 Petition that preserves the application of this important Arizona statute in *civil* actions.

#### 8 **Interest of Amici Curiae**

9 Arizona Media Amici are news organizations that gather and publish news and  
10 information in Arizona. They rely upon the protections of the Anti-SLAPP Law when  
11 making decisions about what to publish and how to respond to civil lawsuits (or threats of  
12 civil lawsuits) based on their reporting. If the Anti-SLAPP Law is ruled unconstitutional  
13 as applied to civil proceedings, Arizona Media Amici will lose these important protections  
14 and their First Amendment-protected speech will be chilled, depriving the general public  
15 of important information on issues of public concern.

16 The Arizona Media Association ("AMA") is the trade association for Arizona's  
17 radio and television stations, newspapers and digital media. KPNX-TV Channel 12, a  
18 division of Multimedia Holdings Corporation ("12 News"), airs newscasts every day and  
19 publishes its reporting on 12news.com. Phoenix Newspapers, Inc. ("PNI") publishes *The*  
20 *Arizona Republic*, the largest daily circulation newspaper in the state, and its reporting also  
21 appears on azcentral.com. Scripps Media, Inc. d/b/a KNXV-TV ("ABC15") and KGUN-  
22 TV ("KGUN"), owns and operates ABC15 in Phoenix and KGUN in Tucson, which  
23 broadcast and publish news in Phoenix on abc15.com and in Tucson on kgun9.com. NW  
24 Communications of Phoenix, Inc. d/b/a FOX 10 Phoenix owns and operates FOX 10 in  
25 Phoenix, which airs daily newscasts and publishes news on fox10phoenix.com. No person  
26 or entity other than the members of the Arizona Media Amici provided any financial  
27 resources for the preparation of this brief.

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Argument

I. **THE ANTI-SLAPP LAW PROVIDES IMPORTANT PROTECTIONS AGAINST MERITLESS LAWSUITS SEEKING TO IMPOSE LIABILITY FOR FIRST AMENDMENT PROTECTED SPEECH.**

A. **The State of Arizona Has a Well-Established Interest in Protecting the Exercise of Free Speech and Swiftly Dismissing Meritless Lawsuits Based on Protected Speech.**

The right to speak freely is deeply important to the State of Arizona. Arizona's Constitution directly grants every Arizonan a broad free speech right. *See* Ariz. Const. Art. 2 § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). Arizona's highest court has characterized this provision as providing *even broader* speech protection than that provided by the First Amendment to the U.S. Constitution. *See Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 104 ¶ 10 (App. 2017) ("The right to free speech is granted directly to every Arizonan and is not merely a protection against government action, as is the First Amendment to the United States Constitution."); *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 354-55 (Ariz. 1989) (recognizing "the broad protection for speech in Arizona" and noting that Article 2, Section 6 has "greater scope than the first amendment").

Consistent with this broad free speech right, the Arizona Supreme Court has recognized that the public has a "significant interest in protecting the press from the chill of meritless . . . actions." *Rodriguez v. Fox News Network, L.L.C.*, 238 Ariz. 36, 39 ¶ 6 (2015) (quoting *Scottsdale Publ'g, Inc. v. Superior Court*, 159 Ariz. 72, 74 (App. 1988)). In furtherance this interest, Arizona's courts play an "important gatekeeper role . . . in safeguarding First Amendment principles." *Rogers v. Mroz*, 252 Ariz. 335, 341 ¶ 23 (2022). When a civil lawsuit raises "serious First Amendment concerns," Arizona courts must carefully review the complaint with a "more rigorous eye" and dismiss it when the pleadings reveal a "case-dispositive First Amendment defense." *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, 517 ¶¶ 8-9 (2005). Such rigorous review advances Arizona's policy interest in avoiding "burden[ing] public debate with insupportable litigation." *AMCOR*

1 *Inv. Corp. v. Cox Ariz. Publ'ns, Inc.*, 158 Ariz. 566, 568 (App. 1988); *see also, e.g.*,  
2 *Rodriguez*, 238 Ariz. at 39 ¶ 6 (“A complaint that implicates freedom of the press under  
3 the First Amendment . . . requires close scrutiny.”)

4 Through this well-developed jurisprudence, Arizona’s courts have emphasized this  
5 State’s interest in preventing its courts from being misused to punish speakers like Arizona  
6 Media Amici for the exercise of their First Amendment freedoms. Not only does this type  
7 of weaponization of the legal system run afoul of the First Amendment, it is contrary to the  
8 express policies of this State. The Legislature passed the Anti-SLAPP Law in 2006 and  
9 amended it in 2022 to secure these cherished liberties by providing statutory procedures  
10 designed to safeguard constitutionally protected speech from the chill of meritless  
11 litigation.

12 **B. The Anti-SLAPP Law Furthers Arizona’s Policies By Providing**  
13 **Procedural Protections Against Civil Lawsuits Seeking to Impose**  
14 **Liability for First Amendment Protected Speech.**

15 The Arizona Supreme Court has recognized that, if the courts’ important  
16 “gatekeeper” role is not maintained, costly and time-consuming litigation, combined with  
17 the threat of an adverse monetary judgment, may “chill the exercise of political debate that  
18 is the foundation of our constitutional republic.” *Rogers*, 252 Ariz. at 338 ¶ 4; *see also,*  
19 *e.g., Greenbelt Co-op. Pub. Ass’n v. Bresler*, 398 U.S. 6, 12 (1970) (“Because the threat or  
20 actual imposition of pecuniary liability for alleged defamation may impair the unfettered  
21 exercise of . . . First Amendment freedoms, the Constitution imposes stringent limitations  
22 upon the permissible scope of such liability.”). This is precisely the negative consequence  
23 that the Anti-SLAPP Law was designed to prevent.

24 The Anti-SLAPP Law provides a mechanism for a defendant to move to dismiss a  
25 civil action involving their exercise of their First Amendment rights. A.R.S. § 12-7551(A).  
26 The movant “has the burden of establishing prima facie proof that the legal action was  
27 substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise  
28 of a constitutional right,” which can be shown via the record or evidence submitted in

1 support of the motion. *Id.* § 12-751(B). If the court finds that the movant has met this  
2 burden, it must dismiss the action unless the plaintiff shows that the lawsuit “is justified by  
3 existing law or supported by a reasonable argument for extending or modifying existing  
4 law.” *Id.* § 12-751(B)(2). Importantly, the Anti-SLAPP law contains a discretionary fee-  
5 shifting provision allowing the court to award a prevailing defendant their costs and  
6 reasonable attorneys’ fees. *Id.* § 12-751(F).

7 Arizona Media Amici can attest that the specter of potential lawsuits is a very real  
8 consideration when determining what to publish. Even the most facially meritless claims  
9 take time and money to defend – resources that newsrooms would otherwise spend on  
10 investigating and reporting on issues of public concern. Powerful and wealthy figures are  
11 particularly well-suited to weaponize the legal process to effectively silence negative  
12 reporting about them, even when such reporting is true and of legitimate concern to the  
13 public, and therefore protected by the First Amendment. The statute’s fee-shifting  
14 provision, however, provides an important deterrent to meritless claims and the prospect  
15 of defraying the costs of defending such lawsuits. Arizona Media Amici rely on the Anti-  
16 SLAPP Law as one line of defense to protect them against unfounded litigation based on  
17 the content of their speech. This critical legal protection shields and empowers the press  
18 to report newsworthy information, particularly about powerful figures, without fear of  
19 being harassed with meritless lawsuits aiming to silence their reporting.

20 If the Anti-SLAPP Law’s application to civil proceedings were struck down as  
21 unconstitutional, the ability of readers and viewers to know about newsworthy  
22 developments in their communities across the state would be compromised. Arizona  
23 Media Amici’s speech about matters of public concern would inevitably be chilled.  
24 Moreover, this loss of First Amendment freedoms for even a very short period of time can  
25 constitute significant injury. *See generally Elrod v. Burns*, 427 U.S. 347, 373 (1976)  
26 (reasoning that “[t]he loss of First Amendment freedoms, for even minimal periods of time,  
27 unquestionably constitutes irreparable injury” for purposes of the issuance of a preliminary  
28

1 injunction).

2 As the statutory history shows, if meritless claims are allowed to drain parties and  
3 the judiciary of precious resources, the “free flow of ideas, information and opinions that  
4 are essential to carrying out [government] functions” will be diminished. 2006 Ariz. Sess.  
5 Laws 234 (HB 2440) § 2. Without these protections in civil cases, critical information  
6 about politics and public policy, community concerns and even sports and entertainment  
7 may never see the light of day, thereby depriving the public of facts that are essential to  
8 making informed decisions and enriching public life. In brief, the Anti-SLAPP Law not  
9 only safeguards the press from insupportable civil litigation but also promotes our system  
10 of democratic self-government.

11 **II. THE ANTI-SLAPP LAW AS APPLIED TO CIVIL PROCEEDINGS IS**  
12 **CONSTITUTIONAL.**

13 **A. The Anti-SLAPP Law’s Prohibition Against Lawsuits that are**  
14 **“Substantially Motivated” By Certain Improper Purposes Is Not**  
15 **Unconstitutionally Vague.**

16 The State argues in the Petition that the Anti-SLAPP Law is facially void for  
17 vagueness because it lacks “minimal [enforcement] guidelines” and fails to specify “any  
18 ascertainable standards for defining” what the statute proscribes. Pet. at 39 (quoting  
19 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) and *State v. Steiger*, 162 Ariz. 138, 141  
20 (App. 1989)). As a threshold matter, this argument does not apply to the Anti-SLAPP  
21 Law’s provisions applicable in civil cases. *Kolender* and *Steiger* describe the void for  
22 vagueness doctrine as applying to “penal statutes” – criminal laws – rather than statutes  
23 such as the Anti-SLAPP Law that draw the boundaries of proper civil litigation. See  
24 *Kolender*, 461 U.S. at 357 (“[T]he void-for-vagueness doctrine requires that a *penal statute*  
25 define the *criminal offense* with sufficient definiteness” that ordinary people can  
26 understand what is proscribed and what is permitted.) (emphases added); *Steiger*, 162 Ariz.  
27 at 141 (holding that “*penal statutes* must be precise enough to clearly define the limits of  
28 that [governmental] power”) (emphasis added). Thus, at least regarding the Anti-SLAPP  
Law’s application in civil cases, the void for vagueness argument is a *non sequitur*.

1           The State specifically takes issue with the Anti-SLAPP Law’s “substantially  
2 motivated” term, arguing that it renders the statute unconstitutionally vague. *See* Pet. at  
3 39-41. To recap, the Anti-SLAPP Law requires a person who files a motion pursuant to  
4 the statute to establish prima facie proof “that the legal action was *substantially motivated*  
5 by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right.”  
6 A.R.S. § 12-751(B) (emphasis added). This provision is not vague, let alone  
7 unconstitutionally so.

8           The State undermines its argument by acknowledging up front that “courts have in  
9 many cases concluded that the appearance of the word ‘substantial’ or derivatives of the  
10 word ‘motive’ in a statute does not necessarily render them void for vagueness.” Pet. at  
11 39. And it fails to explain why this provision does not meet the low bar of an “ascertainable  
12 standard” that is required for a statute to be avoid being deemed void for vagueness. *Smith*  
13 *v. Goguen*, 415 U.S. 566, 578 (1974).

14           The State’s suggestion that there is no authority demonstrating that this term can be  
15 applied to produce consistent, predictable outcomes is incorrect. *See* Pet. at 40. The State  
16 cites no evidence, and the Arizona Media Amici are aware of none, indicating that the  
17 courts of this state have had any difficulty in applying the “substantially motivated”  
18 provision consistently and predictably. The available case law suggests precisely the  
19 opposite. *See, e.g., Lucky’s, LLC v. Berman*, No. 2 CA-CV 2024-0045, 2025 Ariz. App.  
20 Unpub. LEXIS 780, at \*19 (App. Aug. 5, 2025) (mem. decision)<sup>1</sup> (Superior Court  
21 determined that defamation defendant “established prima facie proof under § 12-751(B)”  
22 and plaintiff did not challenge that ruling on appeal); *Stout v. Gagic*, No. 1 CA-CV 24-  
23 0829, 2025 Ariz. App. Unpub. LEXIS 693, at \*3-4 (App. July 15, 2025) (mem. decision)<sup>2</sup>  
24 (“The record shows no evidence suggesting that the requested injunction was substantially  
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26 <sup>1</sup> Pursuant to Arizona Supreme Court Rule 111(c), a copy of this memorandum decision is  
attached as Exhibit A.

27 <sup>2</sup> Pursuant to Arizona Supreme Court Rule 111(c), a copy of this memorandum decision is  
28 attached as Exhibit B.

1 motivated by a desire to deter, retaliate against or prevent the lawful exercise of a  
2 constitutional right, meaning A.R.S. § 12-751 does not apply.”); *Richer v. Lake*, 2023 Ariz.  
3 Super. LEXIS 628, \*15-16 (Maricopa Cnty. Dec. 19, 2023) (holding that the defendants  
4 “have not satisfied their burden of establishing prima facie proof that Plaintiff initiated the  
5 legal action as a means of deterring the lawful exercise of free expression”); *Hintzen-*  
6 *Gaines v. Adelson*, 2023 Ariz. Super. LEXIS 457, \*2 n.2 (Maricopa Cnty. July 13, 2023)  
7 (noting the court did not consider defendants’ affidavits in ruling on their Rule 12(b)(6)  
8 motion to dismiss but did consider that evidence in ruling that defendants had met their  
9 burden under A.R.S. § 12-751(B)), *aff’d*, No. 1 CA-CV 23-0562, 2024 Ariz. App. Unpub.  
10 LEXIS 924 (App. Oct. 29, 2024)).

11 Because most states have enacted Anti-SLAPP statutes, state courts across the  
12 country are familiar with the task of determining how and when they apply. *See* Reporters  
13 Committee for Freedom of the Press, Anti-SLAPP Legal Guide, [https://www.rcfp.org/anti-](https://www.rcfp.org/anti-slapp-legal-guide/)  
14 [slapp-legal-guide/](https://www.rcfp.org/anti-slapp-legal-guide/) (reporting that as of June 2025, 38 states and the District of Columbia  
15 have anti-SLAPP laws that “provide defendants a way to quickly dismiss meritless lawsuits  
16 — known as SLAPPs or strategic lawsuits against public participation — filed against them  
17 for exercising speech, press, assembly, petition, or association rights.”). Researchers from  
18 New York University have found more than 10,000 cases involving Anti-SLAPP statutes  
19 since 1994 in the Westlaw database. *See* Preliminary Data Findings, The SLAPP Back  
20 Initiative (Nov. 18, 2025), <https://slappback.org/analysis/>. Maryland’s statute, for  
21 example, applies to actions “[b]rought in bad faith against a party” who has exercised their  
22 rights under the First Amendment or similar provisions in that state’s constitution. *MCB*  
23 *Woodberry Developer, LLC v. Council of Owners of the Millrace Condo., Inc.*, 265 A.3d  
24 1140, 1150-51 (Md. Ct. App. 2021). Courts in Maryland can determine bad faith at the  
25 pleading stage by using the same analysis used to assess bad faith under the state’s rules  
26 for sanctions against frivolous litigation. *Id.* at 1156-57.

27 Further, the Anti-SLAPP Law’s “substantial motivation” term is not particularly  
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1 unique. Many other areas of law—including areas of constitutional law—incorporate a  
2 similar requirement to determine a person or entity’s substantial motivation for taking a  
3 certain action. In fact, it is quite likely that the Anti-SLAPP Law was influenced by the  
4 standard for First Amendment retaliation claims, which require a plaintiff to demonstrate,  
5 among other things, that her protected speech was “a substantial or motivating factor” in  
6 the adverse government action. *Burch v. City of Chubbuck*, 146 F.4th 822, 832-33 (9th  
7 Cir. 2025). This well-established standard for determining a constitutional violation is, of  
8 course, not unconstitutionally vague. And the Petition provides no reason why the term’s  
9 inclusion in the Anti-SLAPP Law, as opposed to being developed through case law, can or  
10 should be seen as uniquely problematic.

11 Additional examples abound. In another constitutional context, to prove a claim for  
12 racial discrimination in jury selection, a defendant must demonstrate that “race was a  
13 *substantial motivating factor*” in the prosecutor’s use of the peremptory strike. *Currie v.*  
14 *McDowell*, 825 F.3d 603, 605-06 (9th Cir. 2016) (quoting *Cook v. LaMarque*, 593 F.3d  
15 810, 815 (9th Cir. 2010)) (emphasis added). This type of “substantial motivation”  
16 requirement is also common in employment discrimination claims. *See, e.g., Harris v. City*  
17 *of Santa Monica*, 56 Cal. 4th 203, 232 (2013) (under California’s Fair Employment and  
18 Housing Act, a plaintiff must show that her disability was a “substantial motivating factor”  
19 in the challenged employment action); *Erickson v. U.S. Postal Serv.*, 571 F.3d 1364, 1368  
20 (Fed. Cir. 2009) (to prove a violation of the Uniformed Services Employment and  
21 Reemployment Rights Act, the claimant “bears the initial burden of showing by a  
22 preponderance of the evidence that his military service was a *substantial or motivating*  
23 *factor* in the adverse employment action.”) (emphasis added); *Scrivener v. Clark Coll.*, 334  
24 P.3d 541, 545 (2014) (to prove a claim for violation of Washington’s Law Against  
25 Discrimination (WLAD), a plaintiff must prove that her age was a “substantial factor” in  
26 an adverse employment action.)

27 As the State conceded, courts have developed case law in the normal course that  
28

1 fleshes out the meaning of terms such as “substantially motivated,” and the Petition  
2 provides no legitimate reason to believe that the interpretation of this term in the context  
3 of the Anti-SLAPP Law presents some unique difficulty not present in these other well-  
4 developed areas of law. The statute is not unconstitutionally vague.

5 **B. The Anti-SLAPP Law’s Prohibition Against Lawsuits that are**  
6 **“Substantially Motivated” By Certain Improper Purposes Is Not**  
7 **Unconstitutionally Overbroad.**

8 A statute may be facially overbroad if it “reaches a substantial amount of  
9 constitutionally protected conduct.” *State v. Boehler*, 228 Ariz. 33, 35, ¶ 5 (App. 2011);  
10 *see* Pet. at 42. While the State generally cites the correct standard for determining  
11 overbreadth when a statute potentially infringes First Amendment rights, *see* Pet. at 42  
12 (citing *Boehler*), the Petition tries unsuccessfully to fit the Anti-SLAPP Law within this  
13 standard.<sup>3</sup>

14 First, the State argues that the term “substantially motivated” must be interpreted to  
15 mean “motivated wholly *or in part*,” Pet. at 42, which the State asserts would be an  
16 impermissible “enlargement” of the statute rather than a “construction” of it. *See* Pet. at  
17 41-42 (citing *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004)). Despite its admission  
18 that this massive expansion of the scope of the statute would be improper, the State then  
19 argues that this expanded interpretation renders the statute unconstitutional because it is  
20 now *too broad*. *Id.* This analytical approach is nonsensical. As explained above, *supra*  
21 Section II(A), *there is no reason to interpretively expand the “substantially motivated”*  
22 *requirement because it is not vague*. Without this manufactured expansion in the scope of  
23 the Anti-SLAPP Law (which is not permitted in any event, as the State acknowledges), the  
24 State’s overbreadth argument crumbles underneath its own weight.

25 Furthermore, the Anti-SLAPP Law expressly permits civil actions to proceed  
26 *despite* an improper “substantial motivation” if the responding party shows that the action

27 <sup>3</sup> As with its vagueness argument, the State does not cite any authority applying the  
28 overbreadth doctrine outside of the criminal context. *See* Pet. at 41-42. The only  
overbreadth authority the State cites is *Boehler*, which struck down a Phoenix criminal  
ordinance banning panhandling. 228 Ariz. at 34 ¶ 1.

1 “is justified by existing law or supported by a reasonable argument for extending or  
2 modifying existing law.” A.R.S. §12-751(B)(2). To be sure, civil litigants do not have any  
3 right, under the constitution or otherwise, to proceed with a lawsuit that does not meet this  
4 basic standard. At bottom, the Anti-SLAPP Law is not facially overbroad because it does  
5 not preclude any constitutionally protected conduct.

6 **III. REGARDLESS OF THE COURT’S ULTIMATE RULING ON THE ANTI-  
7 SLAPP LAW’S APPLICATION IN CRIMINAL PROCEEDINGS, THE  
8 COURT SHOULD PRESERVE THE LAW’S APPLICABILITY IN CIVIL  
9 PROCEEDINGS.**

10 Whatever the Court may determine with respect to the Anti-SLAPP Law’s  
11 applicability to this case in particular and to criminal proceedings in general – and Arizona  
12 Media Amici take no position on those aspects of the Petition – the Court should preserve  
13 the statute’s application in civil cases. The Arizona Supreme Court has explained that  
14 courts should “uphold the constitutional portion of the statute ‘where the valid and invalid  
15 parts are so separate and distinct that it is clear’ that the constitutional portion may stand.”  
16 *Roebuck v. Mayo Clinic*, 575 P.3d 375, 387 ¶ 36 (Ariz. 2025) (quoting *Fann v. State*, 251  
17 Ariz. 425, 436 ¶ 37 (2021)). As the Arizona Media Amici have explained, *supra* Section  
18 II, the portions of the Anti-SLAPP Law applying to civil proceedings are constitutional.  
19 They are separate and distinct from the portions applying to criminal proceedings and can  
20 easily be severed.

21 Furthermore, preserving the Anti-SLAPP Law’s applicability to civil proceedings  
22 would be consistent with Arizona’s policy preferences for protecting free speech as  
23 detailed above. *See supra* Section I(A); *see generally Roebuck*, 575 P.3d at 387 ¶ 36  
24 (instructing courts to consider whether “the [L]egislature would have passed the statute  
25 had it been presented with the invalid features removed.”) This result would also be  
26 consistent with the analogous state laws across the country designed to protect free speech  
27 and the press against civil content-based claims such as defamation. *See supra* Section  
28 II(A).

Because this aspect of the statute serves important purposes, is constitutional, and

1 is consistent with the well-documented policies of this State, the Court should preserve its  
2 application in civil proceedings.

3 **Conclusion**

4 For the foregoing reasons, and however the Court may rule on the Petition as it  
5 applies to criminal prosecutions, the Court should preserve the Anti-SLAPP Law's  
6 application to civil proceedings.

7  
8 DATED this 26th day of November, 2025.

9 Respectfully submitted,

10  
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24 *NW Communications of Phoenix, Inc. d/b/a*  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to RPSA 14(i) and ARCAP 16(B)(1)(C), undersigned counsel certifies that the Brief of Amici Curiae Arizona Media Association; KPNX-TV Channel 12, a Division of Multimedia Holdings Corp.; Phoenix Newspapers, Inc.; Scripps Media, Inc., d/b/a KNXV-TV and d/b/a KGUN-TV; and NW Communications of Phoenix, Inc. d/b/a FOX 10 Phoenix does not exceed the word limit of 8,500 words, was not authored in whole or in part by any party to the case, and complies with the form, formatting, filing, and service requirements under ARCAP 4.



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of November 2025 the foregoing document was filed with the Clerk of the Maricopa County Superior Court, with copies served electronically and by First Class Mail this same date on:

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# **Exhibit A**

**Lucky's, LLC v. Berman**

Court of Appeals of Arizona, Division Two

August 5, 2025, Filed

No. 2 CA-CV 2024-0045

**Reporter**

2025 Ariz. App. Unpub. LEXIS 780 \*; 2025 LX 344711; 2025 WL 2218597

LUCKY'S, LLC, DBA LOVE CABARET, Plaintiff/Appellee/Cross-Appellant, v. SYLVIA BERMAN, Defendant/Appellant/Cross-Appellee.

**Notice:** THIS DECISION IS SUBJECT TO FURTHER APPELLATE REVIEW. MOTIONS FOR RECONSIDERATION OR PETITIONS FOR REVIEW TO THE ARIZONA SUPREME COURT MAY BE PENDING. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

**Prior History:** [\*1] Appeal from the Superior Court in Pima County. No. C20211872. The Honorable Kellie Johnson, Judge.

Lucky's, LLC v. Berman, 2023 Ariz. App. Unpub. LEXIS 33, 2023 WL 154988 (Ariz. Ct. App., Jan. 11, 2023)

**Disposition:** AFFIRMED IN PART; REVERSED AND REMANDED IN PART; CROSS-APPEAL DISMISSED.

**Counsel:** Christian Dichter & Sluga P.C., Phoenix, By Stephen M. Dichter and Nathan R. Andrews, Counsel for Plaintiff/Appellee/Cross-Appellant.

Humphrey & Petersen P.C., Tucson, By Andrew J. Petersen, and Curl & Glasson, Tucson, By J.C. Patrascioiu, Counsel for Defendant/Appellant/Cross-Appellee.

**Judges:** Judge Gard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Kelly concurred.

**Opinion by:** Gard

**Opinion**

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**MEMORANDUM DECISION**

GARD, Judge:

P1 Lucky's, LLC, which owns and operates a Tucson adult-entertainment club called Love Cabaret, accuses Sylvia Berman of defamation and trade libel based on a series of nine written statements. The superior court granted Berman's motion to dismiss Lucky's challenge to seven of those statements under Rule 12(b)(6), Ariz. R. Civ. P., after concluding they were not actionable as defamation. The court determined the remaining two statements were actionable, and thereafter denied Berman's motion to dismiss them under Arizona's statute barring strategic litigation against public participation ("anti-SLAPP statute"), A.R.S. § 12-751.

P2 Both parties [\*2] now appeal. Berman contends the superior court erred by refusing to dismiss under § 12-751 the two statements that had survived its Rule 12(b)(6) analysis. In a cross-appeal, Lucky's argues the court erred by dismissing the remaining seven statements under Rule 12(b)(6). For the reasons explained below, we dismiss Lucky's cross-appeal for lack of jurisdiction. We affirm in part and reverse in part the court's ruling denying Berman's motion to dismiss under § 12-751, and remand the case for further proceedings.

### **Factual and Procedural Background**

P3 We view the facts in the light most favorable to Lucky's, the non-moving party. *Date St. Cap., LLC v. Clearcover Ins. Co.*, 256 Ariz. 430, 540 P.3d 921, ¶ 2 (App. 2023).<sup>1</sup> In 2020, Lucky's acquired an adult-entertainment club that had been operating for fifty years and renamed it Love Cabaret. Berman lived in a neighborhood near the club and served as secretary to the neighborhood association. In that capacity, she opposed Lucky's application to obtain a liquor license for Love Cabaret. She created a Facebook page for neighbors to share information about the club, which she then collected and forwarded to local officials. The City of Tucson Mayor and Council voted to deny Lucky's application in March 2021, but Berman, anticipating Lucky's would appeal, continued posting [\*3] updates about the application on the Facebook page.

P4 In April 2021, Lucky's filed a complaint, which it subsequently amended, accusing Berman of defamation and trade libel. The first amended complaint did not identify any specific statements by Berman, but alleged generally that she had accused Lucky's of engaging in prostitution, selling illegal drugs, operating a "sex club," and being owned by a convicted murderer. On Berman's motion, the superior court dismissed the first amended complaint under the then-existing version of the anti-SLAPP statute, A.R.S. § 12-752 (2006). See 2006 Ariz. Sess. Laws, ch. 234, § 1. That statute permitted a party to move to dismiss "any legal action that involves a party's exercise of the right of petition," § 12-752(A), and required a court to grant the motion "unless the party against whom the motion is made shows that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law

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<sup>1</sup>Although we consider only a complaint's four corners when reviewing a superior court's order dismissing a case under Rule 12(b)(6), see *Coleman v. City of Mesa*, 230 Ariz. 352, 284 P.3d 863, ¶ 9 (2012), § 12-751(C) requires a court to consider an expanded record to resolve a motion to dismiss, see *BLK III, LLC v. Skelton*, 252 Ariz. 583, 506 P.3d 812, ¶ 6 (App. 2022). Because we do not reach the superior court's dismissal under Rule 12(b)(6) for the reasons explained below, we do not limit our review to the second amended complaint and instead draw our facts from that complaint and the evidence submitted in support of the motion to dismiss under § 12-751.

and that the moving party's acts caused actual compensable injury to the responding party," § 12-752(B).

P5 Lucky's appealed, and we affirmed the superior court's decision in part, vacated it in part, and remanded. *Lucky's, LLC v. Berman*, No. 2 CA-CV 2021-0145, 2023 Ariz. App. Unpub. LEXIS 33 (mem. decision). We concluded that, with one exception, [\*4] Berman's statements did not implicate the right to petition and thus were not protected by former § 12-752, and that Lucky's had not shown a compensable injury from Berman's allegations against its owner. *Id.* ¶¶ 13-21. We remanded for the superior court to consider Berman's alternative arguments for dismissal under Rule 12(b)(6), which the court had not reached. *Id.* ¶¶ 22-23.

P6 While Lucky's appeal was pending, the legislature amended the anti-SLAPP statute and renumbered it as § 12-751. See 2022 Ariz. Sess. Laws, ch. 267, § 2. The new statute is not limited to the right to petition, but instead permits a defendant to move to dismiss a legal action if it implicates various state or federal constitutional rights, including the right to freedom of speech. § 12-751(A). It assigns the moving party the burden of establishing prima facie proof that the lawsuit was "substantially motivated" by a desire to retaliate against, deter, or prevent the party's exercise of a listed constitutional right. § 12-751(B). If the moving party establishes such a prima facie case, the burden shifts to the non-moving party to show that existing law justifies the litigation. *Id.*

P7 On remand, Lucky's again amended its complaint. The second amended complaint, which is the operative complaint here, alleged [\*5] that Berman had published nine specific defamatory statements between January and June 2021. The parties designated the alleged defamatory statements ADS # 1 through ADS # 9:

- ADS # 1: Berman stated in an email and a Facebook post that "numerous residents have witnessed noise, drugs, prostitution, loitering, smoking, and driving through our neighborhood since [Lucky's] took ownership" of the club.
- ADS # 2: Berman emailed a local newspaper, referring to the neighborhood's efforts to defeat Lucky's application for a liquor license and stating, "We have been abused for 50 years. Now we have drugs, prostitution, fighting in our neighborhood again."
- ADS # 3: Berman emailed at least one neighbor, referencing Love Cabaret in the email's subject line, describing "reports of prostitution" associated with a nearby adult bookstore, and opining that "[p]eople are not standing around there, simply loitering."
- ADS # 4: Berman emailed her neighbors, again referencing Love Cabaret in the subject line and stating, "We have reports of prostitution."
- ADS # 5: Berman responded to a neighbor's email reporting an advertised "4/[20 party" at Love Cabaret and stated, "It[']s 'liquid' marijuana that they [\*6] are selling."
- ADS # 6: Berman reported "another violation" to the Arizona Department of Liquor Licenses and Control, stating that Lucky's had circulated a video on Facebook "advertising the sale of marijuana" at Love Cabaret, and that the establishment's "new local manager has decided to start selling marijuana."
- ADS # 7: Berman e-mailed an unknown person asking that person to report any experiences "seeing prostitutes (it's getting bad) and fighting." She also remarked that she had "heard gunshots."

- ADS # 8: Berman e-mailed another local newspaper, describing Love Cabaret as a "sex club" and stating that neighbors had experienced "men with guns walking through the neighborhood, drug deals behind their homes, noise at all hours of the night, [and] people parking in front of their homes to engage in sex and drug activities (and leaving evidence in the street)." In addition, she alleged that neighbors had "watched as residents routinely cleaned the street near their homes of drug and sex paraphernalia on many mornings after," that they were "now seeing prostitutes regularly," and that they had "never [seen] prostitution like this" under the club's prior ownership.
- ADS # 9: Berman [\*7] informed a neighbor by email that there were "daily reports of prostitution" in the neighborhood.

P8 Berman again moved to dismiss, citing both Rule 12(b)(6) and § 12-751. In a written ruling issued in October 2023, the superior court determined that § 12-751, rather than the former § 12-752, governed the motion because Lucky's had amended its complaint after § 12-751's effective date and the changes were only procedural.<sup>2</sup> Applying that statute, the court found that Berman had made a "prima facie showing that the lawsuit was substantially motivated by . . . a desire to deter, retaliate against, or prevent the lawful exercise of a constitutional right." The court recognized that, in light of this prima facie showing, it was required to determine whether Lucky's action was "justified by existing law or supported by reasonable argument to extend or modify existing law." The court concluded that an evidentiary hearing was necessary to resolve this issue.

P9 The superior court, however, separately considered whether the challenged statements were capable of bearing defamatory meanings because, if they were not, they were independently subject to dismissal under Rule 12(b)(6). The court concluded that ADS # 1, ADS # 3, ADS # 4, and ADS # 7 through [\*8] ADS # 9 were not capable of bearing such meanings because they did not "state or imply objective facts about Lucky's" or its business practices but rather described the business's "effects . . . on the neighborhood" and "what neighbors [had] observed since the business opened." These statements could not "reasonably be interpreted to imply that Lucky's, as part of its business practices, is complicit in or facilitating the conduct." The court likewise concluded that ADS # 2 did not state or imply objective facts about Lucky's that were provable as false, but rather "clearly contains exaggeration and hyperbole."

P10 The superior court determined, however, that ADS # 5 and ADS # 6 "directly accuse Lucky's and its manager of selling marijuana illegally." "Because the statements are provable as false, are about Lucky's, and directly accuse Lucky's of criminal activity," the court continued, "the statements are actionable as defamation." The court accordingly granted the motion to dismiss ADS # 1 through ADS # 4 and ADS # 7 through ADS # 9 under Rule 12(b)(6), but denied the motion to dismiss ADS # 5 and ADS # 6. The court also denied Lucky's subsequent motion to reconsider.

P11 Before the § 12-751 hearing, which [\*9] occurred in December 2023, the parties submitted supplemental briefing addressing the legal standard for establishing that an action is justified

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<sup>2</sup>Although Lucky's argued below that former § 12-752 should apply, it does not challenge this portion of the court's ruling on cross-appeal.

under existing law within that statute's meaning. The superior court concluded that, in answering the justification question, it would determine whether there were "facts that, if proven, support [Lucky's] claim," but would not resolve factual disputes. The parties submitted a number of exhibits at the hearing, consisting primarily of the nine published statements at issue, but neither party called witnesses to testify.

P12 At the end of the hearing, the superior court concluded that "the legal action on which the [m]otion is based is justified by existing law" and denied the motion to dismiss. The court found the complaint's factual allegations to be "supported by the law of defamation."<sup>3</sup> Berman moved to reconsider, and the court denied the motion. In so doing, it reiterated its conclusion that factual disputes—such as whether Berman's statements were actually defamatory, were substantially true, or were negligently made—"were not appropriate for the determination of whether the action was 'justified by existing law.'" Berman appealed from [\*10] the court's order denying her motion to dismiss under § 12-751, as well as all intermediate orders, including the order denying, in part, her motion to dismiss under Rule 12(b)(6). Lucky's cross-appealed from the court's order granting, in part, Berman's motion to dismiss under Rule 12(b)(6).

## Discussion

### I. Jurisdiction

P13 "Because our jurisdiction is defined by statute, we have an obligation to examine whether we have jurisdiction over an appeal and, if lacking, to dismiss." *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 382 P.3d 812, ¶ 6 (App. 2016). Berman did not include a jurisdictional statement in her opening brief. See Ariz. R. Civ. App. P. 13(a)(4) (opening brief must contain a statement of the case that states the "basis of the appellate court's jurisdiction"). Lucky's included such a statement in its combined answering and cross-opening brief, asserting we have jurisdiction over its cross-appeal under A.R.S. § 12-2101(A)(1), which empowers us to hear appeals from final judgments, and over Berman's appeal under § 12-751(H), which, in certain circumstances, makes an order granting or denying a motion under the anti-SLAPP statute appealable under § 12-2101.

P14 During our review of the case, we identified a potential jurisdictional defect with Lucky's cross-appeal, the notice of appeal for which appeared to have been filed prematurely. We therefore ordered [\*11] supplemental briefing on the basis for our appellate jurisdiction. In our order, we identified § 12-2101(A)(5)(e), which neither party had cited, and asked whether it conferred appellate jurisdiction over Lucky's cross-appeal.<sup>4</sup> For the reasons that follow, we

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<sup>3</sup>The superior court acknowledged that it had already dismissed a number of Lucky's allegations under Rule 12(b)(6), but resolved to nonetheless rule on those statements under § 12-751(B) "for purposes of the record and the attorney's fees provision" and in order to avoid "get[ting] ourselves in the situation we found ourselves in on the last [m]otion to [d]ismiss." The court, however, made a general ruling denying the motion to dismiss, without addressing any specific claims.

<sup>4</sup>Section 12-2101(A)(5)(e) directs an appellate court to expedite an appeal taken under that provision unless the court determines for good cause under the circumstances that expedited review is not feasible. Under the circumstances here, which include the parties' failure to cite § 12-2101(A)(5)(e); the existence of a cross-appeal not governed by § 12-2101(A)(5)(e); and

conclude we have jurisdiction over Berman's appeal under § 12-2101(A)(5)(e) but lack jurisdiction over Lucky's cross-appeal.

### A. Pertinent facts

P15 The superior court granted Berman's motion to dismiss in part and denied it in part under Rule 12(b)(6) in a written order filed October 27, 2023. The court signed the order, but did not include findings and finality language under Rule 54(b), Ariz. R. Civ. P., designating the order as immediately appealable.<sup>5</sup> The court denied Berman's motion to dismiss under § 12-751 in a ruling from the bench on December 1, 2023. On December 12, Lucky's lodged a proposed form of judgment, asking the court to enter judgment on the Rule 12(b)(6) dismissals under Rule 54(b).<sup>6</sup> Berman objected on December 18, arguing that judgment was inappropriate under Rule 54(b) because the October 2023 ruling had not resolved Lucky's *claims* but had merely determined that seven of the allegedly defamatory statements could not provide the *factual basis* for those claims.

P16 On December 21, 2023, Berman moved to reconsider the § 12-751 ruling [\*12] under Rule 7.1(e), Ariz. R. Civ. P., which was not a time-extending motion for notice-of-appeal purposes. See Ariz. R. Civ. App. P. 9(e)(1). Accordingly, although the motion to reconsider had not yet been resolved, Berman filed a notice of appeal from the § 12-751 ruling on January 2, 2024. Berman's notice also identified various intermediate orders, including the October 2023 ruling denying her motion to dismiss ADS # 5 and ADS # 6 under Rule 12(b)(6). The same day, Lucky's filed its reply in support of a Rule 54(b) judgment, completing briefing on that issue.

P17 On January 19, 2024, within twenty days of Berman's notice of appeal, see Ariz. R. Civ. App. P. 9(b), Lucky's filed a notice of cross-appeal, identifying the October 2023 ruling under Rule 12(b)(6) as the order from which it appealed. In a written order filed on February 7, the superior court denied Berman's motion to reconsider its order denying her motion to dismiss under § 12-751. The same day, the court entered partial final judgment under Rule 54(b) on the October 2023 Rule 12(b)(6) ruling. Neither party filed a new or amended notice of appeal from the Rule 54(b) judgment.

### B. Berman's appeal

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the jurisdictional concerns associated with that cross-appeal, which necessitated supplemental briefing, expedited review was not feasible here.

<sup>5</sup> Rule 54(b) provides, in pertinent part, "If an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines there is no just reason for delay and recites that the judgment is entered under Rule 54(b)." It further directs that "[i]f there is no such express determination and recital, any decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties" but may instead "be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." *Id.*

<sup>6</sup> The proposed form of judgment Lucky's lodged is not attached to its notice of lodging as contained in the record on appeal, but we deduce its content from the subsequent briefing, as well as the judgment the court ultimately signed, which bears Lucky's attorney's letterhead.

P18 The parties do not dispute, and we agree, that we possess jurisdiction over Berman's appeal from the superior court's December 2023 ruling denying her motion to dismiss under § 12-751.<sup>7</sup> Section 12-751(H) provides: "If [\*13] the court determines that the moving party has established prima facie proof as prescribed in subsection B of this section, an order granting or denying a motion filed pursuant to this section is appealable pursuant to § 12-2101." Section 12-2101(A)(5)(e), in turn, provides in pertinent part that a party may appeal from an order "[g]ranted or denying a motion to dismiss . . . pursuant to § 12-751, unless the court did not find that the moving party established prima facie proof as prescribed in § 12-751, subsection B."

P19 Here, the superior court found that Berman had established a prima facie case that Lucky's lawsuit was substantially motivated by its desire to deter, retaliate against, or prevent Berman's lawful exercise of a constitutional right. See § 12-751(B). As a result, the court's subsequent order denying the motion to dismiss under § 12-751 was immediately appealable and did not require the formal entry of judgment. See §§ 12-751(H); 12-2101(A)(5)(e). Berman filed a timely notice of appeal from the superior court's December 2023 order denying her motion under § 12-751, and we have jurisdiction over her appeal under § 12-2101(A)(5)(e).<sup>8</sup>

### C. Lucky's cross-appeal

P20 We reach a different conclusion as to Lucky's cross-appeal. In its supplemental brief, Lucky's conceded that our jurisdiction over Berman's [\*14] appeal under § 12-2101(A)(5)(e) does not also extend to the cross-appeal because the cross-appeal challenges the Rule 12(b)(6) ruling, which "does not pertain to A.R.S. § 12-751." We agree. Although Berman based her motion to dismiss on both Rule 12(b)(6) and § 12-751 and the facts and analysis overlapped on those legal theories, the court consistently treated the motion's Rule 12(b)(6) component as distinct from its § 12-751 component and resolved the two theories separately. Section 12-2101(A)(5)(e), by its plain terms, applies only to orders granting or denying motions to dismiss under § 12-751.

P21 Lucky's argues, however, that its January 2024 notice of appeal, while premature, was sufficient to confer appellate jurisdiction over the Rule 12(b)(6) ruling. In general, "a notice of appeal filed in the absence of a final judgment . . . is 'ineffective' and a nullity." *Craig v. Craig*, 227 Ariz. 105, 253 P.3d 624, ¶ 13 (2011) (quoting *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 132 P.3d 1187, ¶ 39 (2006)). But there are two narrow exceptions to this rule.

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<sup>7</sup> To the extent Berman purports to appeal from the superior court's order denying her motion to dismiss ADS # 5 and ADS # 6 under Rule 12(b)(6), we lack jurisdiction because "[a]n order denying a motion to dismiss is an interlocutory, nonappealable order." *Qwest Corp. v. Kelly*, 204 Ariz. 25, 59 P.3d 789, ¶ 3 (App. 2002).

<sup>8</sup> Although Berman filed her notice of appeal on the thirty-second day, it was nonetheless timely. See Ariz. R. Civ. App. P. 9(a) ("To appeal a judgment, a party must file a notice of appeal under Rule 8[, Ariz. R. Civ. App. P.,] no later than 30 days after entry of the judgment from which the appeal is taken, except as otherwise provided in this Rule or unless the law provides a different time."). Because the thirtieth day was a Sunday and the thirty-first day was a legal holiday, Berman's filing period was extended by operation of law until the next business day—January 2. See Ariz. R. Civ. App. P. 5(a); Ariz. R. Civ. P. 6(a)(3).

P22 The first exception, articulated in *Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200 (1981), applies "only 'if no decision of the court could change and the only remaining task is merely ministerial,'" a final judgment is ultimately entered, and there is no prejudice to the appellee. *McCleary v. Tripodi*, 243 Ariz. 197, 403 P.3d 1191, ¶ 9 (App. 2017) (quoting *Smith*, 212 Ariz. 407, 132 P.3d 1187, ¶ 37). That exception does not apply here because the entry of judgment under Rule 54(b) is discretionary, not ministerial. See *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 977 P.2d 769, ¶ 19 (1999) ("A trial judge has discretion [\*15] to decide whether an order or judgment should be accorded finality; the judge should certify the order or judgment pursuant to Rule 54(b) only in those cases in which some hardship or injustice would result from a delay in entering a final judgment."); see also *Smith*, 212 Ariz. 407, 132 P.3d 1187, ¶ 38 (distinguishing between ministerial tasks and "substantive matters requiring the discretion of the decision-maker"). In fact, the parties disputed below whether a Rule 54(b) judgment was legally or factually appropriate in the first place.

P23 Lucky's relies on the second exception, which is set forth in Rule 9(c), Ariz. R. Civ. App. P. That rule provides: "A notice of appeal or cross-appeal filed after the superior court announces an order or other form of decision—but before entry of the resulting judgment that will be appealable—is treated as filed on the date of, and after the entry of, the judgment." *Id.* We have previously interpreted this rule in a manner consistent with its federal counterpart, see Fed. R. App. P. 4(a)(2), to save an untimely notice only if the decision at issue "would be appealable if immediately followed by the entry of judgment." *Camasura v. Camasura*, 238 Ariz. 179, 358 P.3d 600, ¶ 14 (App. 2015) (emphasis omitted) (quoting *FirsTier Mortg. Co. v. Invs. Mortg. Ins. Co.*, 498 U.S. 269, 276, 111 S. Ct. 648, 112 L. Ed. 2d 743 (1991)); see *McCleary*, 243 Ariz. 197, 403 P.3d 1191, ¶ 19 (noting that Court in *FirsTier* "considered whether the order could form the basis of a final judgment and whether it [\*16] actually resulted in final judgment").

P24 Here, the October 2023 order could not, standing alone, have provided an immediate basis for an appealable final judgment because it lacked Rule 54(b)'s required findings. See *McCleary*, 243 Ariz. 197, 403 P.3d 1191, ¶ 19; *Camasura*, 238 Ariz. 179, 358 P.3d 600, ¶ 14. Specifically, the court did not find that there was "no just reason for delay" in imposing judgment, Ariz. R. Civ. P. 54(b), nor did it express any intention to enter final judgment. To the contrary, the court anticipated further proceedings addressing the motion's § 12-751 component. Under these circumstances, the superior court's February 2024 judgment under Rule 54(b) did not cure Lucky's premature notice of cross-appeal from the October 2023 ruling dismissing seven allegedly defamatory statements under Rule 12(b)(6). The premature notice was a nullity, see *Craig*, 227 Ariz. 105, 253 P.3d 624, ¶ 13, and given the absence of a timely filed notice, see Ariz. R. Civ. App. P. 9(a), we lack jurisdiction to consider the cross-appeal.<sup>9</sup>

## II. Section 12-751

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<sup>9</sup>Lucky's has not asked us to exercise special-action jurisdiction to reach its cross-appeal, nor would any such request be appropriate. See Ariz. R. P. Spec. Act. 11(e) ("If the reviewing court lacks jurisdiction over a direct appeal for reasons other than timeliness, the court may—on a party's request or on its own initiative—treat the appeal as a special action and accept special action jurisdiction . . . ." (emphasis added)).

P25 Berman challenges the superior court's determination that Lucky's complaint was "justified by existing law," § 12-751(B)(2), insofar as it rested on ADS # 5 and ADS # 6. She argues the court applied an incorrect legal standard to resolve this question, and that the litigation was not justified because ADS # 5 and ADS # 6 are not actionable [\*17] as defamation. We review a trial court's ruling on a motion to dismiss under § 12-751 de novo. See *BLK III, LLC v. Skelton*, 252 Ariz. 583, 506 P.3d 812, ¶ 6 (App. 2022).

#### A. Justified by existing law

P26 The parties first dispute the standard for determining whether an action is "justified by existing law" under § 12-751(B)(2). Although she does not clearly propose a standard, Berman maintains that the superior court erroneously based its analysis on Rule 11, Ariz. R. Civ. P., which permits sanctions for an attorney's violation of his or her duty to ensure that the representations in a pleading "are warranted by existing law." Berman argues that a court may not exclude a defendant's evidence, or her asserted privileges, in assessing whether a claim is justified. Lucky's responds that a Rule 11-type analysis is appropriate, and that a legal action is "justified by existing law" under § 12-751(B)(2) so long as it is not objectively frivolous or groundless. See *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 276 P.3d 11, ¶ 113 (App. 2012) (Rule 11 is an objective standard, which an attorney violates "by filing a document that he or she knows or should know asserts a position that 'is insubstantial, frivolous, groundless or otherwise unjustified'" (quoting *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319, 868 P.2d 329 (App. 1993))).

P27 As a preliminary matter, the superior court does not appear to have applied a Rule 11-type standard as Berman believes. At the December 2023 hearing, the [\*18] court expressed skepticism that such a standard applied, stating that Rule 11 could provide "helpful" guidance but remarking, "I don't know if it means exactly the same thing." The court later clarified these comments in its order denying Berman's motion to reconsider, explaining that it had "found that . . . although it was not going to apply a strict Rule 11 standard, it could certainly seek guidance from interpretation of the Rule 11 phrase 'warranted by existing law.'" Ultimately, the court required Lucky's to establish, based on its "allegations and the law upon which [its] complaint is based," that facts exist "that, if proven, support [its] claim[s]." The court did not require Lucky's to show that it would succeed on its claims or that it could defeat Berman's defenses, but instead asked only whether there was "evidence to support the allegations [Lucky's] has put in the complaint and [whether] it [is] justified by existing law."

P28 "We review questions of statutory interpretation de novo." *Am. C.L. Union of Ariz. v. Ariz. Dep't of Child Safety*, 251 Ariz. 458, ¶ 11, 493 P.3d 885 (2021). We begin with the text, *Franklin v. CSAA Gen. Ins. Co.*, 255 Ariz. 409, 532 P.3d 1145, ¶ 8 (2023), giving the words used their plain meanings "in their broader statutory context, unless the legislature directs us to do otherwise." *In re Drummond*, 257 Ariz. 15, 543 P.3d 1022, ¶ 19 (2024) (quoting *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 522 P.3d 671, ¶ 31 (2023)). We "will not read into a statute something [\*19] which is not within the manifest intention of the legislature as gathered from the statute itself," nor will we "inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions." *Roberts v. State*, 253 Ariz. 259, 512 P.3d 1007, ¶ 20 (2022) (quoting *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133, 407 P.2d 91 (1965)). If

"a statute's plain language is unambiguous in context, it is dispositive." *Drummond*, 257 Ariz. 15, 543 P.3d 1022, ¶ 5.

P29 Section 12-751(A) allows a non-state party to move to dismiss "any legal action that involves a person's lawful exercise of the right of petition, the right of speech, the freedom of the press, the right to freely associate or the right to peaceably assemble" under the Arizona and federal constitutions. The moving party bears 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," and it may rely on "the record, a sworn affidavit or other evidence" to do so.<sup>10</sup> § 12-751(B). The non-moving party need not respond unless and until the court finds prima facie proof and orders a response. *Id.*

P30 If the moving party establishes the required prima facie proof, the burden shifts to the responding party to justify the lawsuit's continuation. *Id.* A court must stay all discovery, § 12-751(E) [\*20], and must grant the motion to dismiss unless, as relevant here, "the responding party shows that the legal action on which the motion is based is justified by existing law," § 12-751(B)(2). To make that determination, "the court shall conduct an evidentiary hearing or consider the pleadings and supporting and opposing affidavits stating facts on which the liability, defense or action is based." § 12-751(C).

P31 The word "justified"—the operative term here—commonly means to have a reasonable or sufficient legal basis. See *Justified*, Merriam-Webster, <https://merriam-webster.com> (last visited July 17, 2025) ("having or shown to have a just, right, or reasonable basis"); *Justified*, The American Heritage Dictionary, <https://ahdictionary.com> (last visited July 17, 2025) (defining justified in the legal context as "sufficient legal reason for (an action taken)"); cf. *Substantially Justified*, Black's Law Dictionary (12th ed. 2024) ("having a reasonable basis in law and in fact").<sup>11</sup> Applying this definition to § 12-751(B)(2), the statute required Lucky's to establish that its legal action had a reasonable or sufficient basis under existing law. In the context of defamation, this inquiry necessarily involved a determination whether the allegedly defamatory statements were actionable, as a complaint predicated on non-actionable statements is subject to dismissal and thus has no reasonable or sufficient basis under existing law. *BLK III*, 252 Ariz. 583, 506 P.3d 812, ¶ 13.

P32 While [\*21] the statute requires a superior court to consider evidence submitted by both parties in deciding a motion to dismiss, see § 12-751(C), we need not determine the degree to which a court may or should resolve factual disputes as part of this process. Here, as the superior court recognized, Berman did not dispute making the alleged defamatory statements. Similarly, Lucky's did not contest Berman's proffered evidence at the evidentiary hearing, which

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<sup>10</sup> Lucky's does not challenge the superior court's determination that Berman established prima facie proof under § 12-751(B).

<sup>11</sup> We have used similar language to describe the inquiry for determining whether a complaint states a claim on which relief can be granted under Rule 12(b)(6). See *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 519, 591 P.2d 1005 (App. 1979) (motion to dismiss for failure to state a claim "attacks the legal sufficiency of the complaint").

provided context for those statements. The facts relevant to the court's assessment of the motion to dismiss were, therefore, undisputed.<sup>12</sup>

### **B. Whether Lucky's complaint is justified by existing law**

P33 "The right to free speech, enshrined in the First Amendment, is not absolute—'[s]ociety has a pervasive and strong interest in preventing and redressing' defamatory speech."<sup>13</sup> *Takieh v. O'Meara*, 252 Ariz. 51, 497 P.3d 1000, ¶ 13 (App. 2021) (alteration in *Milkovich*) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990)). At the same time, however, "the expense of defending a meritless defamation case" can have "a chilling effect on First Amendment rights." *Id.* (quoting *Read v. Phx. Newspapers, Inc.*, 169 Ariz. 353, 357, 819 P.2d 939 (1991)). Courts must therefore "act as gatekeeper[s] protecting the right to free speech from encroachment." *Id.* (quoting *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, 402 P.3d 457, ¶ 1 (App. 2017)).

P34 In its role as a gatekeeper, a superior court "decides, in the first instance, whether, under all the circumstances, [\*22] a statement is capable of bearing a defamatory meaning." *Yetman v. English*, 168 Ariz. 71, 79, 811 P.2d 323 (1991). "If a court determines that the publication is incapable of a defamatory meaning, the claim is subject to dismissal." *BLK III*, 252 Ariz. 583, 506 P.3d 812, ¶ 13. But if the statement is capable of bearing a defamatory meaning, "[t]he jury then decides whether the defamatory meaning of the statement was in fact conveyed." *Yetman*, 168 Ariz. at 79.

P35 As a further safeguard, we apply "enhanced appellate review" to defamation claims. *Harris v. Warner*, 255 Ariz. 29, 527 P.3d 314, ¶ 9 (2023) (quoting *Rogers v. Mroz*, 252 Ariz. 335, 502 P.3d 986, ¶ 20 (2022)). Under this review, "we examine for ourselves the statements in issue and the circumstances under which they were made" to determine "whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Id.* (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)).

P36 "To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation." *Id.* ¶ 11 (quoting *Turner v. Devlin*, 174 Ariz. 201, 203-04, 848 P.2d 286 (1993)). "[I]n order 'to establish a defamation claim on matters of public concern: (1) the assertion must be provable as false; [and] (2) the statement must be reasonably perceived as stating actual facts

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<sup>12</sup>To the extent Berman contends the court erred by declining to address factual issues relating to whether the statements conveyed defamatory meanings, were substantially true, or were negligently made, those matters, as discussed at length below, fell outside the court's purview in deciding whether a defamation action is subject to dismissal. See *Yetman v. English*, 168 Ariz. 71, 79, 811 P.2d 323 (1991) (court considers whether statement is capable of defamatory meaning but jury determines whether defamatory meaning was in fact conveyed).

<sup>13</sup>Lucky's complaint also alleged trade libel, which "involves the intentional publication of an injurious falsehood disparaging the quality of another's property with resulting pecuniary loss." *Gee v. Pima County*, 126 Ariz. 116, 116, 612 P.2d 1079 (App. 1980). Berman does not separately argue the trade libel claim, instead asserting that because the claim rests on the same factual basis as the defamation claim, the "same privileges and defenses apply." We therefore do not separately address the trade libel claim here.

about an individual, rather than imaginative expression or rhetorical hyperbole."<sup>14</sup> *Id.* ¶ 12 (alteration in *Harris*) (quoting [\*23] *Rogers*, 252 Ariz. 335, 502 P.3d 986, ¶ 22). We "analyze [the statements] within their proper context to determine their meaning," and context is particularly important where the speech relates to issues of public concern. *Id.* ¶ 13; see *Rogers*, 252 Ariz. 335, 502 P.3d 986, ¶ 31. Overall, the "key inquiry is whether the challenged expression"—when viewed from the perspective of an average, reasonable, non-law-trained listener, and in light of the statement's circumstances and general tenor—"would reasonably appear to state or imply assertions of objective fact." *Id.* (quoting *Yetman*, 168 Ariz. at 76).

## 1. ADS # 5

P37 ADS # 5 is contained within an email exchange between Berman and a person who appears to be a neighbor. The neighbor sent the first email on April 8, 2021, bringing to Berman's attention a street sign advertising a "4/20 party" at Love Cabaret, which the neighbor "presume[d]" would be a "weed' fest on the smoking patio." Berman responded less than two hours later, reporting that she had looked up the advertisement on Facebook. She then made the statement designated as ADS # 5: "It[]s 'liquid' marijuana that they are selling." She concluded the email by asking when Lucky's liquor license expired, vowing to mention the situation to City officials, accusing Lucky's of "flaunting the law," [\*24] and stating, "If it[]s illegal to consume MJ on their premises, it would make a nice violation at the State Liquor Dep't!"

P38 The neighbor responded to Berman's email later that night. The neighbor acknowledged his or her uncertainty whether "liquid marijuana" contains THC but opined that, if it does or if Lucky's otherwise intended to permit marijuana consumption at Love Cabaret, it could run afoul of licensing requirements for marijuana dispensaries. The neighbor also included a screen shot of the Facebook post at issue, which advertised a "4/20 celebration" and promoted "2-4-1 Liquid Marijuanas." On April 10, Berman responded to the neighbor and stated, "[name redacted] says it[]s not marijuana. It[]s a 2 for 1 drink special. Further research suggest[s] it[]s some kind of gimmick."

P39 Even if ADS # 5, viewed in isolation, could be read to accuse Lucky's of selling marijuana unlawfully, it is not defamatory when viewed in the context of the conversation as a whole. See *Harris*, 255 Ariz. 29, 527 P.3d 314, ¶ 27 ("Although in isolation the[] statements might be read as assertions of verifiable fact, their nature and full context render them not defamatory."); *Rogers*, 252 Ariz. 335, 502 P.3d 986, ¶ 32 ("[W]e must view the statement within the entirety of the [\*25] publication, as the meaning or implication is only fully apparent in context."). The full email exchange makes clear that Berman and the neighbor were reacting to Love Cabaret's advertisement promoting "liquid marijuana" and were attempting to discern the meaning and significance of that term and any implications for Lucky's liquor license. Ultimately, Berman learned that "liquid marijuana" is a drink, not actual marijuana, and so advised the neighbor. Taking ADS # 5 in context, a reasonable person would thus have understood it as a commentary on Lucky's own advertisement, as part of a larger conversation aimed at determining whether Lucky's actually intended to sell marijuana at Love Cabaret. See *Sign Here Petitions LLC*, 243 Ariz. 99, 402 P.3d 457, ¶ 25 (concluding that a "reasonable person would

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<sup>14</sup> While Lucky's is a private figure, the parties agree that the statements in dispute here relate to an issue of public concern.

understand [the disputed] statement in the context of the previous several tweets, which set a tone of puffery and exaggeration"). The statement was not defamatory as a matter of law. As a result, Lucky's complaint was not justified by existing law to the extent it rested on ADS # 5.

## 2. ADS # 6

P40 ADS # 6 presents a closer question. That statement is contained in an email Berman sent to an employee of the Arizona Department of Liquor Licenses and [\*26] Control ("Liquor Department") on April 9, 2021—the day after she wrote the email containing ADS # 5 and the day before she advised the neighbor about her discovery that "liquid marijuana" does not actually contain marijuana. In the email, Berman reported "another violation" at Love Cabaret, provided a link to Love Cabaret's Facebook advertisement, advised the recipient that a party was scheduled to occur on April 20 at which "liquid marijuana will be available," stated her belief that Lucky's did not have a dispensary license, and requested "an investigation into this matter." Berman also complained about Lucky's treatment of the neighbors, as well as its tendency to blame Love Cabaret's local manager for problems and then promptly "fire and replace" that manager. ADS # 6 is contained in the email's last line: "This new local manager has decided to start selling marijuana." The record contains no responsive emails or further context for this statement.

P41 Berman does not dispute that ADS # 6 is about Lucky's and provable as false, and is therefore capable of having a defamatory meaning. *Harris*, 255 Ariz. 29, 527 P.3d 314, ¶¶ 11-12; *Yetman*, 168 Ariz. at 79. Rather, citing *Melton v. Slonsky*, 19 Ariz. App. 65, 504 P.2d 1288 (1973), she argues that the statement was conditionally privileged because she made [\*27] it to a government entity. In response, Lucky's contends that the existence of a conditional privilege was insufficient to support dismissal because Lucky's had alleged facts sufficient for a factfinder to determine that the privilege had been overcome.<sup>15</sup> Assuming without deciding that Berman is correct that a superior court must consider a defendant's defenses in ruling on a motion to dismiss under § 12-751, we agree with Lucky's. See *Dube v. Likins*, 216 Ariz. 406, ¶ 42, 167 P.3d 93 (App. 2007) (noting the existence of "Arizona authority describing conditional privilege as a defense to a defamation action," and concluding that it "would be premature to address privilege on appeal in the context of a pre-answer motion to dismiss").

P42 We have previously held that a statement made to the Liquor Department is entitled to a conditional or qualified privilege. *Melton*, 19 Ariz. App. at 68; see also *Burns v. Davis*, 196 Ariz. 155, 993 P.2d 1119, ¶ 30 (App. 1999) (statements made to board of adjustment entitled to qualified privilege); *Lewis v. Oliver*, 178 Ariz. 330, 335, 873 P.2d 668 (App. 1993) (statements made to United States Department of Transportation qualifiedly privileged). But that privilege may be overcome upon a showing of actual malice. See *Burns*, 196 Ariz. 155, 993 P.2d 1119, ¶

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<sup>15</sup> Lucky's also contends that Berman waived her conditional-privilege argument in two ways. First, it argues that she failed to raise the argument in the trial court. Berman, however, argued below that ADS # 6 was conditionally privileged. Second, Lucky's maintains that this issue is waived because Berman argued it insufficiently in her opening brief. While Berman's argument is perfunctory, the waiver doctrine is discretionary, *Jones v. Respect the Will of the People*, 254 Ariz. 73, 517 P.3d 1188, ¶ 42 (App. 2022), and we prefer to resolve issues on their merits, *Ramos v. Nichols*, 252 Ariz. 519, 505 P.3d 312, ¶ 10 (App. 2022). We do so here.

35 ("An abuse through actual malice occurs when the speaker makes a statement knowing it is false or with reckless disregard of whether it is false."); *Lewis*, 178 Ariz. at 335 (plaintiff [\*28] may establish abuse of conditional privilege by showing either "(1) actual malice, i.e., with knowledge of its falseness or with reckless disregard of whether it was true or not; or (2) excessive publication, i.e., publication to an unprivileged recipient not reasonably necessary to protect the interest upon which the privilege is grounded"). "Whether a privileged occasion arose is a question of law for the court, and whether the occasion for the privilege was abused is a question of fact for the jury." *Green Acres Tr. v. London*, 141 Ariz. 609, 616, 688 P.2d 617 (1984).

P43 Lucky's alleged in its second amended complaint that Berman had made the statements "for the express purpose of harming Love Cabaret's reputation in the community" and either knew they were false or recklessly disregarded their falsity; it also offered at the § 12-751 hearing portions of Berman's deposition in which she admitting to having no firsthand evidence of drug use at Love Cabaret. Moreover, the timing of the emails sent in connection with ADS # 5 suggests that Berman was on notice from her neighbor the day before her report to the Liquor Department that "liquid marijuana" may not actually contain marijuana. Unless "only one conclusion can be drawn from the evidence, the determination [\*29] of the question whether the privilege has been abused is for the jury." *Burns*, 196 Ariz. 155, 993 P.2d 1119, ¶ 36 (quoting *Melton*, 19 Ariz. App. at 68). More than one conclusion can be drawn here, making dismissal inappropriate. Lucky's complaint was justified by existing law to the extent it rested on ADS # 6.

### C. Damages

P44 Finally, Berman briefly argues that Lucky's has presented insufficient evidence of actual damages. She claims that Lucky's relied on the same declaration from its owner, S.C., that it had submitted in support of its first motion to dismiss and maintains that, in our prior memorandum decision, we held this declaration insufficient to prove damages. Berman misapprehends our prior decision's scope.

P45 The prior appeal involved an allegedly defamatory statement not at issue here. Specifically, Berman advised her city councilmember by email that S.C.'s name is also the alias of a convicted murderer. *Lucky's*, No. 2 CA-CV 2021-0145, ¶ 6. We noted that "both the First Amendment and [former] § 12-752 impose an additional requirement that Lucky's prove 'actual compensable injury,' § 12-752, or 'actual injury.'" *Id.* ¶ 20 (citing *Boswell v. Phx. Newspapers, Inc.*, 152 Ariz. 9, 19-20, 730 P.2d 186 (1986), *disapproved on other grounds by Torres v. JAI Dining Servs. (Phx.), Inc.*, 256 Ariz. 212, 536 P.3d 790, ¶ 14 (2023))).<sup>16</sup> S.C.'s declaration was insufficient to make this showing because he had merely "attested that the opposition [\*30] to the liquor license application required Lucky's to retain counsel and incur attorney fees." *Id.* ¶ 21. "[M]erely stating that general neighborhood opposition to the application resulted in legal expenses," we concluded, "is insufficient to establish that the specific statement made by Berman to her councilmember resulted in an actual injury." *Id.* In particular, the declaration did

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<sup>16</sup> Because actual injury is also required by the First Amendment when the alleged defamation involves an issue of public concern, see *Boswell*, 152 Ariz. at 19-20, the legislature's removal of the actual damages requirement from the anti-SLAPP statute is not dispositive.

not reference the statement at issue, and therefore did not "create a nexus between Berman's email to her city councilmember and an actual, compensable injury based on a harm to Lucky's reputation." *Id.*

P46 Accordingly, our previous *Lucky's* decision addressed only Berman's accusation that S.C.'s name is also a convicted murderer's alias, and our reasoning does not extend to other statements Lucky's alleges are defamatory. In particular, we cannot say that S.C.'s declaration is fatally deficient insofar as the lone surviving statement—ADS # 6—is concerned. While the declaration does not reference ADS # 6, it does discuss the reputational and financial harm caused by allegations that, among other things, Lucky's allowed illegal drugs to be used at Love Cabaret. See *Boswell*, 152 Ariz. at 19-20 (recognizing that "actual injury is not limited [\*31] to out-of-pocket loss" and that "the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering" (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974))).

### **Attorney Fees**

P47 Berman requests attorney fees under § 12-751(F). That provision, however, makes fees discretionary and, in our discretion, we deny her request. But as the partially prevailing party on appeal, Berman is entitled to her appellate costs under A.R.S. § 12-341 upon compliance with Rule 21(b), Ariz. R. Civ. App. P. See *Henry v. Cook*, 189 Ariz. 42, 43, 938 P.2d 91 (App. 1996) ("We hold that a party who succeeds on less than all claims is sufficiently successful to recover costs.").

### **Disposition**

P48 For the reasons set forth above, we dismiss Lucky's cross-appeal for lack of jurisdiction. We reverse the superior court's ruling denying Berman's motion to dismiss ADS # 5 under § 12-751, affirm its ruling denying her motion to dismiss ADS # 6, and remand for further proceedings.

# **Exhibit B**

## **Stout v. Gagic**

Court of Appeals of Arizona, Division One

July 15, 2025, Filed

No. 1 CA-CV 24-0829

### **Reporter**

2025 Ariz. App. Unpub. LEXIS 693 \*; 2025 LX 220261; 2025 WL 1938783

PAUL STOUT, Plaintiff/Appellee, v. VLADIMIR GAGIC, Defendant/Appellant.

**Notice:** THIS DECISION IS SUBJECT TO FURTHER APPELLATE REVIEW. MOTIONS FOR RECONSIDERATION OR PETITIONS FOR REVIEW TO THE ARIZONA SUPREME COURT MAY BE PENDING. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.  
NOT FOR OFFICIAL PUBLICATION.

UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

**Prior History:** [\*1] Appeal from the Superior Court in Maricopa County. No. CV2024-022841. The Honorable Richard Albrecht, Judge Pro Tempore.

**Disposition:** AFFIRMED.

**Counsel:** Vladimir Gagic, Phoenix, Defendant/Appellant.

**Judges:** Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Kent E. Cattani joined.

**Opinion by:** Samuel A. Thumma

### **Opinion**

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#### **MEMORANDUM DECISION**

**THUMMA, Judge:**

P1 Appellant Vladimir Gagic challenges an injunction against harassment issued against him after a two day evidentiary hearing. Because Gagic has shown no error, the injunction is affirmed.

#### **FACTS AND PROCEDURAL HISTORY**

P2 The injunction against harassment arises from inflammatory social media posts by Gagic and appellee Paul Stout in June, July and August 2024. On August 22, 2024, Stout filed a petition for

injunction against harassment against Gagic. Stout cited numerous social media posts by Gagic containing inflammatory false accusations about Stout.

P3 The court granted the requested injunction, which limited (but did not preclude) Gagic's social media posts. Specifically, the injunction ordered Gagic not to post personal attacks against Stout that "do not convey a message of public interest or which contain lewd, profane, or obscene [\*2] remarks," expressly allowing Gagic to "comment civilly on" Stout. The order was served on Gagic on August 29, 2024, with a one year duration.

P4 Gagic requested an evidentiary hearing. In late September 2024, after a two day contested evidentiary hearing where Stout and Gagic testified, the court affirmed the injunction. This court has jurisdiction over Gagic's timely appeal under Arizona Revised Statutes (A.R.S.) sections 12-120.21 and 12-2101(A)(5)(b) (2025).<sup>1</sup>

## DISCUSSION

P5 This court reviews the grant of an injunction against harassment for an abuse of discretion. *Wood v. Abril*, 244 Ariz. 436, 438, 420 P.3d 220 ¶ 6 (App. 2008) (citing cases). This court defers to the superior court's credibility assessment and weighing of conflicting evidence and will affirm if the record contains substantial evidence supporting the injunction. *Williams v. King*, 248 Ariz. 311, 317, 460 P.3d 303 ¶ 25-26 (App. 2020).

P6 Gagic's opening brief fails to comply with the Arizona Rules of Civil Appellate Procedure (ARCAP). An opening brief must contain a table of contents, a table of citations and arguments containing appropriate references to the record and authorities on which the party relies. ARCAP 13(a)(1), (2), (7). Gagic's opening brief fails to meet these requirements. Gagic's brief also fails to explain his "contentions concerning each issue presented for review" with supporting citations to legal authority and the record. ARCAP 13(a)(7)(A). The one case he does cite is an unpublished [\*3] memorandum decision addressing a public records request, with a vexatious litigant designation and a fee award, none of which are at issue here. See *Potter v. Ariz. House of Representatives*, No. 1 CA-CV 23-0213, 2024 Ariz. App. Unpub. LEXIS 95 (mem. decision). Given this failure to comply with ARCAP, any arguments Gagic purported to assert are waived. See, e.g., *Sholes v. Fernando*, 228 Ariz. 455, 460, 268 P.3d 1112 ¶ 14 n.3 (App. 2011) (citing cases); *In re Aubuchon*, 233 Ariz. 62, 64-65, 309 P.3d 886 ¶ 6 (2013).

P7 Waiver aside, Gagic has shown no error. Gagic is a former member of the State Bar of Arizona, having since been disbarred. Gagic argues that Stout is acting as a proxy to his fiancé, the Maricopa County Attorney, to have him disbarred. Gagic, however, was suspended from the State Bar in September 2022, nearly two years before the events resulting in the injunction against harassment. Gagic's suspension was for his "personal attacks and unsubstantiated accusations against several judges," also actions occurring before (and unrelated to) his social media postings targeting Stout in 2024. For these reasons, Gagic's arguments regarding his disbarment show no error in the issuance of the injunction.

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<sup>1</sup>Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

P8 Finally, Gagic argues that the First Amendment protects his social media posts, and he is "entitled to a motion to dismiss under A.R.S. 12-751 Arizona [A]nti-SLAPP." The court found Gagic's posts were directed at and intended to harass [\*4] Stout, which is not protected by the First Amendment. See *State v. Brown*, 207 Ariz. 231, 234, 85 P.3d 109 ¶ 8 (App. 2004) (citing cases). The court also found that the injunction is content-neutral, covers a narrow scope and does not infringe upon Gagic's First Amendment rights, findings that the record supports. The record shows no evidence suggesting that the requested injunction was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right, meaning A.R.S. §12-751 does not apply. Gagic has shown no error.

## CONCLUSION

P9 The injunction against harassment is affirmed.

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