OFFICE OF THE PRESIDING DISCIPLINARY JUDGE
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C.LOPEZ
DISCIPLINARY CLERK

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** **RESPONDENT'S BRIEFING RE: MOTION TO DISMISS**

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I. INTRODUCTION

On April 30, 2026, this Court asked the parties to brief the issue of "whether the Court's supremacy precludes [A.R.S. § 12–751's] application in discipline proceedings." This pleading provides Respondent's position on this issue.

To begin, the real concern here does not appear to be "supremacy," but rather *separation of powers*. To rephrase the question: when the Arizona Legislature amended A.R.S. § 12–751 in 2022, did this usurp the Supreme Court's *exclusive* authority to establish procedural rules for bar cases? That is a separation of powers issue, not a supremacy concern. However, supremacy as a separate issue is discussed below.

As explained below, A.R.S. § 12–751 does not violate the separation or "distribution" of powers clause in Article III of the Arizona Constitution. That exact legal issue was recently resolved in *State v. Koert*, a case Respondent mentioned on pages 2–3 of his Reply In Support of Motion for Leave to Exceed Page Limits.[1] In *Koert*, the Superior Court found A.R.S. § 12–751 was constitutional and did not violate "our Supreme Court's procedural rulemaking authority …." Because that ruling is correct, supported by other authority (including from the Supreme Court), this Court must reach the same conclusion.

[1] Available at: [redacted]

II. PREFATORY COMMENT RE: SUPREMACY

Before addressing the Court's specific legal question about the anti-SLAPP law, an important preliminary comment must be made. In this Court's order, the PDJ repeated a line mentioned in multiple prior pleadings/orders: "that the Oath and Creed are not aspirational but enforceable …." It appears the PDJ cites this line as support for the idea that the Arizona Supreme Court holds unlimited final and supreme authority to adopt *any* rules it desires, and that the PDJ may (indeed must) enforce those rules as-written.

That view is incorrect as a matter of law. The PDJ's view is not wrong because it is *inaccurate*, but rather because it is *incomplete*.

The PDJ is right about one thing – the Arizona Supreme Court has admonished lawyers that the Rules of Professional Conduct and the lawyer's Oath and Creed are "not aspirational." Fair enough. But that is not the end of the analysis. The Arizona Supreme Court is not the final, nor is it the supreme, arbiter of the law.

The supreme law of the land is not Arizona law, nor the pronouncements of the Arizona Supreme Court; the Alpha and the Omega in a constitutional republic is the *Constitution.* The supreme law of the land is the United States Constitution, because it says so (with odd capitalization from 250 years ago): "the Laws of the United States ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The role of the Supremacy Clause is well-settled; "Under the Supremacy Clause of the Federal Constitution, when a state law conflicts with a properly enacted federal law, the state law is preempted." *Varela v. FCA US, LLC*, 505 P.3d 244, 250 (Ariz. 2022).

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Here is where the concept of "supremacy" comes into play. The United States Supreme Court has spoken clearly about the limits imposed on the states by the supremacy clause: "Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991). Period.

Thus, while the Arizona Supreme Court has correctly noted the ethical rules are "not aspirational," the Court was certainly not speaking as if they believed that there was no supremacy clause, nor that their own actions were not constrained by both the Constitution of the State of Arizona and the Constitution of the United States. The Constitutions are themselves not merely aspirational, and the U.S. Supreme Court's decisions in *Gentile* and *Chiles v. Salazar*, 607 U.S. ____, 2026 WL 1433456 (2026) are controlling. Even the Supreme Court of Arizona, if it were to seek to find a way to overcome *Gentile* and *Salazar*, it would realize that it had no avenue to travel that could lead around those decisions. *See National Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2663 (2025) (mem.) (Gorsuch, J., concurring in part and dissenting in part) ("Lower court judges may sometimes disagree with this Court's decisions, but they are never free to defy them.").

The complete and accurate legal rule is as explained by the U.S. Supreme Court in *Gentile* is this: no matter what ethical rules the Arizona Supreme Court adopts, those rules "cannot punish activity protected by the First Amendment." Thus, while none of the ethical rules are aspirational in a general sense, the reach of those rules (and this Court's application of them) is *always* strictly limited by the First Amendment, and by binding decisions from the United States Supreme Court.

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Having said that, this response will address the PDJ's specific question concerning the legality of the anti-SLAPP law.

III. DISCUSSION

a. Separation of Powers – General Rules

Although the PDJ referred to the issue of "supremacy" (which *does* play a role in this case for the reasons explained above), the question concerning A.R.S. § 12–751 does not implicate the supremacy clause. The question involves separation of powers:

> The Arizona Constitution identifies the three branches of government—the legislative, executive, and judicial—and provides that they "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. III. Among the powers ascribed to the supreme court is the "[p]ower to make rules relative to all **procedural matters** in any court." Ariz. Const. art. VI, § 5(5) … . Our supreme court clarified … however, that *the authority to promulgate procedural rules does not belong exclusively to the supreme court*; rather, "it is more accurate to say that the **legislature and [the supreme court] both have rulemaking power,** but that in the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails."

Lear v. Fields, 226 Ariz. 226, 229–30, 245 P.3d 911, 914–15 (Ariz.App. 2011) (emphasis added) (cleaned up) (citing/quoting *Seisinger v. Siebel*, 220 Ariz. 85, ¶ 7, 203 P.3d 483, 486 (Ariz. 2009); *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590, 691 P.2d 678, 681 (Ariz. 1984)).

The legislative branch *makes law*. The executive branch *enforces* the law. The judicial branch *interprets* the law. The Arizona constitution mandates that each branch is generally "separate" from the others; i.e., each is forbidden from exercising (or "usurping") the powers of any other branch per Article III of the Arizona Constitution, but with some allowable overlap (i.e., courts certainly play a role in *enforcing* laws).

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Under Article III, the Arizona Supreme Court cannot *create* new substantive laws, because that is the Legislature's role. However, the Court *can* adopt **procedural rules**; i.e., what font colors are permitted, how long a brief may be, and so forth.

These rules are simple and clear enough, BUT with at least two important caveats – first, the Legislature can **always** create/change **substantive law** (since that is *not* a power held by the Supreme Court). Second, the Legislature can also create procedural rules for the courts without creating a separation of powers problem, as long the Legislature's rules do not directly *conflict* with any existing Supreme Court rule. *See State v. Brearcliffe*, 254 Ariz. 579, 584–85 (Ariz. 2023).

Brearcliffe is illustrative. That case involved an Arizona statute, A.R.S. § 13–4033(C), created by the Legislature, which prohibited criminal fugitives from appealing convictions if they fled the state. *See Brearcliffe*, 254 Ariz. at 581. The defendant in *Brearcliffe* was convicted and fled to California where he was later arrested. He attempted to appeal, but the State moved to dismiss, claiming A.R.S. § 13–4033(C) barred the appeal. In response, the defendant argued: "§ 13-4033(C) is unconstitutional because it is a procedural law that usurps this [Supreme] Court's rulemaking authority." 254 Ariz. at 584, ¶ 20. That is the same separation of powers concern the PDJ raised here regarding the anti-SLAPP law.

The Supreme Court rejected that argument, noting, "The legislature may properly enact statutory procedures that supplement, rather than conflict with, rules this Court has promulgated …." 254 Ariz. at 584–84 (emphasis added), The Court found A.R.S. § 13–4033(C) did not *conflict* with any existing Rule of Criminal Procedure; it only *supplemented* the rules (by adding a rule where the Supreme Court had not yet spoken).

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As such, the *Brearcliffe* Court held the law was constitutional. This was true even though the law was procedural in nature and even though it was created by the Legislature. The Court held the law did not usurp its rule-making authority and was thus valid. *See id*.

The holding of *Brearcliffe* is simple—the Arizona Supreme Court does not possess *exclusive* authority to create procedural rules. As the Court itself explained, the Legislature may also create rules for the courts, provided the Legislature's rule does not directly conflict with any existing Court-created rule. Only when a direct conflict arises is there any need to consider separation of powers.

That is the case here. Nothing in A.R.S. § 12–751 *conflicts* with any procedural rule applicable to this proceeding; it merely supplements the rules. Supreme Court Rule 48 adopts *some* Civil Procedure Rules for use in discipline cases. But nothing in Supreme Court Rule 48 *prohibits* the application of any substantive Arizona statutory law.

That makes sense given that *multiple* Arizona statutes can and do apply in discipline cases. As just two examples, clearly A.R.S. § 13–2702 (prohibiting perjury) applies here, as does A.R.S. § 12–353 (making an award of attorney's fees mandatory for a prevailing respondent in a bar discipline proceeding). Supreme Court Rule 48 does not *exclude* those statutes from applying in discipline matters. If it did, then would we say perjury or fee shifting no longer apply unless the Supreme Court of Arizona makes its own rules pertaining to those subjects? Of course not. By the same logic, the anti-SLAPP law can also apply here without running afoul of separation of powers.

A.R.S. § 12–751 does not *conflict* with any existing procedural rule; it merely *supplements* those rules (exactly like A.R.S. § 13–4033(C) as approved in *Brearcliffe*). It is therefore constitutional and valid and must be applied as valid law.

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b. A.R.S. § 12–751 Has Previously Been Held Constitutional

Although A.R.S. § 12–751 is relatively new (having been amended in late 2022), the law has been applied without much difficulty, at least in one recent civil case. *See Lucky's, LLC v. Berman*, 2025 WL 2218597 (Ariz.App. 2025) (discussing and applying anti-SLAPP law in civil defamation case). The Court of Appeals did not consider whether the anti-SLAPP law was *constitutional* in *Lucky's*, because that argument was never raised by any party – probably because the answer was obvious.

However, if the anti-SLAPP law was *not* constitutional (because it infringed the Supreme Court's rule-making authority), the Court of Appeals could not have reached the conclusion it did in *Lucky's*. Indeed, if the Arizona Supreme Court really has sole and exclusive authority to establish all rules that govern legal proceedings, the anti-SLAPP law would be invalid in *every case*, not just bar discipline cases. Thus, the fact that the Court of Appeals *presumed* the legal validity of A.R.S. § 12–751 weighs heavily in favor of this Court reaching the same conclusion.

As Respondent's anti-SLAPP motion noted, other states with similar laws, such as Texas, have held they apply in bar 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]…"); *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.")

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Even more helpful is a case Respondent mentioned just weeks ago – *State v. Koert*, Maricopa County Superior Court Case No. LC2025-000363. Pursuant to Ariz. Sup. Ct. R. 111(c), a copy of is attached as Exhibit A, and is available online here: [redacted]

Koert is helpful because the case involved the same issue raised by the PDJ – whether A.R.S. § 12–751 invades the Arizona Supreme Court's rulemaking authority. The Superior Court easily determined the answer to that question was no.

The defendant in *Koert* was arrested and charged with trespassing after she attended a protest at Arizona State University. She then invoked A.R.S. § 12–751, claiming the charges were "substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right" (meaning her First Amendment right to protest). The trial court (a justice court) found the defendant made a *prima facie* showing as required by the law, and the court set the matter for an evidentiary hearing.

The Maricopa County Attorney then filed a special action in the Superior Court, arguing among other things, that A.R.S. § 12–751 was unconstitutional because it violated the Supreme Court's *exclusive* right to adopt procedural rules. The Superior Court rejected that argument:

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

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impermissible. This is a substantive rather than procedural law and therefore this statute is not an unconstitutional infringement on the Supreme Court's procedural rulemaking authority.

Koert, LC2025-000363 at 4 (emphasis added).

Of course, as noted above, the Arizona Supreme Court *does not* possess exclusive authority to create procedural rules. As long as a legislatively-passed procedural rule does not conflict with any existing rule adopted by the Supreme Court and does not abrogate any existing rule, the legislature is free to adopt any rules it deems necessary. In that case, if the Supreme Court deems the Legislature's rule to be bad policy, the Court can simply reject it (assuming the rule is *procedural*, since the Supreme Court has no authority to create or change substantive law for policy reasons).

IV. CONCLUSION

A.R.S. § 12–751 is plainly constitutional. It was passed by the Arizona legislature for the express purpose of protecting the First Amendment rights of all Arizonans, including lawyers. The law prohibits state actors from retaliating against any person for exercising constitutionally protected rights, and it requires such claims to be resolved in an expeditious manner. For those reasons, the Court should proceed with addressing Respondent's anti-SLAPP motion on the merits as soon as possible.

Submitted May 4, 2026.

/s/ Marc J. Randazza
Marc J. Randazza #027861
RANDAZZA LEGAL GROUP, PLLC
[redacted]
Las Vegas, Nevada 89117
Tel: [redacted]
Email: [redacted]

Attorneys for Respondent
David S. Gingras

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CERTIFICATE OF SERVICE

Original electronically filed via email to [redacted] on May 4, 2026 with:

Disciplinary Clerk of the
Office of the Presiding Disciplinary Judge
Supreme Court of Arizona
[redacted]
Phoenix, AZ 85007

Mr. James D. Lee, Esq.
Craig Henley, Esq.
State Bar of Arizona
c/o [redacted]
[redacted]
Phoenix, AZ 85016-6266

/s/ David S. Gingras

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Exhibit A

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

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2025-000363-001 DT 04/14/2026

HONORABLE KEVIN B. WEIN

CLERK OF THE COURT
A. Rowe
Deputy

STATE OF ARIZONA

v.

MICHAELA JOY KOERT (001)

PHILIP DANIEL GARROW

ALEXANDER R ARPAD

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

UNDER ADVISEMENT RULING

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

Background and Procedural History

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

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

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

Analysis

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

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

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

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

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

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

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

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

A. The Statute Does Not Infringe on Executive Authority

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

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

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

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

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

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

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

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

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

D. The Statute Is Neither Vague nor Overbroad

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

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

Conclusion

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

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