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SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,

Petitioner,

v.

MICHAELA JOY KOERT,

Respondent / Real Party in Interest

No. LC2025-000363-001

No. JC 2024-148377-001
University Lakes Justice Court

REAL PARTY IN INTEREST MICHAELA KOERT'S RESPONSE TO PETITION FOR SPECIAL ACTION

(Hon. Kevin Wein assigned)

INTRODUCTION

In 2022, the Legislature amended Arizona's anti-SLAPP statute, A.R.S. § 12-751, to allow criminal defendants to challenge prosecutions if they can show the prosecution is "substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right." A.R.S. § 12-751(B). When a criminal defendant makes a prima facie showing that a prosecution was so motivated, the judge can set a hearing to determine whether charges should be dismissed in accordance with the statute.

Defendant Michaela (Mikey) Koert ("Defendant") moved to dismiss pending third-degree trespassing charges based on A.R.S. § 12-751. *See generally* Motion to Dismiss, and, Motion to Set for Evidentiary Hearing Pursuant to A.R.S. § 12-751(C) (the "Anti-SLAPP Motion").[1] The Justice Court found Defendant had made the necessary prima facie showing and scheduled a hearing. The State filed a motion for reconsideration and then filed a special action to this Court, making new and increasingly improbable arguments in each iteration of its briefing. This Court stayed the Justice Court hearing.

The point of a statutory anti-SLAPP proceeding is to bring a prompt end to a legal action that was brought with the intention of weaponizing the legal process to burden, harass, and exhaust the defendant, regardless of the outcome. The State's meritless and ever-changing arguments about the anti-SLAPP statute itself only demonstrate further that the State intended (and still intends) to punish and deter Defendant (and 67 other similarly situated defendants) in ways that go far beyond any prescribed penalty for third-degree trespassing. The defendants in these cases face real hardship, including employment, educational, and housing opportunities impacted by low-level charges that have been open for more than 18 months. Imposing disproportionate cost, hardship, and punishment is exactly what SLAPP actions do, and this case is not an exception.

Defendant believes the Court should never have granted a stay or accepted jurisdiction to address the State's meritless arguments, but those sunk costs have now been incurred.

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[1] Filed in Justice Court June 16, 2025, attached as Exhibit C to the State's Appendix A-H in Support of State's Petition for Special Action ("SA Appendix" at 37-65) (Oct. 17, 2025).

Accordingly, this Court should accept review of the State's statutory interpretation argument and publicly reject it on the merits for the reasons set forth in Argument Section I, *infra*, and in the amicus brief attached as Exhibit K to the reply in support of the original Anti-SLAPP Motion. *See* Appendix 1-4 in Support of Real Party in Interest Michaela Koert's Response to Petition for Special Action ("Response Appendix") at 95-110. This Court should also accept review of the State's facial challenges to the constitutionality of the statute and reject those arguments as well. This Court should decline review of any as-applied challenge for lack of any record showing non-speculative harm. This Court should award attorney fees to Defendant pursuant to A.R.S. § 12-751(F), and then then remand the case for the statutorily required anti-SLAPP hearing.

STATEMENT OF FACTS

I. Background.

On the morning of April 26, 2024, Free Palestine protestors began pitching symbolic tents on the lawn in front of Arizona State University's ("ASU's") Old Main building. Anti-SLAPP Motion at 10 (SA Appendix at 47). The protestors could not have known that ASU and its police department had already determined that such a protest encampment would not be allowed to take hold. *Id.* & Exhibit C (Response Appendix at 37-41).[2] ASU police, including the chief, began destroying tents and otherwise disrupting the protest during the day. *Id.* at 11-12. Discovery later revealed that ASU police and the Maricopa County Attorney's Office ("MCAO") were already planning for mass arrests later that evening. *Id.* at 12.

Seventy-two (72) people were arrested that night and booked into jail on identical copy-and-paste probable cause statements for overnight "camping," even though none of the protestors were sleeping in the tents. Anti-SLAPP Motion at 12. This first round of charges was later vacated by the Justice Court. *Id.* at 13. Despite this apparently favorable result,

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[2] The State omitted the exhibits from its Special Action Appendix, so the exhibits to Defendant's Anti-SLAPP Motion are provided as Exhibit 1 in the Appendix to this Response.

many of the protestors suffered harsh consequences, including being barred from housing, classes, and exams at ASU. *Id.* at 13 & Exhibit E (Response Appendix at 43-45).

Several months later, on October 9, 2024, County Attorney Rachel Mitchell was running for re-election as Maricopa County Attorney. Anti-SLAPP Motion at 13. In a volatile environment shortly before the election, Mitchell distributed a press release bragging that she was charging 68 "pro-Palestinian" protestors "who defied police orders to leave ASU's Tempe campus last April" with third-degree trespass. *Id.* at 14.

II. Anti-SLAPP Motion.

Defendant filed a motion setting forth a strong prima facie case that the State, through MCAO, sought to punish and deter First Amendment protected political activity by:

- Active co-ordination with law enforcement to justify mass arrests and interrogations before any alleged illegal conduct had occurred (Anti-SLAPP Motion at 3, 11-13, Exhibit C);
- Handcuffing, detention, involuntary transport, and booking of protestors into jail overnight on "copy-and-paste" misdemeanor charges (*Id.* at 3, 12);
- Premature assignment of a criminal matter without probable cause and subsequent dismissal by the Justice Court (*Id.* at 3, 12-13);
- MCAO's issuance of a politically charged press release by the County Attorney herself, on the first day of early voting in her own election, publicly announcing the charging of class three misdemeanors (*Id.* at 3, 13-14, 19-21);
- MCAO's production (presumably after its own review) to defense counsel of approximately 217 hours of unindexed, unsorted body-worn camera footage (*Id.* at 3, 14, 21-23);
- MCAO's assignment of this class three misdemeanor case to two county attorneys with nearly five decades of combined legal experience (*Id.* at 3, 14); and,
- MCAO's refusal to offer diversion pleas to first offenders in violation of MCAO's own written diversion policy (*Id.* at 3, 14-15, 23-24, Exhibit F).

The same pattern was repeated with charges against 67 other defendants based on the same Free Palestine protest. Anti-SLAPP Motion at 3-4. Defendant noted that MCAO has a recent history of highly political prosecutions, particularly the well-documented campaign to bring trumped-up felony charges against Black Lives Matter activists in 2020. *Id.* at 6-9 & Exhibits A & B (Response Appendix at 5-36).

One of the most unusual aspects of these prosecutions was MCAO's disregard for its own written plea-bargaining policy. Anti-SLAPP Motion at 14-15 & Exhibit F (Response Appendix at 47-49).

> The express terms of Procedure 17.5 make third-degree trespass eligible for diversion. By policy, this "eligibility" establishes diversion as the default—meaning that the only circumstance in which MCAO will not extend a diversion offer at the first pretrial conference will be if MCAO has made the specific determination that the case is "not appropriate" for diversion. That appears to be exactly what has happened here:
>
> ***MCAO has declined to extend any plea offer to any of the 68 defendants.***

Anti-SLAPP Motion at 14-15. The last sentence of MCAO's written diversion policy says "[t]he fact of and reason for any deviation should be specifically detailed in the case notes." *Id.*, Exhibit F at 3 (Response Appendix at 49). No such case notes have been disclosed even at this late date. *See generally* Response to Defense Motion to Dismiss, and Motion to Set for Evidentiary Hearing Pursuant to A.R.S. 12-751(C)) ("Anti-SLAPP Response");[3] Initial Witness List and Rule 26.1 Disclosure Statement for November Evidentiary Hearing ("MCAO Disclosure Statement") at 3.[4]

The Anti-SLAPP Motion explained the procedural framework of A.R.S. § 12-751. Anti-SLAPP Motion at 15-16. MCAO's filings have featured inaccurate paraphrases and out-

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[3] Filed in Justice Court June 26, 2025, attached as Exhibit D to the State's Appendix A-H in Support of State's Petition for Special Action (SA Appendix at 68-91) (Oct. 17, 2025).

[4] Filed in Justice Court September 23, 2025, attached as Exhibit 4 in the Appendix to this Response (Response Appendix at 111-15).

of-context quotes from the statute, so the portion of the statute governing preliminary proceedings is reproduced here:

> A. In 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 pursuant to the United States Constitution or Arizona Constitution, the person other than a state actor or an intervenor may file a motion to dismiss or quash the action under this section.
>
> B. A person who files a motion pursuant to subsection A of this section has the burden of establishing prima facie proof that the legal action was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right. The moving person may submit evidence based on the record, a sworn affidavit or other evidence that is submitted with the motion to dismiss or quash. A party is not required to file a response to a motion filed pursuant to subsection A of this section unless and until the court finds that the moving party has established the prima facie proof and orders the party to file a response. The court shall grant the motion unless one of the following applies:
>
> > 1. If the responding party is a state actor, the responding party shows that the legal action on which the motion is based is justified by clearly established law and that the responding party did not act in order to deter, prevent or retaliate against the moving party's exercise of constitutional rights. A state actor may satisfy the requirements of this paragraph by doing any of the following:
> >
> > > (a) Establishing that the person who initiated and conducted an investigation that resulted in the legal action and that made the decision to pursue the legal action was unaware of the movant's lawful exercise of the constitutional right.
> > >
> > > (b) Establishing that the state actor has a consistent practice of pursuing similar legal actions against similarly situated persons who did not lawfully exercise constitutional rights.
> > >
> > > (c) Producing any other evidence that the court finds sufficient.
> >
> > * * *
>
> C. In making its 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.

A.R.S. § 12-751.

The Anti-SLAPP Motion highlighted evidence of preliminary communications between MCAO and ASU police to set up a prosecution framework before any allegedly illegal activity had occurred, reminiscent of MCAO's *modus operandi* in the 2020 anti-protestor prosecutions. Anti-SLAPP Motion at 17-18 & Exhibits A, B, G (Response Appendix at 5-35 & 51-57). Defendant also presented evidence of County Attorney Mitchell's politicization of the prosecution shortly before the election. Anti-SLAPP Motion at 19-21. Defendant pointed out MCAO's unreasonably vague and voluminous disclosures in the criminal proceedings. *Id.* at 21-23. Defendant pointed out MCAO's drastic and unexplained deviation from its own written policy for offering diversion. *Id.* at 23-24. Defendant also produced evidence that MCAO had offered extremely lenient plea offers to right wing activists and pro-Israel counter-protesters. *Id.* at 24-26.

III. MCAO Response and Anti-SLAPP Reply.

The anti-SLAPP statute does not call for any response until the trial court has evaluated the prima-facie showing in the defendant's motion. A.R.S. § 12-751(B). The County filed an immediate response anyway. Instead of submitting "a sworn affidavit or other evidence" as provided in A.R.S. § 12-751(B), MCAO submitted 29 pages of largely unsupported narrative and argument. *See generally* Anti-SLAPP Response (SA Appendix at 66-96).

The first two pages of the Anti-SLAPP Response consist of bald assertions such as "there is no bias in this prosecution." Anti-SLAPP Response at 1-2. The next two pages consist of "facts" about the April 26, 2024 incident without any affidavits or other supporting evidence. *Id.* at 3-4. MCAO then provided a stream-of-consciousness series of arguments intended to justify MCAO and police conduct, while mentioning worse things MCAO and the police could do to protesters if they wanted to. *Id.* at 6-18. None of this was supported by affidavits or other evidence.

With regard to the departure from written plea guidelines, MCAO argued "defendants are not entitled to a plea offer from the prosecution because criminal plea negotiations are not

guaranteed by either the state or federal constitutions." Anti-SLAPP Response at 18. The MCAO Response is devoid of any sworn evidence about the reasoning behind the plea decisions, and is also devoid of any "reason" provided in the "case notes" that are specifically required by MCAO's written diversion policy. Anti-SLAPP Motion, Exhibit F at 3 (Response Appendix at 49).

MCAO did, however, provide some insight into its approach when it admitted that "[t]he State is skeptical whether an offer of diversion to the current defendants will lead to a reduction in recidivism." Anti-SLAPP Response at 19. MCAO argued that the established policy of diversion was not appropriate *precisely because these defendants were engaged in civil disobedience*. *Id.* at 20-21. Even if you accept MCAO's claim (unsupported by evidence) that its actions are not partisan, MCAO essentially admitted that it intends to deter, retaliate against, or prevent *political protesting in general* by its treatment of these defendants.

The Anti-SLAPP Response did not make any of the statutory interpretation or constitutional arguments that are at issue in this special action.

Defendant's reply pointed out that a hearing would be necessary because the Anti-SLAPP Response failed to include any affidavits or other evidence, as required by the statute. *See generally* Reply to State's Response to Motion to Dismiss and Motion to Set for Evidentiary Hearing Pursuant to A.R.S. § 12-751(C) ("Anti-SLAPP Reply").[5] The Anti-SLAPP Reply also included a copy of the amicus curiae brief submitted by the Speaker of the Arizona House and the President of the Arizona Senate explaining in detail the language and intent of the statute. *Id.*, Exhibit K.[6]

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[5] Filed in Justice Court July 7, 2025, attached as Exhibit E to the State's Appendix A-H in Support of State's Petition for Special Action (SA Appendix at 97-105) (Oct. 17, 2025).

[6] The exhibits to Defendant's Anti-SLAPP Reply are provided as Exhibit 3 in the Appendix to this Response (Response Appendix at 95-111).

IV. Anti-SLAPP Ruling.

On October 28, 2025, the Justice Court ruled "the defense has met their burden as to the potential prima facie case warranting an evidentiary hearing, so now we need to set terms with regards to the evidentiary hearing." State's Motion to Supplement the Record with Additional Appendices (Exhibit I-P) to State's Petition for Special Action, Exhibit P at 6 (bates no. 041, electronic page 45) ("State Supplemental Exhibits").

Defendants argued for a hearing within 30 days. *Id.*, Exhibit P at 10. Defendants asked for 12 hours of trial time (*id.* at 11) and the State asked for a week. *Id.* at 12-13. The earliest available week for the Justice Court was November 17, 2025. *Id.* at 13. Defendants pointed out that they would need to subpoena the County Attorney and other prosecutors in order to "inquire into the motivations for these prosecutions," so the schedule would need to accommodate any motions to quash from MCAO. *Id.* at 17.

MCAO filed Defendants' subpoenas as supplemental exhibits. *See* State Supplemental Exhibits I-N at 2-24. No motions to quash were ever filed because the State elected to pursue this facial challenge to the anti-SLAPP statute instead. As a result, there is no record in this case as to which attorneys will be compelled to testify or any limitations on the scope of that testimony.

V. Motion for Reconsideration.

MCAO filed a motion for reconsideration. *See* Motion to Reconsider Prima Facie Ruling and Account for Dispositive Precedent Omitted by the Anti-SLAPP Motion ("Motion for Reconsideration").[7] The Motion for Reconsideration made a new and rather complicated argument that the anti-SLAPP statute applies to a "legal action that involves a person's lawful exercise" of First Amendment rights (A.R.S. § 12-751(A), and therefore defendants could not prevail without proving they were entirely innocent of any trespassing charges, and defendants could only do so by invalidating ASU's time, place, and manner restrictions. Motion for Reconsideration at 1-13.

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[7] Filed in Justice Court August 27, 2025, attached as Exhibit B to the State's Appendix A-H in Support of State's Petition for Special Action (SA Appendix at 21-36)(Oct. 17, 2025).

Defendant filed a response pointing out that the Motion to Reconsider appeared to be another procedurally improper delaying tactic, and that this argument was addressed (and fully refuted) by the amicus brief attached as Exhibit K to the Anti-SLAPP Reply. *See* Response to State's Motion to Reconsider ("Response to Reconsideration Motion").[8] As the Speaker of the Arizona House and the President of the Arizona Senate explained, "the anti-SLAPP statute . . . is not concerned with the defendant's factual or legal innocence" because "an otherwise colorable legal action predicated on alleged conduct that can be permissibly proscribed loses its legitimacy if it is propelled by a desire to repress a disfavored perspective." *Id.* at 4-5, quoting Anti-SLAPP Reply, Exhibit K. Legislative amici also explained that the State's interpretation just describes existing First Amendment defenses, and would render the entire anti-SLAPP statute redundant.

> [I]f the anti-SLAPP statute embraced only conduct that is constitutionally sanctioned to begin with, the statute would be largely superfluous because the constitution would, by its own force, immunize the defendant. Rather, the anti-SLAPP statue pivots on the motive animating the adverse government action. . . . Here, the prosecution "involves"— indeed, was precipitated by—the Defendants' exercise of their First Amendment rights, irrespective of whether the particular acts alleged in the indictment are themselves constitutionally protected.

Anti-SLAPP Reply, Exhibit K at 3 (Response Appendix at 97).

In other words, the Legislature chose the language of the anti-SLAPP statute carefully to give Arizona citizens greater substantive First Amendment protection than prior law. The Response to Reconsideration Motion pointed out that a reasonable fact-finder could (and did) conclude that the State probably intended to deter, retaliate against or prevent lawful conduct by expanding this litigation and violating its own policies applicable to similar cases. Response to Reconsideration Motion at 5-6 (SA Appendix at 112-13). Because the State is

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[8] Filed in Justice Court September 24, 2025, attached as Exhibit F to the State's Appendix A-H in Support of State's Petition for Special Action (SA Appendix at 106-114) (Oct. 17, 2025).

wrong about what the statute says, the State's arguments about establishing innocence by invalidating ASU's time, place and manner restrictions are completely irrelevant.

VI. MCAO Disclosure Statement.

While the Motion for Reconsideration was pending, the State filed a civil disclosure statement in the Justice Court. *See* MCAO Disclosure Statement (Response Appendix at 111-15). Notably, MCAO disclosed its intent to affirmatively call County Attorney Mitchell as a witness. *Id.* at 3. This seriously undermines any claim that MCAO is harmed by having to comply with Defendants' witness subpoenas, especially if MCAO is taking the position that decisions were made at the highest levels on these third-degree trespassing cases, rather than being made by the line prosecutors appearing in the case.

Equally notable, MCAO still has not disclosed relevant documents, including the written "reason" from the "case notes" detailing why MCAO refused to follow its own Diversion Guidelines. Anti-SLAPP Motion, Exhibit F at 3 (Response Appendix at 49).

VII. Special Action

Not content with the ongoing expansion and delay of Justice Court proceedings, the State filed this petition for special action to the Superior Court, most of which consists of new arguments that were never made in the Justice Court. *See generally* Petition for Special Action (Oct. 17, 2025) ("SA Petition"). The SA Petition was accompanied by an appendix that did not include the exhibits from the Anti-SLAPP Motion and Anti-SLAPP Response. The exhibits are provided with this response, and they make it obvious (again) that the State produced little or no actual evidence to counter the evidence originally submitted by Defendant.[9] Nor has the State produced much of anything to support its ever-expanding arguments about the anti-SLAPP statute since then.

[9] In addition to Justice Court exhibits previously noted, the exhibits to the State's Response to Defendant's Anti-SLAPP Motion are provided as Exhibit 2 in the Appendix to this Response (Response Appendix at 64-92).

ARGUMENT

In its SA Petition, MCAO has largely abandoned the unsupported factual assertions it made in the Anti-SLAPP Response. *See, e.g.*, Anti-SLAPP Response at 1-2 (SA Appendix at 67-68) ("there is no bias in this prosecution"). MCAO has little choice in the matter, because after months of Anti-SLAPP proceedings the record is still devoid of evidence supporting MCAO's bald assertions. MCAO has refused to provide the sworn affidavits or other evidence required by A.R.S. § 12-751(B). MCAO has also failed to produce the written "case notes" detailing the "reason" for the deviation from MCAO's diversion policy as required by the policy. Anti-SLAPP Motion, Exhibit F at 3 (Response Appendix at 49).

Instead, MCAO is now attacking the statute itself, apparently taking the view that deterring, retaliating, and preventing the exercise of constitutional rights is just part of a prosecutor's job, and those functions must be protected from interference by other branches of government. MCAO's interpretation of the Anti-SLAPP statute is meritless, and its constitutional arguments are even more meritless. This special action is just another attempt (successful so far) to abuse the judicial machinery of Maricopa County to expand and delay the proceedings, thereby punishing of these defendants beyond anything normally associated with a first offense of third-degree trespassing. This is exactly what the Anti-SLAPP statute is supposed to prevent.

I. The Justice Court Did Not Err in Finding Koert's Anti-SLAPP Motion Satisfied the Prima Facie Threshold of A.R.S. § 12-751(B).

A. MCAO's interpretation of A.R.S. § 12-751 is simply wrong.

MCAO characterizes the Justice Court's ruling as a "clear factual and legal error" because "the protesters were not *lawfully* exercising their constitutional rights when they were arrested, as the statute requires." SA Petition at 3-44. MCAO argues that

> the inquiry here begins and ends with this dispositive point: to trigger the anti-SLAPP statute's protections, Koert was required to show that the exercise of her constitutional rights was "lawful" – meaning it was her burden to establish that the time, place, and manner restrictions imposed here

> were unreasonable – yet her anti-SLAPP motion [Appx., Exh. C] failed to even mention those restrictions, much less demonstrate they were improper.

SA Petition at 5. Despite this allegedly being the beginning and ending of the inquiry, MCAO's special action brief goes on for 37 more pages after addressing this point, adding to the substantial evidence that expansion and delay of these proceedings is the real goal.

MCOA repeatedly attempts to state the issue in misleading ways to confuse the Court about the actual language of the statute. MCOA says "[t]he anti-SLAPP statute initially requires the moving party to make a threshold showing of "'prima facie proof' that the moving party was engaged in 'the lawful exercise of a constitutional right.'" SA Petition at 6; *see also id.* at 12. That is not what the statute says at all. The statute requires "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." A.R.S. § 12-751(B). The case needs to "involve" the lawful exercise of constitutional rights, but the lawful exercise of rights does not need to be the same as the charged conduct. *See* Anti-SLAPP Reply, Exhibit K at 2-6 (Response Appendix at 96-101).

As the Legislative Amici have explained, the statute is very carefully worded to apply when a defendant produces evidence of an improper motive of suppressing constitutional rights. A.R.S. § 12-751(B). The statute does not require that the charged conduct be lawful, it only requires a showing that the charge was intended to "deter, retaliate against or prevent" protected lawful conduct. In this case, Defendant can prevail by showing the decision to prosecute harshly for a very minor offense was intended to retaliate for past protected conduct (including protesting lawfully on the day of the arrest prior to the curfew), or to deter future protected conduct.

As further pointed out by three Arizona civil rights organizations in their amicus brief, MCAO's interpretation of the statute cannot possibly make sense in a criminal context because it would require the trial court to prejudge guilt or innocence before holding a proper trial. Brief of Amici Curiae Arizona Center for Law in the Public Interest, Arizona Attorneys for Criminal Justice, and American Civil Liberties Union if Arizona in Support of Respondent

Michaela Joy Koert (Filed with Consent) (Nov. 26, 2025) ("Civil Rights Amicus Brief") at 5-6.

The attorney general has submitted an amicus brief that contains a short (and unsupported) assertion that the Justice Court's finding of a prima facie showing based on disparate treatment "does not track the language of A.R.S. § 751." *See* Brief of Amicus Curiae Arizona Attorney General in Support of Petitioner State of Arizona (Oct 22, 2025) ("AG Amicus Brief") at 4-5. It is not clear what point the attorney general intends to make, but the statute clearly says that "a consistent practice of pursuing similar legal actions against similarly situated persons" is a defense to an anti-SLAPP motion, so disparate treatment is plainly intended to be at issue. A.R.S. § 751(B)(1)(b). Moreover, the statute applies to "any legal action," not just charging decisions. MCAO's deviations from both written policies and ordinary practices in prosecuting these defendants are legal actions within the meaning of A.R.S. § 751, and also evidence of an improper overall motive.

B. The constitutionality of ASU's 11:00 pm curfew is not relevant.

MCAO spends several pages in its SA Petition setting up an elaborate straw-man argument about First Amendment principles. SA Petition at 12-15. MCOA argues that Koert cannot prevail except by showing that ASU's 11:00 pm curfew was unconstitutional. *Id.* at 15. This is completely irrelevant because neither Koert's anti-SLAPP motion nor the Justice Court's ruling were based on these principles. Without waiving the right to raise direct First Amendment defenses at some point in the future, the anti-SLAPP motion at issue here was based on an entirely different logic. Indeed, MCAO admits this when it says the anti-SLAPP motion "made no attempt to address that issue." SA Petition at 16.

MCAO argues that the factual basis of the Justice Court's ruling was primarily "whether or not these individuals are being treated disparately based on the plea offers given." SA Petition at 3-4 (internal quotes and emphasis omitted). The Justice Court had evidence of a far greater pattern of political motivation and disparate treatment beginning before any illegal conduct even occurred. Anti-SLAPP Motion at 3, 6-9, 11-13, 24-26,

Exhibits A, B, C, G.[10] MCAO also argues that the decision was made "out of concern that some of the defendants had not been given diversion plea offers." SA Petition at 11. In reality, no plea offers of any kind have been given, which is both extremely unusual and outside the MCAO written policy for cases of this nature. Anti-SLAPP Motion at 14-15 & Exhibit F at 3.

MCAO's involvement in strategizing for the arrests prior to any unlawful conduct transitioned seamlessly into MCAO's combination of blatant political campaigning based on the case plus disparate treatment after the arrests. Moreover, MCAO has provided literally no contrary evidence whatsoever up to this point, instead providing 29 pages of politicized argument unsupported by evidence. *See generally* Anti-SLAPP Response (SA Appendix at 66-96). A fact-finder could (and did) rationally conclude from this record that a prima facie case had been made raising a presumption that MCAO's conduct was intended to punish the lawful exercise of First Amendment rights prior to 11:00 pm on April 26, 2025, or to deter the exercise of First Amendment rights in the future. There is no error here, and certainly no error that could justify special action relief. The Justice Court did not abuse its discretion, and the Legislature provided for an immediate interlocutory appeal to correct any errors. A.R.S. § 751(H).

MCAO also argues that errors in the prima-facie finding stage of an anti-SLAPP proceeding would become moot once the hearing is held. SA Petition at 10; *see also* AG Amicus Brief at 5. MCAO offers no authority or legal analysis to back this up. Because the Legislature provided for a prompt appeal after the anti-SLAPP hearing, it seems far more likely the Legislature intended a dismissal under the anti-SLAPP statute to be reversed if the appellate court found insufficient evidence of an improper motive for the prosecution.

[10] The Anti-SLAPP Motion is SA Appendix at 37-65, while the exhibits to the Motion are Response Appendix at 4-63.

II. The Justice Court Did Not Err in Setting an Evidentiary Hearing for the State to Rebut the Anti-SLAPP Claim.

MCAO complains that County Attorney Mitchell will be required to testify at a hearing about the reasons for charging decisions. SA Petition at 3. Notably, MCAO expressly requested a hearing in its Anti-SLAPP Response, thereby waiving any objection. Anti-SLAPP Response at 1 (SA Appendix at 67). MCAO also affirmatively disclosed County Attorney Mitchell as a witness, so she is not appearing involuntarily. MCAO Disclosure Statement at 3 (Response Appendix at 113). In any event, MCAO is entirely responsible for the necessity of holding a hearing. The statute specifically contemplates ruling on an anti-SLAPP motion on affidavits and other evidence without a hearing. A.R.S. § 12-751(C).

If the County Attorney had any credible explanation for her actions, she could have provided those reasons in the form of affidavits with the anti-SLAPP response and allowed the justice of the peace to rule on the merits. She also could have provided the written "case notes" detailing the "reason" for the deviation, as required by MCAO's formal diversion policy. Anti-SLAPP Motion, Exhibit F at 3 (Response Appendix at 49). MCAO elected not to do so, making a hearing necessary. If County Attorney Mitchell really is personally driving and supervising these extraordinary third-degree trespassing prosecutions, that simply adds to the evidence that these defendants are not being treated in accordance with "consistent practice" for "legal actions against similarly situated persons who did not lawfully exercise constitutional rights." A.R.S. § 12-751(B)(1)(b).

Because MCAO filed this premature special action, the Justice Court proceedings have been stayed. This has prevented any record from being made as to who needs to testify and whether any subpoenas or other discovery should be quashed. MCAO clearly cannot prevail on a facial challenge to the statute, as discussed in the next Section, and MCAO has not made a record to challenge the statute as applied. There is simply no plausible basis for MCAO to avoid an anti-SLAPP hearing in this case.

III. MCAO Has Not Raised Any Legitimate Constitutional Issue.

MCAO admits that its constitutional challenges are primarily facial in nature. SA Petition at 18. This is necessarily so, first because MCAO failed to make any evidentiary record about the reasons for its actions, and the anti-SLAPP proceeding was interrupted before the Justice Court had a chance to make decisions about critical issues such as what testimony will be allowed. A facial challenge to a statute ordinarily requires the challenger "to demonstrate that under no set of circumstances can the law be enforced in a constitutional manner." *AZ Petition Partners LLC v. Thompson*, 255 Ariz. 254, 258, ¶ 17 (2023). MCAO has not come anywhere close to making this showing in any of its half a dozen different constitutional arguments. Indeed, MCAO appears to be just throwing underdeveloped ideas against the wall, continuing its established pattern of expanding and delaying these proceedings.

MCAO also purports to make an as-applied challenge. SA Petition at 33. That one-paragraph argument appears to be just a rehash of MCAO's statutory interpretation argument addressed in Section I, *supra*. Beyond that, none of the constitutional issues MCAO complains about have actually arisen in this case.

The core of MCAO's concern seems to be that County Attorney Mitchell will be required to testify. SA Petition at 3-4. But the record shows that MCAO wants County Attorney Mitchell to testify. MCAO Disclosure Statement at 3 (Response Appendix at 113). This is entirely proper because County Attorney Mitchell is the one who politicized the cases in the first place. Anti-SLAPP Motion at 13-14, 19-21 (SA Appendix at 50-51, 56-57). If County Attorney Mitchell is also the one making the key decisions on these third-degree trespassing prosecutions, that an unusual situation that needs to be explained as well. If the answers to those questions involve information that would otherwise be considered privileged or confidential, then the judicial officer will need to address those issues based on individualized facts and circumstances that are completely absent from this record. Arizona courts do not entertain speculative challenges to laws enacted by the legislative branch." *AZ Petition Partners*, 255 Ariz. at 258, ¶ 17; *see also Ariz. Creditors Bar Ass'n v. State*, 257 Ariz.

406, 412, ¶¶ 20 (2024) (declining to address hypothetical scenarios). MCAO simply has not made a record in this case that would support anything other than a facial challenge, and the facial challenge clearly fails.

MCAO attempts to excuse its failure to raise any of these issues in the Justice Court by arguing that "[j]ustice courts do not have authority to decide whether a statute violates the state constitution." SA Petition at 9. The cases and statutes cited in the SA Petition do not say that. Even if MCAO is correct that a Justice Court cannot actually invalidate a statute, a Justice Court can certainly interpret a statute to stay within constitutional boundaries. If the unconstitutionality of a statute is sufficiently clear then the Justice Court can presumably refuse to make an unconstitutional ruling in the case before it.

The State's constitutional arguments are also addressed in the excellent brief submitted by *Amici Curiae* Arizona State Senate President Warren Petersen and Speaker of the Arizona House of Representatives Steve Montenegro (Nov. 6, 2025) ("Legislative Amicus Brief"). Defendant agrees with the arguments in the Legislative Amicus Brief and will attempt to avoid duplicating them.

A. The Justice Court did not "create its own rules."

MCAO's first constitutional argument is that "the justice court has departed from the anti-SLAPP statute's unambiguous terms and impermissibly created its own rules. This constitutes an unconstitutional invasion by the judiciary into a prosecutor's exclusive authority." SA Petition at 4. This is not a real constitutional issue, it is just a rhetorical attempt to inflate the importance of MCAO's meritless statutory interpretation argument. For the reasons explained in Section I, *supra*, the Justice Court did not depart from the anti-SLAPP statute's terms.

B. A.R.S. § 12-751 does not violate the constitutional separation of powers.

MCAO's second constitutional argument is that neither the legislature nor the courts can ever limit a prosecutor's discretion. SA Petition at 6-8, 18-33. MCAO quotes *Carson v. Gentry*, 574 P.3d 205 (Ariz. 2025) for the proposition that the statutory authorization for dismissal under A.R.S. § 12-751(D) "incorrectly empowers judges to commandeer the

charging decision—a core executive function." SA Petition at 18. MCAO's misuse of this case perfectly illustrates the fallacy underlying this whole argument.

Carson had nothing whatsoever to do with the anti-SLAPP statute. Instead, *Carson* involved a judicially created requirement for "the State to obtain prior judicial approval before refiling charges" against a person who had been found incompetent to stand trial. *Carson*, 574 P.3d at 212, ¶ 23. The Arizona Supreme Court held that charging a defendant is only a preliminary procedural step toward a prosecution, so it does not carry the same constitutional due process limitations as forcing an incompetent person to stand trial. *Id.* at 213, ¶ 27. The *Carson* court recognized some degree of due process concern with charging decisions in this context, but held that requiring court pre-approval was not the solution because "separation of powers concerns weigh heavily against a court-created preapproval rule." *Id.* at 213-14, ¶ 28.

Our case does not raise any of the same issues as *Carson*. There is no pre-approval requirement under the anti-SLAPP statute, only a retrospective evaluation of legality. That is completely normal. Under the separation of powers doctrine, prosecutors decide whether to bring cases and judges decide whether to dismiss them based on the facts and the law. Under A.R.S. § 12-751, prosecutors remain in control of charging decisions, while judges are tasked with dismissing charges that are found to be legally improper based on the terms of the statute.

Meanwhile, the Legislature is "the branch of government responsible for pronouncing public policy." *Young v. Beck*, 224 Ariz. 408, 414, ¶ 21 (App. 2010). The Legislature determined that additional substantive protections were needed to weed out vindictive and political prosecutions. Legislative Amicus Brief at 2. Legislative Amici cite the case law at some length, so it will not be repeated here. *Id.* at 5-11. MCAO is the one attempting to encroach on the prerogatives of the legislative and judicial branches under well-established Arizona law by arguing that there can be no limits on prosecutorial discretion.

The Coconino County Attorney argues narrowly that diversion and deferral offers are within the sole discretion of prosecutors. Brief of Amicus Curiae Coconino County Attorney

in Support of Petitioner State of Arizona (Nov. 26, 2025) ("CCAO Amicus Brief") at 1-2 citing A.R.S. § 11-365 and *J.V. v. Blair*, 256 Ariz. 247 (App. 2023). That does not mean a prosecuting agency's exercise of discretion over time is immune from observation and limitation by the other branches. Prosecutorial discretion is the general rule "unless the legislature has restricted that authority." *J.V.*, 256 Ariz. at 250, ¶ 13.

As Coconino County admits, "[e]xecutive powers 'shall be as prescribed by law.' Ariz. Const. art. 5, § 9." CCAO Amicus Brief at 3. Diversion and deferral programs were authorized by the Legislature to begin with. A.R.S. § 11-361 *et seq*. The Legislature maintains a requirement that prosecutors adhere to guidelines and report annually to the Legislature. A.R.S. § 11-362. The discretion authorized in A.R.S. § 11-365 does not purport to immunize prosecutors from legislative remedies for abuses of discretion.

In any event, any limit imposed by A.R.S. § 12-751 on prosecutorial discretion in offering diversion comes only after the discretion has been exercised. In certain cases such as this one, MCAO's refusal to offer diversion as required by its own written policy is just one of the facts of the case demonstrating intent to deter, retaliate against or prevent the exercise of constitutionally protected rights. Protecting First Amendment rights by authorizing judges to evaluate how prosecutors use their discretion is within the Legislature's power, and MCAO cannot possibly succeed in a facial challenge on that basis. Indeed, the State's lengthy argument concerning selective and vindictive prosecution defenses (SA Petition at 22-33) only further demonstrates that judges can evaluate prosecutorial discretion. The only difference is that the Legislature has expanded the availability and altered the burden of proof for this type of defense, which is entirely within the Legislature's competence. Legislative Amicus Brief at 4-9, 12.

Whether MCAO could succeed in a much narrower as-applied challenge is not properly before the Court, especially given MCAO's complete failure to make a record of the reasons for what it did, including violating its own diversion policy. Anti-SLAPP Motion, Exhibit F at 3 (Response Appendix at 49).

C. A.R.S. § 12-751 does not violate victims' rights.

MCOA's third constitutional argument is that A.R.S. § 12-751 "effectively assumes crime victims and their rights out of existence." SA Petition at 34. This is a makeweight argument at best, and does not in any way explain how the rights of victims will be impacted by the statute, either facially or as applied. *Id.* In fact, MCAO admits that "[t]he term 'victim' does not appear in the statute." *Id.*

The statute allows the State and the judicial officer wide leeway to argue and rule based on "established law" under A.R.S. § 12-751(B), and to defend based on "any other evidence that the court finds sufficient." A.R.S. § 12-751(B)(1)(c). The State has not shown any basis whatsoever to believe that evidence concerning impact on victims would be excluded. In any event, this case is not an appropriate vehicle to review this issue because the "victim" is supposedly Arizona State University, the same entity that ordered the police to detain the Defendants. This is an extremely unusual situation, and no record has been made to show that ASU should qualify as a victim under these circumstances, or that the justice court abused its discretion in relation to any victim's rights issue.

D. A.R.S. § 12-751 is not purely procedural and does not conflict with the Rules of Criminal Procedure.

MCOA's fourth constitutional argument is that A.R.S. § 12-751 "is a procedural statute that directly conflicts with the Arizona Rules of Criminal Procedure." SA Petition at 8. MCAO argues the statute is procedural rather than substantive

> because it merely provides the method, procedure, and legal mechanisms, to enforce an independent source of substantive law, and to enable potential dismissal of meritless legal actions at an early stage. That is, it sets forth the framework to accomplish the statute's purpose of permitting a movant to obtain prompt review of the merits of a case implicating the non-movant's exercise of constitutional rights . . . .

SA Petition at 36. This argument is just naked rhetoric unsupported by any reference to facts or authority. As explained in Section I, *supra*, A.R.S. § 12-751 does not require a moving party to prove innocence. The Legislature intended to expand the substantive rights of

citizens to be free from prosecutions that are substantially motivated by a desire to deter, retaliate against or prevent protected conduct. A.R.S. § 12-751 creates new substantive rights, and the Legislature's establishment and delineation of substantive rights is controlling. Legislative Amicus Brief at 3-13. As explained by Legislative Amici, this includes changes to substantive burdens of proof. *Id.* at 8.

MCAO then makes a laundry list of throwaway arguments about criminal procedure rules, each argument consisting of two or three conclusory sentences. SA Petition at 36-38. These are purely hypothetical arguments with no relationship to the present case. They do not present the Court with a justiciable controversy. *AZ Petition Partners*, 255 Ariz. at 258, ¶ 17. Nor are these arguments appropriate to a special action proceeding, which can only be brought to remedy an abuse of discretion by the trial court. The trial court was never presented with any of these issues.

In any event, as explained in by Legislative Amici, A.R.S. § 12-751 does not conflict with procedural rules in any significant way. Legislative Amicus Brief at 11-13. MCAO first argues that A.R.S. § 12-751 conflicts with Rule 39 governing victims' rights. SA Petition at 36-37. That argument has already been fully addressed in Section II.C, *supra*. Nothing in A.R.S. § 12-751 purports to limit the consideration of victims in determining whether a prosecution was substantially motivated by a desire to deter, retaliate against or prevent protected conduct.

MCAO argues that A.R.S. § 12-751 conflicts with Rule 16.4(b) because the rule only authorizes dismissal based on legal insufficiency of the charging documents. SA Petition at 37. To the contrary, Rule 16.4(b) does not purport to list all possible discretionary reasons for dismissing a prosecution, it only lists reasons why a prosecution "must" be dismissed as a matter of law. Rule 16.4(d) expressly anticipates dismissal of prosecutions for other reasons based on "the interests of justice."

MCAO argues that A.R.S. § 12-751 conflicts with the grand jury role under Rule 12.9. SA Petition at 37-38. This case does not involve a grand jury, and even if it did the fact that an indictment was issued from a grand jury does not immunize a case from dismissal

thereafter. MCAO also argues that A.R.S. § 12-751 conflicts with Rule 5.1 by authorizing a different standard than probable cause. SA Petition at 38. Rule 5.1 does not say anything about lack of probable cause being the only basis for dismissal of a prosecution. MCAO also argues that A.R.S. § 12-751 conflicts with Rule 15.1, "effectively requiring the prosecution to relinquish work-product protection to defend against the anti-SLAPP motion." SA Petition at 38. A.R.S § 12-751 does not say anything about relinquishing work-product protection, and MCAO has not made a record in this case showing any problem with applying the statute.

MCAO's arguments about procedural rules are utterly meritless at every level.

E. A.R.S. § 12-751 is not unreasonably vague or overbroad.

MCAO's fifth constitutional argument is that the term "substantially motivated" in A.R.S. § 12-751(B) is impermissibly vague or otherwise overbroad. SA Petition at 8. MCAO's textual argument is that the term "substantially motivated" must mean "motivated wholly *or in part*," but attributing such a meaning would be an impermissible rewriting of the statute. SA Petition at 41-42. This argument makes no sense. If the words can only be interpreted one way, then interpreting them that way is not enlargement or rewriting. Moreover, MCAO's argument that the words can only have one meaning directly contradicts any argument that the words are vague or overbroad.

Statutes are not unreasonably vague if they rely on terms with a history in case law. *Ariz. Creditors Bar*, 257 Ariz. at 413-14, ¶¶ 25-28. "Substantially motivated" is such a term. *See, e.g., Lacey v. Maricopa Cty.*, 693 F.3d 896, 916-17 (9th Cir. 2013). The term is also used elsewhere in Arizona law. *See* A.R.S. § 41-1493(2) ("'Exercise of religion' means the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief."); *see also Brush & Nib Studios v. City of Phoenix*, 247 Ariz. 269, 298, ¶¶ 128-29 (2019). The term "substantially motivated" has a straightforward plain language meaning as well as established legal usage, and is capable of being applied by courts in a constitutional manner. MCAO's facial challenge to the language fails.

The Attorney General argues that the term "prima facie proof" is ambiguous, and that the statute is otherwise novel. Brief of Amicus Curiae Arizona Attorney General in Support of Petitioner State of Arizona at 3 (Oct. 22, 2025) ("AG Amicus Brief"). The AG Amicus Brief references other cases to "highlight the need for clarification," but does not explain how these cases are relevant here, or why the State did not appeal those cases instead. *Id.*, at 4 & n.1. The AG Amicus Brief then presents a series of hypothetical scenarios concerning discovery and other matters. AG Amicus Brief at 6. As previously noted, hypothetical challenges to a statute do not present a justiciable controversy. *AZ Petition Partners*, 255 Ariz. at 258, ¶ 17. None of the attorney general's hypothetical concerns are presented by the State's facial challenge to A.R.S. § 751, and the attorney general does not take a position on constitutionality or even state what outcome she is seeking here.

Even if the statute were ambiguous, the remedy is to construe it in a way that preserves constitutionality. *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 272 (1994). That hasn't happened yet in this case because the State took this special action before the Justice Court had made any rulings at all about procedure, burdens of proof, limitations on discovery, or limitations on testimony.

MCAO's primary example of a vagueness concern is to fall back once again on the argument about time, place, and manner restrictions. SA Petition at 40-42. MCAO complains that A.R.S. § 12-751 does not make it easier for judges to evaluate the legitimacy of those restrictions. *Id.* But the purpose of A.R.S. § 12-751 was not to clarify the law of time, place, and manner restrictions. Time, place, and manner restrictions might possibly be relevant if a defendant can show that those restrictions are being enforced more harshly against those who are exercising protected rights, but that is not the case here.

For purposes of this special action, we still reach the same result if we assume ASU's time, place, and manner restrictions were entirely reasonable and constitutional. Those time, place, and manner restrictions were not even on the list of issues Defendant identified in the anti-SLAPP Motion. Anti-SLAPP Motion at 3. Defendant argued that the State sought to punish and deter First Amendment protected political activity by:

- Active co-ordination with law enforcement to justify mass arrests and interrogations before any of the alleged illegal conduct had occurred;
- Handcuffing, detention, involuntary transport, and booking of protestors into jail overnight on "copy-and-paste" misdemeanor charges;
- Premature assignment of a criminal matter without probable cause and subsequent dismissal by the Justice Court;
- MCAO's issuance of a politically charged press release by the County Attorney herself, just weeks before her own election, publicly announcing the charging of class three misdemeanors;
- MCAO's production (presumably after its own review) to defense counsel of approximately 217 hours of unindexed, body-worn camera footage;
- MCAO's assignment of this class three misdemeanor case to two county attorneys with nearly five decades of combined legal experience; and,
- MCAO's refusal to offer diversion pleas to first offenders in violation of MCAO's own written diversion policy.

Anti-SLAPP Motion at 3 (SA Appendix at 40). Defendant presented evidence from which a reasonable judicial officer could (and did) make a finding that this concerning pattern was sufficient to justify a hearing. No hearing has taken place because MCAO filed this special action to argue about time, place, and manner restrictions that were never at issue in the Justice Court.

ATTORNEY FEES

Rule 13, Ariz. Superior Ct. R. App. P. - Civil, requires any claim for appellate costs and attorney fees to be filed in the Superior Court proceeding. Notice of a claim for attorney fees is necessary at each stage of a legal action. *Adwell v. Moore*, 249 Ariz. 355, 359-60, ¶ 16 (App. 2020). Pursuant to A.R.S. § 12-751(F), Koert requests an award of reasonable attorney fees and costs incurred in this special action. An award of appellate attorney fees is particularly appropriate here to reduce the incentive for MCAO to continue its pattern of expanding this litigation by filing additional special actions every time it disagrees with a

Justice Court ruling on discovery, motions to quash, or motions in limine. Alternatively, Koert requests that this Court authorize the trial court to award fees incurred in this appellate proceeding if Koert prevails in the anti-SLAPP proceeding. *Leo Eisenberg & Co., Inc. v. Payson*, 162 Ariz. 529, 535 (1989).

CONCLUSION

For the foregoing reasons, this Court should accept review of MCAO's statutory interpretation argument, but reject it on the merits for the reasons set forth in Section I and in the amicus brief attached as Exhibit K to the original Anti-SLAPP Motion. This Court should also accept review of MCAO's facial challenges to the constitutionality of the statute and reject those arguments as well. This Court should decline review of any as-applied challenge for lack of any record showing non-speculative harm.

DATED: December 5, 2025.

/s/ Russell Brian Facente

Russell Brian Facente
Attorney for real party in interest
Michaela Joy Koert

ORIGINAL of the foregoing filed
this 5th day of December, 2025, with:

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