BEFORE THE PRESIDING DISCIPLINARY JUDGE

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA, **DAVID S. GINGRAS** **Bar No. 021097** **Respondent.**	**No. PDJ 2026-9010** **MOTION TO DISMISS AND, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**

Pursuant to A.R.S. § 12–751 (Arizona's "anti-SLAPP" law), Respondent David S. Gingras ("Respondent" or "Gingras") respectfully moves for an order dismissing this matter with prejudice. Dismissal is required because the Complaint contains claims which arise from state and federally constitutionally protected speech and petitioning activity and the state bar cannot meet the burdens required by A.R.S. § 12–751(B). Respondent further moves for an award of costs including attorney's fees and damages including lost income, in an amount to be established by affidavit, pursuant to A.R.S. §§ 12–751(F) and 12–353.

In the alternative, and solely if the Court finds A.R.S. § 12–751 inapplicable for any reason, Respondent moves for summary judgment pursuant to Ariz. R. Civ. P. 56. Summary judgment is proper because no material facts are disputed and Respondent is entitled to judgment as a matter of law.

Respondent is aware the PDJ recently issued an order granting judgment on the pleadings with respect to a single issue. That order did not mention, nor did it resolve, Respondent's defenses under A.R.S. § 12–751 or the Arizona/U.S. Constitutions. To preserve those issues, this motion will raise those arguments, even though the Court may consider them to have been resolved by the prior ruling.

I. INTRODUCTION

In this case, the Arizona Bar seeks to discipline David Gingras for activities that are protected under the right to free speech and the right to petition. The Bar's position is inconsistent with the First Amendment, but even if it were, the Arizona Constitution would not tolerate the Bar's positions. The Arizona Constitution provides broader guarantees than the First Amendment. *See Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm'n,* 160 Ariz. 350, 354-55, 773 P.2d 455 (1989). "The words of the Arizona Constitution are too plain for equivocation. The right of every person to freely speak, write[,] and publish may not be limited . . . ." *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 259, 418 P.2d 594, 596 (1966) (rejecting a gag order of the type prohibited in *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539 (1976) but 10 years before that decision was decided).

Nevertheless, even if this Tribunal were to ignore the Arizona Constitution's higher levels of speech protection, the First Amendment and *Gentile v. State Bar of Nevada* and its progeny would roundly reject the Bar's positions in this matter.

This case arises from a high-profile paternity matter called *Owens v. Echard*. This case drew immense public attention, because the Respondent in that case, Clayton Echard, is a former TV celebrity who appeared on the reality TV dating show, *The Bachelor*. As is common in such high-profile cases, it drew an army of spectators – not just in person, but online. This online morass of attention and harassment created a bit of a circus, and appears to have excited the judge, who did not appear to handle the public attention with the greatest degree of care. *See* Request for Judicial Notice ("RJN") Ex. 105 at pp. 17–37 (Affidavit

of David S. Gingras In Support of Petitioner's Notice of Change of Judge for Cause (describing pre-trial and post-trial issues).

Respondent, in representing his client, determined some of the judge's actions were tainted. For example, the judge made a finding of fact that was not based on any trial evidence, but was raised on social media after the trial ended. *See* RJN Ex. 105 at 33-34, ¶¶ 79–85. And the great amount of attention by anonymous trolls on Reddit, a notorious online cesspool, led Respondent to describe them as "fucking assholes" – not in court, but in a private email.

In what has become a proceeding Kafka would consider too far-fetched to believe, the Bar charges Respondent with six different acts of misconduct during *Owens:*

1.) Violating an order which allegedly required information to be filed under seal;

2.) Asking law enforcement to enforce a valid restraining order issued by a California court;

3.) Making disparaging comments about the trial judge, Julie A. Mata;

4.) Making disparaging comments referring to a group as "fucking assholes";

5.) Pursuing "meritless claims", presenting "false information in an affidavit" and presenting Ms. Owens' "False testimony/Changing Version of Events"; and

6.) Pursing a "non-meritorious appeal".

None of these claims have merit. First, claims 1–4 arise from speech and conduct[1] which is protected by the First Amendment and the Arizona Constitution's Free Speech

[1] Reports to law enforcement are protected "petitioning" activity; "[S]ubmission of complaints … to … a police department constitutes petitioning activity protected by the petition clause [of the First Amendment]." *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir.

Clause, Ariz. Const. art. II, § 6. Claims 5-6 are demonstrably factually false, and prosecuting Respondent for Claim 6 is a violation of the right to petition. The State Bar cannot impose discipline for constitutionally protected speech/conduct absent narrow circumstances which are not present here.

Second, the state bar has misconstrued the facts relating to claim 1. Viewed in full context, the material facts show Respondent did not violate any court order requiring information to be *filed under seal*, because no such order was ever issued.

Third, even if Respondent unintentionally violated a court order (because the order was so vague and ambiguous it was impossible to understand), that aspect of the case must be dismissed under A.R.S. § 12–751 because the state bar has arbitrarily refused to discipline opposing counsel in *Owens* (Gregg R. Woodnick) for violating the same order in the same manner as Respondent, which occurred *before* Respondent ever appeared in the case. Arizona's anti-SLAPP law and the Due Process Clause forbid state actors from arbitrarily enforcing vague laws/orders in this manner. So, even if the bar's first claim was otherwise factually and legally correct, which it is not, dismissal of the claim is still mandatory.

Fourth, the Complaint accuses Respondent of *knowingly* presenting false testimony from Ms. Owens. That allegation is false, and the Bar has no admissible evidence to support it.

2000) (citing *California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)); *see also Ruiz v. Hall*, 191 Ariz. 441, 453 (Ariz. 1998).

In short, the bar's theory appears to be:

- Ms. Owens offered one version of events (before Respondent was involved);
- Later, Ms. Owens changed her story slightly;
- Therefore, Respondent must have known the first version was true and the second was false.

This argument fails for an obvious reason of logic – just because a witness *changes* a prior statement does not automatically show the first statement was true and the second was false. It is equally possible the witness realized the first statement was inaccurate and corrected it (which is not only proper, but mandatory). In that situation, absent clear and convincing evidence showing the lawyer *knew* which version was true and which was false, the rules do not permit discipline simply because a witness changed their story.

The bar's theory also ignores the fact the opposing party (Clayton Echard) did exactly the same thing – while the case was pending, he changed his version of events in several ways. Yet again, the bar has selectively chosen *not* to pursue discipline against Mr. Woodnick for that conduct. Such arbitrary enforcement of the rules violates the Arizona anti-SLAPP law and the federal Due Process Clause and the State due process clause Ariz. Const. art. II, § 4.

Fifth and finally, the bar's arguments with respect to Respondent pursuing a "non-meritorious" appeal are groundless. The appeal involved a matter of first impression concerning a new law, and Respondent cited extensive legal authority which showed his argument was not just meritorious, but legally and factually correct. The Court of Appeals may have disagreed with that position, but it did not find Respondent's arguments were

frivolous (because they were not). While a lawyer could, and perhaps should, be disciplined for bringing a *frivolous* appeal, that standard is not so low as to encompass "non meritorious" appeals, otherwise 50% of the appellate lawyers in Arizona must now all face bar charges, since someone has to lose and someone has to win.

Based on these undisputed facts, this case must be resolved as a matter of law. Under the anti-SLAPP law, the bar cannot meet its burden of showing all claims are "justified by **clearly established law**" nor can the bar show it "did not act in order to deter, prevent or retaliate against the moving party's exercise of constitutional rights." A.R.S § 12–751(B)(1). Because the bar cannot meet its burden, this action must be dismissed, and Respondent must be awarded fees, costs and damages pursuant to A.R.S. § 12–751(F).

II. PRELIMINARY DISCUSSION OF A.R.S. § 12–751

In 2022, Arizona amended A.R.S. § 12–751 (entitled "Strategic Actions Against Public Participation"), also known as the "anti-SLAPP" law. The term SLAPP was originally adopted by California as part of its effort to curb meritless lawsuits used to punish protected speech; "The Legislature enacted the anti-SLAPP statute 'to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern.'" *Doe v. California Ass'n of Directors of Activities*, 117 Cal.App.5th 796, 809 (Cal. App. 6th Dist. 2025) (quoting *Wilson v. Cable News Network, Inc*., 7 Cal.5th 871, 883–84 (Cal. 2019)).

Like California, Arizona's anti-SLAPP law allows any person to bring a special form of motion "[i]n any legal action that involves a person's lawful exercise of the right of petition [or] the right of speech … pursuant to the United States Constitution or Arizona

Constitution." A.R.S. § 12–751(A). The statute defines "legal action" to include "Any written investigative demand … or other compulsory legal process or any regulatory or administrative action by a state actor." A.R.S. § 12–751(J)(iii) (emphasis added).

When an anti-SLAPP motion is filed, "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." A.R.S. § 12–751. If that showing is made, the Court is required to dismiss the action *unless* "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.R.S. §12–751(B)(1) (emphasis added).

Since the Arizona anti-SLAPP law was amended in 2022, there have been no published decisions applying it in state bar discipline cases. However, other states with similar laws agree such laws apply in discipline cases. *See*, *e.g.*, *Commission for Lawyer Discipline v. Rosales*, 577 S.W.3d 305, 308 (Tex. App. 2019) (holding the Texas Citizen Participation Act or "TCPA", a law similar to A.R.S. § 12–751, "applies to the Commission's disciplinary proceeding against [an attorney]", but finding the Commission met its burden of showing its claims did not violate the TCPA); *Robins v. Commission for Lawyer Discipline,* 2020 WL 101921, at *8 (Tex. App. 2020) (agreeing TCPA applies in lawyer discipline cases, because "The TCPA was enacted to safeguard the constitutional rights to petition, speak freely, associate freely, 'and otherwise participate in government' from infringement by meritless lawsuits."); *see also* In re Discipline of Att'y, 442 Mass.

660, 673–74, 815 N.E.2d 1072, 1082–83 (Mass. 2004) (Assuming without deciding that the anti-SLAPP statute applies to bar discipline cases, but finding law was not violated under the facts of that case).

This case involves a "regulatory or administrative action by a state actor", and the case plainly arises from Respondent's speech and petitioning activity under the First Amendment and the Arizona constitution. In addition, the bar's claims *plainly* seek to punish Respondent for his speech and conduct, thereby deterring and retaliating against the exercise of protected rights. Thus, this is a textbook SLAPP action which is governed by A.R.S. § 12–751.

Because a prima facie showing has been made, this Court must dismiss the case unless the Bar proves each claim is "is justified by **clearly established law**" and that this case was *not* brought to deter, prevent or retaliate against Respondent's exercise of constitutional rights. For the reasons explained below, the Bar cannot meet its burden as to either showing, much less both. Accordingly, this matter must be dismissed.

III. ARGUMENT

The Amended Complaint contains six claims. Each will be discussed in order.

a. Violation of February 21, 2024 "Sealing" Order

i. Summary of Material Facts

The material facts relating to the first claim are all undisputed:

- On September 14, 2023, Ms. Owens filed a *pro se* "Expedited (!) Motion to Seal Court Record." That motion asked the Court to "seal the case (all that has been

submitted so far and everything that will be filed in the future) so that the general public may not access it." RJN Ex. 17.

- On October 20, 2023, the Court denied Ms. Owens' Motion to Seal. RJN Ex. 20.
- On January 17, 2024, after Ms. Owens retained counsel, she filed a "Motion for Confidentiality and Preliminary Protective Order". RJN Ex. 39. That motion asked the Court to order; "that relevant discoverable information which either party designates as confidential remains confidential and is not disseminated to anyone other than the parties." RJN Ex. 39 at 4:12–13.
- On January 19, 2024, Mr. Echard's counsel, Gregg Woodnick, filed a motion *opposing* Ms. Owens' request for a protective order. RJN Ex. 43. Mr. Woodnick's pleading argued it would be an unconstitutional prior restraint for the Court to issue a protective order limiting the parties' ability to share information about their claims. Mr. Woodnick further argued: "Apparently, Petitioner feels she is entitled to what is essentially a backdoor Motion to Seal after this Court already **denied** her attempt." RJN Ex. 43 at 1:27–28 (all emphasis in original).
- On February 15, 2024 the trial judge issued an order agreeing with Mr. Woodnick's position. As a result, the court denied Ms. Owens' second motion for confidentiality in its entirety. RJN Ex. 59.
- A week later, on February 21, 2024, Ms. Owens' counsel made a third request for confidentiality in the form of an oral motion for reconsideration. That request was denied. RJN Ex. 60 at 6; "IT IS FURTHER ORDERED denying counsel for

Petitioner's oral motion to reconsider regarding the ruling concerning Petitioner's Motion for Confidentiality."

- After denying all three of Ms. Owens' requests for any form of confidentiality, and in the same order in which it denied Ms. Owens' request for reconsideration, on February 21, 2024, the court made an observational comment stating: "LET THE RECORD FURTHER REFLECT that no party shall disclose outside of themselves any medical or other documentation (exhibits, medical records, etc.) disclosed between the parties." RJN Ex. 60.
- After the February 21, 2024 order was issued, Mr. Echard's counsel filed an unsealed Motion to Compel. RJN Ex. 61. The motion contained a description of Ms. Owens' medical records, and attached to the motion was "medical or other documentation" disclosed between the parties. This included a letter to one of Ms. Owens' doctors, RJN Ex. 61 at 13–14, and an email from Mr. Echard's counsel containing a list of Ms. Owens' medical providers. RJN Ex. 61 at 32.
- Respondent was retained by Ms. Owens on March 25, 2024 and he filed a Notice of Appearance in the case that same day. RJN Ex. 66.
- After Mr. Echard's counsel filed unsealed pleadings containing "medical or other documentation" exchanged between the parties, on April 1, 2024, Respondent filed a Motion for Extension of Time To Respond to Mr. Woodnick's Motion to Compel which was supported by a detailed affidavit. RJN Ex. 67; *see also* Amended Complaint ¶¶ 42–43.

- Attached to Respondent's affidavit were some of Ms. Owens' medical records including a payment receipt from Banner Urgent Care and a positive pregnancy test result from Banner. None of those records were disclosed to Ms. Owens *by* Mr. Echard; *those records were Ms. Owens' own medical records which were disclosed by Respondent with Ms. Owens' express permission*. RJN Ex. 67.
- On April 4, 2024, Mr. Echard's counsel sent an email to Respondent which stated in part: "I am also not certain why you are publishing *court documents* and your client's personal medical records contrary to court order." Amended Compl. ¶ 49.
- Immediately that same day, Respondent replied to Mr. Echard's counsel and stated, among other things:

> First, I am aware of no court order that would stop Laura from publishing her own medical records. Yes, I am aware there is a minute entry order dated 2/21/24 that says, among other things, "no party shall disclose outside of themselves [odd wording] any medical or other documentation … *disclosed between the parties*."
>
> I was obviously not present when that order was entered, so I may not have the full context, but my reading of this is if *Laura* discloses medical records to you, you can't share them publicly, and if Clayton shares records with us, we can't share them publicly. That's typical, and it is how I read the court's order. If my reading is correct, it does not prohibit Laura from posting her own medical records, which she did solely to rebut false claims from your side that no such records existed. There is nothing nefarious or improper about this.
>
> If you interpret the order to mean that Laura is somehow *enjoined from publishing her own records* for the purpose of responding to false statements other people are making (including Dave Neal, who Clayton is clearly working directly with), you need to let me know that immediately so I can take the issue up with the judge.

Gingras Aff. ¶ 35 (emphasis in original).

- Mr. Woodnick never responded to Respondent's request for further clarification of his position regarding Ms. Owens' ability to publish her own medical records, nor did he ever challenge Respondent's assertion that he was "aware of no court order that would stop Laura from publishing her own medical records." Gingras Aff. ¶ 36.
- On April 26, 2024, Respondent filed a pleading entitled Petitioner's Response to Respondent's Amended Motion for Relief Based on Fraud. RJN Ex. 78; *see also* Amended Compl. ¶ 53. That pleading contained certain medical information including a discussion of an expert witness report from Dr. Samantha Deans which was disclosed by Mr. Echard.
- Also attached to the pleading was a copy of Dr. Deans' curriculum vitae. RJN Ex. 78.
- On April 19, 2024, Respondent published a tweet which contained a document showing Ms. Owens' weight (133 lbs.) as of November 14, 2023 (during the alleged pregnancy). Amended Compl. ¶ 52.

ii. Discussion

Based on the above facts, the bar claims Respondent violated multiple rules including ER 3.4(c) (by knowingly violating a court order); ER 3.6(a) (by making statements that would have a substantial likelihood of prejudicing the paternity case); ER 4.4(a) (by using means that had no substantial purpose other than to embarrass, delay or

burden another person), and Rule 54(c) (by knowingly violating a court order). None of these claims have merit.

1. Nothing In the February 21, 2024 Order Required Anything to be Filed Under Seal

The state bar's primary argument is that the February 21, 2024 order required any/all pleadings to be filed under seal *if* they contained "medical or other documentation" exchanged between the parties. This argument ignores at least SEVEN key problems.

First, the "order" says nothing about "sealing" anything, nor does it contain the words "IT IS ORDERED" with respect to limits imposed on the sharing of information. The language used is: "*LET THE RECORD REFLECT*" which is materially different than other parts of the documents which state: "IT IS ORDERED" as to specific issues. This text appears to simply *reflect* an informal, off-the-record agreement reached between counsel at a hearing where Respondent was not present and which took place more than a month before he was involved in the case.

Second, Ms. Owens made multiple requests asking for precisely the relief (confidentiality) the bar now claims was granted. But every single request by Ms. Owens was denied, in writing, and in its entirety.

Third, Mr. Woodnick *successfully* argued it would be an unlawful prior restraint on speech to prohibit the parties from publicly sharing their own side of the story, just as Mr. Woodnick did in the press release he issued on March 7, 2024. That argument was, in fact, legally correct. *See Yanez v. Sanchez*, 257 Ariz. 302, 306 (Ariz.App. 2024) (invalidating family court order which "prohibited both parents from posting on social media" and

explaining: "The order here restricts future speech and is thus a prior restraint. That order is presumptively unconstitutional.")

Fourth, viewed in **full** context (meaning in light of the court's *refusal* to grant *any* form of protective order in response to multiple request by Ms. Owens, including in the same February 21, 2024 order), it is clear the single sentence selectively adopted by the bar is unconstitutionally vague and ambiguous such that it violated Respondent's right to due process. *See Whitmer v. Hilton Casitas Homeowners Ass'n*, 2024 WL 338160, at *3 (Ariz.App. 2024) (explaining, "All injunctions must, inter alia, describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required. The requisite specificity will be found "only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden or required.") (emphasis added) (quoting *Havens v. James*, 76 F.4th 103, 121 (2d Cir. 2023) (citing Ariz. R. Civ. P. 65(d)(1)).

The language in question contained no time limits, and no clear definition as to what it prohibited. Merely stating "no party shall disclose outside of themselves any medical or other documentation (exhibits, medical records, etc.) disclosed between the parties" seems to mean that if any party exchanged any document with the other party, that document could not be disclosed to *anyone, not even to the court*. If that is not what it means, then what does it mean? A person of even high intelligence cannot tell. Such a vague/ambiguous order is facially unconstitutional.

Fifth, the bar's position ignores the requirements of Family Law Rule 17 (entitled "**Sealing, Redacting, and Unsealing Court Records**.") That rule allows material to be

filed under seal, but the rule contains multiple mandatory prerequisites. First, the court must make "written findings of fact and conclusions that the specific sealing or redaction is justified." Ariz. R. Fam. L.P. 17(c). Second, the court must find "there exists an overriding interest that overcomes the right of public access to the record." Ariz. R. Fam. L.P. 17(c)(1). Here, it is undisputed the February 21, 2024 order contained none of the findings required by Family Law Rule 17. Thus, the order did not meet the requirements for allowing (much less *requiring*) documents to be filed under seal.

Sixth, Mr. Woodnick interpreted the ambiguous order exactly the same way Respondent did – i.e., it had no impact on any party's ability to file unsealed pleadings which included "medical or other documentation" exchanged between the parties. We know this because after the February 21, 2024 order was issued, Mr. Woodnick filed unsealed pleadings containing "medical or other documentation" exchanged between the parties. *See* RJN Ex. 61.

This leads to the seventh and final problem – even if the bar's interpretation of the order was factual and legally correct (which it clearly is not), the anti-SLAPP law and the Due Process Clause prohibit the bar from arbitrarily choosing to punish Respondent while ignoring identical misconduct by Mr. Woodnick. Specifically, to prove the bar's conduct was *not* intended to unlawfully deter, prevent, or retaliate against Respondent, the bar must show: "a consistent practice of pursuing similar legal actions against similarly situated persons who did not lawfully exercise constitutional rights." A.R.S. § 12–751(B)(1)(b) (emphasis added).

Here, Mr. Woodnick is similarly situated to Respondent. Mr. Woodnick did *exactly* the same thing Respondent is accused of doing – filing an unsealed pleading containing "medical or other documentation" exchanged between the parties. But the bar has *not* pursued discipline against Mr. Woodnick.

That fact requires dismissal of the bar's first claim pursuant to the anti-SLAPP law. In addition, Respondent is also entitled to summary judgment because the undisputed facts show he did *not* violate any order.

2. Respondent's Public Comments Did Not Violate ER 3.6)

As a separate issue, the Bar claims by sharing information such as a document that reflected Ms. Owens' weight and an expert witness report, Respondent violated ER 3.6(a) which provides:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This claim is groundless for multiple reasons. First and foremost, ER 3.6(a) is primarily focused on safeguarding *jury trials* in criminal cases by limiting a lawyer's public statements before the jury is empaneled. When a case involves a jury trial, if a lawyer makes a public statement containing inadmissible evidence or facts, this creates a risk that a potential juror could hear that information resulting in prejudice.

That concern is simply not present in a case like *Owens* involving a bench trial. That reality is further reflected in comment 6 to ER 3.6 which states:

> Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding. (emphasis added).

Here, when Respondent published a tweet showing Ms. Owens' weight, that information could not possibly have caused any prejudice to the case because: A.) the case did not involve a criminal jury trial, and B.) the same information had already been provided to the court in an earlier filing.

Specifically, on April 26, 2024, Respondent filed a pleading entitled Petitioner's Response to Respondent's [Clayton Echard's] *Amended* Motion for Relief Based on Fraud. *See* RJN Ex. 78, also available:

https://www.appeals2.az.gov/APL2NewDocs1/COA/1061/3954137.PDF (Part 1)

https://www.appeals2.az.gov/APL2NewDocs1/COA/1061/3954138.PDF (Part 2)

https://www.appeals2.az.gov/APL2NewDocs1/COA/1061/3954139.PDF (Part 3)

Attached to that pleading were various medical records, including records of a visit to an OB/GYN facility called "MomDoc" on November 14, 2023. On page 65 of this pleading (https://www.appeals2.az.gov/APL2NewDocs1/COA/1061/3954139.PDF) was a record indicating that Ms. Owens' weight was 133 lbs. during that visit. This information is the "medical record" Respondent published on his website and on social media.

Under these circumstances – the "medical records" Respondent shared were not being viewed by members of a jury venire. Those records were provided to both the court

and to the public, as part of Ms. Owens' response to Mr. Woodnick's claim that she had never seen an OB/GYN, and that she was wearing a fake "moon bump" belly in court (her weight was relevant to disprove that allegation). Given that *Owens* involved a bench trial, and given that Judge Mata was ethically prohibited from considering ANY social media posts, it is literally not possible for Respondent's public statements to have any prejudicial effect on the case.

Moreover, ER 3.6(b) specifically allows a lawyer to publicly state: "the claim, offense or defense involved", and a lawyer may always publish: "information contained in a public record …." Here, Ms. Owens' weight was part of her defense, and that information was also contained in a public record – the filings submitted in response to Mr. Woodnick's Motion for Relief Based on Fraud.

Under these circumstances, there is no factual or legal basis for the Bar to argue that by sharing the same harmless information publicly which had already been provided to the family court in filed pleadings, this somehow would or could cause prejudice to the outcome of the case. The trier of fact—Judge Mata—was not ethically permitted to review or consider *any* social media posts made regarding the case. *See* Code of Judicial Conduct Canon 2.9(c) (providing, "Except as otherwise provided by law, a judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.") As such, Respondent's public comments about the case *could not* have had any impact on the outcome (and they were also specifically permitted by ER 3.6(b)). This claim is therefore groundless and must be dismissed.

b. Michael Marraccini

The second issue involves an allegation Respondent improperly attempted to preclude a witness named Michael Marraccini from testifying at the June 10, 2024 trial in *Owens*. The bar's allegations regarding Mr. Marraccini are set forth in ¶¶ 65–99 of the Amended Complaint.

Although *most* of the bar's factual allegations are accurate, the Complaint omits significant other facts which shed light on what actually happened. Those additional facts show Respondent's conduct was lawful, ethical, and within the scope of the anti-SLAPP law (because making a truthful report to law enforcement is protected by both the First Amendment and by federal law).

i. Summary of Undisputed Facts

- Shortly after Respondent first appeared in *Owens*, he attempted to interview all disclosed witnesses, one of whom was a person named Michael Marraccini (an ex-boyfriend of Ms. Owens). Gingras Aff. ¶ 40.
- At the time, Ms. Owens had a valid domestic violence restraining order against Mr. Marraccini issued by the San Francisco County Superior Court which required him to remain at least 100 yards away from her at all times, without exception. *See* Compl. ¶¶ 66–67.
- Although Family Law Rule 49 required Mr. Woodnick to disclose the names **and addresses** of any witnesses he intended to call, the only contact information provided by Mr. Woodnick for Mr. Marraccini was a lawyer in California named Randy Sue Pollock. Gingras Aff. ¶ 41.

- In mid-April 2024, Respondent contacted Ms. Pollock to request an interview with Mr. Marraccini. During a telephone call, Ms. Pollack stated Mr. Marraccini would not testify at trial in *Owens*. Gingras Aff. ¶ 42.
- On April 19, 2024, Ms. Pollock sent an email to Respondent stating: "My client [Marraccini] will not be testifying." Gingras Aff. ¶ 43.
- A short time later, Mr. Woodnick disclosed new evidence suggesting Mr. Marraccini was going to testify at trial in *Owens*. Gingras Aff. ¶ 44.
- Upon receiving this new information, Respondent again contacted Randy Sue Pollock to discuss the matter and to request that Mr. Marraccini agree to an interview or, if necessary, a deposition. Gingras Aff. ¶ 45.
- During a telephone call, Ms. Pollock informed Respondent Mr. Marraccini was refusing to submit to either an interview or a deposition, and that he "may just show up at trial rather than participating as a subpoenaed witness". Gingras Aff. ¶ 48.
- In response to Ms. Pollock's statements, on May 6, 2024, Respondent sent an email to Ms. Pollock documenting their conversation. Gingras Aff. ¶ 50. In that message, Respondent informed Ms. Pollock that if Mr. Marraccini was going to testify at trial in *Owens*, he was required to submit to either an informal interview or a deposition. Respondent further stated: "On the phone, you suggested Mr. Marraccini may just "show up" at trial rather than participating as a subpoenaed witness (i.e., he would simply choose to be

there, either as a spectator, or as a non-subpoenaed witness). If that is his plan, I need to be clear about our position – if Mr. Marraccini shows up as *either* a spectator or as a non-subpoenaed witness, Laura will ask the Phoenix Police to have Mr. Marraccini immediately arrested for violating the restraining order issued against him." Gingras Aff. ¶ 50.

- In the same email, Respondent stated: "I am not, under any circumstances, suggesting Mr. Marraccini should *not* participate in the trial if he has relevant information. All I am saying is that if he WANTS to testify, he needs to do so in a manner that complies with the rules and the law. This is mandatory to ensure basic fairness to ALL sides." Gingras Aff. ¶ 50. Respondent further explained, "For avoidance of any doubt, nothing in this email should be construed as an attempt to cause Mr. Marraccini *not* to appear." Gingras Aff. Ex. D.
- The California court order issued against Mr. Marraccini contained the following warnings:

Warnings and Notices to the Restrained Person in 2

If You Do Not Obey This Order, You Can Be Arrested And Charged With a Crime.

- If you do not obey this order, you can go to jail or prison and/or pay a fine.
- It is a felony to take or hide a child in violation of this order.
- If you travel to another state or to tribal lands or make the protected person do so, with the intention of disobeying this order, you can be charged with a federal crime.

- On April 30, 2024, citing Family Law Rule 76.1(a) Respondent filed an *Emergency* request with the court in *Owens* asking to discuss the issue of Mr. Marraccini's testimony. RJN. Ex. 30.
- Despite the emergency nature of the request and the mandatory language of Family Law Rule 76.1 (which states a court must grant a hearing if requested), on May 22, 2024, the court issued an order denying Respondent's request for an emergency hearing without explanation. RJN Ex. 93.
- On June 10, 2024, Mr. Marraccini violated the California DVRO by traveling from California to Arizona and by coming within 100 yards of Ms. Owens in the parking lot outside the court. Gingras Aff. ¶ 55.
- After seeing Mr. Marraccini violate the order, Ms. Owens told Respondent she intended to leave unless Respondent contacted law enforcement to report the violation of the DVRO by Mr. Marraccini. Gingras Aff. ¶ 55.
- Respondent initially spoke with court security and provided them with a copy of the California DVRO and a copy of the specific federal statute (18 U.S.C. § 2262) which required Arizona to honor and enforce the California order. Gingras Aff. ¶ 56.
- Court security informed Respondent they could not help, and that the only option for enforcement of the order was to contact Phoenix Police. Gingras Aff. ¶ 56.

- Respondent then contacted Phoenix Police, provided them with a copy of the California order and a copy of 18 U.S.C. § 2262. Gingras Aff. ¶ 57.

ii. Discussion

The bar claims Respondent violated multiple rules including ER 3.4(a) and ER 8.4(a) by attempting to obstruct Mr. Echard's "access" to Mr. Marraccini's testimony (even though Mr. Marraccini did not testify because the court did not allow sufficient time for his testimony), ER 4.4(a) (by using means that had no substantial purpose other than embarrass, delay or burden Echard or his counsel), and ER 8.4(d) (by engaging in conduct prejudicial to the administration of justice). Each one of these claims is groundless.

These claims fail because Respondent did nothing to "obstruct" Mr. Echard's "access" to Mr. Marraccini's testimony. Mr. Marraccini appeared at trial and could have offered any testimony he wanted. He ultimately did not testify for one reason—because Mr. Woodnick never called him to the witness stand.

Prior to trial, Respondent merely asked Mr. Marraccini's counsel to comply with the Rules of Family Law Procedure which entitled Respondent to obtain disclosure from Mr. Marraccini (by deposition or otherwise) *before* trial. Respondent told Mr. Marraccini's counsel he *wanted* Mr. Marraccini to testify; the only restriction being that Mr. Marraccini must comply with the rules and the law. Asking Mr. Marraccini to comply with the law is not obstruction nor is it unethical.

Furthermore, Respondent's phone call to the police cannot form the basis for discipline because it is fully protected by the First Amendment. Making a *truthful* report to law enforcement is protected "petitioning" activity under the First Amendment;

"[S]ubmission of complaints … to … a police department constitutes petitioning activity protected by the petition clause [of the First Amendment]." *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) (citing *California Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)); *see also Ruiz v. Hall*, 191 Ariz. 441, 453 (Ariz. 1998).

Not only does the First Amendment protect truthful reports made to law enforcement, it is also a crime for any person to *retaliate* against another for making such a report to law enforcement:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 1513(e) (emphasis added).

When Mr. Marraccini traveled from California to Arizona with the intent to violate the California court's order, he committed a federal crime by violating 18 U.S.C. § 2262. Respondent's choice to contact law enforcement (at Ms. Owens' insistence) to report the *possible* commission of a federal crime was protected by both the First Amendment *and* by 18 U.S.C. § 1513(e) (the bar does not allege any information Respondent provided to law enforcement was false).

The state bar has misconstrued these facts as an attempt to *prejudice the administration of justice*, when, in fact, exactly the opposite is true – as quoted in ¶ 96 of the Amended Complaint, Respondent asked the trial judge to order Mr. Marraccini to comply with the California DVRO because Ms. Owens stated "she is so terrified that she

may not be able to sit here during this trial." That statement was a reference to the fact that Ms. Owens stated she intended to *leave the courtroom* and not participate in the trial unless Respondent did everything possible to enforce the California DVRO, as required by both federal law (VAWA) and Arizona law. *See* A.R.S. § 13–3602(V) (providing, "A valid protection order that is related to domestic or family violence and that is issued by a court in another state, a court of a United States territory or a tribal court shall be accorded full faith and credit and s**hall be enforced** as if it were issued in this state for as long as the order is effective in the issuing jurisdiction.") (emphasis added).

If Ms. Owens had walked out of trial, this would have resulted in clear prejudice to the administration of justice. Rather than trying to cause that result, Respondent did everything he could to *avoid* it.

The state bar has also misconstrued the legal effect of the Arizona subpoena Mr. Woodnick allegedly obtained for Mr. Marraccini. First, an Arizona subpoena is *not enforceable* outside of the state, and thus could not have lawfully *compelled* Mr. Marraccini to travel from California for the trial in *Owens*; "It is well settled … that a state court's subpoena power is limited to the state's borders." *State v. Bennett*, 324 Conn. 744, 155 A.3d 188, 197 (Conn. 2017) (citing *Minder v. Georgia*, 183 U.S. 559, 562 (1902) (explaining, "it is not within the power of the Georgia courts to compel the attendance of witnesses *who are beyond the limits of the state*.") (emphasis added).

Second, if Mr. Woodnick actually intended to obtain Mr. Marraccini's testimony (rather than having him appear at trial solely to terrify and harass Ms. Owens), Arizona's Intestate Depositions and Discovery Act provided a lawful method for him to obtain that

testimony *without* violating the California DVRO. Pursuant to Ariz. R. Civ. P. 45.1, Mr. Woodnick could easily have obtained a *California* subpoena using the process set forth in Ariz. R. Civ. P. 45.1(b)(1). This would have allowed Mr. Woodnick to obtain any needed testimony from Mr. Marraccini in California *without* requiring him to violate the California court's order by illegally engaging in interstate travel without permission from the California court that issued the order.

Third, the state bar's position is essentially this – a lawyer who obtains an Arizona subpoena using the bar's "self-serve" online process can literally overrule any lawful court order issued by any other court in the country, without the consent or knowledge of any judge or court. That position ignores VAWA (which requires domestic violence restraining orders to be given full faith and credit and enforced in all 50 states), and it also ignores the specific Arizona rule on this issue – Rule 28 of the Arizona Rules of Protective Order Procedure. That rule states: "When two parties have obtained conflicting protective orders, *both orders must be given full force and effect*, regardless of whether the orders were issued by courts of limited or general jurisdiction." (emphasis added).

Here, the state bar takes the position that a self-issued subpoena obtained by an Arizona lawyer is sufficient to trump a valid court order issued by a Superior Court judge in California. That position fails to meet the standards of A.R.S. § 12–751(B)(1) because it is *not* "justified by clearly established law". On the contrary, the bar's position is directly contrary to clearly established law (VAWA), as well as Arizona's criminal law which both say exactly the same thing.

Respondent never prevented, nor did he attempt to prevent, Mr. Marraccini from offering relevant testimony. Instead, Respondent merely asked Mr. Marraccini to comply with a valid court order and the rules of procedure. When Mr. Marraccini ignored that request and violated the law, Respondent made a truthful report to law enforcement.

Making a truthful report to the police is classic petitioning conduct that falls squarely within the protection of both the First Amendment and the anti-SLAPP law. Asking a witness to comply with the law is not a violation of any ethical rule. Because the bar cannot show its position is "justified by clearly established law", the second claim relating to Mr. Marraccini must be dismissed.

c. Disparaging Comments About The Public

The third issue involves allegedly disparaging comments regarding Judge Mata. However, because the PDJ may have disposed of that claim, and because it is perhaps the most legally complicated, that topic will be addressed last.

The next issue (which is thankfully simple) involves a claim Respondent made "disparaging comments about the public". This issue is described in four short paragraphs in the Complaint (¶110–113).

The bar accuses Respondent of sending a private email on his own behalf (not on behalf of any client) to a website called Reddit. In that email, Respondent informed Reddit that one of Ms. Owens' critics engaged in copyright infringement by copying content owned by Respondent and creating derivative works from that material.

While providing an explanation of the background to Reddit, Respondent used the terms "total fucking psychotic assholes" and "total fucking assholes" to describe certain

unidentified fans of Mr. Echard's. The bar claims the use of such language in a private email violated Supreme Court Rule 41(b)(7).

The bar's position fails because coarse language like this is fully protected by the First Amendment. *See*, *e.g.*, *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 894 (9th Cir. 1998) (holding First Amendment protected magazine's right to publish "Asshole of the Month" column which included article criticizing a plaintiff as a "pus bloated walking sphincter …."); *Michino v. Lewis*, 2015 U.S. Dist. LEXIS 77614, *26 (D.Hawaii 2015) (holding First Amendment protected plaintiff's right to call police officer "a fucking asshole", and explaining, "As rude and sophomoric as Plaintiff's speech to Officer Lewis may have been, 'it represented an expression of disapproval toward a police officer' and, as such, 'fell squarely within the protective umbrella of the First Amendment." (cleaned up) (emphasis added) (quoting *Duran v. City of Douglas, Ariz*., 904 F.2d 1372, 1378 (9th Cir. 1990)); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987)); *Wood v. Eubanks*, 25 F.4th 414, 424 (6th Cir. 2022) (compiling cases, holding First Amendment protected plaintiff's right to use coarse language including, "motherfucker" and "asshole"; "We have held that similar speech is protected by the First Amendment when unaccompanied by other conduct, which is consistent with the rule that '[f]its of rudeness or lack of gratitude may violate the Golden Rule' but are not illegal ….") (emphasis added) (quoting *Green v. Barber*, 310 F.3d 889, 895 (6th Cir. 2002) (explaining, "Standards of decorum have changed dramatically since 1942, moreover, and indelicacy no longer places speech beyond the protection of the First Amendment."); *Kindred v. Colby*, 2015 N.Y. Misc. LEXIS 5105, *9, 50 N.Y.S.3d 26 (Monroe County, 2015) (holding First Amendment

protected statement: "Gotta love assholes who hide behind group names like 'Friends of Northhampton Park'.") (emphasis added); *Tuvell v. Marshall*, 96 Mass. App. Ct. 1107; 137 N.E.3d 1090; 2019 WL 5654950 (Mass. App. 2019) (holding First Amendment protected speech criticizing Plaintiff by referring to him as "'special', a 'jerk,' 'a few cherries short of a sundae,' and 'an asshole,' and describing his posts as 'whiny' and 'bitching.'") (emphasis added); *Dillon v. City of New York*, 261 A.D.2d 34, 37 (App. 1st Div. 1999) (holding First Amendment protected statement referring to plaintiff as: "what a fucking asshole.") (emphasis added).

If a lawyer used profanity or expletives in court for the purpose of displaying contempt towards a judge, a witness, or anyone else, that would be a different situation. But no law supports the bar's position here – i.e., that a lawyer who is *not engaged in the practice of law* is forbidden from using otherwise constitutionally-protected expletives during private conversations, including private emails. The email Respondent sent to Reddit was not sent on behalf of any client. Rather, the issue involved Respondent's efforts to enforce and protect his own legal rights. In that context, Respondent was not engaged in the practice of law; "one who acts only for himself in legal matters is not … practicing law." *Munger Chadwick, P.L.C. v. Farwest Dev. & Const. of the Sw., LLC*, 235 Ariz. 125, 127 n.3, 329 P.3d 229, 231 n.3 (Ct. App. 2014) (quoting *State ex rel. Frohmiller v. Hendrix,* 59 Ariz. 184, 190, 124 P.2d 768, 772 (1942)); "In Arizona, one who acts only for himself in legal matters is not considered to be engaged in the practice of law." *Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (Ct. App. 1983) (citing *State ex rel. Frohmiller v. Hendrix,* 59 Ariz. 184, 190, 124 P.2d 768, 772 (1942)).

Because Respondent was not engaged in the practice of law when he sent the email to Reddit, that speech receives full constitutional protection, regardless of its coarse nature. Again, this shows the bar's position is not "justified by clearly established law", requiring dismissal and/or summary judgment as to this claim.

d. Pursuing "meritless claims", presenting "false information in an affidavit" and presenting Ms. Owens' "False testimony/Changing Version of Events"

The fifth issue involves allegations that Ms. Owens offered false testimony, and that she changed her story slightly as the case was pending. These claims are described in some detail in ¶¶ 114–177 of the Complaint.

The disposition of this claim is extremely easy to resolve – because the bar has no evidence of any kind to support the alleged misconduct. This is so because in August 2025, the Arizona Supreme Court issued an order (No. R-25-0029)[2] amending comment 8 to ER 3.3 to clarify the standards that govern the presentation of false evidence. That comment explains, in detail, what a lawyer can and cannot do when faced with the possibility that a client has not been truthful.

The full comment 8 to ER 3.3 now states:

> The prohibition against offering false evidence **only applies if the lawyer knows that the evidence is false**. A lawyer's reasonable belief that evidence is false **does not preclude its presentation to the trier of fact.** A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See ER 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the

[2] Available here: https://www.azcourts.gov/Portals/0/20/2008-2025%20Rule%20Minutes-Orders/2025%20Rules/R-25-0029%20FinalRulesOrder.PDF?ver=KbVRo6mCcJtUw65eyqXxuQ%3D%3D

> lawyer cannot ignore an obvious falsehood. If a lawyer reasonably believes that evidence has been materially altered or generated with the intent to deceive the court, the lawyer has an obligation to conduct a reasonable inquiry before submitting the evidence to the court. The scope of the inquiry will vary according to the circumstances of each case, but factors to consider may include the probative value of the evidence, the value or importance of the case or issue, the source of the evidence, and what, if any, accessible, reliable, and affordable tools or methods are available to assess the evidence's authenticity or integrity. **If after inquiry the lawyer still does not know that the evidence has been materially altered or generated with intent to deceive, the lawyer retains discretion to submit the evidence to the court**. (emphasis added).

Based on these standards, Respondent is entitled to summary judgment as to this claim because even assuming Ms. Owens was not truthful at some point, the bar has no evidence to show Respondent actually knew that. The bar's implied argument that Respondent *should have known* the truth misstates the legal requirement of *actual knowledge*; "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question." ER 1.0(f) (emphasis added).

Here, the Complaint claims Ms. Owens offered testimony the bar claims was false. And the Complaint claims Respondent "did not take any steps during direct or redirect examination to address Owens' false or inconsistent testimony." Amended Compl. ¶ 176.

Despite those allegations, the Complaint merely claims Ms. Owens made one statement at one time, and then later changed her story. The bar appears to allege this proves Respondent *knew* Ms. Owens' first statement was true and her second was not. That argument is simply not logical. If a witness offers testimony and later changes it, that may mean the witness intentionally lied, or it could simply mean the witness realized the initial statement was wrong, and thus a correction was required.

In this case, one of the bar's main allegations is that during her deposition on March 1, 2024 (which took place before Respondent represented Ms. Owens), she said she visited a Planned Parenthood location in Orange County, California. Then, at trial on June 10, 2024, Ms. Owens claimed she went to a different Planned Parenthood location in Los Angeles, not Orange County (Los Angeles and Orange County are directly adjoining).

The fact that Ms. Owens changed her testimony means that *one* version was incorrect. But the state bar does not explain *which*, nor does the bar have even a scintilla of evidence to show that Respondent *knew* which version was correct and which was not. In fact, the Complaint specifically alleges (without citing any evidence) that "Respondent learned prior to the June 10, 2024 hearing that Owens had not gone to a Planned Parenthood office in Mission Viejo, California [meaning Orange County]." Compl. ¶ 134.

Respondent denied that allegation in his Answer, and he has supplied this court with an affidavit stating under penalty of perjury that the bar's allegation in ¶ 134 of the Complaint is factually false. As such, the bar now bears the burden of offering admissible evidence to prove a genuine factual dispute on that issue. But the bar has disclosed nothing to support this false allegation. For that reason, Respondent is entitled to summary judgment on that issue.

Obviously, comment 8 to ER 3.3 indicates: "A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances", and ER 1.0(f) provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." (emphasis added).

It does not appear that the Arizona Supreme Court has published any authority regarding the correct standards under which a lawyer's knowledge of falsity may be inferred, but clearly the answer cannot be based on nothing but pure speculation. In that case, any lawyer involved in any case in which a client made a statement and later changed it would *always* be exposed to career-ending discipline. Since the standard here is clear and convincing evidence, the bar cannot be allowed to make such a serious claim of wrongdoing based on literally nothing but sheer conjecture and speculation.

That fact is supported by decisions from other states which have the same ethical rules. For instance, in *Matter of Herron*, 309 Kan. 839 (Kan. 2019) a lawyer was accused of making a false statement to a court regarding the amount of time his client had tested "clean" for drugs. At a status conference, the lawyer informed the court his client had "tested clean" for 16 weeks. In truth, the actual amount of time was 11 weeks. Based on those facts, a hearing panel "found that respondent had been dishonest with the court" in violation of ER 3.3. *See Herron*, 309 Kan. at 870.

On review to the Kansas Supreme Court, the lawyer argued his statement was based on a simple miscalculation, and he specifically cited language in comment 8 to Kansas's version of ER 3.3 that was identical to Arizona's; i.e., "A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances." *Herron*, 309 Kan. at 871 (emphasis added).

The Kanas Supreme Court *reversed* the hearing panel's finding of *knowing* dishonesty, finding the facts did not support the charge (even though knowledge of falsity

can be inferred). The Court held clear and convincing evidence did not prove the lawyer offered "a knowing falsehood, rather than a faulty mental calculation during argument." *Id*. As a result, that charge was dismissed.

Similarly, in *Doe v. Idaho State Bar*, 161 Idaho 139, 384 P.3d 386 (Idaho 2016), a lawyer was found guilty of violating Idaho's version of ER 3.3 (which is identical to Arizona's). The lawyer violated ER 3.3 by making representations to a court based on the facts contained in an "unsigned" declaration from a witness named Miller. The lawyer continued to make those representations "from March 2011 through February 2012", but it was eventually discovered Miller signed a different declaration containing different facts on May 9, 2011. *See Doe*, 161 Idaho at 140. The lawyer (Doe) never disclosed this new information to the court.

The Idaho Supreme Court found there was "substantial evidence" to prove a violation of ER 3.3. This is so because "Bar Counsel expressly found that Doe made false statements to the tribunal by continuing to rely on the unsigned declaration after receiving the signed affidavit and representing to the court that Miller was unwilling to sign an affidavit when he had already done so." *Id*. at 143 (emphasis added).

Here, there are no facts to support the same result. The bar correctly notes Ms. Owens changed her story, claiming in her deposition that she went to a Planned Parenthood in Orange County, and later changing her story at trial to claim she went to one in Los Angeles. Despite that change, the bar has no evidence – literally none – to show Respondent *knew* which story was true and which was false. The bar also has no evidence that Ms. Owens ever told Respondent that she planned to change her testimony at trial.

Given those facts, Respondent understood when Ms. Owens changed her story at trial, this was done to *correct* a prior inaccurate statement. In that situation, Respondent was under no obligation to "take corrective action" regarding Ms. Owens' trial testimony because Respondent believed *the changed story WAS the correction*.

Because Ms. Owens gave "contradictory versions of events", the bar argues Respondent was required to withdraw. Compl. ¶ 3. But this is both a misstatement of the law[3] *and* it ignores the fact Mr. Echard also offered contradictory versions of events.

Specifically, on October 11, 2023, Mr. Echard filed a petition for a harassment injunction in Case No. CV2023-053592 against Ms. Owens. In his original petition, Mr. Echard claims Ms. Owens harassed him by sending "**over 100 emails**".

required	Defendant has sent over 100 emails, despite being blocked, also has texted me from at least 7 different phone numbers,
required	everytime I block one, she creates a new number

Later, Mr. Woodnick presented a materially different story to the court in his Motion for Rule 26 Sanctions: "Respondent obtained an Injunction of Harassment against Petitioner based on the receipt of **500+ harassing messages** in (CV2023-05392 [sic])." RJN Ex. 33 at 4:11–22 (emphasis added).

If the state bar's position in this case is correct – that Respondent was *required* to withdraw from representing Mr. Owens simply because she changed to her story and offered "contradictory versions of events" – then the same rule would apply to Mr. Woodnick. But again, the bar has refused to pursue discipline against Mr. Woodnick.

[3] Comment 15 to ER 3.3 states a lawyer is *not* required to withdraw simply because a client has offered false testimony which the lawyer is later required to correct.

In any case, the above facts show Respondent did *not* violate ER 3.3 or any other rule simply because Ms. Owens changed her story. The standard of proof here is extremely high – the bar bears the burden of show not just that Ms. Owens changed her story, but also that Respondent knew the truth and intentionally offered false testimony and evidence to the court. There is not a scintilla of admissible evidence to support that claim. A such, Respondent is entitled to summary judgment on that claim.

e. Pursing An Unsuccessful Appeal

The fifth issue involves the appeal Respondent filed on Ms. Owens' behalf. The Complaint quotes hearsay statements from the unpublished memorandum decision finding that certain arguments Respondent presented were "unreasonable". Of course, statements contained in the appellate decision are hearsay, and even when a court sanctions a lawyer for misconduct, such rulings are not entitled to *res judicata* or preclusive effect in discipline proceedings. *See Hancock v. O'Neil*, 253 Ariz. 509 (Ariz. 2022).

To date, the state bar has disclosed no evidence showing Respondent's arguments in the appeal violated any ethical rule. Obviously the appeal was not successful, but the case involved a matter of first impression which was not controlled by any published (or unpublished authority). The arguments Respondent presented were based on analogous provisions of federal law which were supported by *extensive* legal authority. Unfortunately, the Court of Appeals ignored the authority cited by Respondent, without ever discussing it.

In any case, Respondent's arguments in the appeal were certainly not frivolous; "'Groundless' and 'frivolous' are equivalent terms, and a claim is frivolous 'if the

proponent can present no rational argument based upon the evidence or law in support of that claim." *Rogone v. Correia*, 236 Ariz. 43, 50, 335 P.3d 1122, 1129 (Ariz. App. 2014) (quoting Evergreen W., Inc. v. Boyd, 167 Ariz. 614, 621 (Ariz. App. 1991)).

"However, a claim is not groundless if it is 'fairly debatable,' even if such claim constitutes a long shot[.]' In other words, a claim may lack winning merit without being sufficiently devoid of rational support to render it groundless." *Arizona Republican Party v. Richer*, 257 Ariz. 237, 243 (Ariz. 2024) (quoting *Goldman v. Sahl*, 248 Ariz. 512, 531 ¶ 68, 462 P.3d 1017, 1036 (App. 2020); *Johnson v. Mohave County*, 206 Ariz. 330, 335 ¶ 19, 78 P.3d 1051, 1056 (App. 2003) (holding a claim that requires "considerable examination" is "fairly debatable" and thus non-frivolous)).

Here, the appellate arguments Respondent presented were complicated, well-supported, and clearly debatable. Merely losing an appeal is not unethical. This is especially so when there was no indication by the Court of Appeals that the position was sanctionable. There is no basis at all for the bar's position, and certainly none is supported by *clearly* established law (an impossible finding to make, given that the arguments in *Owens* raised matters of first impression in Arizona).

Based on those facts, the bar's claim as to the appeal should be dismissed pursuant to A.R.S. § 12–751 and/or summary judgment should be granted. The mere fact that Bar counsel is seeking to punish a lawyer for a failed appeal is so utterly beyond any rational basis, if the Anti-SLAPP law does not apply here, and that refusal to apply it is sustained on appeal, then woe unto any Arizona lawyer who files an appeal at all – since a full one-half of all Arizona appellate lawyers shall now find themselves at least deeply concerned

about being disbarred. And even if Gingras' position on appeal was novel, due to it being an issue of first impression, that should never be the basis for discipline. If it is, then Arizona must declare that it is no longer a common law jurisdiction, as the common law cannot develop without lawyers willing to take cases of first impression.

f. Statements Regarding Judge Mata

The final point of discussion concerns the statements Respondent made about Judge Mata. It is understood the PDJ accepted the state bar's position that Respondent's speech is not protected by the First Amendment, and that the comments violated the ethical rules without regard to their truth/falsity. Neither Ariz. Const. art. II, § 6 nor the First Amendment would abide such a shockingly unconstitutional position. It is far more frivolous to say that truthful speech is not protected by the First Amendment than any position that the Respondent took in the appeal that the Bar finds so offensive.

To preserve these issues for appeal, and this issue for certain will be the subject of an appeal, Respondent offers the following arguments. First, states (and even Congress) *cannot* create new categories of unprotected speech. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (rejecting argument that states and Congress have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."); *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 791 (2011) ("new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.")

Here, citing *Matter of Marshall*, 528 P.3d 653 (N.M. 2023), this Court appears to have created a new category of unprotected speech – *true* statements made with reckless

disregard for the truth. That conclusion directly conflicts with Ariz. Const. art. II, § 6 and the First Amendment, all for what seems to be a desperate misreading of *Marshall*.

In *Marshall*, a lawyer accused a judge of bias claiming the judge "concealed his ties to the Navajo Nation in order to award water to his former clients." *Marshall*, 528 P.3d at 665. In that case, the lawyer's claim was *literally false* because the evidence showed the judge merely represented "individual Navajo people" in the past, *not* the entire Navajo Nation itself. *See id*. at 666.

Because the lawyer's statement was technically false, the Court found "Substantial evidence supports the hearing committee's determination that Marshall did not have an objectively reasonable factual basis to support his allegations of bias and lack of candor against Judge Wechsler." *Id*. During its discussion of the case, the New Mexico Supreme Court appeared to suggest that even a *true* statement could be punished if it was made with "reckless disregard for the truth" (which the Court defined as making "accusations against judicial officers in the absence of an adequate factual grounding.")

That conclusion was stated in footnote 2 of the decision:

> Just as we reject imposing a requirement that the statement be, in fact, false, so we reject a requirement that it be demonstrably true. What is important is whether the attorney has exhibited a conscious indifference to the statement's truth or falsity. If an attorney possesses an objectively reasonable factual basis for making a statement, the attorney cannot be said to be indifferent to its truthfulness.

Id. at 662 n.2 (emphasis added).

To be clear – because the attorney's speech in *Marshall* was apparently literally false, the New Mexico court seems to have abandoned the substantial truth doctrine, which

is alive and well in Arizona. Ariz. Const. art. II, § 6, would not tolerate such a decision. "A technically false statement may nonetheless be considered substantially true if, viewed through the eyes of the average reader, the statement differs from the truth only in insignificant details." *Desert Palm Surgical Group, P.L.C. v. Petta*, 343 P.3d 438, 449 (Ariz. Ct. App. 2015). The Bar should not rely on an unprincipled decision from New Mexico when no Arizona court has ever agreed with such a novel interpretation of the First Amendment. And even if the First Amendment would hypothetically support such a ludicrous statement of law, the Arizona free speech clause would not do so.

However, to the extent this Court believes *Marshall* allows a New Mexico lawyer to be disciplined for *truthful* speech, simply because the *Court* believes the lawyer somehow acted recklessly, that conclusion is legally erroneous, and incompatible with our civil liberties in Arizona. If New Mexico wants to secede from rational interpretations of free speech, federalism might permit it to do so. But Arizona has never before followed this road, and it should not do so here.

This is so because punishing *truthful* statements based on a speaker's recklessness is a brand-new category of unprotected speech, never before recognized. Very much to the contrary, the "reckless disregard" standard originated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). *Sullivan* was a defamation case involving statements criticizing a public official.

The U.S. Supreme Court held in that context:

> The constitutional guarantees [of the First Amendment] require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory **falsehood** relating to his official conduct unless he proves that

> the statement was made with 'actual malice'-that is, with knowledge that it was false or with **reckless disregard of whether it was false or not**.

Sullivan, 376 U.S. at 279–80 (emphasis added).

In Arizona, a true statement cannot be defamatory. For that reason, "In an action for defamation, 'the truth of the contents of ... [a] statement is a complete defense.'" *Sign Here Petitions LLC v. Chavez,* 243 Ariz. 99, 107 (Ariz.App. 2017) (quoting Read v. Phoenix Newspapers, Inc., 169 Ariz. 353, 355 (Ariz. 1991)).

Thus, while a lawyer certainly CAN be punished for making a *false* statement with reckless disregard for the truth (as occurred in *Marshall*), there is no legal authority allowing punishment for true statements, regardless of how recklessly the lawyer may have been. That fact was recognized thirty years ago by the Ninth Circuit in *Yagman*; "attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense." *Standing Committee v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995). *See also In Re Green*, 11 P.3d 1078, 1083 (Colo. 2000) (agreeing only false statements of fact may be punished, and recognizing, "if an attorney's activity or speech is protected by the First Amendment, disciplinary rules governing the legal profession cannot punish the attorney's conduct."); *In re Olin*, 2024 WL 6881775, *9 (Cal. Bar Ct. 2024) ("The First Amendment does not protect intentionally false statements and false statements made with reckless disregard for the truth. Truth is an absolute defense to any statement made by an attorney that impugns the honesty or integrity of a judge.")

Given these authorities, a *false* statement may be punished when made with reckless disregard for the truth. But a *true* statement cannot be punished, no matter how carefully

or careless uttered. In short, a lawyer *cannot* act with reckless disregard for the truth when making a true statement.

Here, the bar takes the position true statements may be punished simply because a third party (bar counsel or this Court) thinks the lawyer made a recklessly *true* statement. The *only* authority that supports that position is *Marshall*, which is inconsistent with the Arizona and U.S. Constitutions.

Let us, however, presume that the Arizona Supreme Court will one day take leave of reason and adopt *Marshall* and reject the U.S. and Arizona Constitutions views on the subject of truth, stating that *Yagman*, *Green*, and *Olin* were wrong. Even then, Respondent cannot be disciplined for this, because the Arizona Supreme Court has not yet become the first court in the United States to follow *Marshall*. Therefore, the bar cannot meet its burden of showing this aspect of the Complaint is "justified by clearly established law."

That position is further supported by *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) which it appears this Court has misunderstood. *Gentile* explained that as a general matter, "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." 501 U.S. at 1054.

Despite that general rule, *Gentile* explained there are narrow exceptions that allow lawyers to face greater restrictions on their speech. One exception is "commercial speech by attorneys" and the other exception is "restrictions upon release of information that the attorney could gain only by use of the court's discovery process."

This Court appears to take the position that these narrow exceptions somehow swallow the general rule, thus allowing "freewheeling" new restrictions on attorney speech.

Respondent disagrees. This case does not involve attorney advertising, nor do Respondent's comments about Judge Mata implicate information gained "only by use of the court's discovery process." Because this case does not fall within either of the two recognized exceptions in *Gentile*, there is no basis to ignore "normal First Amendment principles" here. *Gentile*, 501 U.S. at 1054.

At the end of the day, under a correct application of the law, the state bar must prove Respondent made a false statement of fact impugning Judge Mata's integrity and that Respondent acted with reckless disregard for the truth at the time he made the statement. The bar has disclosed no evidence of any kind that would support such a finding. In addition, Respondent has disclosed clear and unrefuted evidence to support every critical statement he made.

Based on these facts, the bar's claims regarding Judge Mata are barred by Ariz. Const. art. II, § 6 and thus A.R.S. § 12–751. The bar's claims are not clearly supported by existing law; if anything, they are contrary to the law. In addition, the bar has failed to disclose any evidence to support a finding that Respondent made any factually untrue statements. Accordingly, that claim should be extinguished.

g. Additional Issues

To ensure a complete appellate record, two other points warrant brief mention. First, as the Ninth Circuit discussed in *Yagman*, and as the Colorado Supreme Court agreed in *Green*, there is a general rule in First Amendment jurisprudence which provides that if a speaker explains the facts on which his statements are based, and if those facts are true, the speaker's conclusions about those facts qualify as protected opinions:

> We applied this principle in *Lewis v. Time, Inc*., 710 F.2d 549 (9th Cir.1983), where an attorney claimed he had been defamed by an article calling him a "shady practitioner." *We held that this expression of opinion was protected by the First Amendment because the article set forth the facts on which the opinion was based*: a judgment entered against the attorney for defrauding his clients, and another judgment holding him liable for malpractice. Id. at 556. Because the article's factual assertions were accurate, we concluded that the plaintiff's claim was barred: "[W]here a publication sets forth the facts underlying its statement of opinion ... and those facts are true, the Constitution protects that opinion from liability for defamation."

Yagman, 55 F.3d at 1440.

Applying that rule to attorney criticism of a judge, the Ninth Circuit held Mr. Yagman's criticism of the judge in that case was protected by the First Amendment because the lawyer explained the facts on which his statements were based: "Like the defendant in Lewis, Yagman disclosed the basis for his view that Judge Keller is anti-Semitic and has a penchant for sanctioning Jewish lawyers: that he, Kenner and Manes are all Jewish and had been sanctioned by Judge Keller." *Id*. Because the underlying facts were *disclosed*, and those facts were not false, the Ninth Circuit held the speech was fully protected.

> The same rule was applied in *Green*:
>
> We view Green's statements that the judge was a "racist and bigot" and having a "bent of mind" as statements of opinion *based upon fully disclosed and uncontested facts*. Because Green's statements do not involve false statements of fact or represent statements of opinion necessarily implying undisclosed false assertions of fact, we may not, consistent with the First Amendment and the first prong of the New York Times test, discipline Green for his subjective opinions, irrespective of our disagreement with them

Green, 11 P.3d at 1086.

The same standard was also applied by the California Bar Court in *In Re Olin*, 2024 WL 6881775, *11 (Cal. Bar Ct. 2024) (affirming dismissal of charge because: The hearing

judge determined the statement represents Olin's *belief on stated facts*. The judge reasoned that Olin was presenting his subjective view and concluded that the statement, whether accurate or not, was not disciplinable.")

Notably, in *Marshall*, the New Mexico Supreme Court did not discuss the concept of statements based on fully disclosed facts. It appears in that case, the lawyer made false statements impugning a judge's integrity, but the lawyer did *not* explain the facts on which his statements were based. Therefore, the Court had no occasion to consider whether this concept applied to protect the lawyer's speech.

Even assuming *Marshall* was correctly decided (which Respondent does not concede), the facts of this case are completely different because here, like in *Green* and *Yagman* and *Olin*, Respondent's claims against Judge Mata were based on facts which were disclosed at length, in a detailed affidavit submitted in support of the Notice of Change of Judge filed in *Owens*. *See* RJN Ex. 105 at pp. 17-37. The State Bar has challenged none of the facts in that affidavit.

By fully disclosing the true facts on which his statements were based, Respondent offered opinions which were fully protected by the First Amendment and the Arizona constitution. Opinions cannot be false, because "Under the First Amendment there is no such thing as a false idea." *Green*, 11 P.3d at 1084 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)).

The final point worth mentioning is this – the bar repeatedly accuses Respondent of violating ER 4.4(a) by using means that had no substantial purpose other than to embarrass, delay or burden another person, ER 8.4(d) by engaging in conduct prejudicial to the

administration of justice, and Supreme Court Rule 41(b)(7) (prohibiting "unprofessional" conduct).. As applied to Respondent's speech and petitioning conduct, those rules are unconstitutional as-applied both for reasons of vagueness and overbreadth, because they seek to unnecessarily punish substantial portions of protected speech.

As the U.S. Supreme Court held in both *Bates v. State Bar of Arizona* and *Gentile v. State Bar of Nevada*, ethical rules cannot be applied in a manner that violates the First Amendment, nor can vague/overbroad rules withstand First Amendment scrutiny.. As for speech that may "embarrass" other person, the Supreme Court has spoken clearly: "Speech does not lose its protected character ... simply because it may embarrass others or coerce them into action." *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 910, 102 S.Ct. 3409, 3424, 73 L.Ed.2d 1215 (1982); *see also FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 3038, 57 L.Ed.2d 1073 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.")

IV. CONCLUSION

For the reasons stated above, this Court must dismiss the Amended Complaint in its entirety pursuant to A.R.S. § 12–751. In the alternative, the Court must grant summary judgment in favor of Respondent as to all claims pursuant to Ariz. R. Civ. P. 56.

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