

ARIZONA SUPREME COURT

David S. Gingras,

Petitioner,

v.

State Bar of Arizona,

Respondent.

Arizona Supreme Court

No.: _____

Office of the Presiding Disciplinary Judge

No. PDJ2026-9010

PETITION FOR SPECIAL ACTION (APPELLATE)

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INTRODUCTION

This case presents an important constitutional question: May Arizona discipline an attorney for truthful public criticism of a judge on the theory that the First Amendment does not protect lawyers in the same manner as other citizens?

The Presiding Disciplinary Judge answered that question yes. Accepting the State Bar's arguments, the court held the protections of the United States and Arizona Constitutions yield to the Arizona Rules of Professional Conduct when the speaker is a licensed attorney.

That conclusion cannot be reconciled with settled constitutional law. For more than fifty years, the United States Supreme Court has consistently held lawyers do not surrender their First Amendment rights upon admission to the bar, subject only to a handful of narrowly defined exceptions that have no application here. The Bar's position asks this Court to recognize a new class of citizens who enjoy less First Amendment protection solely because they are licensed to practice law. No decision of the United States Supreme Court nor the Arizona Supreme Court supports such a proposition. The decision below threatens not merely Petitioner's constitutional rights, but the free speech rights of every attorney in Arizona.

This Court should not permit that result. As Justice Gorsuch recently observed, "Lower court judges may sometimes disagree with this Court's decisions,

but they are never free to defy them.” *National Inst. of Health v. American Public Health Ass’n*, 145 S. Ct. 2658, 2663 (2025) (mem.) (Gorsuch, J., concurring in part).

JURISDICTION

This Court has jurisdiction to hear this appellate special action pursuant to Article 6 of the Arizona Constitution and Rule 4 of the Arizona Rules of Procedure for Special Actions.

Special action jurisdiction is especially appropriate here because:

1. The challenged orders are interlocutory but conclusively resolve important issues of Constitutional law which this Court has held warrant “enhanced” appellate review; “enhanced appellate review ... in cases raising First Amendment issues provides assurance that the foregoing determinations will be made in a manner so as not to constitute a forbidden intrusion of the field of free expression.” *Turner v. Devlin*, 174 Ariz. 201, 204, 848 P.2d 286, 289 (1993) (cleaned up) (quoting *Yetman v. English*, 168 Ariz. 71, 76, 811 P.2d 323, 328 (1991)).
2. The Presiding Disciplinary Judge expressly recognized this case presents issues of first impression, further confirming that special action review is appropriate.
3. This case raises legal issues of statewide importance. *See Piner v. Superior Court*, 192 Ariz. 182, 185 ¶ 10 (1998).
4. The resolution of the legal issues involved will materially advance the efficient management of the case.
5. Petitioner has no equally plain, speedy, or adequate remedy by appeal because: “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

STATEMENT OF ISSUES

1. Must attorneys surrender their First Amendment and Arizona free speech rights by becoming members of the Arizona Bar?
2. Do Arizona attorneys retain the same First Amendment and Arizona constitutional protections as other citizens and, if so, did the State Bar establish that Petitioner's speech falls within a recognized exception permitting discipline?
3. Did the Presiding Disciplinary Judge err by granting judgment on the pleadings when the material facts were disputed and by applying an erroneous legal conclusion that the First Amendment and Arizona Constitutional protections for speech do *not* apply to lawyers?
4. Does Arizona's newly-expanded anti-SLAPP law, A.R.S. § 12-751, apply in attorney discipline proceedings and, if so, does it "unduly hamper" this Court's authority to regulate the practice of law in Arizona and therefore violate separation of powers principals?

STATEMENT OF FACTS

This attorney discipline proceeding arises from Respondent State Bar of Arizona's attempt to discipline Petitioner David S. Gingras for, among other things, his truthful public criticism of a superior court judge, his petitioning activities, and other speech relating to matters of substantial public concern. Mr. Gingras has been licensed to practice law in Arizona since 2004.

The disciplinary charges, *see* [State Bar's Amended Complaint; Petitioner's Appendix \("Pet. Appx."\) Exhibit 1](#), stem from Petitioner's representation of a party in *Laura Owens v. Clayton Echard*, a highly publicized Maricopa County family court proceeding. Because the case involved a former TV star of *The Bachelor* and extraordinary allegations of fabricated pregnancy, it attracted widespread public attention, extensive social media coverage, and live-streamed court proceedings.

Following trial, the superior court ruled against Ms. Owens, awarded approximately \$150,000 in attorneys' fees against her, and referred the matter for criminal investigation. Mr. Gingras was not accused of participating in or having knowledge of any alleged criminal conduct.

During and after the litigation, Mr. Gingras engaged in several forms of speech and petitioning activity that later became the subject of disciplinary charges. This included criticism of the trial judge, communications with law enforcement, and private communications unrelated to the practice of law. The State Bar alleges

these statements violated the Rules of Professional Conduct. Mr. Gingras maintains his statements were either factually true, constitutionally protected opinion, or otherwise protected by the First Amendment, the Arizona Constitution, and Arizona's anti-SLAPP statute. See [Gingras' Amended Answer; Pet.Appx. Ex. 2](#).

A principal focus of the disciplinary proceeding concerns Petitioner's public criticism of the trial judge in *Owens*. That criticism arose after Petitioner discovered information suggesting the trial court relied upon facts never introduced into evidence and considered material originating outside the trial record. Based upon the trial transcript and other evidence, Petitioner filed a verified Notice of Change of Judge for Cause, [Pet.Appx. Ex. 17](#), supported by affidavit, [Pet.Appx. Ex. 18](#), setting forth the factual basis for his concerns. The request was denied, [Pet.Appx. Ex. 19](#), but the allegations were not adjudicated to be false.

After Petitioner filed his Answer asserting that the challenged speech was protected by the United States and Arizona Constitutions, the State Bar moved for partial judgment on the pleadings. [Pet.Appx. Ex. 3](#). The Bar acknowledged factual disputes existed but argued they were legally irrelevant because constitutional free speech protections are not a valid defense in attorney disciplinary proceedings. Petitioner filed a lengthy brief opposing the motion. [Pet.Appx. Ex. 4](#).

The Presiding Disciplinary Judge granted the Bar's motion in part, holding Petitioner's constitutional defenses failed as a matter of law. [Pet.Appx. Ex. 11](#).

Petitioner later moved to dismiss under A.R.S. § 12–751. [Pet.Appx. Ex 8](#). The court denied that motion, concluding constitutional protections for speech did not bar attorney discipline and further concluding Arizona’s anti-SLAPP statute could not be applied in disciplinary proceedings because it would unduly interfere with this Court's authority to regulate the practice of law. [Pet.Appx. Ex. 16](#). The court expressly recognized that its interpretation of Arizona’s anti-SLAPP statute presented an issue of first impression that could warrant special action review.

Petitioner now seeks special action relief because the rulings below hold, as a matter of law, that the First Amendment and Arizona Constitution do not protect the speech at issue and because those rulings present recurring constitutional questions of statewide importance.

ARGUMENT

I. Special Action Review Is Particularly Appropriate in Free Speech Cases Like This One

This Court has repeatedly recognized interlocutory review is especially appropriate where a case presents substantial First Amendment issues. In *Citizen Publishing Co. v. Miller*, this Court acknowledged its general policy of declining special action jurisdiction to review orders denying motions to dismiss. Nevertheless, it explained that “there is good reason to depart from this general rule ... when a suit raises serious First Amendment concerns.” *Citizen Publ’g.*, 210 Ariz. 513, 516 (Ariz. 2005). This Court further observed:

In cases in which an appellate court can determine from the pleadings a case-dispositive First Amendment defense, special action review of a trial court’s refusal to grant a motion to dismiss may be appropriate. Such a procedure “relieve[s] the parties and the court of a prolonged, costly, and inevitably futile trial” and protects First Amendment rights.

Id. (quoting *Scottsdale Pub., Inc. v. Superior Court*, 159 Ariz. 72, 74 (App. 1988)).

This case presents an even stronger basis for interlocutory review. The Presiding Disciplinary Judge has already resolved the controlling constitutional issue as a matter of law, holding Petitioner’s First Amendment and Arizona constitutional defenses fail even if his speech was entirely truthful. Based on that holding, the parties will be required to litigate the remainder of this disciplinary proceeding under a legal standard Petitioner contends is fundamentally incorrect and inconsistent with controlling state and federal constitutional precedent.

Immediate review is therefore necessary. If the ruling below is erroneous, delaying review will require the parties and the disciplinary judge to expend substantial time and resources litigating aggravation, mitigation, and other issues that may ultimately prove unnecessary. More importantly, the PDJ's ruling forecloses factual development on issues directly bearing on Petitioner's constitutional defenses, including the truth of the challenged statements and the factual basis supporting them.

This is precisely the circumstance *Citizen Publishing* contemplated. The controlling issue is a purely legal one: whether attorneys retain the same constitutional protections for speech as every other citizen, absent a *recognized* exception. Resolving that question now will protect First Amendment rights, promote judicial economy, and avoid the needless expenditure of resources that would result from completing a disciplinary proceeding conducted under an erroneous constitutional standard. This Court should therefore accept special action jurisdiction and grant relief.

II. The PDJ Erred by Granting Judgment on the Pleadings

The Presiding Disciplinary Judge granted the Bar's motion for judgment on the pleadings based upon a single flawed legal premise: that Petitioner's First Amendment and Arizona constitutional defenses failed as a matter of law because attorneys do not enjoy the same constitutional protection for speech as other citizens.

That legal premise is contrary to controlling authority from the United States Supreme Court and cannot support judgment on the pleadings.

Moreover, even apart from that constitutional error, judgment on the pleadings was independently improper because Petitioner’s Answer denied essential factual allegations and asserted legally cognizable defenses. Under settled Rule 12(c) principles, those disputed factual issues required denial of the Bar’s motion.

a. The Bar Was Not Entitled to Judgment On The Pleadings

A motion for judgment on the pleadings tests only the legal sufficiency of the pleadings, not the evidence. The court must accept the non-moving party’s well-pleaded factual allegations as true, construe all reasonable inferences in that party’s favor, and deny the motion whenever material factual disputes exist or the Answer asserts a legally sufficient defense. *See Delta Zee Sols. LLC v. Britannia Tucson LLC*, 2026 WL 71411, *3 (D.Ariz. 2026) (citing extensive authority).

Those standards were not satisfied here.

Petitioner’s Answer admitted making certain statements concerning the trial judge in *Owens*, but expressly denied that any statements were false or made with reckless disregard for the truth.¹ The Answer further alleged that the challenged

¹ “Reckless disregard is shown if the attorney had no reasonable factual basis for making the statements, considering their nature and the context in which they were made.” *Matter of Parrish*, 5 Cal. State Bar Ct. Rptr. 370, 2015 WL 514334, *4 (Cal. Bar Ct. 2015) (cleaned up) citing/quoting *Standing Committee v. Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995)).

statements were either factually true, constitutionally protected opinion, or made with a good-faith factual basis to believe they were true, formed after a reasonable investigation. Those allegations alone created disputed issues of material fact and asserted facially valid constitutional defenses. Accepting those allegations as true—as Rule 12(c) required—the Bar was not entitled to judgment as a matter of law; “a plaintiff’s motion for judgment on the pleadings should be denied where issues of fact are properly raised by the answer.” *Bank of Am., N.A. v. Allen*, 2015 WL 6696911, *2 (Ariz. App. 2015) (quoting *Dons Club v. Anderson*, 83 Ariz. 94, 98 (1957)).

The PDJ nevertheless granted the motion because she concluded those factual disputes were legally irrelevant because, in short, truth is *not* a defense. According to the PDJ, even entirely truthful criticism of a judge may be disciplined because attorneys do not possess the same constitutional protections for speech as other citizens. That legal conclusion is incorrect.

b. The PDJ’s Constitutional Analysis Conflicts with Controlling Supreme Court Precedent

The State Bar’s primary position is that attorneys surrender their First Amendment rights upon admission to the bar. Over the last 50 years, the United States Supreme Court has never approved that argument. To the contrary, each time the same or similar issue has arisen, the Supreme Court has rejected it.

In *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), the Court held Arizona could not condition admission to the practice of law upon surrendering First Amendment freedoms. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court likewise recognized that attorney disciplinary rules remain subject to the First Amendment. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Supreme Court rejected the argument that attorney speech receives diminished constitutional protection simply because the speaker is a lawyer.

The *Gentile* Court explained:

We have not in recent years accepted our colleagues’ apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent [State Bar of Nevada] suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.

Gentile, 501 U.S. at 1054.

The *Gentile* Court further explained that the limited attorney-speech cases applying different constitutional standards involved only two narrow categories: 1.) commercial advertising by attorneys and, 2.) restrictions on information obtained through the discovery process. *See Gentile*, 501 U.S. at 1051–52. Neither category was implicated in *Gentile*, so the Court rejected the Nevada Bar’s position and held the lawyer’s speech was entitled to full constitutional protection, because: “Wide-open balancing of interests is not appropriate in this context.” *Id.*

The same rule applies here. Petitioner’s speech involved public criticism of judicial conduct and other matters of public concern—not attorney advertising and not confidential litigation information. Consequently, the ordinary protections of the First Amendment apply, just like they did in *Gentile*.

Indeed, courts throughout the country recognize the same principle: “the accepted legal principle [is] that 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 Green*, 11 P.3d 1078, 1083 (Colo. 2000) (emphasis added); *Standing Committee v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995) (agreeing, “Attorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context. To begin with, 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.”) (emphasis added); *In re Olin*, 2024 WL 6881775, *9 (Cal. Bar Ct. 2024) (explaining, “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.”) (emphasis added); *Matter of Anderson*, 3 Cal. State Bar Ct. Rptr. 775, 781, 1997 WL 701350 (Review Dept. 1997) (recognizing, “Like all other citizens,

attorneys are entitled to the protection of the First Amendment, even as participants in the administration of justice.”) (emphasis added) (citing authority).

Against this vast weight of authority, the State Bar argued, and the PDJ agreed, that lawyers do *not* have the same (or any) free speech protection. According to the Bar, this conclusion was implicitly (or explicitly) supported by *In re: Matter of James Lawrence Riley*, 142 Ariz. 604, 691 P.2d 695 (Ariz. 1984). That argument was incorrect. (And if it was correct, this court should revisit that erroneous rule).

Riley involved alleged misconduct by a former prosecutor who later was elected judge involving comments he made during his campaign. In discussing those allegations, this Court cited a 1957 case from Missouri—*In re Woodward*, 300 S.W.2d 385 (Mo. 1957)—for the premise: “a lawyer is held to a narrower standard of free speech than a non-lawyer when discussing the judiciary.” This Court further quoted that 1957 Missouri decision for the idea that:

A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics; and if he wishes to remain a member of the bar he will conduct himself in accordance therewith.

Riley, 142 Ariz at 612 (quoting *Woodward*, 300 S.W.2d at 393–94).

These passing comments from *Riley* and *Woodward* were harshly criticized in a dissent by the Chief Justice who warned they were inconsistent with both the First Amendment and the Arizona Constitution:

The broad, sweeping generalities of these statements casts serious doubt on their constitutionality in view of the First Amendment to the United States Constitution and Section 6, Article II of the Arizona Constitution. If the court’s opinion had limited itself to statements by the lawyer candidate which were false, misleading, or concerning pending litigation, I could have joined in that portion of the opinion. The holding that a lawyer as a candidate for judge may not criticize the decisions of a sitting judge, however, is neither in harmony with the First Amendment nor with the necessities of a free society.

Riley, 142 Ariz at 618 (Holohan, C.J., *dissenting*) (emphasis added).

Chief Justice Holohan’s dissent also aptly noted: “Under the freedom guaranteed by the Constitution, we must begin with the proposition that “[l]ike other citizens, attorneys are entitled to the full protection of the First Amendment, even as participants in the administration of justice.” *Id.* (quoting *In re Hinds*, 90 N.J. 604, 614, 449 A.2d 483, 489 (N.J. 1982)).

Viewed in context, it is clear the *Riley* Court’s suggestion that: “a lawyer is held to a narrower standard of free speech than a non-lawyer when discussing the judiciary” was clearly incorrect when *Riley* was decided. That conclusion is even less debatable today in light of more recent U.S. Supreme Court authority which directly rejected that holding.

Again, *Riley* relied on a 1957 case—*Woodward*—which pre-dated (by decades) later cases such as *Baird v. State Bar of Arizona* (1971), *Bates v. State Bar of Arizona* (1977), and *Gentile v. State Bar of State Bar of Nevada* (1991). Those more recent decisions from the U.S. Supreme Court firmly reject the concept that

lawyers do not enjoy the same First Amendment rights as non-lawyers. In fact, they say the opposite.

That conclusion was, yet again, reaffirmed earlier this year by *Chiles v. Salazar*. There, the Supreme Court rejected the Bar’s argument that licensed professionals do not have the same free speech rights as others:

The Constitution does not protect the right of some to speak freely; it protects the right of all. It safeguards not only popular ideas; it secures, even and especially, the right to voice dissenting views. Consistent with these principles our precedents have expressly rejected the ... notion that ‘professional speech’ represents some ‘separate category of speech’ subject to ‘diminished constitutional protection.’

Chiles v. Salazar, 607 U.S. ___, 146 S.Ct. 1010, 1024, 224 L.Ed.2d 446 (Mar. 31, 2026) (cleaned up) (quoting *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755, 767–769, 138 S.Ct. 2361, 201 L.Ed.2d 835 (2018) (NIFLA)).

In its dispositive motion, the Bar never discussed any of this authority, nor did it explain why this case should be governed by 1957 legal standards rather than more recent Arizona and U.S. Supreme Court authority.

In short, the PDJ misunderstood and/or misapplied *Gentile*. Accurately stated, *Gentile* stands for the *opposite* premise cited by the PDJ—attorney speech is **not subject** to greater regulation than speech by others unless the speech falls into one of two categories: “either commercial speech by attorneys or restrictions upon release of information that the attorney could gain only by use of the court’s discovery process.” Neither of those categories applied here, so Mr. Gingras’s

speech was (like in *Gentile*) entitled to full Constitutional protection. The PDJ’s contrary holding misapplied *Gentile* and must be reversed.

c. Because the PDJ Applied an Incorrect Constitutional Standard, Judgment on the Pleadings Must Be Reversed

Once the correct constitutional standard is applied—that lawyers do have the same free speech rights as others—the Bar’s argument fails. Petitioner’s Answer disputes the truth or falsity of the challenged statements, alleges they were either true or constitutionally protected opinion, and raises additional constitutional defenses under both the United States and Arizona Constitutions. Those allegations created factual disputes that could not be resolved on the pleadings.

By holding otherwise, the PDJ treated the First Amendment and Article 2 of the Arizona Constitution as *per se* inapplicable to attorney criticism of judges, even when the criticism was truthful. That conclusion conflicts with controlling Supreme Court precedent and improperly deprived Petitioner of the opportunity to develop the factual record necessary to litigate his constitutional defenses. The order granting judgment on the pleadings should therefore be reversed.

III. Attorneys Do Not Surrender Their First Amendment or Arizona Constitutional Free Speech Rights Upon Admission to the Bar

Here, the State Bar argued, and the Presiding Disciplinary Judge agreed, that an attorney’s admission to the practice of law constitutes an agreement to accept

restrictions on constitutional speech rights that would not apply to other citizens.

The PDJ made that point clear:

A person is not required to practice law in Arizona. However, once one **elects** to do so, upon admission, the person has agreed upon these directives [in the Rules of Professional Conduct] and restrictions on one's general personal rights.

Pet. Appx., Ex. 16 at 10 (emphasis in original).

That proposition cannot be reconciled with controlling precedent. To be sure, Arizona possesses broad authority to regulate the practice of law and to impose lawful ethical obligations upon attorneys. But that authority is not unlimited. Like every exercise of state power, attorney discipline remains subject to the Arizona Constitution and the federal Constitution. *See Baird*, 401 U.S. at 6. The Rules of Professional Conduct do not supersede constitutional guarantees.

Rule 41 recognizes as much. Beyond creating ethical obligations, Rule 41 also requires every lawyer to: “[s]upport the Constitution and the laws of the United States and the State of Arizona.” Ariz. R. Sup. Ct. 41(b)(2). It would be an odd construction of that rule to conclude it simultaneously requires lawyers to *surrender* the very constitutional rights they have sworn to *support*.

The United States Supreme Court has also rejected that proposition. In *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), Arizona refused to admit an otherwise qualified applicant because she declined to answer questions concerning her political beliefs and associations. The Supreme Court reversed, holding that although Arizona

may regulate admission to the legal profession, that authority is constrained by the First Amendment:

The First Amendment’s protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs. Similarly, when a State attempts to make inquiries about a person’s beliefs or associations, its power is limited by the First Amendment.

Baird, 401 U.S. at 6 (emphasis added) (citing extensive authority).

Six years later, the Supreme Court again reversed this Court in *Bates v. State Bar of Arizona*, rejecting Arizona’s attempt to enforce attorney disciplinary rules in a manner inconsistent with the First Amendment. In doing so, the Court reminded Arizona that “habit and tradition are not in themselves an adequate answer to a constitutional challenge.” *Bates*, 433 U.S. at 371.

Thus, the State Bar of Arizona has twice attempted to subordinate First Amendment protections to its regulation of the legal profession. Twice, the United States Supreme Court has reversed that effort.

The Supreme Court reaffirmed this principle even more explicitly in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Rejecting the very argument advanced by the State Bar here—that attorneys possess diminished First Amendment rights simply because they are attorneys—the Court stated:

At the very least, our cases recognize that 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. We have not in recent years accepted our colleagues’ apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms.

Gentile, 501 U.S. at 1054 (emphasis added).

That language leaves little room for doubt. Whatever ethical obligations accompany admission to the practice of law, the surrender of First Amendment protections is not among them.

The Supreme Court reiterated the same principle more broadly only months ago. In *Chiles v. Salazar*, the Court again rejected the notion that “professional speech” constitutes a separate category entitled to diminished constitutional protection:

The Constitution does not protect the right of some to speak freely; it protects the right of all. It safeguards not only popular ideas; it secures, even and especially, the right to voice dissenting views. Consistent with these principles our precedents have expressly rejected the ... notion that ‘professional speech’ represents some ‘separate category of speech’ subject to ‘diminished constitutional protection.’

Chiles v. Salazar, 607 U.S. ___, 146 S. Ct. 1010, 1024 (2026) (cleaned up).

The PDJ’s ruling cannot be reconciled with any of these decisions. Rule 41 and the Rules of Professional Conduct must be interpreted consistently with the First Amendment and Article 2, Section 6 of the Arizona Constitution—not as an exception to either. The PDJ committed legal error by ruling otherwise.

IV. The PDJ Erred By Ignoring The Greater Protection Provided By The Arizona Constitution’s “Speak Freely” Clause

As noted above, judgment on the pleadings is improper unless the moving party shows the Answer fails to raise *any* viable defense. Petitioner’s Answer asserted not only a defense under the First Amendment, but also an independent defense under Article II, Section 6 of the Arizona Constitution, commonly known as the “Speak Freely Clause”. The Bar nevertheless sought judgment on the pleadings without ever addressing that constitutional defense, and the PDJ granted the motion without discussing it.

That omission alone requires reversal.

As discussed above, a plaintiff seeking judgment on the pleadings must demonstrate that the defendant’s Answer fails to assert any legally sufficient defense. Here, Petitioner’s Answer expressly invoked both the First Amendment and Article II, Section 6 as constitutional defenses to the disciplinary charges. Unless both defenses failed as a matter of law, judgment on the pleadings was improper.

Arizona’s Speak Freely Clause is not merely a duplicate of the First Amendment. This Court has repeatedly recognized that Article II, Section 6 may provide broader protection for speech than the federal Constitution. *See Mountain States Telephone & Telegraph Co. v. Arizona Corporation Commission*, 160 Ariz. 350, 354–55 (1989); *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557 (1971).

Just a few weeks ago, this Court reaffirmed that the Speak Freely Clause “tolerates no censorship or restraint” on protected speech except as permitted by the Constitution itself and emphasizing Arizona’s longstanding commitment to robust protection of expressive rights. *Ctr. for Arizona Pol’y Inc. v. Arizona Sec’y of State*, No. CV-24-0295-PR, ___ P.3d ___, 2026 WL 1911955, at *11 (Ariz. June 29, 2026) (citing extensive authority).

Whether Article II, Section 6 ultimately affords broader protection than the First Amendment under the particular facts presented here is a question this Court need not resolve at this stage. The dispositive point is narrower. Petitioner’s Answer expressly raised the Arizona Constitution as an independent defense, yet neither the State Bar nor the PDJ analyzed that defense or explained why it failed as a matter of law. The issue was simply not discussed at all.

Accordingly, even if the Court were to conclude that Petitioner’s federal constitutional defense presented a close question, the unresolved defense under Arizona’s Speak Freely Clause independently precluded judgment on the pleadings. The order granting partial judgment on the pleadings therefore should be reversed.

V. The PDJ’s Anti-SLAPP Ruling Must Be Reversed

The PDJ’s order denying Petitioner’s anti-SLAPP motion rests upon the same erroneous constitutional premise discussed throughout this Petition: that lawyers do not have the same (or any) free speech rights as non-lawyers. Having concluded that

attorneys possess diminished First Amendment protection because they are licensed to practice law, the PDJ further concluded that Arizona’s anti-SLAPP statute could not constitutionally apply to attorney disciplinary proceedings because doing so would improperly restrict this Court’s authority to discipline lawyers. Both conclusions are incorrect.

Arizona’s anti-SLAPP statute reflects the Legislature’s determination that meritless governmental proceedings targeting protected speech should be dismissed at the earliest possible stage. *See Lucky’s, LLC v. Berman*, 2025 WL 2218597 (App. 2025) (discussing newly expanded version of A.R.S. § 12–751, and noting, “the expense of defending a meritless ... case can have a chilling effect on First Amendment rights. Courts must therefore act as gatekeepers protecting the right to free speech from encroachment.”) (cleaned up) (quoting *Read v. Phoenix Newspapers, Inc.*, 169 Ariz. 353, 357 (1991); *Sign Here Petitions LLC v. Chavez*, 243 Ariz. 99, ¶ 1 (App. 2017)).

To accomplish that purpose, the Legislature expressly extended the statute beyond civil lawsuits to include “any regulatory or administrative action by a state actor.” A.R.S. § 12-751(J)(1)(a)(iii). Although this new provision has never been interpreted by any Arizona court, the plain language of the statute encompasses attorney disciplinary proceedings brought by the State Bar. Other courts with similar laws agree they apply in attorney 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.”)

The PDJ nevertheless declined to apply the statute, reasoning that it would “unduly hamper” the judiciary’s authority to regulate attorneys. That conclusion misapprehends both the scope of the Legislature’s authority and the strict constitutional limits upon the judiciary’s disciplinary power.

To be sure, this Court possesses exclusive authority over the practice of law in Arizona. But that authority does not exist in constitutional isolation. The Legislature may enact statutes affecting the practice of law and establishing procedures for enforcing rights so long as those statutes do not conflict with procedural rules promulgated by this Court. *See Seisinger v. Siebel*, 220 Ariz. 85, 87, ¶ 8 (2009); *Scheehle v. Justices of the Supreme Court*, 211 Ariz. 282, 289, ¶ 23 (2005); *State v. Brearcliffe*, 254 Ariz. 579, 584–85, ¶¶ 16-18 (2023).

Nothing in Arizona’s anti-SLAPP statute conflicts with any rule governing attorney discipline. Rather, the statute supplements existing procedures by providing an early mechanism for dismissing proceedings that impermissibly burden constitutionally protected speech. Because no conflict exists between A.R.S. § 12–751 and any existing rule governing disciplinary proceedings, the PDJ had no basis for declining to apply the statute.

More fundamentally, however, the PDJ’s separation-of-powers analysis rests upon a flawed premise: it assumed the judiciary possesses inherent authority to discipline attorneys for *constitutionally protected speech* and that the anti-SLAPP statute improperly burdens or limits that authority. But the Constitution defines the outer limits of every branch’s authority, including the judiciary’s.

Put simply, neither this Court nor the State Bar has the power to punish speech protected by the First Amendment or Article II, Section 6 of the Arizona Constitution. *See Gentile*, 501 U.S. at 1054 (“At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment...”) (emphasis added); *see also In re Green*, 11 P.3d at 1083 (“the accepted legal principle [is] that 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, *8 (“Case law acknowledges that disciplinary rules governing the legal profession

cannot punish speech protected by the First Amendment.”) (cleaned up); *Matter of Anderson*, 3 Cal. State Bar Ct. Rptr. 775, 781, 1997 WL 701350 (Review Dept. 1997) (recognizing, “Like all other citizens, attorneys are entitled to the protection of the First Amendment, even as participants in the administration of justice.”) (emphasis added) (citing *In re R.M.J.*, 455 U.S. 191, 199 (1982); *Konigsberg v. State Bar*, 353 U.S. 252, 273 (1957); *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979)).

Because protected speech cannot support discipline, Arizona’s anti-SLAPP statute does not deprive the judiciary of any legitimate or lawful power. It merely provides a procedural mechanism for promptly enforcing constitutional limitations and protections that already exist. As the Supreme Court recognized long ago, “[a] law repugnant to the Constitution is void.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). Thus, any disciplinary rule that seeks to punish constitutionally-protected speech is simply not a valid or enforceable rule. For that reason, since Petitioner’s speech is constitutionally protected, the State Bar lacks authority to discipline Petitioner for that speech regardless of whether dismissal is sought via A.R.S. § 12–751 or any other available means.

Ultimately, the anti-SLAPP issue rises or falls with the constitutional question already before this Court. If attorneys retain the same constitutional protection for

speech as other citizens, the PDJ’s rationale for refusing to apply Arizona’s anti-SLAPP statute necessarily fails as well.

Because lawyers are entitled to the same free speech protections as non-lawyers, the anti-SLAPP law does nothing more than offer an additional appropriate tool for dismissing claims which lack legal merit.² The order denying Petitioner’s anti-SLAPP motion therefore should be reversed.

VI. Upon Granting Relief, This Matter Should Be Reassigned

If this Court accepts jurisdiction and grants relief, further proceedings will be required below. Under the unusual circumstances presented here, the Court should order that those proceedings be assigned to a different judge.

In any ordinary civil action, when an appellate decision requires a new trial on one or more issues, the successful appellant’s right to a change of judge is renewed. *See* Ariz. R. Civ. P. 42.1(e). Although that rule has not been incorporated into the attorney-disciplinary rules, the policy underlying it remains instructive.

In *King v. Superior Court*, this Court explained that after reversal and remand for a new trial, “it is always possible that the trial judge may subconsciously resent

² Supreme Court Rule 49(b) already permits the dismissal of meritless claims through a variety of dispositive pleadings including a Rule 12(b)(6) or 12(c) motion, or a Motion for Summary Judgment under Civil Rule 56. A.R.S. § 12–751 simply offers an additional method for reaching the same result in a clear and simple manner. The anti-SLAPP law thus operates entirely in harmony, not in conflict, with this Court’s existing rules.

the lawyer or defendant who got the judgment reversed.” 108 Ariz. 492, 493 (Ariz. 1972). The Court concluded “[t]he mere possibility of such a thought in the back of a trial judge’s mind means that a new judge should be found.” *Id.* That is, of course, the reason why litigants in civil proceedings are generally entitled to an *automatic* change of judge following reversal and remand.

Although Civil Procedure Rule 42.1 does not apply here, appellate courts always possess inherent authority to direct reassignment on remand when necessary to preserve both the reality and appearance of fairness. *See United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 789 (9th Cir. 1986). Relevant considerations include whether the original judge could reasonably be expected to have substantial difficulty setting aside previously expressed views or findings determined to be erroneous, whether reassignment would preserve the appearance of justice, and whether it would cause waste or duplication disproportionate to that benefit. *See United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979).

Those considerations favor reassignment here. The PDJ has twice expressly rejected Petitioner’s constitutional arguments and held attorneys possess diminished protection for speech simply because they are licensed to practice law. If this Court grants relief, it will necessarily reject the legal premise upon which those rulings rested. Reassignment would permit the remaining proceedings to occur without

requiring the same judicial officer to accept a constitutional position she has previously rejected and reaffirmed.

Reassignment also would impose no meaningful duplication of efforts. The Bar moved for judgment on the pleadings only three days after Petitioner filed his Answer. The PDJ resolved the principal liability issues before discovery, an evidentiary hearing, or substantial factual development occurred. A successor judge therefore would not be required to repeat a trial, reassess witness credibility, or master an extensive evidentiary record since none of things occurred previously.

Petitioner does not contend that reassignment is necessary as a sanction or because the PDJ acted in bad faith. Rather, reassignment is appropriate to preserve confidence in the fairness of the proceedings following reversal, while imposing virtually no countervailing burden. If this Court grants relief, it should direct that all further proceedings be assigned to a different judge.

VII. CONCLUSION

This case presents a single, fundamental constitutional question: whether attorneys surrender the protections of the First Amendment and Article II, Section 6 of the Arizona Constitution by seeking a license to practice law. The Presiding Disciplinary Judge answered that question in the affirmative. As numerous courts outside Arizona have recognized, that conclusion cannot be reconciled with controlling precedent from the United States Supreme Court, which has repeatedly

and directly rejected the PDJ's and State Bar's position. This Court should follow suit and reach the same conclusion – lawyers do not waive their constitutional freedoms simply because they are lawyers.

Because the PDJ's erroneous constitutional premise permeated each of the challenged rulings, the orders granting partial judgment on the pleadings and denying Petitioner's anti-SLAPP motion should be reversed. The Court should accept special action jurisdiction, vacate those orders, direct that the matter proceed under the proper constitutional standards, and remand for further proceedings before a different judicial officer.

Dated: July 22, 2026

Respectfully Submitted,
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RELATED CASES

Pursuant to Rule 14(c)(5), Petitioner disclosed the following potentially related case: *State of Arizona v. Michaela Joy Koert*, Court of Appeals Case No. 1 CA-CV 26-0466: <https://apps.azcourts.gov/aacc/appella/1CA/CV/CV260466.pdf>

Koert involved a Motion to Dismiss filed by a defendant in a criminal matter pursuant to A.R.S. § 12–751. In that case, the trial court found A.R.S. § 12–751 was constitutional and did not violate separation of powers principles. That holding was affirmed by the superior court following an appellate special action petition filed by the State of Arizona.

The State thereafter sought further review in the Court of Appeals, Division One, where the matter currently remains pending. *Koert* relates to this case insofar as it involves the same constitutional question regarding the application and validity of A.R.S. § 12–751 under separation of powers principles.

APPENDIX

Documents			
Ex.	Date Filed	Description	Appendix Page(s) Pet.Appx
1	2/25/2026	<u>State Bar's Amended Complaint</u>	0001–51
2	3/6/2026	<u>Answer to Amended Complaint</u>	0052–120
3	3/9/2026	<u>State Bar's Motion for Partial Judgment on the Pleadings</u>	0121–129
4	3/18/2026	<u>Response to State Bar's Motion for Partial Judgment on the Pleadings</u>	0130–0152
5	3/18/2026	<u>Gingras Declaration In Support of Response to State Bar's Motion for Partial Judgment on the Pleadings</u>	0153–0172
6	3/23/2026	<u>State Bar's Reply In Support of Motion for Partial Judgment on the Pleadings</u>	0173–0181
7	3/31/2026	<u>Notice of Filing Supplemental Authority</u>	0182–0251
8	4/14/2026	<u>Motion to Dismiss, and Alternatively, Motion for Summary Judgment</u>	0252–0299
9	4/14/2026	<u>Statement of Undisputed Material Facts</u>	0300–0310
10	4/14/2026	<u>Affidavit of David S. Gingras In Support of Motion to Dismiss, and Alternatively, Motion for Summary Judgment</u>	0311–0454
11	4/14/2026	<u>Order Granting in Part and Denying in Part State Bar's Motion for Partial Judgment on the Pleadings</u>	0455–0466
12	4/30/2026	<u>Order re: Briefing on Motion to Dismiss</u>	0467–0469
13	5/4/2026	<u>Respondent's Briefing re: Motion to Dismiss</u>	0470–0485

14	5/14/2026	<u>State Bar’s Briefing re: Motion to Dismiss</u>	0486–0495
15	5/20/2026	<u>Response to State Bar’s Brief re: Applicability of A.R.S. § 12–751 to Lawyer Discipline Proceedings</u>	0496–0536
16	6/22/2026	<u>Order Denying Motion to Dismiss</u>	0537–0551
17	7/8/2024	<u>Notice of Change of Judge For Cause</u>	0552–0566
18	7/8/2024	<u>Affidavit of David S. Gingras In Support of Petitioner’s Notice of Change of Judge For Cause</u>	0567–0762
19	8/13/2024	<u>Order Denying Notice of Change of Judge</u>	0763–0771

CERTIFICATE OF SERVICE

Original electronically filed via email to [REDACTED] on July 22, 2026, with:

Disciplinary Clerk of the
Office of the Presiding Disciplinary Judge
Supreme Court of Arizona

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