IN THE SUPREME COURT
STATE OF ARIZONA

ARIZONA REPUBLICAN PARTY, *et al.*, Plaintiff/Appellant, v. STEPHEN RICHER, *et al.*, Defendants/Appellees.	No. CV-23-0208-PR Court of Appeals No. 1 CA-CV-21-0201 Maricopa County Superior Court No. CV2020-014553

BRIEF OF *AMICUS CURIAE* STATECRAFT PLLC

Kory Langhofer, Ariz. Bar No. 024722
Thomas Basile, Ariz. Bar. No. 031150
STATECRAFT PLLC
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
(602) 382-4078
kory@statecraftlaw.com
tom@statecraftlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

In recent years Arizona courts have seen a dramatic uptick in the frequency of motions filed under A.R.S. § 12-349 in politically charged cases. This wave of fee-shifting motions and the manner in which they have been adjudicated raises vexing problems for practitioners and parties in political cases. This Court should clarify the applicable standards for the lower courts, and confirm its previous guidance and standards for balancing the duties and rights of litigants in these contentious cases.

INTERESTS OF THE *AMICUS*

Amicus Statecraft PLLC is a boutique law firm focused on political and constitutional law. Based on its clients' and attorneys' participation in civil rights litigation over the last decade, Statecraft PLLC is concerned that A.R.S. § 12-349 is being abused by litigants and misapplied in the lower courts.

Statecraft PLLC takes no position in this brief on the merits of the fee-shifting order in this case, and instead discusses general issues surrounding the use and construction of Section 12-349.

ARGUMENT

I. Fee-Shifting Motions Have Become Standard Practice in Arizona Political Cases

Most litigation in Arizona occurs in the lower courts, largely outside the view of the Arizona Supreme Court. Although the Arizona Supreme Court reviews a

disproportionate number of political cases as a percentage of all litigation in the state, its visibility into trial court filings is somewhat limited by the number of cases that ultimately make their way onto the Arizona Supreme Court's docket.

It is therefore important for this Court recognize, if it does not already, that political litigation in the lower courts has in recent years received a seemingly unbreaking tide of fee-shifting motions. Roughly half of all political cases in Arizona, in *amicus*'s estimation, now see either private threats to seek to shift fees, or public filings demanding fee shifting, against opposing parties and counsel. And in a twist that might not have been foreseen only a few years ago, it is not always the prevailing party that pursues fee shifting; certain participants unironically invoke Section 12-349 even as they advance the losing position in a proceeding. *See, e.g.*, Motion for Leave to File First Amended Complaint for Special Action, *Fernandez v. Comm'n on Appellate Ct. Appts.*, Maricopa Cnty. Super. Ct. docket no. CV2020-095696 (Nov. 9, 2020) (requesting sanctions for an opposing party's failure to stipulate to leave to amend pleadings).

To be sure, a portion of the recent increase in such motions is undoubtedly attributable to truly meritless litigation. But the low frequency with which such motions are granted—the lower courts still deny fee-shifting motions in most political cases, *see, e.g.*, Minute Entry, *Lake v. Hobbs*, Maricopa Cnty. Super Ct. docket no. CV2022-095403 (Dec. 27, 2022)—suggests that something else is also

contributing to the change. Culturally, there seems to be a disheartening shift toward weaponizing Section 12-349 with public accusations of subjective bad faith and intentional misconduct (customarily trumpeted online and in press releases simultaneously with court filings) rather than substantive engagement with factual allegations and the merits of legal theories.

The effect is a downward spiral in the tone of political litigation, the quality of relationships between political adversaries and their counsel and, perhaps most troublingly, the willingness of competent attorneys to begin or continue practicing in the subject matter area.

II. The Lower Courts Too Often Base Findings of Frivolousness on Novel Legal Theories as Distinct from False Factual Allegations

Fee-shifting requests can be based on the alleged groundlessness of either factual allegations or legal theories.

False factual allegations that could have been identified with reasonable diligence before a case is initiated, or that are identified in the course of litigation but maintained notwithstanding the newly discovered evidence, rightly invite fee shifting. *See generally* Ariz. R. Civ. P. 11(b) (requiring, before a filing is made, a "reasonable inquiry" supporting the conclusion that "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery"); *Roberts v. Kino Cmty. Hosp.*, 159 Ariz. 333, 335–36 (App. 1988) (declining to

impose fees against an attorney who sued the wrong medical device manufacturer, but dismissed the claim after taking discovery); *see also* Ariz. R. Prof. Conduct 3.1 cmt. 2 ("The filing of an action or defense or similar action taken for a client is not groundless merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.").

But legal theories are different. The law changes over time, and lawyers are expressly authorized to bring previously untested legal theories—and even theories to overrule prior cases and change existing law. *See Ariz. Water Co.*, 199 Ariz. 547, 556 ¶ 30 (2001) (denying fees were the non-movant presented "a question of first impression"); *Fritz v. City of Kingman*, 191 Ariz. 432, 436 ¶ 22 (1998) ("We affirm the denial of attorney's fees and costs based on our finding that Fritz made a good faith argument for extension of existing law."); *cf. Smith v. Lucia*, 173 Ariz. 290, 299 (App. 1992) (rejecting claim for fees under Rule 11 when plaintiff pursued claim in "unsettled" area of the law, and reasoning that "to adopt Smith's reasoning that Lucia acted without probable cause would require us to hold that, in the absence of controlling precedent in Arizona, an attorney acts unreasonably if he or she follows the minority view in the United States. We refuse to do this."). Advocacy for a new and untested legal theory is not groundless, so long as the theory finds a rational basis in law or fact.

The difference between false factual allegations and unpersuasive legal theories is perhaps best illustrated by reference to seminal constitutional decisions regarding political law and civil rights. Each of the following cases adopted a legal theory that, when the case was initiated, directly conflicted with controlling precedent of the U.S. Supreme Court—and nevertheless succeeded in changing the law:

- *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954) ("Any language in *Plessy v. Ferguson* [163 U.S. 537 (1896)] contrary to this finding is rejected.").

- *Gideon v. Wainwright*, 372 U.S. 335, 345, (1963) ("Florida, supported by two other States, has asked that *Betts v. Brady* [316 U.S. 455 (1942)] be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree.").

- *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("*Bowers v. Hardwick* [478 U.S. 186 (1986)] should be and now is overruled.").

- *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) ("Due consideration leads to this conclusion: *Austin* [*v. Michigan Chamber of Com.*], 494 U.S. 652 [(1990)], should be and now is overruled. We return to the principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity.").

- *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015) ("*Baker v. Nelson* [409 U.S. 810 (1972)] must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.").

- *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) ("*Roe* [*v. Wade*, 410 U.S. 113 (1973),] and [*Planned Parenthood v.*] *Casey* [505 U.S. 833 (1992)] must be overruled.").

Even arguments advancing what might be generously characterized as creative or unintuitive constructions of statutory texts can find judicial favor. *E.g.*, *King v. Burwell*, 576 U.S. 473 (2015) (holding that the statutory phrase "an Exchange established by the State" included an exchange established by the federal government); *Yates v. United States*, 574 U.S. 298 (2015) (a fish carcass is not a "tangible object"); *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 350–52 ¶¶ 21–29 (App. 2013) (interpreting the disjunctive "or" to mean the conjunctive "and").

The point is that the judicial system and adverse parties tolerate legal theories, even if squarely contradicted by controlling precedents, to incentivize zealous advocacy and allow for the possibility of changes in the law—and indeed, a significant portion of modern political and other civil rights jurisprudence has come about directly as a result of this principle.

Judicial tolerance for long shot, and even previously rejected, legal theories is not limited to the federal courts or a bygone age. This Court has reversed prior decisions no fewer than three times in the last year. *Avitia v. Crisis Preparation & Recovery Inc.*, 256 Ariz. 198, 536 P.3d 776, 778 ¶ 1 (2023) ("Because prior judicial decisions found a duty in such circumstances based on foreseeability . . . , we

overrule those decisions."); *State ex rel. Mitchell v. Cooper*, 256 Ariz. 1, 535 P.3d 3, 14 ¶ 47 (2023) ("For these reasons, we overrule [*State v.*] *Valencia*[, 241 Ariz. 206, 386 P.3d 392 (2016)]."); *Laurence v. Salt River Project Agric. Improvement & Power Dist.*, 255 Ariz. 95, 528 P.3d 139, 141 ¶ 1 (2023) ("[W]e overrule in substantial part *DeGraff v. Smith*, 62 Ariz. 261, 157 P.2d 342 (1945).").

There may be extraordinary circumstances in which the assertion of a legal theory is meritless for purposes of Section 12-349. Dogged assertion of a legal theory that is barred by the law of the case, or collateral estoppel, or a particularly recent controlling authority may give rise to a colorable claim of legal frivolousness. But absent such highly unusual circumstances, an advocate's assertion and preservation of underdog legal theories, as distinct from false factual allegations, should not give rise to a finding of baselessness under Section 12-349.

The lower courts in Arizona have a different view. Notwithstanding a superficial recognition that "fairly debatable" legal issues are not groundless for purposes of Section 12-349, *Johnson v. Mohave Cnty.*, 206 Ariz. 330, 335 ¶ 19 (App. 2003)—which is consistent with a systemic tolerance of new (or even previously rejected) legal theories—the lower courts in Arizona too often impose and affirm fee shifting in politically charged cases based on an intangible and inarticulable sense that a legal theory was unlikely to succeed on the merits. *See, e.g.*, *Finchem v. Fernandez*, No. 1 CA-CV 22-0647, 2023 WL 5125590, at *6 (Ariz. App. Aug. 10,

2023) (affirming fee shifting because the plaintiff had asserted, consistent with the laws of other states, that defamation privileges do not protect allegations that a defendant publishes to the media); *Statecraft PLLC v. Town of Snowflake*, No. 1 CA-CV 17-0691, 2018 WL 5729344, at *4 (Ariz. App. Oct. 30, 2018) (reviewing legal groundlessness in a case involving issues of first impression).

III. The Lower Courts Too Often Base Findings of "Subjective Bad Faith" on Inapposite Evidence

Fee-shifting under Section 12-349 requires *both* groundlessness *and* subjective bad faith. *Reynolds v. Reynolds*, 231 Ariz. 313, 318 ¶ 16 (App. 2013) ("[T]he absence of even one element render[s] the statute inapplicable.").

In practice, however, the lower courts in Arizona bootstrap findings of subjective bad faith from findings of factual or legal groundlessness.

Because the two factors are doctrinally distinct and require separate analyses, however, the lower courts rely openly on inapposite facts to justify findings of subjective bad faith. *See* Ruling at 6, *Ariz. Republican Party v. Fontes*, Maricopa Cnty. Super. Ct. docket no. CV2020-014553 (Mar. 15, 2021) (relying on the plaintiff's statement that "[p]ublic mistrust following this election motivated this lawsuit"). But of course such facts exist in *every* case; litigation challenging the accuracy of vote tabulations will never come into existence unless there is first some "mistrust" concerning the results—just as a breach of contract claim will never be filed unless there is some mistrust in a counterparty's compliance and an effort to

enforce the terms of the agreement. Indeed, political litigation routinely is premised on assertions that democratically elected bodies harbor or are vessels of invidious racial animus, *see, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349–50 (2021)—a notion that most often fails to find meaningful evidentiary support, and inherently sows "mistrust" in public institutions. The point is that parties rarely initiate litigation for the sole (or even primary) purpose of vindicating a legal proposition purely for its own sake; it often is a means of advancing some extrinsic political, philosophical, or policy objective. While these motivations of course can never excuse a disregard or misrepresentation of material facts, they do not by themselves establish subjective "bad faith," particularly in the context of public interest litigation. *See generally Democratic Nat'l Comm. v. Russian Federation*, 392 F. Supp. 3d 410, 450–51 (S.D.N.Y. 2019) (denying Trump campaign's motion for Rule 11 sanctions against DNC for continuing to pursue allegations of Russian interference in 2016 election notwithstanding special counsel's findings, emphasizing that "courts should be cautious in granting . . . sanctions").

In sum, facile analyses of unremarkable realities underlying litigation decisions are simply not a substitute for evidence bearing directly on the subjective good or bad faith of a party of its counsel. So long as the lower courts infer subjective bad faith from evidence that does not meaningfully illuminate the issue,

the doctrinally distinct requirements of objective groundlessness and subjective bad faith will be conflated and the lower courts will improperly entertain their burgeoning load of Section 12-349 motions.

IV. The Court of Appeals Applies the Wrong Standard of Review

The Court of Appeals has struggled to articulate and apply a coherent standard of review for Section 12-349 orders. The Court of Appeals decision in this case, which rattled off at least two disparate standards in one sentence, is representative: "We review the [trial] court's application of § 12-349 **de novo**, but we view the evidence **in a manner most favorable to sustaining the decision**, and we will affirm unless the [trial] court's findings are **clearly erroneous**. *Arizona Republican Party v. Richer*, 255 Ariz. 363, 532 P.3d 355, 362 ¶ 32 (App. 2023) (emphasis added). In practice, the effect is to subsume questions of law into a deferential clear error review and affirm the trial court's fee-shifting orders, often with vanishingly little, or essentially no, substantive analysis. *See, e.g.*, *Town of Snowflake*, 2018 WL 5729344 at *4 (affirming the trial court's factual and legal analysis because "[t]he superior court cited several reasons for its determination"). Litigants hence are denied any meaningful appellate review—and sometimes, as here, saddled with additional sanctions for even seeking it.

A resort to first principles substantially clarifies this question. To the extent a fee-shifting order under Section 12-349 relies on conclusions of law (*e.g.*, whether

a given legal theory finds any support in prior case law, or the proper definition of "bad faith"), *de novo* review is appropriate; and to the extent a fee-shifting order under Section 12-349 relies on findings of fact (*e.g.*, a Complaint alleges facts that are false and were made without a reasonable investigation), clear error review is appropriate. *Helvetica Servicing, Inc. v. Pasquan*, 249 Ariz. 349, 352 ¶ 10 (2020) ("When an appeal presents a mixed question of law and fact, we defer to the trial court's factual findings but review de novo all legal conclusions."). To warrant such deference, however, such factual findings must be concrete and well-supported by the record. *See Primus Auto. Fin. Services, Inc. v. Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (recognizing that while the trial court "has 'broad fact-finding powers,"' appellate tribunal "must know to what we defer," and remanding for "more detailed findings on whether [litigant] acted in bad faith" (internal citations omitted)).

Appellate courts in Arizona should apply the customary standards of review for mixed questions of law and fact, abandoning their muddled and internally conflicted standard that, in practice, has deprived the appellants of Section 12-349 orders of any meaningful review.

CONCLUSION

For the foregoing reasons, the Court should stand by its tolerance for difficult legal arguments (as distinct from false factual allegations) and the distinction between objective groundlessness and subjective bad faith, and clarify that appellate

courts must independently review fee-shifting orders under Section 12-349 as mixed questions of law and fact.

RESPECTFULLY SUBMITTED this 12th day of February, 2024.

STATECRAFT PLLC

By: */s/ Kory Langhofer*
Kory Langhofer
Thomas Basile
649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003