ARIZONA CASES DIGEST

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Standards of Review: The Court reviews a trial court's denial of a motion for a new trial for an abuse of discretion and will not disturb a trial court's rulings on the exclusion or admission of evidence unless a clear abuse of discretion appears and prejudice results.

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Standards of Review: The Court interprets statutes and administrative rules de novo, applying the same rules in construing both statutes and rules, but do not defer to the agency's interpretation of a rule or statute. Court affirms the agency action unless it concludes the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.

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TABLE OF RULE CHANGES

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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Maria Del Carmen Rendon QUIJADA,
Appellant,
and
Julian Javier Pimienta DOMINGUEZ
Appellee.

No. CV-23-0160-PR
Filed June 18, 2024

Appeal from the Superior Court in Pima County
The Honorable J. Alan Goodwin, Judge
No. D20221319
REVERSED AND REMANDED

Opinion of the Court of Appeals, Division Two
255 Ariz. 429 (App. 2023)
VACATED

COUNSEL:

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JUSTICE BOLICK authored the Opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, and JUSTICES LOPEZ, and BEENE joined. JUSTICE MONTGOMERY, joined by JUSTICE KING, dissented.

This opinion is subject to revision before publication in the Pacific Reporter.

JUSTICE BOLICK, Opinion of the Court:

¶1 This case raises the question of whether federal immigration law divests Arizona courts of jurisdiction over a divorce sought by a TD nonimmigrant visa holder whose visa has expired. We hold that it does not.

BACKGROUND

¶2 This case arises from an Arizona divorce proceeding initiated by Maria Del Carmen Rendon Quijada ("Rendon"), which was dismissed for lack of subject matter jurisdiction pursuant to a motion filed by her husband, Julian Javier Pimienta Dominguez ("Pimienta").

¶3 Rendon and Pimienta married in Mexico in 1999. They relocated to the United States in 2007.

¶4 Pimienta entered the United States on a TN visa. TN visas allow professionals from Canada and Mexico to work temporarily in the United States. *See* 8 C.F.R. § 214.6(d)(1). Rendon entered the United States on a TD visa. TD visas are reserved for the spouses and unmarried, minor children of TN visa holders. *See* 8 C.F.R. § 214.6(j)(1). TN and TD visa holders are "nonimmigrants" who "hav[e] a residence in a foreign country which [they have] no intention of abandoning and who [are] visiting the United States temporarily for business." 8 U.S.C. § 1101(a)(15)(B); *see also* 8 U.S.C. § 1184(e)(1) (providing that aliens "who seek[] to enter the United States" on a TN or TD visa "shall be treated as if seeking classification, or classifiable, as a nonimmigrant under section 1101(a)(15)").

¶5 Rendon's TD visa expired in March 2020. In December 2020, Rendon began seeking lawful permanent resident status by having her sister file a Petition for Alien Relative with the U.S. Citizenship and Immigration Service. That petition was pending at the time of the trial court's August 2022 hearing on Pimienta's motion to dismiss.

¶6 In November 2020, Pimienta filed for marital dissolution in Mexico. Rendon challenged the Mexican court's jurisdiction on the ground that she lives in Arizona, not Mexico. The Mexican court dismissed the case for lack of jurisdiction.

¶7 The couple lived in Arizona before separating. Rendon continues to live in Arizona, but Pimienta moved to Virginia around March 2021. Pimienta has continued to renew his TN visa but refused to renew Rendon's TD visa.

¶8 In May 2022, Rendon filed the dissolution petition at issue here. In response, Pimienta filed a motion to dismiss for lack of subject matter jurisdiction. He argued Rendon could not establish domicile in Arizona because her TD visa precludes her from intending to remain in the state indefinitely. Despite finding that Rendon subjectively intends to remain in Arizona indefinitely, the trial court granted Pimienta's motion to dismiss. The trial court reasoned that under Ninth Circuit precedent, Rendon's TD visa precludes her from establishing domicile in the United States.

¶9 The court of appeals reversed. *In re Marriage of Quijada & Dominguez* ("*Quijada*"), 255 Ariz. 429, 436 ¶ 35 (App. 2023). Relying on *Elkins v. Moreno*, 435 U.S. 647 (1978), and *Park v. Barr*, 946 F.3d 1096 (9th Cir. 2020), the court held Rendon's TD visa precludes her from establishing a United States domicile, absent an adjustment in status. *Id.* at 434 ¶ 22. Because Rendon had begun seeking lawful permanent resident status, the court concluded that by recognizing Rendon's subjective domiciliary intent, "Arizona courts would not impede Congress's purposes and objectives," nor add to or take away from the conditions Congress

imposes on TD visa holders. *Id.* at 435 ¶ 28. Thus, the court found federal immigration law did not preempt Arizona jurisdiction over the dissolution proceeding. *Id.*

¶10 Pimienta petitioned this Court for review. We granted review on three questions: (1) whether the court of appeals erred by holding that federal law does not preempt Arizona from allowing Rendon to establish domicile under Arizona law; (2) whether the court of appeals erred in holding that 8 U.S.C. § 1184(e)(1) permits a TD visa holder to change her domiciliary intent upon entering the United States; and (3) whether the court of appeals erred in holding that Elkins permits TD visa holders to nullify the conditions of their visas by seeking a visa that could lead to permanent residence. Whether federal immigration law divests Arizona courts of jurisdiction over a marital dissolution where a visa holder's visa has expired is a recurring issue of statewide importance. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

¶11 We review de novo the dismissal of a case for lack of subject matter jurisdiction when, as here, the dismissal presents only a question of law. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012).

¶12 This is a case about federalism; specifically, whether Arizona courts should read a federal immigration statute so broadly as to sweep aside their jurisdiction in an area of law traditionally entrusted to state determination. *See Gonzales v. Oregon*, 546 U.S. 243, 270, 274 (2006) (applying "the background principles of our federal system" to caution against reading federal statutes to displace regulation in areas traditionally entrusted to state authority).

¶13 The dissent seeks to avoid the federalism implications of its approach by attempting to graft onto Arizona divorce law an immigration-based legal capacity predicate. *Infra* ¶ 41. But the dissent acknowledges that "Rendon's legal inability to change her domicile to Arizona" is "due to a federal TD visa." *Id.* The dissent's pervasive fallacy is determining Arizona domestic relations jurisdiction by reference to federal immigration law, even though it confesses that such law "establishes the conditions for certain classifications of nonimmigrant visa holders to enter the United States, *regardless of Arizona's substantive law on domestic relations*." *Infra* ¶ 54 (emphasis added).

¶14 The court of appeals held that there is "no binding federal law concluding that Congress has created—or even has the power to create—a uniform regulatory scheme governing domicile in state-law divorce proceedings." *Quijada*, 255 Ariz. at 435 ¶ 25. Because that holding is correct, it was unnecessary for the court to first determine that, as a matter of federal immigration law, Rendon could attempt to adjust her immigration status to that of legal permanent resident. *Cf. id.* at 433 ¶¶ 14–15. Likewise, our resolution of the first question presented for review makes it unnecessary to decide the second and third questions.

¶15 Arizona law regarding subject-matter jurisdiction over divorces has remained unchanged for more than a half century. A.R.S. § 25-312(A)(1) requires "[t]hat one of the parties, at the time the action was commenced, was domiciled in this state . . . for ninety days before filing the petition for dissolution of marriage." Establishing domicile involves two requirements: "(1) physical presence, and (2) an intent to abandon the former domicile and remain [in Arizona] for an indefinite period of time." *DeWitt v. McFarland*, 112 Ariz. 33, 34 (1975) (emphasis omitted) (citation omitted). It does not require legal capacity under federal law. Rather, domiciliary intent, "as evidenced by the conduct of [the] person in question, becomes a question of fact." *Bialac v. Bialac*, 95 Ariz. 86, 87 (1963). Under Arizona law, domicile is a factual, not legal, determination. *Id.*; *see also Clark v. Clark*, 71 Ariz. 194, 197 (1950) (holding that domiciliary intent "is a matter of fact and may be proved as such").

¶16 Neither party disputes the trial court's finding that Rendon satisfies both domicile elements—that is, Rendon lives in Arizona and intends to remain. Rather, Pimienta argues that federal immigration law prevents Rendon from forming the subjective intent to stay indefinitely in Arizona. Specifically, because Rendon's TD visa is predicated upon an intent not to remain in the United States and makes her ineligible to adjust her immigration status, she cannot legally evidence an intent to establish Arizona domicile. But determining that Arizona courts are prohibited from recognizing a subjective domiciliary intent as a matter of federal immigration law turns on a separate finding that the federal law in question preempts state law.

¶17 The dissent chides us for moving too quickly to the preemption issue, contending that the question of jurisdiction is separate from, and antecedent to, a preemption analysis regarding a state's substantive laws. *Infra* ¶ 56. Not so. Whether federal law divests states of jurisdiction in an area like family law, that is traditionally entrusted to the states, is no less momentous than displacing a state's substantive law governing the same subject matter and no less subject to preemption scrutiny. *See Haaland v. Brackeen*, 599 U.S. 255, 265–66, 276–77 (2023) (considering that "Congress lacks a general power over domestic relations" but holding that state family law conflicting with valid congressional legislation must give way in determining the validity of the Indian Child Welfare Act's ("ICWA") displacement of state-court jurisdiction over all child custody proceedings); *Fisher v. District Court*, 424 U.S. 382, 390 (1976) (holding that "even if . . . the Montana courts properly exercised adoption jurisdiction" in the past, "that jurisdiction has now been pre-empted" by a tribal ordinance authorized by the Indian Reorganization Act "conferring jurisdiction on the Tribal Court" and

"implement[ing] an overriding federal policy which is clearly adequate to defeat state jurisdiction"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983) (noting that "a State will certainly be without jurisdiction [over tribal lands] if its authority is preempted under familiar principles of preemption"); *United States v. Bass*, 404 U.S. 336, 349 (1971) (requiring that "Congress convey[] its purpose clearly" before courts find Congress intends "to effect a significant change in the sensitive relation between federal and state criminal jurisdiction"); *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Loc. 54*, 468 U.S. 491, 502–03 (1984) (noting that where "unusually 'deeply rooted' local interests are at stake," such as in cases involving certain state breach of contract, trespass, and tort actions, "appropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that," in enacting the National Labor Relations Act, "Congress intended to deprive the States of their ability to retain jurisdiction over such matters"). Effectively, the dissent argues that the federal immigration statutes governing TN and TD visas create a legal capacity prerequisite to invoking state court jurisdiction over marital dissolutions. As we conclude below, federal law does not do so.

¶18 Our preemption jurisprudence is clear and consistent, and embraces the principles applied by the United States Supreme Court. Responding to the dissent's assertion that it is state law that establishes jurisdictional requirements that encompass federal immigration law, it is notable that we recently held unanimously that "[w]e will not lightly divine legislative intent to displace state law with sweeping and prescriptive federal [laws]." *Roberts v. State*, 253 Ariz. 259, 266 ¶ 21 (2022). And we held that "in our system of federalism, we do not start with federal law and apply it unless the legislature manifests a contrary intent; rather, we presume that state law prevails unless we find a manifest intent to adopt federal law." *Id.*

¶19 In Varela v. FCA US LLC, 252 Ariz. 451 (2022), this Court stated that "[w]e presume that federal lawmakers do not 'cavalierly preempt' state law because 'the States are independent sovereigns in our federal system,' and have historically 'had great latitude' to protect 'the lives, limbs, health, comfort, and quiet' of their citizens." *Id.* at 459 ¶ 13 (internal citation omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996)). We declared that this "presumption against preemption is 'particularly' strong in 'field[s] which the States have traditionally occupied.'" *Id.* (alteration in original) *(*quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). In particular, we cautioned against finding that "state law is preempted not by what is expressed in federal law, but rather by what may be implied by federal law . . . . By venturing beyond the text of federal law, courts risk preempting state law based on something other than what has been 'made in Pursuance' of the Constitution." *Id.* at 460 ¶ 16 (quoting U.S. Const. art. VI, cl. 2). We concluded that "liberally applying implied preemption destabilizes the twin pillars of our constitutional order: federalism and the separation of powers." *Id.* ¶ 17.

¶20 Congress possesses plenary authority over immigration. *See Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) ("[T]he supremacy of the national power . . . over immigration, naturalization and deportation, is made clear by the Constitution . . . ."). Hence, pursuant to the Supremacy Clause, U.S. Const. art. VI, cl. 2, when a state law clearly conflicts with federal immigration law, the state law must yield, *see Arizona v. United States*, 567 U.S. 387, 400–11 (2012) (striking down several Arizona immigration laws conflicting with the federal government's comprehensive immigration regulations). At the same time, the field of domestic relations "has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *accord Haaland*, 599 U.S. at 276–77. We therefore address the pertinent types of preemption to determine whether Congress's exercise of its immigration authority displaces Arizona's jurisdiction over nonimmigrant divorces.

¶21 The clearest and most readily dispositive form of preemption is express preemption—that is, where federal law by its own clear terms preempts state law. *See Arizona*, 567 U.S. at 399. None of the relevant federal statutes contain a preemption provision. Indeed, it is not even clear that the relevant immigration laws address domiciliary intent outside of the immigration context *at all*. *See* §§ 1101(a)(15)(B), -1184(e)(1) (classifying a person who enters the United States on a TD visa as a "nonimmigrant alien" who has "a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure"); 8 U.S.C. § 1227(a)(1)(C)(i) ("Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted . . . or to comply with the conditions of any such status, is deportable."). At most, any applicability of these provisions beyond the immigration context, and specifically to the domiciliary requirements of state domestic relations law, would have to be inferred from a very broad reading of those provisions.

¶22 The Supreme Court has strongly admonished against doing that. In *Bond v. United States*, 572 U.S. 844 (2014), a unanimous Supreme Court ruled that absent a clear congressional command, a federal chemical weapons treaty could not be used to prosecute a woman for placing poisonous substances on surfaces that were touched by her husband's lover, because such usage would displace state criminal processes. *Id.* at 848. In construing the congressional enactment, the Court instructed that "it is appropriate to refer to basic principles of

federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 859. In that case, the "ambiguity derive[d] from the improbably broad reach of the key statutory definition given the term . . . being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose." *Id.* at 859–60. In such instances, "we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States." *Id.* at 860.

¶23 In this case, such clear intent is manifestly absent. The immigration law's provisions regarding domiciliary intent exist within a self-contained statute pertaining to immigration. They do not purport to define or restrict domicile for all purposes; no intent appears to reach beyond the immigration context. Were Congress intent upon substituting its own jurisdictional confines for those of the states, it surely knows how to do so. *See, e.g.*, 25 U.S.C. § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."). Congress did not do so here, and it would do grave damage to federalism for us to infer that it did.

¶24 Congress may also withdraw a subject from state regulation by fully occupying the field through comprehensive regulation. *See Arizona*, 567 U.S. at 399; *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986). The federal government has fully occupied the area of alien registration. *See Arizona*, 567 U.S. at 401. But the relevant statutes are completely silent on domestic relations. Because divorce jurisdiction is "fundamentally unrelated" to the field of alien registration, field preemption does not apply here. *See Kansas v. Garcia*, 589 U.S. 191, 208 (2020); *contra Haaland*, 599 U.S. at 276–77 (holding that Congress could directly regulate child custody matters through ICWA, pursuant to its broad powers over Indian affairs, despite the fact that "Congress lacks a general power over domestic relations").

¶25 Nor does Arizona's jurisdiction over nonimmigrant divorce pose an obstacle to the attainment of federal immigration-law objectives. *See Arizona*, 567 U.S. at 399–400 (noting that state laws are preempted where "they stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (quoting *Hines*, 312 U.S. at 67)). Pimienta urges that by asserting jurisdiction over the divorce here, the state would usurp federal authority. But this is not, as the dissent asserts, a matter of "immigration status or benefits." *See infra* ¶ 50. To the contrary, the state is simply conducting divorce proceedings in accord with Arizona laws and procedures that long predate the visa status at issue here. *Compare* 1973 Ariz. Sess. Laws ch. 139, § 2 (1st Reg. Sess.) (codifying Arizona's ninety-day domicile requirement for divorce jurisdiction), *with* 8 U.S.C. § 1184(e) (1994) (creating the TD visa). The Supreme Court has instructed that "courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 567 U.S. at 400 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *accord Wyeth*, 555 U.S. at 565; *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146–47 (1963) (requiring "an unambiguous congressional mandate" of preemption in such cases). At oral argument, Pimienta acknowledged that *granting Rendon a divorce would have no impact on her immigration status or deportability*. It is difficult to conceive how asserting jurisdiction over such proceedings even implicates federal immigration law, much less poses an obstacle to accomplishing its objectives.

¶26 Pimienta mainly relies on "impossibility" preemption, asserting that it is impossible for Rendon to comply both with her federal TD nonimmigrant status, which requires an intent to not remain in the country, and with the domiciliary intent requirement of Arizona divorce law. *See Florida Lime*, 373 U.S. at 142–43 (noting that preemption is present where it is a "physical impossibility for one engaged in interstate commerce" to comply with conflicting state and federal requirements).[1]

¶27 Given the presumption against preemption, the absence of express preemption, and the fact that exercising jurisdiction here would not interfere with federal immigration objectives, we will construe the law as best we can to avoid a finding of impossibility. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (providing that state family law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden" (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966))). Here, as in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), federal and state statutes "do not impose directly conflicting duties . . . as they would, for example, if the federal law said, 'you must sell insurance,' while the state law said, 'you may not.'" *Id.* at 31.

¶28 As noted above, Arizona determines domicile based on subjective intent and conduct, not on a detailed and complex legal determination of a person's immigration status. *See Bialac*, 95 Ariz. at 87. If someone seeking a divorce applies for a change in immigration status, that can be evidence of intent to remain in Arizona, regardless of her legal authority to do so. A legal determination of immigration status by the family court is not commanded by either state or federal law. *See Printz v. United States*, 521 U.S. 898, 935 (1997)

("Congress cannot compel the States to enact or enforce a federal regulatory program."). Granting a divorce affects Rendon's immigration status and deportability not at all.

¶29 A contrary decision, embracing the dissent's view that federal immigration law governs domicile-based jurisdiction for TN and TD visa holders, could impact other areas of Arizona law that use domicile to determine jurisdiction and a person's legal rights and responsibilities. *See, e.g.*, A.R.S. §§ 14-2711, -2401 (administration of trusts and estates); *see also Bryant v. Silverman*, 146 Ariz. 41, 43–45 (1985) (conflict of laws in personal injury context); *Maricopa County v. Trs. of Ariz. Lodge No. 2*, 52 Ariz. 329, 338 (1938) (taxation of intangible property); *Oglesby v. Pac. Fin. Corp. of Cal.*, 44 Ariz. 449, 453 (1934) (same).

¶30 For similar reasons, several other state courts confronting this issue have concluded that federal immigration law does not deprive them of jurisdiction over divorce proceedings. In *In re Marriage of Dick*, 18 Cal. Rptr. 2d 743 (Ct. App. 1993), the California Court of Appeal held that a B-2 nonimmigrant could establish residence for the purpose of obtaining a divorce. *Id.* at 747.[2] The court held that "immigration status is, at most, evidence of domiciliary intent, but not dispositive of the residency issue as a matter of law." *Id.* at 746. The court found its conclusion was "buttressed by the different aims and purposes of immigration and dissolution law," concluding that the former does not preclude the latter when the parties "otherwise meet domiciliary requirements and when they are subject to the courts of this state for other purposes." *Id.* at 748; *accord In re Marriage of Pirouzkar*, 626 P.2d 380, 383 (Or. Ct. App. 1981) ("Whatever the consequences of [establishing subjective domiciliary intent] may be for purposes of immigration law, it is not pertinent as to the issue of domicile for the purposes of jurisdiction."); *Garcia v. Angulo*, 644 A.2d 498, 504 (Md. 1994) (holding that because "there is no certainty as to when, if ever, [the nonimmigrant] will receive a notice of deportation," the subjective intent to remain is not inconsistent with law); *Das v. Das*, 603 A.2d 139, 141–42 (N.J. Super. Ct. Ch. Div. 1992) (noting that a rule to the contrary would "require state trial courts to assume (or possibly usurp) the very function" of federal immigration authorities)[3]; *cf. Arizona*, 567 U.S. at 396 (noting that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials").

¶31 The cases Pimienta relies on do not dictate a contrary result. *Elkins* speaks to the conditions of a nonimmigrant's visa, but it does not apply preemption analysis. 435 U.S. at 663–64. Indeed, the Court expressly did not reach the question of the effect of federal immigration law on subjective domiciliary intent under state law, *id.*, so it also did not need to address whether federal law would preempt state law. Similarly, *Toll v. Moreno*, 458 U.S. 1 (1982), is inapposite because that case merely prevents states from imposing discriminatory burdens (in that case, ineligibility for in-state university tuition) not contemplated by Congress on lawfully admitted aliens. *Id.* at 12–14. By contrast, in *Carlson v. Reed*, 249 F.3d 876 (9th Cir. 2001), the Ninth Circuit held that California could permissibly exclude TN and TD visa holders from in-state tuition eligibility because, due to their professed intention not to remain in the United States, the state "ha[d] hardly imposed on such aliens any 'ancillary burden not contemplated by Congress.'" *Id.* at 881 (quoting *Toll*, 458 U.S. at 14); *see also State ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539, 540 ¶ 1 (2018) (holding no right of undocumented immigrants to in-state tuition). There being no conflict between state and federal law, the court did not apply preemption analysis. *Carlson*, 249 F.3d at 881.

¶32 The most pertinent case on which Pimienta relies is *Park*, in which the Ninth Circuit construed federal immigration law to prohibit a B-2 nonimmigrant from establishing California domicile. 946 F.3d at 1098–99. At issue was a California statute that denied effect to a foreign divorce decree when both parties were living in California after overstaying their B-2 visas. *Id.* at 1098. The court held that because "Congress has *not* permitted B-2 nonimmigrants to lawfully form a subjective intent to remain in the United States[,] such an intent would inescapably conflict with Congress's definition of the nonimmigrant classification." *Id.* at 1099. Accordingly, the court concluded that under federal law, the B-2 nonimmigrant could not have been domiciled in California. *Id.* at 1100.

¶33 Technically, *Park* does not apply here as it distinguished the California Court of Appeal's decision in *Dick*, in part, on the grounds that the latter dealt (as here) with a marriage dissolution statute. *Id.* at 1100. Regardless, we are not obliged to follow Ninth Circuit precedent. *See Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 532–33 ¶¶ 8–9 (2003). *Park* failed to engage in any meaningful preemption analysis, simply concluding that state law wasdisplaced by federal law with which the court deemed it to conflict. 946 F.3d at 1100.

¶34 Such a cursory approach is at great variance with Arizona jurisprudence. Most closely on point is *St. Joseph's Hospital & Medical Center v. Maricopa County*, 142 Ariz. 94 (1984), in which the Court rejected precisely the argument Pimienta makes here, that federal law precludes an undocumented immigrant from legally forming an intent to domicile in Arizona for state law purposes.[4] *Id.* at 98. The Court concluded that "[i]llegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a state," and "[t]here is no federal impediment" to doing so. *Id.* at 99–100 (quoting *Plyler v. Doe*, 457 U.S. 202, 227 n.22 (1982)).

¶35 Further, in *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119 (2015), we held that the Arizona Medical Marijuana Act (the "AMMA") is not preempted by the federal Controlled Substances Act (the "CSA"). *Id.* at 141–42 ¶¶ 19–23. After conducting a fulsome preemption analysis, the Court concluded that in enforcing the AMMA, "the trial court would not be authorizing or sanctioning a violation of federal law," *id.* at 141 ¶ 21, and that "[t]he state-law immunity AMMA provides does not frustrate the CSA's goals of conquering drug abuse or controlling drug traffic," *Id.* at 141–42 ¶ 23. Those same criteria are satisfied in this case.

¶36 Similarly, in *Arizona Farmworkers Union v. Phoenix Vegetable Distributors*, 155 Ariz. 413 (App. 1986), a case we view as much closer than the present one, an employer challenged a court order requiring the employer to rehire workers due to a violation of state labor law. *Id.* at 414. The workers were undocumented and therefore not entitled to work in this country. *Id.* The court defined the issue as "whether a state court, enforcing a state agricultural labor law, must restrict its remedies" in light of the objectives of federal immigration law. *Id.* at 416. The court declared that "[w]hen federalism is involved it is necessary to determine whether federal law has preempted state law." *Id.*

¶37 After finding no express or field preemption, the court held it was not "impossible" for the employer to comply with both the court order and federal immigration law because federal law did not forbid employment of undocumented workers. Id. at 416–17. Further, the court held enforcement of state labor law did not create an obstacle to the enforcement of federal law because "[a] state court order of reinstatement does not restrain or limit the ability of the Immigration and Naturalization Service to deport illegal aliens," and a mere "speculative and indirect impact upon" federal immigration policies was insufficient to warrant preemption of state labor law. *Id.* at 417. Likewise, here, federal immigration law does not prohibit state courts from granting divorces to those whose TD visas have expired, nor does exercising jurisdiction in this context interfere with the objectives or operation of federal immigration law.

¶38 The dissent manufactures a conflict between state and federal law that does not exist, and then demands obeisance to the purported federal mandate without the requisite preemption analysis that Supreme Court precedents, our precedents, and the principles of federalism require. The dissent and Pimienta's arguments and the authorities they rely upon miss the forest for the trees: exactly what federal policy or goal would be frustrated by adjudicating a divorce in these circumstances? Indeed, had Arizona used residency rather than domicile for divorce jurisdiction purposes, it would not even arguably present a conflict, though the consequence would be exactly the same. And if Pimienta was domiciled in Arizona and had filed a dissolution petition, Arizona courts would inarguably have had jurisdiction over Rendon, regardless of her immigration status. Absent a clear conflict, we will not preemptively preempt our state's law.

CONCLUSION

¶39 For the foregoing reasons, we vacate the court of appeals' opinion, reverse the trial court, and remand for the trial court to decide whether, under Arizona law, Rendon is domiciled in Arizona.

MONTGOMERY, J., joined by **KING, J.**, dissenting.

¶40 Despite our strong adherence to the principles of federalism, *see, e.g.*, The Federalist (Alexander Hamilton, John Jay, James Madison) (Clinton Rossiter ed., 1999), we nonetheless dissent from the majority's failure to properly identify the nature of this case and the actual role federal law serves in disposing of the issues before us. This case does not necessitate a defense of Arizona's virtue as a separate sovereign in our compound republic. Instead, we need only follow our own statutory requirements informed by the conditions established by the federal government upon which Rendon entered and remained in this country since 2007. To paraphrase Iñigo Montoya from The Princess Bride: The majority keeps calling this a case about federalism, but it is not the federalism case you think it is. (Act III Communications 1987).

¶41 At its core, this case concerns the statutory requirements established by the Arizona Legislature that Arizona courts must consider when assessing jurisdiction over Rendon's petition for dissolution. Thus, the consideration of jurisdiction as required by Arizona law concerns whether an Arizona court has the authority to decide a petition for dissolution in the first instance, not whether Arizona has the authority to enforce its laws regarding domestic relations and any conflict with federal jurisdiction to enforce immigration law. *Compare Jurisdiction*, Black's Law Dictionary (11th ed. 2019) ("1. A government's general power to exercise authority over all persons and things within its territory . . . ."), *with Jurisdiction, id.* ("2. A court's power to decide a case or issue a decree . . . ."). Accordingly, the conclusion that Rendon cannot meet the jurisdictional requirements established by Arizona law, while due to the terms and conditions of her visa, are ultimately a consequence of Arizona, not federal law.

¶42 By not acknowledging the need to establish jurisdiction first, the majority goes straight to considering whether a conflict exists between federal immigration law and Arizona's substantive law of domestic relations. Well, "have fun storming [that] castle," The Princes Bride, Valerie, (Act III Communications 1987), because, as a consequence, the majority's entire analysis is flawed from the beginning—from the misplaced invocation of the presumption against preemption, to the errant

treatment of federal case law, to an inapt reliance on authority from other jurisdictions and the misapplication of our own cases. Ultimately, given that Rendon has not demonstrated that she has the legal capacity to change her domicile from Mexico to Arizona, she cannot meet Arizona's jurisdictional requirements and we respectfully must dissent.

I. JURISDICTION AND ARIZONA'S SUBSTANTIVE LAW

A. Jurisdiction In This Case

¶43 Before considering Rendon's petition and applying Arizona's domestic relations law to a marriage dissolution proceeding, the superior court had to make specific statutory findings. In particular, the court had to find that "one of the parties, at the time the action was commenced, was domiciled in this state" and that the domicile "has been maintained for ninety days before filing the petition for dissolution of marriage." A.R.S. § 25-312(A)(1). *See also Gnatkiv v. Machkur*, 239 Ariz. 486, 489 ¶ 8 (App. 2016) ("[T]he trial court must first resolve 'jurisdictional fact issues' where a question of jurisdiction exists . . . ." (quoting *Swichtenberg v. Brimer*, 171 Ariz. 77, 82 (App. 1991))).

¶44 The distinction between determining jurisdiction to decide a case and applying the pertinent substantive law is one this Court has recognized almost since statehood:

> Jurisdiction does not relate to the right of the parties, as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity (right) to be enforced, nor the right of the plaintiff to avail himself of it if it exists. *It precedes these questions* . . . . Have the plaintiffs shown a right to the relief which they seek? and [sic] has the court authority to determine whether or not they have shown such a right? A wrong determination of the question first stated is error, but can be re-examined only on appeal. The other question is the question of jurisdiction.

Tube City Min. & Mill. Co. v. Otterson, 16 Ariz. 305, 313 (1914) (emphasis added) (quoting *People v. Sturtevant*, 9 N.Y. 263, 269 (1853)); *see also Sil–Flo Corp. v. Bowen*, 98 Ariz. 77, 81 (1965) ("Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power." (quoting *Foltz v. St. Louis & S.F. Ry. Co.*, 60 F. 316, 318 (8th Cir. 1894))).

¶45 Pimienta was not domiciled in Arizona at any relevant time during these proceedings. Hence, Rendon's ability to establish domicile is a necessary condition precedent *imposed by Arizona law* for the court to exercise jurisdiction over her petition for dissolution before it could even consider the application of the relevant substantive law. *See Tanner v. Marwil*, 250 Ariz. 43, 46 ¶ 10 (App. 2020) ("The court has subject-matter jurisdiction over a marriage dissolution only if, at the time the petition for dissolution is filed, one or both parties have been domiciled in Arizona for at least 90 days."). Domicile under Arizona law requires "(1) physical presence, and (2) an intent to abandon the former domicile and remain here for *an indefinite period of time*; a new domicile comes into being when the two elements coexist." *DeWitt v. McFarland*, 112 Ariz. 33, 34 (1975) (quoting *Heater v. Heater*, 155 A.2d 523, 524 (D.C. 1959)). Thus, to have subject matter jurisdiction, the superior court had to find that Rendon had been domiciled in Arizona for ninety days before the petition for dissolution was filed.

¶46 Pimienta moved to dismiss Rendon's petition, arguing that she could not meet the domicile requirement. The parties stipulated that Rendon entered the United States with a nonimmigrant visa, pursuant to the North American Free Trade Agreement ("NAFTA"). Specifically, Rendon was admitted with a TD visa, explicitly conditioned upon her "having a residence in a foreign country which [s]he has no intention of abandoning and [was] visiting the United States temporarily for business." 8 U.S.C. §§ 1101(a)(15)(B), -1184(e)(1) (specifying that "[a]n alien who is a citizen of Canada or Mexico . . . who seeks to enter the United States" pursuant to the United States-Mexico-Canada Agreement ("USMCA"), which has replaced NAFTA and authorizes TD visas, will be classified "as a nonimmigrant under section 1101(a)(15) of this title"). Consistent with the visa conditions and as noted by the superior court, Rendon "expressly stated in her TD [v]isa applications over the course of more than a dozen years that she did not intend to remain in the United States and instead intended to return to Mexico."

¶47 Furthermore, Rendon acknowledged on cross-examination during the hearing on Pimienta's motion to dismiss that she understood that as a TD visa holder—or even as a TN visa holder—she could not express an intent to be domiciled in Arizona. Consequently, the express conditions of her TD visa preclude her from possessing the legal capacity required to change her domicile from Mexico to Arizona. *See Texas v. Florida*, 306 U.S. 398, 425 (1939) ("When one intends the facts to which the law attaches consequences, [s]he must abide the consequences whether intended or not."). And a person may only have one domicile at a time. *See Clark v. Clark*, 124 Ariz. 235, 237 (1979) (discussing whether domicile maintained for required timeframe prior to petitioner seeking a divorce).

¶48 A person seeking to establish a new domicile must have the legal capacity to do so. *Ariz. Bd. of Regents v. Harper*, 108 Ariz. 223, 228 (1972); *see also* Restatement (Second) of Conflict of Laws § 15

(Am. L. Inst. 1971). Arizona has long recognized this proposition. *See, e.g.*, *In re Sherrill's Estate*, 92 Ariz. 39, 43 (1962) ("The domicile of a person who becomes insane remains where it was established at that time. However, if he thereafter *regains the capacity* to form an intention to change his domicile, he may do so . . . ." (internal citations omitted) (emphasis added)); *McNeal v. Mahoney*, 117 Ariz. 543, 545 (1977) ("The domicile of a minor child . . . is that of the parent to whom legal custody of the child has been given."). The determination of domicile *under Arizona law* can, therefore, require a legal, as well as a factual, inquiry. Regardless, the majority errs in concluding that it is federal immigration law that "create[s] a legal capacity prerequisite." *Supra* ¶ 17.

¶49 Furthermore, in responding to Pimienta's motion to dismiss, Rendon had the burden of establishing that she possessed the legal capacity to change her domicile. *See Gnatkiv*, 239 Ariz. at 490 ¶ 9 ("The plaintiff bears the burden of demonstrating the trial court had subject matter jurisdiction . . . ."); *Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 367 (1975) ("The burden of proof is on the party alleging that a former domicile has been abandoned in favor of a new one."); *Valley Nat. Bank v. Siebrand*, 74 Ariz. 54, 62 (1952) ("It is . . . the rule that: The burden of proof is on one asserting that an earlier domicile was abandoned in favor of a later one.").

¶50 To this point, the focus has been on the restrictions imposed by Rendon's TD visa, first issued in 2007, and renewed annually until March of 2020. Since then, Rendon's TD visa has expired, and she has remained in the United States without lawful authority. Nothing has changed since her initial entry into the United States that permits her to legally change her domicile from Mexico to Arizona. Although her sister has filed a petition for permanent residence on Rendon's behalf, the notice from the United States Customs and Immigration Service acknowledging receipt of the petition states in bold: "This notice does not grant any immigration status or benefits," which the majority fails to acknowledge. *See supra* ¶ 5. Rendon has failed to present *any* legal authority to establish that she has the legal capacity to change her domicile, even though it is her burden to make this showing. Thus, Rendon has no greater capacity to change her domicile today than she did when she first entered the United States in 2007.[5]

¶51 Equally unavailing is Rendon's argument that by virtue of overstaying her TD visa and remaining in the country without lawful authority she is "no longer subject to the statutes that preclude her from establishing a lawful subjective intent to remain in the country." As stated in *Park v. Barr*, 946 F.3d 1096, 1099 (9th Cir. 2020): "It would be inconsistent to conclude that Congress sought to preclude nonimmigrants who *comply* with federal immigration law from the benefits that flow from state domiciliary status while permitting nonimmigrants who *violate* their visa conditions to share in them." *See also Graham v. INS*, 998 F.2d 194, 196 (3d Cir. 1993) ("If petitioner complied with the terms of his temporary worker visa, then he could not have had the intent necessary to establish a domicile in this country. On the other hand, if he did plan to make the United States his domicile, then he violated the conditions of his visa and his intent was not lawful. Under either scenario, petitioner could not establish 'lawful domicile' in the United States while in this country on a nonimmigrant, temporary worker visa."). Not only is Rendon's argument problematic as *Park* observed, but it is also a perverse proposition that a legal disability can be removed by violating the very law that imposed it. Rendon offers no authority to support her proposition, and this Court should decline to endorse it.

¶52 The superior court was correct in dismissing her petition for lack of domicile, and therefore lack of jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868))).

B. Jurisdiction In General

¶53 The majority's argument that the jurisdictional issues are amenable to the same type of preemption analysis as that of a conflict between substantive state and federal law assumes its own conclusion and reflects the misapprehension of the effect of federal immigration law on jurisdiction in this case. To wit, the majority posits: "Whether federal law divests states of jurisdiction in an area like family law, that is traditionally entrusted to the states, is no less momentous than displacing a state's substantive law governing the same subject matter and no less subject to preemption scrutiny." *Supra* ¶ 17. Momentous or not, the characterization that federal law somehow divests Arizona courts of jurisdiction misses the point.

¶54 Federal immigration law does not "divest" Arizona courts of jurisdiction. Instead, it establishes the conditions for certain classifications of nonimmigrant visa holders to enter the United States, regardless of Arizona's substantive law on domestic relations. And because Arizona has chosen to condition the exercise of a court's jurisdiction over a petition for dissolution based on physical presence *and* domicile, Rendon's visa conditions have consequences under Arizona law. The ultimate consequence to her is not dictated by federal immigration law in the first instance but is, instead, due to Arizona law. In fact, if Arizona only required Rendon to *reside* in Arizona for ninety days and nothing more, jurisdiction would not be an issue. But Arizona law requires more.

¶55 The cases cited by the majority to conflate consideration of jurisdiction to decide a case with jurisdiction to impose substantive law actually help to illustrate the issue. These cases deal with, in the first instance, conflicts between the substantive law of respective governing authorities, whether tribal, state, or federal. *Supra* ¶ 17. Because the Supreme Court found that the state substantive law was preempted, the state courts lacked jurisdiction to decide cases under state law. *See Haaland v. Brackeen*, 599 U.S. 255, 264–68 (2023) (finding that Congress had authority to enact the Indian Child Welfare Act which prescribed placement priorities for foster care and adoption that preempted state law priorities and prescribed jurisdictional authority); *Fisher v. District Court*, 424 U.S. 382, 390 (1976) (deciding that Northern Cheyenne Tribe had authority to exercise jurisdiction over adoption proceedings among its members pursuant to the Indian Reorganization Act of 1934 enacted by Congress); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983) (finding that a state's efforts to apply hunting and fishing regulations to non-tribal members on tribal lands preempted by federal law and noting that "a State will certainly be without jurisdiction *if its authority is preempted* under familiar principles of preemption" (emphasis added)). Thus, in these cases, the state court's jurisdiction was preempted because federal law prevented the state from enforcing its substantive law.[6] In the matter before us, federal law informs the determination of whether Rendon can meet the jurisdictional requirements that Arizona law establishes. The lack of jurisdiction is not due to a conflict between federal immigration law and Arizona domestic relations law. Thus, federal law does not divest Arizona courts of jurisdiction and the preemption analysis the majority undertakes, in as much as it considers whether there is a conflict between substantive federal and state law, is misplaced. *Supra* ¶¶ 17–28.

II. PREEMPTION

A. Presumption Against Preemption

¶56 The majority's assertion that this case involves the exercise of "jurisdiction in an area of law traditionally entrusted to state determination," *supra* ¶ 12, further reflects the failure to distinguish between determining jurisdiction to decide a case and applying the substantive law. This failure then leads to a misplaced reliance on the presumption against preemption as discussed in *Varela v. FCA US LLC*, 252 Ariz. 451 (2022). *Supra* ¶ 19.

¶57 In *Varela*, the preemption argument addressed whether the inaction of a federal regulatory agency precluded a personal injury jury trial. 252 Ariz. at 457 ¶ 2. Because the case involved tort law, it was an accurate statement that the "presumption against preemption is 'particularly' strong in 'field[s] which the States have traditionally occupied.'" *Id.* at 459 ¶ 13 (alteration in original) *(*quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)) (noting that tort actions are a traditional field occupied by states). There are important distinctions between *Varela* and the matter before us, though.

¶58 First, this case involves a congressional enactment pursuant to a negotiated treaty between the United States, Canada, and Mexico under an express, enumerated delegation of authority under the Constitution. *See* U.S. Const. art. I, § 8, cl. 303–4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization" and "[t]o regulate Commerce with foreign Nations."); 8 U.S.C. §§ 1184(e)(1), -1101(a)(15)(B); *see also* 8 C.F.R. § 214.6. This is not the kind of assertion of implied preemption due to the absence of action by a regulatory agency with inferred preemptive effect.

¶59 Second, the conditions governing the entry and continued presence of nonimmigrants in the United States—let alone treatymaking in the case of NAFTA and the USMCA—are not fields in "which the States have traditionally occupied." *Varela*, 252 Ariz. at 459 ¶ 13 (quoting *Wyeth*, 555 U.S. at 565). The presumption against preemption as discussed in *Varela* therefore does not apply here and, in this case, the principles of federalism are strengthened when state courts decline to exercise authority precluded by the proper use of powers delegated to the federal government.[7]

B. Impossibility Preemption[8]

¶60 Although there is no conflict between Arizona's law of domestic relations and federal immigration law, the majority has created one with respect to jurisdiction over Rendon's petition for dissolution. Federal law clearly says one thing—Rendon lacks the legal capacity to change her domicile from Mexico to the United States—and the majority reasons otherwise. *Supra* ¶¶ 27–28. But Rendon cannot have the legal capacity to be domiciled in Arizona and lack the legal capacity to be domiciled in the United States at the same time. *See* Aristotle, *The Metaphysics*, Book IV 1005b (John H. McMahon trans., Prometheus Books 1991) (concluding that "it is impossible for the same [woman] to suppose at the same time that the same thing is and is not"). Thus, we clearly have a case where "it is impossible for [Rendon] to comply with both state and federal requirements." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Accordingly, the Supremacy Clause dictates that we follow the federal law that precludes Rendon from changing her domicile to Arizona. *See* U.S. Const. art. VI, § 1, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (emphasis added)).

III. OTHER AUTHORITY

¶61 Given the fact that we have not previously considered an issue like the one before us, it makes sense to consult other jurisdictions that have addressed a similar issue. *See, e.g., Hullett v. Cousin*, 204 Ariz. 292, 296 ¶ 20 (2003) (noting that where a case is "a matter of first impression for Arizona, we look to cases from other jurisdictions having similar statutes"). But the impact of conflating a court's jurisdiction to consider a case and the jurisdiction of a governing authority to promulgate applicable substantive law rears its ugly head once again. Consequently, the majority disregards cases that are on point with respect to the impact that the conditions of Rendon's TD visa have on her capacity to change her domicile and embraces other state cases that neither address capacity in this context nor reflect our jurisprudential principles.

A. Federal Cases

¶62 In considering the federal cases cited to us, the majority observes that we are not obligated to follow Ninth Circuit precedent. *Supra* ¶ 33. Fair enough. But in the same case cited for this point, *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 532 ¶ 8 (2003), this Court also noted that "state courts look first to decisions of the United States Supreme Court. Although only a decision of the Supreme Court binds a state court on a substantive federal issue, a number of state supreme courts have elected to follow, as far as reasonably possible, their federal circuits' decisions on questions of substantive federal law." *Id.* That makes sense where "consistent decisions among federal and state courts further predictability and stability of the law. Therefore, if the Ninth Circuit has announced a clear rule on an issue of *substantive federal statutory law* . . . we will look first to the Ninth Circuit rule in interpreting *substantive federal statutory law*." *Id.* at 533 ¶ 9 (emphasis added). With respect to this case, the Ninth Circuit has squarely addressed the issue presented and announced a clear rule of substantive federal law that also relies on Supreme Court decisions addressing visa considerations relevant to our case, all of which do "dictate a contrary result" than the one the majority reaches. *Supra* ¶ 31.

¶63 *Carlson v. Reed*, 249 F.3d 876 (9th Cir. 2001), is instructive regarding the consequences of the conditions of Rendon's visa on legal capacity. "The specific question before us, therefore, is the proper interpretation of section 68062(h), which provides that aliens are eligible for classification as California residents only if they possess the legal capacity to establish 'domicile in the United States' under federal immigration law." *Id.* at 878. As the court explained, "[t]he TD visa category is for dependents of TN visa holders." *Id.* at 880. "The 'TN' visa category was created pursuant to . . . NAFTA, which provides that '[e]ach party shall grant *temporary entry* . . . to a business person seeking to engage in a business activity at a professional level . . . if the business person otherwise complies with existing immigration measures applicable to *temporary entry*.'" *Id.* (alterations in original) (quoting North American Free Trade Agreement, 32 I.L.M. 605, 664 (1993)). The court then traced the genesis of the language of the California statute before it to the Supreme Court's analysis in *Toll v. Moreno*, 458 U.S. 1 (1982). *Carlson*, 249 F.3d at 879. Therein, the Supreme Court stated, "[w]ith respect to the nonimmigrant class [of the Immigration and Nationality Act (the "INA")], the [INA] establishes various categories . . . . *For many of these nonimmigrant categories, Congress has precluded the covered alien from establishing domicile in the United States.*" *Toll*, 458 U.S. at 13–14 (emphasis added). Rendon is in such a category.

¶64 The *Carlson* court went on to set forth the specific regulations covering Rendon's visa as promulgated by the Attorney General in 8 C.F.R. § 214.6(b):

> Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence. The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. *A temporary period has a reasonable, finite end that does not equate to permanent residence*. In order to establish that the alien's entry will be temporary, the alien must demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time *and that he or she will depart upon completion of the assignment*.

Carlson, 249 F.3d at 880 (emphasis added). The court thus concluded that the plaintiff "*lack[ed] the legal capacity* to establish domicile in the United States within the meaning of *Elkins* and *Toll*." *Id.* at 881 (emphasis added).

¶65 The majority states that the basis for distinguishing *Carlson* is that the Ninth Circuit did not engage in a preemption analysis given the lack of a conflict between state and federal law. *Supra* ¶ 31. But for the majority's error in overlooking Rendon's lack of a legal capacity to establish domicile in the first place, we would not have a conflict here either, and it is only because of the continuing jurisdictional oversight that the majority overlooks *Carlson*'s treatment of the same issue of legal capacity that we have here. *See Carlson*, 249 F.3d at 878 (quoting a California statute regarding in-state tuition and concluding that "aliens are eligible for classification as California residents *only if they possess the legal capacity* to establish 'domicile in the United States' under federal immigration law" (emphasis added)).

¶66 The next federal case referenced is also instructive for considering the import of visa restrictions. *Park* considered the restrictions of a B-

2 visa, similar to Rendon's TD visa, that "requires nonimmigrants to maintain a residence in their country of citizenship with no intention of abandoning it." 946 F.3d at 1099 (citing 8 U.S.C. § 1101(a)(15)(B)). *Park* goes on to reason: "It follows that Congress has *not* permitted B-2 nonimmigrants to lawfully form a subjective intent to remain in the United States; such an intent would inescapably conflict with Congress's definition of the nonimmigrant classification." *Id.* In support of this conclusion, *Park* cited *Elkins v. Moreno*, 435 U.S. 647 (1978), and *Toll*, 458 U.S. at 14 & n.20. *Park*, 946 F.3d at 1099. It behooves us to consider *Elkins*, as well.

¶67 *Elkins* arose from the University of Maryland's denial of in-state tuition to students who were in the United States as G-4 visa holders.[9] 435 U.S. at 652–54. The Supreme Court characterized the main issue as "whether, as a matter of federal and Maryland law, G-4 aliens can form the intent necessary to allow them to become domiciliaries of Maryland." *Id.* at 658. With respect to federal law, the Supreme Court initially addressed the nature of a G-4 visa and stated, "it is clear that Congress *did not* require G-4 aliens to maintain a permanent residence abroad or to pledge to leave the United States at a date certain." *Id.* at 664 (emphasis added). Accordingly, the Court concluded: "Under present law, therefore, were a G-4 alien to develop a subjective intent to stay indefinitely in the United States he would be able to do so without violating either the 1952 Act, the Service's regulations, or the terms of his visa." *Id.* at 666.

¶68 Nevertheless, the Supreme Court made it clear that nonimmigrants cannot establish domicile where "Congress expressly conditioned admission . . . on an intent not to abandon a foreign residence," which is the situation before us with the TD visa. 435 U.S. at 665; *see also Toll*, 458 U.S. at 14 & n.20 (citing the nonimmigrant classification described at § 1101(a)(15)(B) as one in which "Congress has precluded the covered alien from establishing domicile in the United States"); *Gaudin v. Remis*, 379 F.3d 631, 636–38 (9th Cir. 2004) (concluding citizen of Canada who possessed a nonimmigrant visa pursuant to 8 U.S.C. § 1101(a)(15)(B) could not, as a matter of law, permanently relocate to the United States).

¶69 *Park*'s analysis and that of the Supreme Court are readily applicable and pertinent to the facts before us and support the conclusion that Rendon failed to meet her burden that she possessed the legal capacity to establish domicile in Arizona. If she possessed a visa like the G-4 visa, then she would have the legal capacity to change her domicile and an Arizona court would then be able to exercise jurisdiction over her petition. Rather than "simply concluding that state law was displaced by federal law with which the court deemed it to conflict" or having engaged in a "cursory approach," *supra* ¶¶ 33–34, *Park* engaged in a thoughtful review of the issue before it and of relevant Supreme Court case law, and we should follow it.

B. State Court Cases

¶70 Instead of following applicable federal cases, the majority embraces other state court cases supporting the conclusion "that federal immigration law does not deprive them of jurisdiction over divorce." *Supra* ¶ 30. As previously discussed, whether federal immigration law impacts a state's jurisdiction over divorce has more to do with what the state requires for jurisdiction rather than any overt requirement of federal immigration law. Nonetheless, not a single case discussed or even acknowledged the legal capacity issue and none of them addressed the conditions of a TD visa. Given the myriad issues in these cases and for the following stated reasons, we would be wise to reject them.

¶71 Two cases illustrate best the issues with reliance on other state cases. The first, *In re Marriage of Dick*, 18 Cal. Rptr. 2d 743, 746 (Ct. App. 1993), asserted that, pursuant to California law regarding jurisdiction for divorce cases, "residency is synonymous with domicile, the latter term meaning 'both the *act* of residence and an *intention* to remain.'" This Court, however, has not conflated residency with domicile in the domestic relations context. In fact, we have clearly stated that domicile and residence are distinct requirements. *See Clark*, 124 Ariz. at 237 ("Domicile is primarily a state of mind *combined* with actual physical presence in the state. Either, without the other, is insufficient." (emphasis added) (quoting *Harper*, 108 Ariz. at 228)). Mere residence is not enough.

¶72 Additionally, conflating residency with domicile confuses rather than clarifies the distinct requirements for jurisdiction in Arizona courts. *See Brandt v. Brandt*, 76 Ariz. 154, 158 (1953) ("'Residence' and 'domicile' are not synonymous at common law, nor does the one term necessarily include the other. Saying that residence is not a jurisdictional prerequisite is not equivalent to saying that domicile is not essential to a valid decree."). There is no reason for us to countenance such confusion. *See, e.g., Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 310 ¶ 13 (2003) (acknowledging the problem caused by "[t]he inconsistent use of . . . 'lack of informed consent,' . . . and 'lack of consent,'" and that it "blurred the distinction between" the two); *State v. Green*, 248 Ariz. 133, 136 ¶ 12 (2020) (addressing wide and varied interpretations of statute governing probation for drug possession offenses); *Satamian v. Great Divide Ins.*, 545 P.3d 918, 930 ¶ 37 (Ariz. 2024) (addressing accrual of claims and noting that "Arizona's accrual jurisprudence has not been a paragon of clarity").

¶73 Finally, the majority highlights the *Dick* court's finding that its conclusion was "buttressed by the different aims and purposes of immigration and dissolution law," concluding that the former does

not preclude the latter when the parties "otherwise meet domiciliary requirements and when they are subject to the courts of this state for other purposes." *Supra* ¶ 30 (quoting 18 Cal. Rptr. 2d at 748). But this conclusion and its rationale are problematic because to "otherwise meet domiciliary requirements" given "the different aims and purposes of immigration and dissolution law" disregards the distinction between jurisdiction to hear a case and the substantive law to apply in deciding the case. *See supra* ¶ 30. Given our own recognition of the jurisdictional inquiry distinction, there is no reason for us to follow the rationale or conclusion of *Dick* or the cases it relied on. *See* 18 Cal. Rptr. 2d at 747–48.[10] Instead, this Court should adhere to its own assertion that "Congress has the ultimate say in immigration matters and Arizona is bound under the Supremacy Clause of the United States Constitution to follow federal law." *Ariz. ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, 243 Ariz. 539, 543 ¶ 18 (2018).

¶74 The second case, *In re Marriage of Pirouzkar*, 626 P.2d 380 (Or. Ct. App. 1981), also cited by *Dick*, 18 Cal. Rptr. 2d at 747, is no more helpful. The statute in question provided: "When the marriage was not solemnized in this state . . . at least one party must be a resident of *or* be domiciled in this state at the time the suit is commenced and continuously for a period of six months prior thereto." *Pirouzkar*, 626 P.2d at 381 (emphasis added) (quoting O.R.S. § 107.075(2)). Rather than apply the plain meaning of the words of the statute, the court traced the history of interpreting its language to conclude: "When jurisdiction is dependent upon domicile our statutes have generally used the words 'resident' or 'inhabitant' and it has been uniformly held that these words, when used in such statutes, are synonymous with 'domicile.'" *Id.* at 382 (quoting *Fox v. Lasley*, 318 P.2d 933 (Or. 1957)). But resident and domicile are not synonymous for determining jurisdiction under Arizona law. Notably, though, the *Pirouzkar* court also stated that it had not been presented with any authority to conclude "that federal immigration law prevents the states from allowing [nonimmigrant visa holders] such as that of [the] wife in this case to establish a domicile of choice in this country." 626 P.2d at 383. We have been presented with such authority. *See* Part II(A) ¶¶ 46–47.

IV. OTHER CONCERNS

¶75 The majority expresses other concerns and raises points regarding other areas of the law, previously decided cases, and the complexities of federal immigration law. None of these concerns, though, justify overlooking the effect of Rendon's lack of legal capacity on the determination of jurisdiction and her failure to meet her burden to establish jurisdiction.

A. Superior Court Competence

¶76 In addressing impossibility preemption, the majority also expresses concern regarding the need for the superior court to determine immigration status and notes that "[a] legal determination of immigration status by the family court is not commanded by either state or federal law." *Supra* ¶ 28. Although it is true that federal law does not "command" an Arizona court to determine Rendon's immigration status, Arizona law does require, as discussed above, a superior court to make findings regarding domiciliary intent to establish jurisdiction, which may involve an inquiry such as the one before us. But fear not. The task before the court is nothing like the three terrors of the fire swamp. *See* The Princess Bride (depicting flame spurts, lightning sand, and rodents of unusual size). All a court need do, as the superior court did in this very case, is consider the relevant evidence to determine whether it has jurisdiction.[11] *See, e.g.*, *Seafirst Corp. v. Ariz. Dep't of Revenue*, 172 Ariz. 54, 56 (Tax Ct. 1992) (noting that in a challenge to subject matter jurisdiction, "the Court should receive such evidence as is necessary to permit the Court to determine the merits of the motion").

¶77 In particular, the superior court here was able to read, just as we can, the relevant statutes and consider the parties' stipulation regarding the nature and conditions of Rendon's TD visa. The court was also able to read "Exhibit 9," admitted in the hearing on the motion to dismiss, which was the notice from the United States Customs and Immigration Service acknowledging receipt of Rendon's sister's petition that stated in bold: "This notice does not grant any immigration status or benefits." The court was fully capable of ascertaining the relevant information to render its decision.

B. Other Areas of Law

¶78 The majority also expresses concern that finding Rendon unable to establish domicile in this case "*could* impact other areas of Arizona law," but does not give any explanation of what the impact might be. *Supra* ¶ 29 (emphasis added). Nevertheless, each statute or case referenced is not in any way negatively impacted by a determination that Rendon lacks the legal capacity to establish domicile in Arizona due to her former visa status and because she failed to provide *any* legal authority that allows her to establish legal capacity and change domicile. *See* A.R.S. § 14-2401 ("This article applies to the estate of a decedent who dies domiciled in this state."); A.R.S. § 14-2711(A) (referring to "the intestate succession law of the designated individual's domicile"); *Bryant v. Silverman*, 146 Ariz. 41, 42 (1985) (discussing conflict of laws analysis in a wrongful death case and stating that "this Court has adopted the rules embodied in the Restatement (Second) of Conflicts (1971) to analyze and solve conflicts problems arising in Arizona"); *Maricopa County v. Trs. of Ariz. Lodge No. 2, F. & A. M.*, 52 Ariz. 329, 338 (1938) ("It is well settled that the situs of intangibles for purposes of taxation is the domicile of the owner and not that of the debtor."); *Oglesby v. Pac. Fin.*

Corp. of Cal., 44 Ariz. 449, 453 (1934) (noting "that the situs of shares of stock in a corporation is the domicile of the owner of the shares"). Denying jurisdiction due to a lack of legal capacity does not affect the operation of the law for any of the statutes or cases cited.

C. Previous Arizona Cases

¶79 The majority addresses several prior Arizona cases to support its analysis and conclusion. These cases are not helpful in deciding the issue before us. None of the cases had occasion to consider the discrete issue of legal capacity to change one's domicile.

¶80 In *St. Joseph's Hospital and Medical Center v. Maricopa County*, 142 Ariz. 94 (1984), the contention was that the unlawful presence of three individuals who received medical care relieved Maricopa County of the obligation to pay for indigent emergency medical treatment. *Id.* at 97–98. In analyzing whether someone present in Arizona without lawful authority could qualify for indigent medical treatment, the Court noted that to qualify, "the patient [had to] be indigent and 'a *resident* of the county for the preceding twelve months.'" *Id.* at 98 (emphasis added) (quoting A.R.S. 11-297(A) (1973)).[12] Thus, the need to establish domicile, let alone the legal capacity to change it, was not at issue. Accordingly, this Court's discussion of residence and domicile as interchangeable terms is classic dicta. A plain reading of the statutory requirement did not include any reference, implied or otherwise, to domicile and was not necessary to determine the issue. *See Barrows v. Garvey*, 67 Ariz. 202, 206 (1948) ("Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication." (quoting *Obiter Dictum*, Black's Law Dictionary, 575 (3d ed. 1933))). That the majority relies on this case, *supra* ¶ 34, is akin to suffering "a nice paper cut and pour[ing] lemon juice on it." The Princess Bride, Miracle Max.

¶81 The reliance on *Reed-Kaliher v. Hoggatt*, 237 Ariz. 119 (2015), is likewise unhelpful because the preemption analysis comparing the Arizona Medical Marijuana Act and the federal Controlled Substances Act is inapposite to the facts of this case, as is the conclusion regarding preemption. *Id.* at 124–25 ¶¶ 19–23.

¶82 Finally, *Ariz. Farmworkers Union v. Phx. Vegetable Distribs.*, 155 Ariz. 413 (App. 1986), is not helpful for the majority's argument. In concluding that "[n]either the language of the INA nor legislative history indicates that Congress intended to preempt enforcement of state agricultural labor laws," the court went on to quote *De Canas v. Bica*, 424 U.S. 351, 359 (1976): "[t]he central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *Ariz. Farmworkers*, 155 Ariz. at 416 (alteration in original). Accordingly, the trial court's order of reinstatement "*does not actually conflict* with federal law. Under the INA, employers are not prohibited from employing undocumented aliens, even those subject to a final order of deportation or awaiting voluntary departure. Thus, an employer can reinstate [such] worker without violating the INA." *Id.* at 417 (emphasis added).[13] Thus, unlike what occurs here with the assertion of jurisdiction over Rendon's petition for dissolution, the action by the superior court did not in any way conflict with federal immigration law.

V. CONCLUSION

¶83 Rendon has failed to establish that she has the legal capacity under federal law to establish domicile in the United States, and therefore she cannot legally be domiciled in Arizona. She cannot meet her burden of establishing jurisdiction for an Arizona court to consider her petition for dissolution. We would therefore find that the court of appeals erred with respect to the three issues presented, vacate the court of appeals' opinion, and affirm the trial court's judgment dismissing the matter.

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1 Even were we to conclude that federal law controls, we are presented with no provision that dictates that a person whose visa has expired cannot change her mind about domicile. Presumably at that point, it becomes a matter of possible deportation or, if available, some form of obtaining alternative lawful status. We need not reach or resolve that question because we conclude that federal immigration law does not displace state domicile law in this context.

2 The court found that "residence" was synonymous with "domicile" because it required both residence and intent to remain. *Dick*, 18 Cal. Rptr. 2d at 746. Our law requires both elements as well. *DeWitt*, 112 Ariz. at 34. For that reason, the dissent's attempt to distinguish the case, *infra* ¶ 71, is unavailing.

3 Other decisions holding the same include *Bustamante v. Bustamante*, 645 P.2d 40, 41–42 (Utah 1982) (noting the "uncertainty confronting an alien in knowing whether he may be accorded the right to remain indefinitely or permanently under certain situations"); *Estate of Jack ex rel. Blair v. United States*, 54 Fed. Cl. 590, 599 (2002); *Maghu v. Singh*, 181 A.3d 518, 523–25 (Vt. 2018); *Gunderson v. Gunderson*, 123 Wash. App. 1035, 1037–38 (2004); *Padron v. Padron*, 641 S.E.2d 542, 543 (Ga. 2007); *Nagaraja v. Comm'r of Revenue*, 352 N.W.2d 373, 377–78 (Minn. 1984); *Cho v. Jeong*, No. 03A01-9608-CV-00257, 1997 WL 306017, at *4–7 (Tenn. Ct. App. 1997).

4 *St. Joseph's* dealt with whether undocumented immigrants could become "residents" of this state such that they would statutorily qualify for indigent emergency medical treatment. 142 Ariz. at 98. The Court "treated the statutory usage of the term

'residence' as carrying the same connotations as the term 'domicile'"—specifically "a state of mind combined with actual physical presence in the state." *Id.* at 99 (quoting *Ariz. Bd. of Regents v. Harper*, 108 Ariz. 223, 228 (1972)).

5 Accordingly, because it is the capacity to establish a change in domicile that matters, not whether the federal government may or may not remove someone in the United States, the majority's discussion regarding deportation is irrelevant to the precise issue before us. *Supra* ¶ 26 n.1.

6 The remaining cases address typical preemption due to a conflict between substantive bodies of law or are completely inapposite. *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Loc. 54*, 468 U.S. 491, 494 (1984) (addressing conflict between the National Labor Relations Act and New Jersey statutes regulating gambling and the qualifications of union officials); *United States v. Bass*, 404 U.S. 336, 349 (1971) (discussing balance between federal government and the states in the realm of criminal jurisdiction).

7 The need for uniform rules regarding naturalization was noted by James Madison as one of the shortcomings of the Articles of Confederation. James Madison, *Vices of the Political System of the United States, April 1787* no. 5 (Founders Online, Nat'l Archives 1787) ("Instances of inferior moment are the want of uniformity in the laws concerning naturalization.") https://founders.archives.gov/documents/Madison/01-09-02-0187 (last visited Mar. 30, 2024).

8 Because impossibility preemption is dispositive, it is not necessary to analyze the other forms of preemption.

9 A G-4 visa is a "nonimmigrant visa granted to 'officers, or employees of . . . international organizations, and the members of their immediate families' pursuant to 8 U.S.C. § 1101(a)(15)(G)(iv) (1976 ed.)." *Elkins*, 435 U.S. at 652 (alteration in original).

10 Additionally, one of the cases *In re Dick* relied on, *Cocron v. Cocron*, 375 N.Y.S.2d 797 (Sup. Ct. 1975), is no longer good law. The case was superseded by statute as stated in *Unanue v. Unanue*, 141 A.D.2d 31 (N.Y. App. Div. 1988). Therein, the court explained that "residence" as used in the state's divorce jurisdiction statute had been interpreted to be synonymous with the term "domicile," as recognized in *Cocron*. *Unanue*, 141 A.D.2d at 37. However, the court noted that "the bulk of cases so holding" were decided prior to certain amendments to the state's domestic relations laws. *Id.* The court then noted with approval that following the amendments, courts had "declined to equate residency . . . with domicile" and were "adhering to the literal definition of residence." *Id.* at 37–38.

11 Arizona law requires consideration of similar issues in other contexts. *See, e.g.*, A.R.S. § 46-140.01 (requiring "agenc[ies] of this state and all of its political subdivisions" to "verify the immigration status" of applicants for certain state and local public benefits).

12 The Court noted that the Supreme Court had previously held the durational aspect of the residency requirement unconstitutional in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). *St. Joseph's*, 142 Ariz. at 100.

13 Additionally, the federal law at issue in *Arizona Farmworkers* is no longer good law. *See Kansas v. Garcia*, 589 U.S. 191, 195 (2020) ("With the enactment of [the Immigration Reform and Control Act of 1986 (IRCA)], Congress took a different approach. IRCA made it unlawful to hire an alien knowing that he or she is unauthorized to work in the United States. 8 U.S.C. §§ 1324a(a)(1)(A), (h)(3).").

Cite as
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IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE of Arizona,
Appellee,
v.
Kevin DUNBAR,
Appellant.

No. CR-23-0029-PR
Filed June 18, 2024

Appeal from the Superior Court in Pima County
The Honorable Catherine M. Woods, Judge
No. CR20152260-001
REMANDED

Memorandum Decision of the Court of Appeals,
Division Two
No. 2 CA-CR 21-0069
VACATED IN PART

COUNSEL:

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JUSTICE BEENE authored the Opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER and JUSTICES BOLICK, LOPEZ, and KING joined. JUSTICE MONTGOMERY dissenting in part and concurring in part.

This opinion is subject to revision before publication in the Pacific Reporter.

JUSTICE BEENE, Opinion of the Court:

¶1 Appellate courts review objected-to error that occurs during criminal trial proceedings under either structural error or harmless error review. When a court finds structural error, the verdict or sentence of the defendant—whichever is challenged—is automatically reversed. *See Greer v. United States*, 593 U.S. 503, 513 (2021). But if the error is categorized as harmless error, the state must show beyond a reasonable doubt that the error did not contribute to the verdict or sentence. *See Weaver v. Massachusetts*, 582 U.S. 286, 294 (2017).

¶2 Kevin Dunbar—who was convicted of multiple felonies but whose sentence was overturned on appeal—asked to represent himself in the final stages of his resentencing. The trial court denied Dunbar's request and subsequently sentenced him to prison.

¶3 Dunbar appealed. The court of appeals concluded that the trial court's denial of Dunbar's request to represent himself constituted structural error and thus remanded the case to the trial court to reconsider his request. In this case, we decide whether the denial of the right to self-representation at sentencing is amenable to harmless error—rather than structural error—review.

¶4 For the reasons announced in this Opinion, we hold that erroneous denials of the right to self-representation at sentencing constitute structural error. However, we also recognize that not all denials of self-representation requests are erroneous, and we therefore clarify the analysis a trial court must employ in determining whether it should grant a defendant's untimely self-representation request.

BACKGROUND

¶5 Dunbar was convicted of attempted first degree murder, aggravated assault with a deadly weapon, kidnapping, and possession of a deadly weapon by a prohibited possessor. *State v. Dunbar* (*Dunbar I*), 249 Ariz. 37, 42 ¶ 1 (App. 2020). Dunbar appealed his convictions and sentences. *Id.* ¶ 4. He claimed, among other things, that he was denied the right to self-representation at trial. *Id.* at 44 ¶ 10. The court of appeals upheld his convictions but remanded for resentencing on different grounds. *Id.* at 54 ¶ 55. In rejecting his self-representation argument, the court found Dunbar "forfeited his right to self-representation through his vacillating positions," and that Dunbar had eventually signed a motion waiving his right to self-representation. *Id.* at 46 ¶ 17.

¶6 At his resentencing, Dunbar was represented by counsel. After hearing from the victim, the State, and Dunbar's counsel, the trial court asked if Dunbar wished to speak. Dunbar requested a continuance because he had not had an opportunity to consult with his attorney before the hearing. The court granted Dunbar's request and informed him that the continued hearing would only involve his comments regarding sentencing, as the other parties had already been heard.

¶7 Before the continued hearing, Dunbar filed a request to proceed pro se. At the hearing, the court denied Dunbar's request to represent himself. Applying the law of the case doctrine, the court reasoned that Dunbar had forfeited his right to self-representation based on "his vacillating position and his signed waiver," as established in *Dunbar I*. However, the court acknowledged that "it had read his two pro se memoranda on sentencing and would take those into account."

¶8 Dunbar objected to the court's ruling. He informed the court that he still had not spoken to

counsel and that he disagreed with his counsel's position regarding sentencing. The court allowed a recess so Dunbar could speak with his attorney. After reconvening the hearing, and after hearing from Dunbar, the court pronounced the sentence.

¶9 Dunbar appealed, arguing that his sentence should be vacated because he was denied the right to self-representation at resentencing. *See State v. Dunbar* (*Dunbar II*), No. 2 CA-CR 2021-0069, 2023 WL 126419, at *1 ¶ 1 (Ariz. App. Jan. 6, 2023) (mem. decision). In a split decision, the court of appeals concluded that the trial court's denial of Dunbar's right to self-representation at sentencing constituted structural error. *Id.* at *4 ¶ 16. The dissenting judge asserted that the trial court's denial of self-representation was not structural error and should thus be evaluated for harmless error. *Id.* at *6 ¶ 26 (Brearcliffe, J., concurring in part and dissenting in part).

¶10 The court of appeals also concluded that the trial court failed to properly analyze Dunbar's request to represent himself. *Id.* at *4 ¶ 20. Though the court found that Dunbar's request was untimely, it remanded to the trial court to determine whether Dunbar's request should have been granted. *Id.* The court of appeals instructed the trial court to make this determination by considering the factors enunciated in *State v. De Nistor*, 143 Ariz. 407 (1985). *Dunbar II*, 2023 WL 126419, at *4 ¶ 20. If, after conducting this analysis, the trial court determined that Dunbar's requests should have been granted, the court was to vacate his sentences and schedule a resentencing. *Id.*

¶11 The State appealed and we granted review to answer a recurring question of statewide importance in criminal cases: "Is the denial of the right to self-representation at sentencing amenable to harmless error, rather than structural error, review?" We have jurisdiction under article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

¶12 This Court reviews questions of law de novo. State v. Smith, 215 Ariz. 221, 227 ¶ 14 (2007); *State v. Glassel*, 211 Ariz. 33, 50 ¶ 59 (2005) (applying the Sixth Amendment).[1]

I.

¶13 The right to counsel guaranteed under the Sixth Amendment of the United States Constitution includes an accused's right to self-representation. *Faretta v. California*, 422 U.S. 806, 819 (1975); *see also* U.S. Const. amends. VI, XIV. This right also extends to representing oneself at sentencing. *See Lopez v. Thompson*, 202 F.3d 1110, 1117 (9th Cir. 2000) ("There is also no question that [the defendant] had a correlative right to waive assistance of counsel and represent himself [at his sentencing].").

¶14 As previously noted, when it comes to constitutional errors that occur during a criminal proceeding, courts generally analyze the error to determine whether it was harmless. *See Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). Under the harmless error standard, if the state can show beyond a reasonable doubt that the error did not contribute to the verdict, the defendant's conviction or sentence will not be reversed. *See Weaver*, 582 U.S. at 294. In contrast, a structural error entitles the defendant to "automatic reversal without any inquiry into prejudice." *Id.* at 290. Structural error that occurs at sentencing requires the reviewing court to remand for resentencing. *See, e.g., United States v. Virgil*, 444 F.3d 447, 456–57 (5th Cir. 2006).

¶15 "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver*, 582 U.S. at 294–95. Structural errors require reversal because they "infect[] 'the entire trial process' from beginning to end." *State v. Ring*, 204 Ariz. 534, 553 ¶ 46 (2003) (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999)). However, structural errors only apply in "a very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468 (1997); *accord Ring*, 204 Ariz. at 552 ¶ 46 ("The Supreme Court has defined relatively few instances in which we should regard error as structural.").

¶16 Against this backdrop, structural error is readily identifiable because it is not amenable to a harmless error analysis. *See Weaver*, 582 U.S. at 295. Indeed, the United States Supreme Court has highlighted three rationales for concluding an error is structural: (1) "the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "the effects of the error are simply too hard to measure"; and (3) "the error always results in fundamental unfairness." *Id.* at 295–96. However, "[t]hese categories are not rigid. In a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* at 296.

¶17 Supreme Court caselaw establishes that the right to self-representation in the guilt phase falls into the first rationale, *see id.* at 295, as well as the second rationale, *see McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) ("Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis."). As we now determine, both rationales that underpin the self-representation right in the guilt phase also lend themselves to the sentencing phase. We explore both rationales in turn.

A.

¶18 First, the right to self-representation protects the "dignity and autonomy of the accused" rather than protecting the accused from the possibility of erroneous conviction. *See McKaskle*, 465 U.S. at 176–77. The self-representation right is also unique because a defendant's successful assertion of the right "usually increases the likelihood of a trial

outcome unfavorable to the defendant" because they ostensibly lose the expertise of their counsel. *See id.* at 177 n.8; *see also Faretta*, 422 U.S. at 835 ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel."); *United States v. Mendez-Sanchez*, 563 F.3d 935, 945 (9th Cir. 2009) ("[D]espite the potential ill-consequence of self-representation, we permit it because of our society's respect for individual dignity . . . .").

¶19 At its core, the right to self-representation is grounded in the "fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U.S. at 295. Because defendants, rather than their counsel, bear the risk and *consequences* of conviction, every defendant must be free to personally decide whether having counsel is advantageous. *See Faretta*, 422 U.S. at 819–20 ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."). And, though sentencing occurs after guilt is determined, a convicted person's liberty—especially the *extent* of their liberty—is still at stake. *See State v. Ritch*, 160 Ariz. 495, 498 (App. 1989) ("[A] person's liberty is at stake in a sentencing procedure . . . ."); *see also Mempa v. Rhay*, 389 U.S. 128, 135 (1967) (explaining the importance of counsel's presence at sentencing because of the choices over presenting one's case at that stage). Accordingly, when it comes to a defendant's right of self-representation in light of the dignitary harm it protects, there is no meaningful distinction between the guilt phase and the sentencing phase of the trial.

B.

¶20 The erroneous denial of the right to self-representation is also impossible to measure in terms of prejudice. As the court of appeals majority pointed out, "a defendant's right to self-representation is not contingent upon a showing that he or she would have achieved a better result than counsel." *Dunbar II*, 2023 WL 126419, at *4 ¶ 16 n.1. The right is therefore not grounded in readily measurable harm. *See McKaskle*, 465 U.S. at 177 n.8.

¶21 Indeed, this second characteristic of the self-representation right is entwined with the first principle we have already discussed: that an individual "be allowed to make his own choices about the proper way to protect his own liberty." *See Weaver*, 582 U.S. at 295. Such a right cannot be protected in any meaningful way by harmless error analysis because an injury is not manifested in a conviction or a particular sentence, but instead in the wrongful denial of a criminal defendant's control over the case. *See id.*

¶22 Overall, the erroneous denial of the right to self-representation renders sentencing an unreliable vehicle for determining an appropriate sentence because defendants lose the ability to provide their own defense—a defense that may differ from what their counsel offers. To be sure, the Supreme Court has consistently stated that structural errors are limited only to errors that infect the *entire* framework of the trial process. *See id.* at 294–95; *Greer*, 593 U.S. at 513–14; *Neder*, 527 U.S. at 8. And sentencing occurs at the end of the trial process, which raises the question of how denial of the right to self-representation only at sentencing—or, as here, the very end of the sentencing procedure—infects the entire process. But the autonomy and dignitary harm from the denial of self-representation can occur at any time during the trial process, and the intangible nature of that harm means it has the potential to infect the entire proceeding. Accordingly, we hold that a court's denial of a defendant's request for self-representation at sentencing is amenable to structural error review rather than harmless error review.

¶23 In light of our holding, we now clarify the previously articulated standards for determining whether a criminal defendant's untimely request for self-representation should be granted. *See De Nistor*, 143 Ariz. at 412–13.

II.

¶24 Although the denial of the right to self-representation at sentencing is reviewed for structural error, Arizona jurisprudence is clear that not every request to self-represent should be granted. *State v. Cornell*, 179 Ariz. 314, 326 (1994) ("A defendant's right to discharge counsel and proceed in propria persona is a qualified right once trial has begun."). The right to self-representation does not "exist in a vacuum" because the right is balanced against the right to a "fair trial conducted in a judicious, orderly fashion." *De Nistor*, 143 Ariz. at 412 (quoting *United States v. Dujanovic*, 486 F.2d 182, 186 (9th Cir. 1973)). Thus, the request must be timely and subject to a finding that the waiver of counsel is made voluntarily and knowingly. *Id.*

¶25 Such a request "is timely if it is made before the jury is empaneled." Id.; *see, e.g.*, *State v. Weaver*, 244 Ariz. 101, 105 ¶ 10 (App. 2018) ("[A]lthough [the defendant] made his requests at the last possible moment before jury selection began, his requests were timely."). If the request is deemed untimely, a court should consider the factors outlined in *De Nistor*: "[1] the reasons for the defendant's request, [2] the quality of counsel, [3] the defendant's proclivity to substitute counsel, and [4] the disruption and delay expected in the proceedings if the request were to be granted." *De Nistor*, 143 Ariz. at 413 (quoting *People v. Barnes*, 636 P.2d 1323, 1325 (Colo. App. 1981)). A court should also reject a defendant's request if the motion for self-representation "was made for the purpose of delay." *State v. Thompson*, 190 Ariz. 555, 557 (App. 1997). Moreover, a "trial judge may terminate self-

representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46.

¶26 The *De Nistor* analysis "gives the defendant the opportunity to assert the right of self-representation but not at the expense of the orderly administration of the judicial process." 143 Ariz. at 413. This is because the defendant's right must be considered along with victims' constitutional rights and "the trial court's prerogative to control its own docket." *See State v. Lamar*, 205 Ariz. 431, 436 ¶ 27 (2003); Ariz. Const. art. 2, § 2.1(10).

¶27 Considering the consequences of structural error, we expand the analysis in *De Nistor* regarding when the denial of self-representation at sentencing is appropriate. Specifically, a court must also consider whether denying the defendant's request would prevent the defendant from being "allowed to make his own choices about the proper way to protect his own liberty." *Weaver*, 582 U.S. at 295. For example, a trial court should favorably consider a defendant's self-representation request if the defendant still has the opportunity to marshal sentence-influencing evidence or make legal arguments affecting sentencing. Conversely, a trial court should not grant a defendant's request if the remaining proceedings are ministerial in nature—such that the defendant's personal control does not have any bearing on the protection of his or her own liberty.

¶28 A trial court's inquiry as to what remains in a sentencing proceeding is consistent with *De Nistor*'s balance between the protection of the self-representation right and the "orderly administration of the judicial process." 143 Ariz. at 413. Moreover, introducing this consideration is consistent with Supreme Court precedent. The Court in *McKaskle* demonstrated that not every imposition on a defendant's right to self-representation is serious enough to constitute error. *See* 465 U.S. at 187–88. In *McKaskle*, the Supreme Court concluded that the participation of advisory counsel at trial did not violate a defendant's right to conduct his own defense under the Sixth Amendment. *Id.* The Supreme Court reached this conclusion because it determined that advisory counsel's intrusions were not substantial enough to undermine the primary focus of the *Farretta* right— "whether the defendant had a fair chance to present his case in his own way." *Id.* at 177.

¶29 Our dissenting colleague reads *McKaskle* as an endorsement of a quasi-harmless error review for self-representation errors. *Infra* ¶¶ 33–34. But this reading conflates the two distinct questions that comprise every error analysis: (1) did an error occur and, if so, (2) how is this type of error addressed? *See, e.g.*, *State v. Escalante*, 245 Ariz. 135, 142–46 ¶¶ 22–42 (2018). *McKaskle* answered these two questions by concluding that (1) no error had occurred when the defendant conducted his case with standby counsel, but, *if the defendant's denial of self-representation had been erroneous*, (2) the denial would have been addressed using the structural error standard. 465 U.S. at 177 n.8, 188.

¶30 Consistent with *McKaskle*, we remand to the trial court for a determination as to whether there was error. The trial court must determine, alongside the other *De Nistor* factors, whether preventing Dunbar from representing himself at the final stage of sentencing would have been substantial enough to interfere with his *Faretta* right. The gravamen of the trial court's inquiry should focus on whether denying Dunbar's motion for self-representation prevented him from making his own choices about how to protect his own liberty. *See Weaver*, 582 U.S. at 295; Part II ¶ 27; *cf. McKaskle*, 465 U.S. at 188. Denying a defendant the right to self-representation when potentially sentence-influencing evidence or arguments can still be presented is more likely to infect the entire trial framework. Such a denial may be serious enough to adversely affect the defendant's autonomy over the presentation of the case and would therefore amount to a *Faretta* violation. Conversely, if the remaining parts of the trial process are ministerial in nature insofar that they require no choice over how to present one's case, then a denial of the right to self-representation would not prevent a defendant from exercising his or her right to conduct his or her own case.

CONCLUSION

¶31 We vacate paragraphs 12 through 20 of the court of appeals' memorandum decision and remand this case to the trial court for reconsideration of Dunbar's motion to proceed pro se. On remand, the trial court shall consider the *De Nistor* factors, including whether denying Dunbar's request would substantially undermine his right to present his case at sentencing. If the trial court determines Dunbar's motion should have been granted, structural error has occurred, and Dunbar is entitled to resentencing. If the trial court again determines that Dunbar's motion should not have been granted, Dunbar's sentences stand.

MONTGOMERY, J., dissenting in part, concurring in part:

¶32 I respectfully dissent from the majority analysis and disposition regarding structural error for two reasons: 1) the United States Supreme Court has yet to extend a structural error analysis regarding the right to self-representation to a sentencing, let alone a resentencing, proceeding; and, 2) if the facts and circumstances of this case are going to be considered within the Supreme Court's structural error jurisprudence, then it is easily resolved by applying the guidance found in *McKaskle v. Wiggins*, 465 U.S. 168 (1984). However, because I would apply *State v. Lamar*, 210 Ariz. 571 (2005), to resolve this case in the first instance, I concur in the majority's reference to *State v. De Nistor*, 143 Ariz. 407 (1985), for determining

whether Dunbar's right to self-representation was violated.

I. The Majority Needlessly Extends Federal Supreme Court Caselaw

¶33 Previously, this Court has declared that we are bound to follow "applicable holdings of United States Supreme Court decisions." *State v. Soto-Fong*, 250 Ariz. 1, 9 ¶ 32 (2020); *see also State v. Anderson*, 547 P.3d 345, 354 ¶ 39 (Ariz. 2024) (Beene, J., dissenting) ("[W]e are bound by the Supreme Court's interpretation of the Sixth Amendment . . . ."). "Nor may we anticipate or assume that the Supreme Court will overturn or alter its established precedent." *State v. Bush*, 244 Ariz. 575, 598 ¶ 103 (2018); *see also Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (stating that the Court's "decisions remain binding precedent" until the Court "see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality"); *Soto-Fong*, 250 Ariz. at 8–9 ¶ 31 (declining to expand Eighth Amendment analysis beyond that of the Supreme Court in juvenile criminal sentencing and observing that Supreme Court had yet to "squarely address[] whether consecutive sentences should be considered in a proportionality review of an adult offender's sentence"). Thus, unless and until the federal Supreme Court addresses how structural error review under these circumstances applies in the sentencing context, especially in light of the problems set forth next, we should not do so.

¶34 In the course of applying *McKaskle* and combining it with *Weaver v. Massachusetts*, 582 U.S. 286 (2017), to render the denial of the right to self-representation in the sentencing phase subject to structural error review, the majority runs into several conflicts inherent in the Supreme Court's treatment of *Faretta* rights and error review. Importantly, the Supreme Court relied on the trial record in *McKaskle* to conclude that the defendant's *Faretta* rights were vindicated. *McKaskle*, 465 U.S. at 181. Yet, reviewing the record is at the heart of harmless error review. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (reaffirming "the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"); *United States v. Hasting*, 461 U.S. 499, 510 (1983) (discussing authority to review the record to determine whether an error was harmless); *see also Lamar*, 210 Ariz. at 573 ¶ 1 (reviewing the record to determine whether an error was harmless or not). And, at the same time, the Supreme Court stated that the denial of *Faretta* rights in the course of a trial cannot be harmless. *McKaskle*, 465 U.S. at 177 n.8. Compounding the conflict is that *Weaver*'s structural error rationale presumes structural error "def[ies] analysis by harmless error standards." *Weaver*, 582 U.S. at 295 (alteration in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)).

¶35 How can an appellate court review the record to conclude that *Faretta* rights, though violated, were nonetheless vindicated if the violation constitutes structural error? The Supreme Court has yet to even try and clarify this conundrum. Notably, *Weaver* merely quotes *McKaskle* in observing that a defendant's exercise of the right to present his own defense "usually increases the likelihood of a trial outcome unfavorable to the defendant." *Id.* at 295 (quoting *McKaskle*, 465 U.S. at 177 n.8). *Weaver* did not even address the ability to vindicate *Faretta* rights nor try to harmonize its own holding with that of *McKaskle* on that point.

¶36 Regardless, the conflicts manifest in the Supreme Court's structural error jurisprudence need to be resolved before it is extended by the majority to a phase of criminal proceedings the Supreme Court's jurisprudence has yet to encompass. Instead, I would apply the approach first set out in *State v. Lamar*, 205 Ariz. 431, 435–38, ¶¶ 22–37 (2003), *supplemented*, 210 Ariz. 571 (2005). Thus, I concur in the majority's discussion of *De Nistor*. And, upon review of the record and applying the factors, I find no denial of Dunbar's right to self-representation.

II. *McKaskle* Renders Remand Unnecessary

¶37 Assuming that the right to self-representation at a resentencing hearing is amenable to the Supreme Court's structural error jurisprudence, remand is still wholly unnecessary. *McKaskle* provides a ready template to resolve the issue before us without much, if any, effort.

¶38 In *McKaskle*, the Court stated that "[i]n determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way." 465 U.S. at 177. And the core of a defendant's right of self-representation is the "right[] to make his voice heard." *Id.* The Court went on to explain that:

> [A defendant's] *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel.

Id. at 179. The majority does not address this language in its discussion of *McKaskle*.

¶39 The Supreme Court found no error occurred because the record on appeal showed that the trial court vindicated the defendant's *Faretta* rights. *Id.* at 181. The Court noted that:

> [Defendant] was given ample opportunity to present his own position to the court on every matter discussed. He was given time to think matters over, to explain his problems and concerns informally, and to

> speak to the judge off the record. Standby counsel participated actively, but for the most part in an orderly manner. The one instance of overbearing conduct by counsel was a direct result of [defendant's] own indecision as to who would question the witness on voir dire.
>
> [Defendant] was given abundant opportunity to argue his contentions to the court.

Id.

¶40 Here, just as in *McKaskle*, the record reveals that the trial court conducting Dunbar's resentencing hearing vindicated his *Faretta* rights. The court granted Dunbar a continuance to consult with counsel and prepare for the hearing, considered his pro se sentencing memoranda—which agreed with his counsel's determinations as to sentence length—and allowed the defendant to openly address the court. Applying *McKaskle* to the virtually identical facts of this case readily leads to the conclusion that no *Faretta* error occurred, and no remand is necessary.

¶41 In sum, it is not our place to divine what the high court may do, nor our responsibility to reconcile conflicts in its caselaw. I would therefore vacate ¶¶ 12–18 of the court of appeals memorandum decision and, if relying on federal Supreme Court caselaw, resolve the question before us by applying the guidance from *McKaskle* to find no error occurred and affirm Dunbar's sentence.

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1 We limit our analysis to applying the United States Constitution, rather than article 2, section 24 of the Arizona Constitution, because only amici—neither Dunbar nor the State—raised it. *See Brionna J. v. Dep't of Child Safety*, 255 Ariz. 471, 479 ¶ 37 (2023) (declining to address an issue raised by amici because it "would expand the issues on appeal and address an argument not made by either party").

Cite as
125 Arizona Cases Digest 23

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

Daniel LACHANCE, Henry Stephen Conroy, Yvonne Mayer, and Robert McCormick,
***Plaintiffs/Appellants/Election Contestors*,**
v.
COUNTY OF COCHISE; Cochise County Jail District; Board of Supervisors of Cochise County; and the following in their official capacities: Supervisors Ann English, Peggy Judd, and Tom Crosby; Cochise County Recorder; and Cochise County Elections Director,
***Defendants/Appellees/Election Contestees*.**

No. 2 CA-CV 2023-0236
Filed June 25, 2024

Appeal from the Superior Court in Cochise County
No. S0200CV202300363
The Honorable David Thorn, Judge
AFFIRMED IN PART;
REVERSED IN PART AND REMANDED

COUNSEL

Charles R. Johnson, Scottsdale
Counsel for Plaintiff\s / Appellants / Election Contestors

Brian McIntyre, Cochise County Attorney
By Christine J. Roberts, Chief Civil Deputy County Attorney and Paul Correa, Civil Deputy County Attorney, Bisbee, *Counsel for Defendants / Appellees/Election Contestees*

OPINION

Judge Sklar authored the opinion of the Court, in which Vice Chief Judge Staring and Judge O'Neil concurred.

This opinion is subject to revision before publication in the Pacific Reporter.

SKLAR, Judge:

¶1 This appeal arises from an election contest involving a jail-district election. It requires us to determine whether voters on a state-mandated "inactive voter list" were entitled to receive ballots in the district's all-mail election. We conclude that they were.

¶2 The contest concerns a May 2023 election, in which Cochise County voters approved the jail district's creation, as well as the imposition of an accompanying tax. As authorized by A.R.S. § 16-558, the election was conducted entirely by mail. Four county residents, the "Contestors," then filed

this contest. They argued that the county had disenfranchised approximately 11,000 voters on the inactive list by failing to send them ballots. The superior court granted a motion to dismiss the complaint. It concluded that Contestors had failed to state a claim under Arizona's election-contest statutes.

¶3 We conclude that the superior court erred. Assuming as we must that Contestors' well-pled factual allegations are true, they have stated a claim. Because this was an all-mail election, the county was required to mail ballots to "each qualified elector entitled to vote in the election." A.R.S. § 16-558.01. Qualified electors include those on the inactive list. But the county failed to mail ballots to those voters, thus disenfranchising them. Contestors are therefore entitled to proceed with their claim. However, the superior court properly concluded that Contestors failed to state a claim on several other grounds for the contest. These include Contestors' allegation that the tax required sixty percent of the votes and that the Cochise County Attorney lacked the power to defend this case. We therefore affirm the court's dismissal on those grounds.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 In November 2022, the Cochise County Board of Supervisors formed the jail district, a special taxing district, to construct a new jail. The jail would be financed by an excise tax, subject to voter approval at an election held in May 2023. According to official election results, 12,891 voters supported the tax, and 12,141 voters opposed it. We take judicial notice of these results. Cf. Bolin v. Superior Court, 85 Ariz. 131, 136 (1958); Ariz. R. Evid. 201.

¶5 In June 2023, Contesters filed a statement of contest under A.R.S. §§ 16-672 and 16-674. The defendants, collectively "the County," moved to dismiss for failure to state a claim upon which relief can be granted. Thereafter, Contestors filed an Amended Statement of Contest and an application for default judgment. After a hearing, the superior court granted the motion to dismiss the matter with prejudice. This timely appeal followed.

JURISDICTION

¶6 Preliminarily, we must address whether the superior court had jurisdiction. *See Dowling v. Stapley*, 221 Ariz. 251, n.13 (App. 2009) ("Generally, subject matter jurisdiction of the superior court cannot be waived."). The right to contest an election is created by statute, which defines the means and manner of effectuating that right. *See Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978). Thus, the time limits to contest an election under Arizona's election-contest statutes are "mandatory, and unless strictly complied with [t]he court is without jurisdiction to proceed." *Id.*

¶7 The statement of contest was required to be filed within five days after completion of the canvass of the election and declaration of the election result. *See* A.R.S. §§ 16-673(A), 16-674(A). In special-district elections, the canvass is not complete until a presentation to the board of supervisors is conducted. A.R.S. § 16-642(B).

¶8 Here, the results were certified on May 25, and the presentation to the Cochise County Board of Supervisors occurred on June 6. Contestors filed their statement of contest on June 12. Although this was six calendar days after the canvass was completed, the fifth day to file the statement of contest was a Sunday.

¶9 In a nominating-petition challenge, our supreme court determined that "if the fifth day for filing an election appeal falls on a Saturday, Sunday, or state holiday, a notice of appeal will be deemed timely if filed on the next business day." *Bohart v. Hanna*, 213 Ariz. 480, n.2 (2006). It reached the same conclusion concerning election contests, albeit in an unpublished decision order. *Burk v. Ducey*, 2021 WL 1380620, *1 (Ariz. Jan. 6, 2021); *accord* A.R.S. §§ 1-301(A)(1), 1-303. We do the same and conclude that the statement of contest was timely. Thus, the superior court had jurisdiction and, given the timely notice of appeal, we do as well.

MOTION TO DISMISS

¶10 Section 16-672 authorizes electors to contest an election, including the result of any "question or proposal submitted to the vote of the people." A contest may be raised only on five enumerated grounds. Contestors raise three: (a) "misconduct" by certain officials; (b) "illegal votes"; and (c) an "erroneous count of votes." § 16-672(A)(1), (4)-(5); *see also* § 16-674(A) (same grounds and manner for contesting county and local elections).

I. Standard of review

¶11 Arizona has a "strong public policy favoring stability and finality of election results." *Donaghey*, 120 Ariz. at 95. Consistent with this policy, for more than a century, official returns have been deemed prima facie evidence of the number of votes cast. *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917). Even substantive irregularities do not supply a basis for invalidating an election if they do not affect the result or render it uncertain. *Miller v. Picacho Elem. Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994). Thus, unless a "statute expressly provides that non-compliance invalidates the vote," a challenger must show that ballots were "procured in violation of a non-technical statute in sufficient numbers to alter the outcome of the election." *Id.*

¶12 Because this is an appeal from the grant of a motion to dismiss for failure to state a claim upon which relief can be granted, we must apply this standard through the lens of Rule 12(b)(6) of the Arizona Rules of Civil Procedure. *See Lake v. Hobbs*, 254 Ariz. 570, ¶ 25 (App. 2023), *vacated in part on other grounds*, No. CV-23-0046-PR (Ariz. Mar. 22, 2023) (order) (considering election contest under Rule 12(b)(6) standard). Under Rule 12(b)(6), dismissal is appropriate if "as a matter of law . . . plaintiffs would not be entitled to relief under any

interpretation of the facts susceptible of proof." *Coleman v. City of Mesa*, 230 Ariz. 352, ¶ 7 (2012) (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, ¶ 4 (1998)). We assume the truth of all well-pled factual allegations and indulge all reasonable inferences. *Id.* ¶ 9. We review the superior court's ruling de novo. *Id.* ¶ 7.

II. Whether Contestors stated a claim for illegal votes under Section 16-672(A)(4)

¶13 We first address Contestors' claim that the County accepted illegal votes in violation of A.R.S. § 16-672(A)(4). Their illegal-votes claim relies on the alleged disenfranchisement of the inactive voters.

A. Procedural issues

¶14 Before addressing the illegal-votes claim substantively, we must resolve two procedural questions: (1) whether the claim was timely asserted after the election; and (2) whether we may consider the factual allegations in the Amended Statement of Contest despite it having been filed after the five-day deadline.

1. Whether the claim was timely asserted

¶15 The County argues that Contestors' challenge regarding the disenfranchised voters was a procedural challenge that is time barred because it was not brought before the election. At oral argument, the County further asserted that Contestors have no post-election remedy for disenfranchisement.

¶16 Our supreme court recently stated, "It is well-established that a litigant must challenge pre-election procedures prior to the election." *Ariz. Republican Party v. Richer*, No. CV-23-0208-PR, ¶ 26, 2024 WL 1922203 (Ariz. May 2, 2024). However, this court concluded in *Moore v. City of Page*, 148 Ariz. 151, 154-56 (App. 1986), that a claim of voter disenfranchisement is not a pre-election procedural challenge. Like in this case, the contestors in *Moore* challenged the results of a special election. They asserted that voters were disenfranchised because ineligible electors were allowed to vote. *Id.* This court concluded that the contest could be brought after the election. *Id.*; *see also Miller*, 179 Ariz. at 179-80 (involving post-election challenge to conduct in procuring votes from absentee voters).

¶17 The same analysis applies here. Contestors' challenge relates not to pre-election procedures, but to the election itself. Contestors had no practical way to know that inactive voters would be prevented from voting until after the election had begun. Moreover, the County has not explained how Contestors could have meaningfully challenged the disenfranchisement before the election. Ballots can be mailed as late as fifteen days before election day. A.R.S. § 16-558.01. The County has identified no procedure that would have allowed Contestors' challenge to be raised and resolved while still leaving inactive voters sufficient time to receive and cast ballots. Nor can we discern how this could happen in practice. Contestors' challenge was timely.

2. Timeliness of Amended Statement of Contest

¶18 We next address the Amended Statement of Contest's role in our analysis. Contestors initially raised many of their factual allegations in that document, where they explained among other things that the 11,000 assertedly disenfranchised voters were those that the county had placed on the "inactive voter list."

¶19 The amended statement was filed well beyond the statutory five-day deadline for initiating election contests. Amendments beyond the deadline are permitted, but not to the extent that they "set up new grounds of contest" or supply the court with jurisdiction that it would not otherwise have. *Grounds v. Lawe*, 67 Ariz. 176, 186 (1948). By contrast, post-deadline amendments may supply additional facts to support an otherwise timely contest. *See id.* The additional factual detail concerning the inactive voters fits this latter description. It therefore was timely, and we may consider it in our analysis.

B. Whether Contestors' allegation of disenfranchisement is cognizable as a claim for illegal votes

¶20 We must next determine whether Contestors' claim is cognizable as asserting illegal votes. The case law does not clearly define an illegal-vote claim, but most such cases involve ineligible voters being allowed to vote. For example, in *Moore*, the alleged failure to properly purge voter-registration lists supported an illegal-vote claim. 148 Ariz. at 156. Likewise, the court in *Grounds* characterized a claim as involving "illegal votes" where votes were cast by non-residents. 67 Ariz. at 182; *see also Huggins v. Superior Court*, 163 Ariz. 348, 349 (1990) (registered independents and non-partisans improperly allowed to vote in primary election); *Clay v. Town of Gilbert*, 160 Ariz. 335, 337-38 (App. 1989) (non-residents of town allowed to vote in town election).

¶21 This case involves the opposite concern disenfranchisement of eligible voters. Some cases appear to have considered disenfranchisement allegations as involving illegal votes. Most recent was *Moore*. Aside from the allegations discussed above, that case involved a claim that a city had disenfranchised voters by providing an improperly brief voter-registration period. *Moore*, 148 Ariz. at 157. The court did not specifically describe this allegation as asserting "illegal votes." However, it described the "gist" of the contest as asserting either illegal votes or an "offense against the elective franchise" committed by the "person whose right is contested." *Id.* at 155 (citing A.R.S. § 16-672(A)(3)).

¶22 Another case involved an election that was held in a different building and at a different time than had been designated. *Chenoweth v. Earhart*, 14

Ariz. 278, 279-80, 285 (1912). That could have had the practical effect of disenfranchising voters. One ground for that challenge was illegal voting, although the case also involved misconduct allegations. *Id.* at 279. Similarly, in *Donaghey*, our supreme court suggested that an election contest is the proper vehicle for bringing a disenfranchisement claim when an elector alleged that she had been improperly denied an absentee ballot. 120 Ariz. at 95. It did not, however, specify the illegal-votes ground. *Id.*

¶23 This case law indicates that Section 16-672(A)(4)'s "illegal votes" ground encompasses disenfranchisement. Like when ineligible voters cast ballots, disenfranchisement involves a distortion of the power of properly cast votes. In ineligible-vote cases, that power is diluted. In disenfranchisement cases, that power is amplified. We therefore conclude that Contestors' disenfranchisement claim is cognizable under subsection (a)(4).

C. Merits of Contestors' illegal-vote claim

¶24 Turning to the merits, we start with A.R.S. § 16-558, which allows special taxing districts to conduct "a mail ballot election if the governing board of the special district obtains approval from the board of supervisors." The jail district here is a special taxing district created by the Cochise County Board of Supervisors under A.R.S. § 48-4001(A). However, that district could not be established until "voter approval of a property tax or excise tax" under Section 48-4021.

¶25 Section 48-4021 imposes certain procedures concerning the election. Among other things, it requires that the jail district's board of directors distribute "publicity pamphlets concerning the tax issue proposed." § 48-4021(C). A copy of the pamphlet must be distributed "to each household containing a registered voter in the district." *Id.* For purposes of that statute, A.R.S. § 16-193 defines "registered voter[]" as "only active registered voters."

¶26 However, Sections 16-193 and 48-4021 do not address who should receive ballots. Resolving this question requires looking to Section 16-558.01. That statute provides that in all-mail special-district elections, the county recorder must mail a ballot "to each qualified elector entitled to vote in the election." This language mirrors Section 16-541(B), which provides that a "qualified elector of a special district . . . shall be permitted to vote early in any special district mail ballot election as provided" by applicable law. Under these two statutes, "qualified elector[s]" are entitled to ballots.

¶27 "Qualified elector" is defined in A.R.S. § 16-121(A). Relevant here, that statute describes a "qualified elector" as a person who is "properly registered to vote." It also provides that a person remains a "qualified elector" until that person's registration is canceled under Section 16-165. Cancellation is required under several circumstances, including "[w]hen a person has been on the inactive voter list and has not voted" within specified time periods. § 16-165(A)(7).

¶28 Section 16-166(C) requires the county recorder to include two groups of people on the inactive-voter list: (1) those from whom certain election material has been returned undeliverable and who did not provide a new address upon follow-up, and (2) those who appear to have recently moved but have not updated their voter registration or otherwise responded to the recorder's correspondence. A.R.S. § 16-166(A),(E). Section 16-166(C) requires that members of these two groups be kept on the list for either four years, or "through the date of the second general election for federal office following the date of the notice" sent to members of the second group. As noted, once that period expires, Section 16-165(A)(7) requires inactive voters' registration to be canceled.

¶29 When that occurs, Section 16-121(A) provides that such voters cease to be "qualified electors." That means, however, that they remain "qualified electors" while on the inactive-voter list. In all-mail elections, they are thus entitled to ballots under Section 16-558. *But see* A.R.S. § 48-620(G) (providing for "registered voters and property owners within the district" to receive "simplified ballot cards" in all-mail elections concerning underground utility improvement districts); *see also* § 16-193 (defining "registered voters" as "active registered voters" for purposes of mailing ballots under Section 48-620). This is true even though it leads to the anomaly that inactive voters are entitled to ballots but not publicity pamphlets in jail-district elections. We will not construe the statutes in contradiction of their plain meaning to correct this anomaly. *See City of Phoenix v. Butler*, 110 Ariz. 160, 162 (1973) ("[I]t is not the function of the courts to rewrite statutes.").

¶30 At oral argument, the County proposed a different interplay among the statutes. It focused on Section 16-558's requirement that qualified electors be "entitled to vote in the election." Under the County's theory, inactive voters are not so entitled because Section 16-193 limits the term "registered electors" to "active registered voters" for purposes of Section 48-4021. We are unpersuaded. Even if we read "entitled to vote in the election" as authorizing other statutes to restrict qualified electors from voting, Sections 16-193 and 48-4021 impose no such restriction. As we have explained, those statutes say nothing about who is entitled to ballots in jail-district elections. We therefore conclude that Contestors have stated a claim for illegal votes on the ground that the County improperly disenfranchised inactive voters.

D. Contestors' remedy on illegal-vote claim

¶31 We next address the proper remedy. At oral argument, Contestors argued that we should direct the superior court to enter judgment in their favor. They rely on a declaration they submitted in connection with a summary-judgment motion. The

court did not resolve that motion because it granted the motion to dismiss. In Contestors' view, that declaration proves that the inactive voters would have voted "no" in sufficient numbers to affect the election's outcome.

¶32 However, the superior court properly did not consider that declaration in ruling on the motion to dismiss, which is the only matter before us on appeal. *Coleman*, 230 Ariz. 352, ¶ 9 ("'Courts look only to the pleading itself' when adjudicating a Rule 12(b)(6) motion.") (quoting *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, ¶ 6 (2008)). Nor did the court need to decide the summary-judgment motion given that it granted the motion to dismiss. We decline Contestors' invitation to decide the summary-judgment motion in the first instance. *See Reid v. Reid*, 222 Ariz. 204, ¶ 16 (App. 2009) (appellate courts generally will not address issues for the first time on appeal). Instead, we remand to the superior court for further proceedings.

¶33 Relevant to the remand but not the motion to dismiss, the County acknowledged in an answer to the complaint that it did not send ballots to the inactive voters. Thus, on remand, there will be no factual dispute on this point. *See Schwartz v. Schwerin*, 85 Ariz. 242, 249 (1959) ("The law is well settled that an admission in an answer is binding on the party making it, and is conclusive as to the admitted fact."). The remaining issue for the superior court to determine is whether "the illegal votes were sufficient to change the outcome of the election." *Huggins*, 163 Ariz. at 353 (margin of victory must be exceeded by number of invalid votes after applying proportionate deduction); *Lake*, 254 Ariz. 570, ¶¶ 9-10 (clear and convincing evidence required).

III. Whether Contestors stated a claim for misconduct under Section 16-672(A)(1)

¶34 Contestors also raise claims under A.R.S. § 16-672(A)(1), which allows an election to be contested for "misconduct on the part of election boards or any members thereof in any of the counties of the state, or on the part of any officer making or participating in a canvass for a state election." Local elections may be contested on the same basis. § 16-674(A).

¶35 Contestors allege two principal types of misconduct. First they allege that the County violated the applicable election statutes by disenfranchising the approximately 11,000 inactive voters. However, we have already concluded that the disenfranchisement argument is cognizable under subsection (A)(4) as involving illegal votes. Whether it is also cognizable as misconduct makes no difference on remand given the County's admission in its answer that it did not mail ballots to inactive voters. The standard for reversing an election is the same in both illegal-vote and misconduct cases, namely, whether the disenfranchisement affected the election's outcome. *See Lake*, 254 Ariz. 570, ¶ 11 (providing that both misconduct and illegal votes must affect votes "'in sufficient numbers to alter the outcome of the election'") (quoting *Miller*, 179 at 180). We therefore decline to address whether the disenfranchisement allegations are cognizable as alleging misconduct.

¶36 Second, Contestors allege that the County improperly failed to appoint an election board. However, Contestors did not raise this claim in their original statement of contest. They did so only in the Amended Statement of Contest which, as we have explained, was not filed within the five-day statutory deadline. Because this was an additional ground, not an explanation of an original ground, it could not be asserted in the amended statement. *See* A.R.S. §§ 16-673(A), 16-674(A). The superior court therefore properly dismissed it. *See Grounds*, 67 Ariz. at 186; *Donaghey*, 120 Ariz. at 95.

¶37 In addition, Contestors' opening brief refers to other "detailed allegations" of misconduct. However, Contestors do not attempt to further develop any argument as to these additional grounds of misconduct. We therefore deem those arguments waived. *See In re Aubuchon*, 233 Ariz. 62, ¶ 6 (2013) (applying waiver to arguments not supported by adequate explanation, citations to the record, or authority).

IV. Whether Contestors stated a claim for an erroneous count of votes under Section 16-672(A)(5)

¶38 Contestors' next claim arises under Section 16-672(A)(5), which allows a contest where an "erroneous count of votes" resulted in the measure not receiving "a sufficient number of votes to carry." Contestors argue that the tax measure, which received just over fifty percent of the votes, was actually an initiative that required sixty percent. We review this issue de novo, as it requires us to interpret constitutional and statutory provisions. *See Johnson Utilities, L.L.C. v. Ariz. Corp. Comm'n*, 249 Ariz. 215, ¶ 11 (2020).

¶39 The Arizona Constitution reserves for the people the power to propose and enact laws through the initiative process. Ariz. Const. art. IV, pt. 1, § 1(1). That power extends to "all local, city, town or county matters on which such incorporated cities, towns and counties are or shall be empowered by general laws to legislate." Ariz. Const. art. IV, pt. 1, § 1(8). To exercise the initiative power, proponents must obtain a threshold number of signatures, which results in the initiative being placed on the ballot. *See* Ariz. Const. art. IV, pt. 1, § 1(2), (4), (8)-(9); *see also* A.R.S. § 19-102. Under a constitutional amendment adopted in 2022, an initiative that approves the imposition of a tax must obtain sixty percent of the votes to become law. Ariz. Const. art. IV, pt. 1, § 1(5).

¶40 Contrary to Contestors' argument, the tax measure at issue was not an initiative. It was not proposed by the electorate. *See* Ariz. Const. art. IV, pt. 1, § 1(2) (under the power of initiative "qualified

electors shall have the right to *propose* any measure") (emphasis added). Rather, it was proposed by the Cochise County Board of Supervisors and the Board of Directors of the Cochise County Jail District and submitted to the electorate under A.R.S. § 48-4021(B). The constitutional provisions concerning initiatives are therefore not applicable.

¶41 Contestors argue, however, that A.R.S. §§ 48-4021 to 48-4023 violate the Arizona Constitution. In their view, measures may not be submitted to voters unless the signature requirement for initiatives has been satisfied. But the constitution contains no such limitation. While it reserves the initiative power for the people, it does not restrict legislative bodies' power to present other measures to voters. It also provides that the initiative power shall not "be construed to deprive or limit the legislature of the right to order the submission to the people at the polls of any measure, item, section or part of any measure." Ariz. Const. art. IV, pt. 1, § 1(15). *See* Ariz. Const. art. IV, pt. 1, § 1(1); *Feldmeier v. Watson*, 211 Ariz. 444, ¶ 7 (2005) ("The initiative process reserves to the people the power to propose to the electorate laws and amendments to the constitution."). Thus, the election did not require sixty percent of the votes to pass.

PETITION TO INSPECT BALLOTS

¶42 Contestors argue that the superior court erred in denying their petition to inspect the ballots. After a statement of contest has been filed and the action is at issue, either party has a right to have the ballots inspected after filing a verified petition stating that the party cannot adequately prepare for trial without the inspection. *See* A.R.S. § 16-677(A)-(B). Given our conclusion that the court erred in dismissing the contest, we do not address this issue. We leave it instead to the parties and the court on remand.

MOTIONS FOR DEFAULT JUDGMENT AND JUDGMENT ON THE PLEADINGS

¶43 Contestors also argue that the superior court erred in denying their motions for default judgment and judgment on the pleadings. In those motions, Contestors asserted that the Cochise County Attorney's Office was not authorized to defend against this election contest and that the motion to dismiss did not qualify as a timely answer under A.R.S. § 16-675(A).

¶44 The county attorney is authorized by statute to "defend actions brought against the county" and "oppose claims against the county that the county attorney deems unjust or illegal." A.R.S. § 11-532(A)(4), (9); *see also Romley v. Daughton*, 225 Ariz. 521, ¶ 19 (App. 2010) ("The county attorney of each county also has a duty . . . and the authority . . . to represent the county in civil litigation."). As Contestors point out, the board of supervisors is vested with the final authority to "[d]irect and control" and "compromise" such actions where the county is a party. A.R.S. § 11-251(14). However, that statute does not obligate the county attorney to await authorization from the board before defending. Rather, it gives the county attorney independent authority to "deem[]" a claim unjust or illegal, then proceed to defend against it. That is precisely what occurred here.

¶45 In addition, the county attorney did not fail to file a timely answer under Section 16-675. Under that statute, once a statement of contest has been filed and the summons has been served, the opposing party has five days to file an answer. *Id.* A motion to dismiss is treated as an answer for purposes of Section 16-675. *See Prutch v. Town of Quartzsite*, 231 Ariz. 431, ¶¶ 16-18 (App. 2013). Contestors' statement of contest was filed on June 12, 2023. Even assuming that the summons was served on the same day, the motion to dismiss was timely. The answer deadline would have been June 17, a Saturday. The motion to dismiss was timely filed on Monday, June 19. *See Bohart*, 213 Ariz. 480, n.2.

ATTORNEY FEES

¶46 Contestors request an award of attorney fees on appeal. Rule 21 of the Arizona Rules of Civil Appellate Procedure requires them to identify the legal basis for such an award in their opening brief. Ariz. R. Civ. App. P. 21(a)(1)-(2). They did not. Instead, they asked at oral argument that we excuse this failure and award them fees anyway. We see no basis for doing so and therefore deny their request. *See* Ariz. R. Civ. App. P. 21(a)(2). Contestors are entitled to their taxable costs on appeal upon compliance with Rule 21.

¶47 The County requests an award of attorney fees as a sanction under A.R.S. § 12-349. Because Contestors have prevailed in part on their appeal, the County's request is denied. *See* § 12-349(F).

DISPOSITION

¶48 We reverse the superior court's dismissal concerning the allegation that the County improperly failed to mail ballots to inactive voters. We affirm the dismissal in all other respects and remand for further proceedings consistent with this opinion.

Cite as
125 Arizona Cases Digest 29

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

Marvin CARTER, II,
Plaintiff/Appellant,
v.
BNSF RAILWAY Company,
***Defendant/Appellee*.**

No. 1 CA-CV 23-0164
FILED 06-25-2024

Appeal from the Superior Court in Maricopa County
No. CV2019-014216
The Honorable Sherry K. Stephens, Judge Retired
The Honorable Jay R. Adleman, Judge
AFFIRMED

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OPINION

Judge Kent E. Cattani delivered the opinion of the Court, in which Presiding Judge Jennifer B. Campbell and Judge Anni Hill Foster joined.

This opinion is subject to revision before publication in the Pacific Reporter.

CATTANI, Judge:

¶1 Marvin Carter II appeals the superior court's grant of summary judgment in favor of his former employer BNSF Railway Company on his claim for injuries premised on strict liability under the federal Locomotive Inspection Act ("LIA"). For reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Carter was employed by BNSF as a locomotive engineer. In September 2018, Carter and his crew were moving two locomotives to a siding track to assemble a train. After moving the first locomotive, Carter noticed oil coming out of its doors and spreading "all over" the catwalk. He recognized that the locomotive would need to be inspected by a mechanical team, and because there was no maintenance or repair facility in the area, he moved it to a designated location on the track known as the "Bad Order Spot" to await inspection and repair.

¶3 After parking the locomotive at the Bad Order Spot, Carter engaged the hand brake and tested to ensure the locomotive was secured. He did not specifically recall shutting the locomotive down but may have done so. When leaving the cab, Carter slipped on oil on the catwalk and injured his knee.

¶4 Carter sued BNSF under the Federal Employers' Liability Act ("FELA"), asserting BNSF was strictly liable under LIA for violating safety regulations. Carter also asserted liability based on simple negligence. BNSF moved for partial summary judgment on the LIA claim, asserting the locomotive was not "in use" at the time of Carter's injury, which is a prerequisite for liability under LIA. After briefing and oral argument, the superior court granted summary judgment in favor of BNSF on the LIA claim. Carter later filed a motion to "revise" that ruling with a supplemental statement of facts. The court treated the motion as a request for reconsideration and denied it without seeking a response from BNSF.

¶5 With Carter's simple negligence claim still pending, the court entered judgment for BNSF on the LIA claim and certified the judgment on that claim as final and immediately appealable. *See* Ariz. R. Civ. P. 54(b). Carter timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶6 Carter contends the locomotive was "in use" at the time of his injury, and that the superior court thus erred by granting summary judgment for BNSF on his LIA claim. Summary judgment is proper if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). We review a summary judgment ruling de novo, *Coulter v. Grant Thornton, LLP*, 241 Ariz. 440, 447, ¶ 23 (App. 2017), viewing the facts in the light most favorable to the party against whom judgment was entered and considering only the evidence presented in the summary judgment record. *KB Home Tucson, Inc. v. Charter Oak Fire Ins. Co.*, 236 Ariz. 326, 329, ¶ 14 (App. 2014); *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, 57, ¶ 17 n.2 (App. 2007) (noting that review of summary judgment is limited to evidence before the superior court when ruling, not additional evidence first presented in a motion for reconsideration).

¶7 FELA provides the remedy for railroad workers injured on the job, authorizing employees to bring negligence claims against railroads. *See* 45 U.S.C. §§ 51–60. LIA[1] provides a supplemental remedy for negligence claims brought under FELA by establishing strict liability based on negligence

per se for violations of regulations outlining the safe "use" of locomotives. *Wright v. Ark. & Mo. R.R. Co.*, 574 F.3d 612, 620 (8th Cir. 2009); *LeDure v. Union Pac. R.R. Co.*, 962 F.3d 907, 910 (7th Cir. 2020); 45 U.S.C. §§ 53–54; 49 U.S.C. § 20701. Under these regulations, carriers are required to conduct a daily inspection for non-compliance with the act and repair any conditions before the locomotive can be used. 49 C.F.R. § 229.21(a). Part of the inspection is to ensure that the floors and passageways of the locomotive are kept free from oil that creates a slipping hazard. 49 C.F.R. § 229.119(c).

¶8 The preliminary question under LIA is whether the locomotive was "in use"[2] at the time of the accident, which is a question of law for the court. *Brady v. Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 13 (1938); *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 329 (4th Cir. 1998). The purpose of the "in use" limitation is to provide railroads with the opportunity to remedy hazardous conditions before LIA exposes them to strict liability. *Wright*, 574 F.3d at 620. When analyzing whether a locomotive was "in use," courts look to the totality of the circumstances, considering the location of the equipment at the time of the accident and the activity of the injured party. *See Deans*, 152 F.3d at 329; *Wright*, 574 F.3d at 621; *Pinkham v. Me. Cent. R. Co.*, 874 F.2d 875, 882 (1st Cir. 1989); *Huntsinger*, 398 P.3d at 408.

¶9 In *Brady*, the Supreme Court held that a train was "still in use, though motionless" when the train was only temporarily placed on a receiving track and "had not been withdrawn from use." 303 U.S. at 13. But the Court noted the general rule that a train car that has reached "a place of repair" is not "in use." *Id.* (citing *Balt. & Ohio R. Co. v. Hooven*, 297 F. 919, 922–24 (6th Cir. 1924)); *see also Hooven*, 297 F. at 922 (holding that a train undergoing repairs, even if "such withdrawal be but temporary," is not "in use").

¶10 Here, even assuming the locomotive was initially "in use," it was not "in use" at the time of Carter's injury. After Carter discovered the oil, he moved the locomotive to the Bad Order Spot to be inspected. Absent a nearby repair facility, the Bad Order Spot served as the designated location for repair at that location. Moreover, Carter himself noticed the oil, and he had finished securing the locomotive in the Bad Order Spot before he was injured. Because Carter had already secured the locomotive in a place of repair, the locomotive was not "in use" at the time of his injury. *See LeDure*, 962 F.3d at 910 (holding that a train was not "in use" because it was "stationary, on a sidetrack, and part of a train needing to be assembled before its use"); *Wright*, 574 F.3d at 622 (holding that a train in a "repair in place" track undergoing inspection was not "in use," emphasizing its "blue flagged status"[3] and locked position).

¶11 Carter cites a variety of cases that, in his view, support a finding that the locomotive here was "in use." But in all of those cases, the train either was not taken to or had not yet reached a place of repair, a critical difference from the circumstances presented here. *See, e.g.*, *Delk v. St. Louis & S.F. R.R. Co.*, 220 U.S. 580 (1911); *Johnson v. S. Pac. Co.*, 196 U.S. 1 (1904); *Great N. Ry. Co. v. Otos*, 239 U.S. 349 (1915); *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916); *Chi. Great W. R.R. Co. v. Schendel*, 267 U.S. 287 (1925); *S. Ry. Co. v. Bryan*, 375 F.2d 155 (5th Cir. 1967); *Raudenbush v. Balt. & Ohio R.R. Co.*, 160 F.2d 363 (3d Cir. 1947); *Deans*, 152 F.3d at 326. These authorities thus do not alter our analysis.

¶12 Carter next asserts that, because he may not have activated the emergency shutdown before his injury, the locomotive was still "in use." But regardless whether the engine was fully shut down, Carter had— by his own testimony—already done all that was necessary to secure the locomotive in the Bad Order Spot by the time of his injury.

¶13 Carter further argues the superior court wrongly failed to consider that only a few minutes passed between actively moving the locomotive and his ultimate injury. *See Raudenbush*, 160 F.2d at 368 (reasoning that a locomotive was still "in use" when it had been uncoupled and stopped for only "an interval of but a few seconds or minutes between the active use of the locomotive and the time of the accident"). But again, the interval (however short) is not alone dispositive, and here, the fact that Carter had noted the anomalous oil and already secured the locomotive in a place of repair compels the conclusion that the locomotive was not in use. *Compare id.* at 364 (active use of a locomotive to move train cars within a yard, then injury almost immediately after the crew cut the train cars loose).

¶14 Finally, Carter asserts that the locomotive was "in use" because "the unit would soon be ready for departure, the unit was not being moved to any repair facility, and any servicing and maintenance work would presumably soon be over." But the authority on which he relies in fact reasons that a locomotive that is stationary and waiting to be serviced or repaired is not "in use." *Balough v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 950 N.E.2d 680, 698 (Ill. Ct. App. 2011). Moreover, the record does not support Carter's assertions that "the unit would soon be ready for departure" or that "any servicing or maintenance work would presumably soon be over." To the contrary, Carter made clear that the locomotive needed to be put aside for inspection by a mechanical team due to the oil leak. Regardless whether the locomotive was eventually used later that day, it was not "in use" at the time of Carter's injury for the reasons stated above.

¶15 Accordingly, the superior court did not err by entering judgment in favor of BNSF on the LIA-based claim. The court looked to the totality of the

circumstances and reasonably determined the locomotive was not "in use" because it had "reached a place of repair" by the time Carter was injured.

CONCLUSION

¶16 For the foregoing reasons, we affirm.

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1 Congress amended the Boiler Inspection Act ("BIA") in 1915 to apply to the entire locomotive and all its parts. Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192. Thereafter, BIA as amended became known as LIA. *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 629 (2012).

2 The Federal Safety Appliance Act also has an "in use" requirement, and courts sometimes rely on cases construing "in use" in that context when considering LIA claims. *Huntsinger v. BNSF Ry. Co.*, 398 P.3d 403, 407 n.9 (Or. Ct. App. 2017).

3 Blue flags serve as a warning that work is being done in the area. *Carder v. Ind. Harbor Belt R.R.*, 205 F. Supp. 2d 981, 985 n.3 (N.D. Ind. 2002).

Cite as
125 Arizona Cases Digest 31

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE of Arizona,
Appellee,
v.
Natalie Simone BURKE,
Appellant.

No. 1 CA-CR 23-0351
FILED 06-25-2024

Appeal from the Superior Court in Maricopa County
No. CR2003-015998-002
The Honorable David W. Garbarino, Judge
AFFIRMED

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OPINION

Presiding Judge Angela K. Paton delivered the opinion of the Court, in which Judge Michael S. Catlett and Judge Andrew M. Jacobs joined.

This opinion is subject to revision before publication in the Pacific Reporter.

PATON, Judge:

¶1 The superior court granted Natalie Simone Burke's petition to expunge her drug paraphernalia offense records and seal the arrest, charging, and court records pertaining to that offense, but denied her request to seal the remaining unexpunged offense records within the same criminal case. She appealed, and contends that Arizona Revised Statutes ("A.R.S.") Section 36-2862(C)(1)(e) requires the court to seal the entire case record—including unexpunged offense records—when the case includes at least one expunged offense. We conclude that it does not and affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2004, a jury convicted Burke of possession of marijuana for sale, a class 2 felony (count 1); conspiracy to commit sale or transportation of marijuana, a class 2 felony (count 2); possession of drug paraphernalia, a class 6 felony (count 3); and first-degree money laundering, a class 2 felony (count 4). The superior court sentenced her to a term of probation, which she completed and was discharged from in 2012.

¶3 In 2020, Arizona voters adopted Proposition 207, known as the Smart and Safe Arizona Act, which authorizes courts to expunge certain

marijuana-related offense records. *See* A.R.S. § 36-2862. Under Section 36-2862, an individual may seek expungement of the record of a prior arrest, charge, adjudication, conviction, or sentence involving a qualifying marijuana offense. *See* A.R.S. § 36-2862(A). If the court grants expungement of an eligible offense, the court's order shall "[r]equire the clerk of the court to seal all records relating to the expunged arrest, charge, adjudication, conviction or sentence and allow the records to be accessed only by the individual whose record was expunged or the individual's attorney." A.R.S. § 36-2862(C)(1)(e).

¶4 In 2021, the Arizona Supreme Court enacted Arizona Rule of Criminal Procedure ("Rule") 36 to provide additional guidelines for expungement. The Rule states: "If the court grants the [expungement] petition, the court must, *as to any applicable count*, vacate the conviction and sentence, if any, [and] order that any record of the arrest, charge, conviction and sentence be expunged . . . ." Ariz. R. Crim. P. 36(d)(4) (emphasis added).

¶5 Our supreme court also issued an administrative order to establish "standardized procedures . . . to implement the expungement process" pursuant to Rule 36 and Section 36-2862. *See* Ariz. Sup. Ct. Admin. Order No. 2021-82 (May 26, 2021). The Administrative Order requires all Arizona courts to comply with certain procedures after granting expungement, including:

> 2. Seal the entire case file if the charges being expunged constitute the entirety of the complaint, information, or indictment, including the petition to expunge and related responses, motions, and orders, and allow the records to be accessed only by the person whose record was expunged or the person's attorney.
>
> 3. Seal all records contained within the case file relating to the expunged arrest, charge, adjudication, conviction, and sentence, including the petition to expunge and related responses, motions, and orders as to the applicable counts if the charges being expunged constitute less than the entirety of the complaint, information, or indictment. Upon receipt of a public records request, the court must withhold case records related solely to the expunged charges, redact references to the expunged portions of the case file, and allow public access to the records containing information concerning the charges that were not expunged in the case file.
>
> . . .
>
> 6. Comply with Rule 123(c)(2)(C), Rules of the Supreme Court, by ensuring that all sealed information related to the expunged charge is redacted from any record provided in response to a public record request.

Id.

¶6 In April 2023, Burke petitioned to expunge her drug paraphernalia conviction (count 3) pursuant to Section 36-2862(A)(3). Count 3 was eligible for expungement because Burke was convicted of "[p]ossessing, using or transporting paraphernalia relating to the cultivation, manufacture, processing or consumption of marijuana." A.R.S. § 36-2862(A)(3).

¶7 Burke acknowledged in her petition that her only expungement-eligible offense was the drug paraphernalia conviction, but also requested that her possession, conspiracy, and money laundering convictions be sealed and made available only to Burke or her attorney. She asserted "[t]he request for expungement . . . if granted, provides the basis to seal counts one, two, and four of this case." The State agreed that the drug paraphernalia conviction was expungement-eligible but asserted: "To the extent that any records contain information about other charges, records related to the arrest, charge, conviction, adjudication or sentence of charges outside the purview of A.R.S. § 36-2862 they should not be expunged."

¶8 The court heard argument regarding Burke's expungement petition and request to seal the records for not only her expungement-eligible drug paraphernalia conviction, but also for her non-expungement eligible possession, conspiracy, and money laundering convictions. The court expressed concern about sealing the entire matter when only one conviction was eligible for expungement and asked whether Burke's petition should be treated as a combined petition to expunge and petition to seal, in which case the court would consult the sealing statute, Section 13-911. The court noted that in previous cases containing both expunged and unexpunged offenses, it ordered the clerk of court to redact information related to the expunged offenses, leaving the unexpunged, unsealed offenses publicly available. Burke asserted that the Section 13-911 sealing statute was not a part of her petition, and that under Section 36-2862, once an expungement is granted, all records related to the expunged offense are sealed—including non-expungement eligible offenses that are part of the same criminal case. She also argued the statute requires more than redaction of the expunged portion. The State did not "have a detailed answer for [the court]" at the time, adding that it also understood Section 36-2862 to require the entire case record to be sealed but the other convictions would still exist and be eligible for sentencing enhancement.

¶9 The superior court found that no legal authority supported sealing the entire case. It ruled that "[e]xpungement is charge specific," and under Section 36-2862(C)(1)(e), "only records that relate to the expunged charge are to be sealed." It also concluded that "Section 36-2862(C)(1)(e) does not authorize either expressly or impliedly the Court to order sealing of documents related to charges that are not expunged," and thus, "[c]harges that are not

subject to expungement continue to exist and the public should have access to the court records related to those charges absent an order upon a proper petition to seal based on A.R.S. § 13-911." The court granted expungement of the arrest records, charging documents, and all court records "**pertaining only to Count 3**" (the drug paraphernalia conviction), but denied Burke's request to seal the case records relating to the unexpunged convictions. (Emphasis in original.)

¶10 Burke timely appealed, and we have jurisdiction under Article 6, Section 9 of the Arizona Constitution, and Sections 12-120.21(A)(1), 13-4031, 13-4033(A)(3), and 36-2862(F).

DISCUSSION

¶11 Burke argues the superior court abused its discretion by denying her request to seal the entire case file, including the records for her possession, conspiracy, and money laundering convictions, after expunging her drug paraphernalia offense under Section 36-2862. Specifically, she argues the term "seal" in Section 36-2862(C)(1)(e) applies to all unexpunged offenses if those offenses are "related to" an expunged offense in the same criminal case, and because all four of her convictions are within the same criminal case, the three unexpunged convictions are "related to" the one expunged conviction.

¶12 Both parties acknowledge that the State agreed with Burke's interpretation of the statute during the superior court proceedings. On appeal, Burke does not raise waiver or respond to the State's judicial estoppel arguments. Even if she had, we are not bound by the parties' agreements or concessions when interpreting a statute. *See Mora v. Phoenix Indem. Ins. Co.*, 196 Ariz. 315, 318, ¶ 14 n.3 (App. 1999). We review the superior court's ruling on an expungement petition for an abuse of discretion but "'review the interpretation of statutes and court rules de novo.'" *State v. Ibarra*, 254 Ariz. 320, 323, ¶ 5 (App. 2022) (quoting *Cranmer v. State*, 204 Ariz. 299, 301, ¶ 8 (App. 2003)).

¶13 This court recently examined whether the words "relating to" in Section 36-2862(A)(3) should be read broadly to allow the expungement of a drug paraphernalia conviction if the conviction involves *any* marijuana paraphernalia plus some other illegal substance. *See State v. Cisneros*, 255 Ariz. 564, 566–68, ¶¶ 10–17 (App. 2023). To determine the meaning of the phrase "relating to," we looked to our supreme court's decision in *Saban Rent-a-Car LLC v. Ariz. Dep't of Revenue*, 246 Ariz. 89 (2019). In *Saban*, the supreme court concluded that the phrase "relating to" is subject to "unlimited reach if construed too broadly," and, therefore, must be read "in conjunction with the history and purpose" of the text. *Id.* at 95–96, ¶ 22. We applied this reasoning to *Cisneros* and held:

> Given the voters' limited intent to legalize possession and use of marijuana and related paraphernalia, and to provide for expungement of such offenses only, we reject Cisneros's argument that the absence of the word 'only' from the phrase 'relating to' requires us to read it more expansively. *Cf. Roberts v. State*, 253 Ariz. 259, 266, ¶ 20 (2022) ("court will not inflate, expand, stretch or extend a statute to matters not falling within its expressed provisions" (quoting *City of Phoenix v. Donofrio*, 99 Ariz. 130, 133 (1965))).

Cisneros, 255 Ariz. at 567, ¶ 16.

¶14 We face a similar interpretive question here—that is, when a criminal matter involves at least one expungement-eligible offense, whether the court must also seal unexpunged offenses that are part of the criminal case because they "relat[e] to" the same criminal matter. *See* A.R.S. § 36-2862(C)(1)(e). Burke asserts the answer to that question is yes, contending that multiple offenses within a single criminal case establish a "connection" between all offenses, such that unexpunged convictions are "related to" an expunged conviction, requiring the entire criminal case record to be sealed when expungement is granted for one eligible offense.

¶15 Our primary goal in interpreting Section 36-2862(C)(1)(e) "is to effectuate the electorate's intent in adopting it." *See Saban Rent-a-Car LLC*, 246 Ariz. at 95, ¶ 21 (citing *Jett v. City of Tucson*, 180 Ariz. 115, 119 (1994)). "If we can discern the provision's meaning from its language alone, we will apply it without further analysis." *Id.* (citing *Jett*, 180 Ariz. at 119).

¶16 We disagree with Burke's broad reading of Section 36-2862(C)(1)(e). The statute requires the court to order the clerk of court to "seal all records relating to the *expunged* arrest, charge, adjudication, conviction or sentence[.]" A.R.S. § 36-2862(C)(1)(e) (emphasis added). The text applies the term "seal" only to the expunged portion of a defendant's criminal record. Here, the court only expunged the drug paraphernalia conviction from Burke's criminal record. Thus, the statute requires that only records relating to the expunged offense—here, the drug paraphernalia offense—be sealed; the statute does not automatically require sealing of unexpunged offenses within the same criminal case record.

¶17 Further, the text of Proposition 207 does not support the notion that the voters intended the phrase "relating to" to mean the expungement statute requires sealing other unexpunged offenses because they exist in the same criminal case. Sections 36-2850 to 36-2865 decriminalized certain marijuana-related offenses, only making some offenses eligible for expungement. *See Ibarra*, 254 Ariz. at 323, ¶ 6 (citing A.R.S. §§ 36-2850 to 36-2865). The offenses that may be expunged are limited, and include those involving possession, consumption, or transportation of two and one-half ounces or less of marijuana; possession,

transportation, cultivation, or processing of not more than six marijuana plants at the individual's residence for personal use; and possession, use, or transportation of drug paraphernalia related to the cultivation, manufacture, processing, or consumption of marijuana. A.R.S. § 36-2862(A)(1)–(3). Sealing the entire criminal case record—including unexpunged offenses—would expand the statute's protections beyond the text, structure, and purpose of Proposition 207 by shielding other offenses not included in the statute's narrowly-constructed definition of legal marijuana use. *See* A.R.S. § 36-2853(A).

¶18 The superior court gave the following helpful hypothetical: If before the enactment of the expungement statute, an individual was arrested for armed robbery, and in the course of that arrest was also found to be in possession of marijuana and thus charged with both marijuana possession and armed robbery, it cannot be the case that because the two convictions exist under the same case number, all records related to the armed robbery would be sealed if the possession conviction is expunged. "[W]e interpret and apply statutory language in a way that will avoid an untenable or irrational result." *State v. Estrada*, 201 Ariz. 247, 251, ¶ 16 (2001). Applying Burke's interpretation would require us to read the statute in a way that would result in non-marijuana specific records being sealed or withhold access to criminal records that would otherwise be public—essentially rendering other statutes meaningless. *See State v. Thompson*, 204 Ariz. 471, 475, ¶ 10 (2003).

¶19 Our supreme court's guidance in Administrative Order 2021-82 confirms our interpretation of Section 36-2862(C)(1)(e). Our supreme court has "administrative supervision over all the courts of the state," and the "[p]ower to make rules relative to all procedural matters in any court." Ariz. Const. art. 6, §§ 3, 5. Pursuant to that power, the supreme court ordered that Arizona courts "must withhold case records *related solely to the expunged charges, redact references to the expunged portions* of the case file, and *allow public access to the records containing information concerning the charges that were not expunged in the case file.*" Ariz. Sup. Ct. Admin. Order No. 2021-82 (emphasis added). The supreme court ordered courts to only "[s]eal the entire case file if the charges being expunged constitute the entirety of the complaint, information, or indictment . . . ." *Id.* And in Rule 36, which governs petitions to expunge records, the supreme court ordered expungement of all records related to the "applicable count," meaning the count eligible for expungement. Ariz. R. Crim. P. 36(d)(4). The Administrative Order and Rule 36 direct the courts to redact references to the expunged portions—*i.e.*, the applicable counts—and otherwise allow public access to records concerning the unexpunged offenses. *See* Ariz. Sup. Ct. Admin. Order No. 2021-82; Ariz. R. Crim. P. 36.

¶20 Finally, Burke's interpretation of Section 36-2862(C)(1)(e) conflicts with the right of access to judicial records in Arizona Supreme Court Rule 123. Our supreme court has recognized that the public has a "significant interest in access to information regarding the courts," and given the importance of public access, there is a "presumption that court records be open and available to the public." *London v. Broderick*, 206 Ariz. 490, 492, ¶ 8 (2003).

¶21 Rule 123, adopted by our supreme court in 1997, recognizes that "[h]istorically, [Arizona] has always favored open government and an informed citizenry." Ariz. R. Sup. Ct. 123(c)(1). Thus, court records "are presumed to be open to any member of the public for inspection or to obtain copies[.]" *Id.* But public access to court records may be restricted because of "countervailing interests of confidentiality, privacy or the best interests of the state" or "in accordance with . . . other provisions of law." *Id.*

¶22 When it comes to adult criminal records, Rule 123 restricts access to the following records: "Criminal History Records, diagnostic evaluations, psychiatric and psychological reports, medical reports, alcohol screening and treatment reports, social studies, probation supervision histories" and court work product. Ariz. R. Sup. Ct. 123(d)(2)(A). "Criminal History Record Information" includes "only those records of arrests, convictions, sentences, dismissals and other dispositions of charges" provided by crime information centers or criminal justice agencies. Ariz. R. Sup. Ct. 123(b)(6). Otherwise, "[a]ll other information in the adult criminal case files maintained by the clerk of the court is open to the public[.]" Ariz. R. Sup. Ct. 123(d)(2)(C).

¶23 The expungement statute provides that an individual who was involved in court proceedings for certain marijuana offenses "may petition the court to have the record of *that* arrest, charge, adjudication, conviction or sentence expunged[.]" A.R.S. § 36-2862(A) (emphasis added). "That" means "the person, thing, or idea indicated, mentioned, or understood from the situation[.]" Merriam-Webster's Dictionary, https:// (last visited June 21, 2024). Here, the "thing" indicated in Section 36-2862(A) is an arrest, charge, adjudication, conviction, or sentence stemming from one of the marijuana offenses listed in the statute. The statute does not say that non-marijuana offenses occurring at the same time as marijuana offenses are eligible for expungement. Thus, Section 36-2862 is not a "provision[] of law" restricting public access to non-marijuana offenses. *See* Ariz. R. Sup. Ct. 123(c)(1).

¶24 Yet Burke asks us to interpret Section 36-2862(C)(1)(e) in a way that would restrict public access to case documents reflecting non-marijuana offenses. She does not attempt to rebut any presumption that case documents reflecting non-

marijuana offenses remain open for inspection and copying. Nor does she argue that such case documents fall within an exception to the right to public access. And she does not claim that such documents fall within those categories of documents restricted under Rule 123(d)(2)(A). Accordingly, adopting Burke's interpretation and sealing documents reflecting non-marijuana offenses would conflict with Rule 123's right of access to judicial records.

¶25 In sum, the statutory language the Arizona electorate adopted does not support sealing unexpunged offenses within the same criminal case as an expunged offense merely because the unexpunged offenses occurred in the same criminal case as an expunged offense. The superior court correctly concluded that Section 36-2862(C)(1)(e) does not authorize the court to order sealing of records related to unexpunged offenses. We therefore reject Burke's broad reading of the statute and hold that the phrase "relating to" does not mean that unexpunged offenses are eligible for sealing under Section 36-2862(C)(1)(e).

CONCLUSION

¶26 We affirm.

Cite as
125 Arizona Cases Digest 35

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Sherold D. ROAF,
Plaintiff/Appellee,
v.
Stephen S. REBUCK CONSULTING, LLC, et al.
***Defendants/Appellants*.**

No. CV-23-0233-PR
Filed June 25, 2024

Appeal from the Superior Court in Maricopa County
The Honorable Timothy J. Thomason, Judge (Retired)
No. CV2019-003654
REVERSED AND REMANDED

Memorandum Decision of the Court of Appeals, Division One
No. 1 CA-CV 22-0620
Filed Aug. 8, 2023
VACATED

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CHIEF JUSTICE BRUTINEL authored the Opinion of the Court, in which VICE CHIEF JUSTICE TIMMER and JUSTICES BOLICK, LOPEZ, BEENE, MONTGOMERY, and KING joined.

This opinion is subject to revision before publication in the Pacific Reporter.

CHIEF JUSTICE BRUTINEL, Opinion of the Court:

¶1 In this case an employer admitted both direct and vicarious liability for its employee's tortious

actions. Nonetheless, the trial court admitted evidence of the employee's personnel record and driving history in a damages-only trial and submitted separate claims of negligent hiring and vicarious liability to the jury, in addition to the claim for the employee's negligence.

¶2 The trial court should have precluded the personnel record and driving history because evidence related to the negligent hiring claim was not relevant to the only issue before the jury: the amount of compensatory damages. We also find that the defendant was prejudiced by this error, warranting a new trial.

I. BACKGROUND

¶3 In January 2018, while working for defendant Medstar, Francisco Ortiz rear-ended Sherold Roaf's car on State Route 101 in Scottsdale. In July 2019, Roaf sued Ortiz for negligence and sued Medstar under theories of both (1) vicarious liability for Ortiz's negligent driving and (2) direct liability for Medstar's negligent hiring, supervision, and retention ("negligent hiring") of Ortiz. Roaf sought compensatory and economic damages. He did not seek punitive damages.

¶4 Medstar admitted liability for the incident, but never moved to dismiss the negligent hiring claim. Instead, it moved in limine to prevent Roaf from introducing Ortiz's personnel record and driving history. Medstar argued any evidence relating to fault would be irrelevant and would improperly influence the jury. Medstar also argued that because Roaf did not bring a claim for punitive damages, there was no other purpose for which the evidence would be relevant. The court denied the motion, reasoning that, although it would "keep in mind that 100% of the fault in this case [was] going to be allocated to the defendants" and "determine if any of the material [was] relevant at trial," Roaf was "entitled to pursue both theories" of liability.

¶5 At trial, Roaf's counsel declared in opening statements that the issue of liability was "taken care of." Nevertheless, he raised Ortiz's driving record and Medstar's hiring policy. During direct examination of Ortiz, Roaf's counsel established that Ortiz had at least three moving violations within three years before his hiring and that Medstar's policies precluded an applicant from being hired as a driver if the applicant had more than three moving violations or accidents in the three years prior to hiring. In closing, Roaf's counsel emphasized this evidence.

¶6 In back-and-forth discussions before the jury's deliberation, the court expressed uncertainty about allowing the negligent hiring claim to proceed to the jury. Roaf asked for a jury instruction on how the jury should apportion fault between Ortiz and Medstar. Medstar argued that apportionment was unnecessary and stated that it wanted to admit on the record that Medstar negligently hired Ortiz. Ultimately, the court allowed the fault allocation instruction and submitted the negligent hiring claim to the jury. In its final jury instructions, the court told the jury to allocate fault between Ortiz "in connection with the accident" and Medstar's fault "in connection with the negligent hiring, supervision or retention claim" in percentages adding up to 100%. The jury instructions noted that Medstar had admitted both vicarious liability for Ortiz's negligent actions and direct liability for negligent hiring, supervision, and retention of Ortiz.

¶7 The jury found Roaf's full damages to be $4.625 million. It allocated 40% fault to Ortiz and 60% to Medstar.

¶8 Medstar moved for a new trial, arguing, in part, that the negligent hiring claim was superfluous and had allowed Roaf to put prejudicial evidence before the jury. The court disagreed and denied the motion, finding that the evidence of Ortiz's driving history had no unfair influence and that the damage award was supported by other evidence.

¶9 The court of appeals agreed that the jury's award was appropriate based on the evidence and that Medstar failed to show that the trial court committed prejudicial error by allowing the separate claims of negligent hiring and vicarious liability to go to the jury. The court determined that it did not need to rule on whether the negligent hiring claim should have gone to the jury because Defendants did not show how any related error prejudiced them. Even if admitting Ortiz's personnel record was error, the court reasoned, any error was harmless because it related to the uncontested issue of fault and had no bearing on damages.

¶10 We granted review to address whether prejudicial error occurred when the trial court allowed the plaintiff to introduce evidence based on separate claims of negligent hiring and vicarious liability when Medstar admitted liability for both claims and there was no claim for punitive damages. This Court has jurisdiction under article 6, section 5(3) of the Arizona Constitution.

II. DISCUSSION

¶11 We review a trial court's denial of a motion for a new trial for an abuse of discretion. *State v. Hoskins*, 199 Ariz. 127, 142 ¶ 52 (2000). In addition, "[w]e will not disturb a trial court's rulings on the exclusion or admission of evidence unless a clear abuse of discretion appears and prejudice results." *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 506 (1996).

A. Vicarious And Direct Negligence

¶12 We first consider whether Roaf should have been able to present evidence relevant to Medstar's alleged liability for negligently hiring Ortiz.

¶13 Under Arizona law, each defendant in a personal injury action is liable only for the "damages allocated to that defendant in direct proportion to that defendant's percentage of fault." A.R.S. § 12-2506(A). In a jury trial, the jury determines the amount of damages to which the plaintiff is entitled and then determines the percentage of fault attributable to each defendant.

See id. Damages are then apportioned based on those percentages to decide the amount owed by each defendant. *See id.* To determine those percentages, the jury "shall consider the fault of all persons who contributed to the alleged injury, death or damage to property, regardless of whether the person was, or could have been, named as a party to the suit." § 12-2506(B). "Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of the named parties." *Id.* Generally, "Arizona's pure comparative fault scheme protects defendants from bearing more than their fair share of liability for a plaintiff's injuries under the harsh common-law rule of joint and several liability." *Cramer v. Starr*, 240 Ariz. 4, 7 ¶ 11 (2016) (quoting *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 26 ¶ 20 (2016)).

¶14 Arizona's comparative fault regime notwithstanding, "[u]nder the doctrine of respondeat superior, an employer is vicariously liable for 'the negligent work-related actions of its employees.'" *Kopp v. Physician Grp. of Ariz., Inc.*, 244 Ariz. 439, 441 ¶ 9 (2018) (quoting *Engler v. Gulf Interstate Eng'g, Inc.*, 230 Ariz. 55, 57 ¶ 9 (2012)). Employers are liable for such acts if they occur while "the employee is acting within the scope of employment when the accident occurs." *Engler*, 230 Ariz. at 57 ¶ 9 (internal quotation marks omitted).

¶15 Section 12-2506(D) addresses the respondeat superior doctrine, providing an exception to comparative fault: "[A] party is responsible for the fault of another person, or for payment of the proportionate share of another person, if . . . [t]he other person was acting as an agent or servant of the party." An employer that is vicariously liable for an employee's actions is wholly responsible for the employee's fault. *See Laurence v. Salt River Project Agric. Improvement & Power Dist.*, 255 Ariz. 95, 105 ¶ 41 (2023) ("[T]he doctrine of respondeat superior imputes the employee's tortious acts to the employer, not the employee's liability."). Apportionment of fault is therefore not necessary when an employer is vicariously liable because no fault remains for the factfinder to apportion.

¶16 In this case, apportionment of fault was unnecessary, and general principles of comparative fault did not apply. Because it admitted liability, Medstar was wholly responsible for Roaf's damages. Although Roaf brought both vicarious and direct negligence claims against Medstar, he did not seek any damages for injuries separately sustained as a result of Medstar's conduct, nor did he seek punitive damages against Medstar. The only issue for the jury to decide was the amount of damages owed to Roaf due to the collision, and the court erred by instructing the jury to apportion fault.

¶17 For the same reasons, evidence that was not relevant to the damages question before the jury was irrelevant and inadmissible. *See* Ariz. R. Evid. 402. Evidence of liability relating to the negligent hiring claim should have been precluded because Medstar admitted Ortiz was negligent in causing the accident, admitted Medstar was vicariously liable, and admitted Medstar negligently hired Ortiz.

¶18 We need not decide whether the trial court erred in not dismissing Roaf's negligent hiring claim because in this case it was irrelevant to the jury's determination. To be sure, negligent hiring is a separate claim from vicarious liability, which arises from an employer's breach of its own, independent duty of care. *See Kopp*, 244 Ariz. at 442 ¶ 12 ("If there is an independent ground for finding the principal liable, judgment can be entered against him." (alteration omitted) (quoting *Torres v. Kennecott Copper Corp.*, 15 Ariz. App. 272, 274 (1971), *overruled in part on other grounds by Laurence*, 255 Ariz. at 107 ¶ 49)). In *Kopp*, this Court held that plaintiffs did not waive their ability to bring a negligent hiring claim against a hospital merely because they had previously settled with the operating surgeon. *Id.* Although the plaintiffs had dismissed all vicarious liability claims against the hospital, they could still bring an action against the hospital for negligent supervision. *Id.*

¶19 In contrast, where the plaintiff claims no separate or additional damage from the employer's conduct, the employer's separate liability adds nothing to the damages sought, and any related evidence is similarly irrelevant. See Lewis v. S. Pac. Co., 102 Ariz. 108, 109 (1967). In *Lewis*, a widow sued the railroad and its employees after a train struck her husband's car and killed him. *Id.* The widow sought to admit evidence that the engineer had previously been cited for violating the railroad's speed limits and that the railroad's fireman had misinterpreted a signal and was known to be incompetent. *Id.* This Court concluded the trial court did not err in refusing to admit the evidence. *Id.* In view of the railroad's respondeat superior admission, its liability could be established by showing "the defendant employees were actually negligent at the time of the accident and proximately caused the accident." *Id.* Any negligent hiring or supervision on the railroad's part was unnecessary for the widow's recovery. *See id.*

¶20 Ignoring Lewis, which this Court has never overturned, Roaf cites a line of court of appeals decisions that are distinguishable from this case because they involved claims for separate, punitive damages. *See Quinonez ex rel. Quinonez v. Andersen*, 144 Ariz. 193 (App. 1984). In *Quinonez*, a semi-truck driver struck a woman's vehicle and killed her; her widower subsequently claimed the driver's employer was liable both vicariously and for negligent entrustment. *Id.* at 195. The court concluded that the negligent entrustment action was independent from the respondeat superior negligence action. *Id.* at 197 (basing its reasoning in part on *Pruitt v. Pavelin*, 141 Ariz. 195, 201–02 (App. 1984), the Restatement (Second) of Torts § 307, and the Restatement (Second) of Agency § 213 (providing that liability results because the employer

has reason to believe that putting his employee in such a position will create an unreasonable risk of harm to others)). But evidence supporting direct liability under the negligent entrustment claim was "only material on the issue of aggravating circumstances affecting punitive damages," not compensatory damages. *Id.* at 198;[1] *see also Pruitt*, 141 Ariz. at 202 (App. 1984) (holding that a realty company, aware of an employee's past forgery, was liable for negligent hiring where it hired and actively helped that employee obtain a real estate license, which she then used to defraud a seller *outside* the scope of her employment).

¶21 In line with this reasoning, this Court has recognized that an employer can be liable for its own conduct justifying punitive damages when its employee's conduct warranted punitive damages in the underlying claim. *See Wiper v. Downtown Dev. Corp. of Tucson*, 152 Ariz. 309, 311–12 (1987). In *Wiper*, this Court held that an employer can be liable for punitive damages for its negligent hiring or supervision, but "[i]f an employee's conduct does not warrant recovery of punitive damages against himself, it can not serve as a basis for such recovery against his employer." *Id.* at 311. A punitive damages award against the employer was improper "where no punitive damages have been awarded against the employee and the employer's liability is based solely on the doctrine of respondeat superior." *Id.* at 312; *see also Laurence*, 255 Ariz. at 106 ¶ 44 ("Dismissing a tort claim against an employee because the claim lacks merit requires the court to also dismiss a claim against an employer under the doctrine of respondeat superior.").

¶22 Because Medstar did not move to dismiss the negligent hiring claim, this case does not require us to consider the merits of the so-called *McHaffie* rule. *Compare McHaffie ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995) ("The majority view is that once an employer has admitted *respondeat superior* liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability."), *with Ramon v. Nebo Sch. Dist.*, 493 P.3d 613, 618 ¶ 19 (Utah 2021) (holding that because negligent employment and respondeat superior claims are distinct, plaintiffs are "entitled to assert them both if there is a factual basis for doing so"). Similarly, this case does not implicate the Arizona Constitution's anti-abrogation clause because the negligent hiring claim does not affect Roaf's ability to recover damages for his injuries. *See* Ariz. Const. art. 18, § 6.

B. Prejudice

¶23 We next consider whether the admission of Ortiz's driving record and the violation of the company hiring policy prejudiced Medstar. We recognize that this Court "cannot substitute our view of the record for that of either the trial judge or the jury." *Petefish ex rel. Clancy v. Dawe*, 137 Ariz. 570, 577 (1983).

¶24 When deciding whether to grant a motion for a new trial, the trial judge should consider "whether the error likely 'affect[ed] the substantial rights of the parties' such that refusing to order a new trial would be 'inconsistent with substantial justice.'" *Am. Power Prods., Inc. v. CSK Auto, Inc.*, 239 Ariz. 151, 155 ¶ 17 (2016) (alteration in original) (quoting Ariz. R. Civ. P. 61). "In other words, the moving party is not required to prove actual prejudice, but is required to demonstrate the objective likelihood of prejudice." *Id.* at 156 ¶ 17. "Such error cannot be harmless." *Id.* When reviewing a jury trial, we consider whether the error "clearly interfered with the jury's decision-making process." *Id.* ¶ 18.

¶25 We find such error here. We note that in ruling on Medstar's motion for a new trial, the trial court determined the verdict was "clearly supported by the evidence." In its view, Medstar's argument that admission of Ortiz's driving history resulted in a jury verdict that was "higher than it otherwise would have been" was "purely speculative." But the record—including several of Roaf's arguments—shows a likelihood of prejudice beyond speculation.

¶26 Ortiz's driving record and Medstar's hiring and retention practices were inadmissible as irrelevant to the damages question, but Roaf presented them to the jury and then argued Medstar's culpability from that evidence. Roaf argued in closing that the jury, "as the conscience of the community," should punish Medstar for being "a company [that] does wrong," notwithstanding the lack of a punitive damages claim. Roaf's counsel even minimized Ortiz's role in the accident at the expense of Medstar: "[Ortiz] made a mistake. But he worked for a company that acted badly. . . . And that's why we insist[ed] on having that [fault allocation] instruction." Because Medstar turned a "blind eye" in hiring and retaining Ortiz, Medstar "should be responsible for that harm" following the rear-end collision.

¶27 Final jury instructions noted Medstar's admission of both vicarious and direct liability. Allocation instructions and the verdict form, however, directed the jury to apportion Ortiz and Medstar's individual faults, asking jurors "to allocate fault between [Ortiz's] fault in connection with the accident and [Medstar's] fault in connection with the negligent hiring, supervision, or retention claim." The resulting 60% allocation of fault to Medstar suggests that the jury found Medstar more at fault for the accident than Ortiz, which makes little sense under the circumstances of the damages-only trial in which Medstar had accepted 100% of the responsibility. All these factors demonstrate an objective likelihood that admission of Ortiz's personnel record and driving history interfered with the jury's decision-making process and prejudiced the verdict.

III. CONCLUSION

¶28 Under the circumstances of this case, evidence regarding Medstar's liability for negligent

hiring should not have been admitted, and Medstar suffered prejudice because of its erroneous admission. We vacate the court of appeals' memorandum decision, and we reverse and remand to the trial court for a new trial.

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1 Only federal courts have extended *Quinonez*'s holding beyond cases where the plaintiff sought punitive damages. *See, e.g.*, *Salazar v. Flores*, No. CV-16-08201-PCT-SPL, 2019 WL 1254661 (D. Ariz. Mar. 18, 2019); *Ford v. Barnas*, No. CV-17-2688-PHX-DGC, 2018 WL 5312912 (D. Ariz. Oct. 26, 2018).

Cite as
125 Arizona Cases Digest 39

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

SAN CARLOS Apache Tribe,
Appellant,
v.
STATE OF ARIZONA; Arizona Water Quality Appeals Board; Arizona Department of Environmental Quality,
Appellees.

Resolution Copper Mining, LLC,
Intervenor/Appellee.

No. CV-22-0290-PR
Filed June 27, 2024

Appeal from the Superior Court in Maricopa County
The Honorable Sigmund G. Popko,
Judge Pro Tempore
No. LC2019-000264-001
AFFIRMED

Opinion of the Court of Appeals, Division One
254 Ariz. 179 (2022)
VACATED IN PART

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JUSTICE KING authored the Opinion of the Court, in which CHIEF JUSTICE BRUTINEL, VICE CHIEF JUSTICE TIMMER, and JUSTICES BOLICK, LOPEZ, BEENE, and MONTGOMERY joined.

JUSTICE KING, Opinion of the Court:

¶1 Copper mining began at the Magma Copper Mine near Superior, Arizona, over a century ago. In 1975, the United States Environmental Protection Agency (the "EPA") issued the mine its first permit authorizing the discharge of water pursuant to the Clean Water Act, 33 U.S.C. §§ 1251–1389 (the "CWA"). *See* 33 U.S.C. § 1342(a) (tasking the EPA with administering the National Pollutant Discharge Elimination System ("NPDES") permit program, which includes issuing permits that authorize the discharge of pollutants when certain conditions are met). The EPA later renewed the mine's discharge permit every five to eight years.

¶2 In 2002, the EPA delegated its administrative authority over the CWA permit program to the Arizona Department of Environmental Quality ("ADEQ"). *See* Approval of Application by Arizona to Administer the NPDES Program, 67 Fed. Reg. 79629, 79630 (Dec. 30, 2002); A.R.S. §§ 49-255 to -265. Thereafter, ADEQ periodically renewed the mine's permit, as required by the CWA.

¶3 In 2014, the mine's owner, Resolution Copper Mining, LLC ("Resolution"), completed construction of a new mine shaft ("Shaft 10"). Shaft 10 is a vertical excavation about thirty feet wide that descends nearly 7,000 feet underground. The issue before us is whether Shaft 10 is a "new source" under the CWA. A "new source" is subject to the generally more stringent new source performance standards under § 306 of the CWA, 33 U.S.C. § 1316. Based on the record before us, we conclude that the sinking of Shaft 10 did not create a "new source" under the CWA. Thus, ADEQ acted within its discretion when it issued the discharge permit renewal to Resolution in 2017.

I. BACKGROUND

A. History And Development Of The Mine

¶4 In 1910–1911, Magma Copper Company ("Magma") purchased and began developing the mine to extract copper ore. Part of Magma's development included deepening an existing mine shaft (Shaft 1) and constructing other underground workings, including additional mine shafts (Shafts 2 through 8). A "shaft is the surface opening to the mine which provides a means of entry to or exit from the mine for men and materials, and for the removal of ore or waste from underground to the surface. It may be vertical or inclined." *See* EPA, *Development Document for Final Effluent Limitations Guidelines and New Source Performance Standards for the Ore Mining and Dressing Point Source Category* ("*Development Document*") 29–30 (Nov. 1982), https: 2015-10/documents/ore-mining_dd_1982.pdf. The mine shafts were used for a variety of purposes, including the removal of water to keep the mine workings dry (a process known as dewatering) and ventilating and improving air quality below the surface of the mine. Magma also installed equipment at the mine, such as a local concentrator to process ore and a smelter. In addition, the mining operation included underground tunnels that connected the shafts and facilitated ore extraction.

¶5 The development of a mine may expand as new ore deposits are located. In this case, as active extraction depleted copper ore in the original area, Magma turned its attention to other exploratory efforts. New copper-ore deposits were discovered, and Magma's operations consequently expanded in an eastward direction.

¶6 In 1971, Magma constructed Shaft 9 on non-contiguous property located approximately two miles east of the original workings of the mine. The purpose of Shaft 9 was to identify copper-ore bodies within that area and improve access to ore.

¶7 Magma also constructed an underground tunnel extending about two miles in length that connected the eastern portion of the mine (including Shaft 9) with the western portion. This tunnel was known as the "Never Sweat Tunnel." Magma used the Never Sweat Tunnel to transport copper ore from Shaft 9 to the western portion of the mine, where extracted ore was processed and stored.

¶8 As mining operations continued depleting copper ore, Magma began drilling underground exploratory holes in an effort to locate new ore. Magma discovered some new copper ore near Shaft 9 but ceased further exploratory drilling in 1982. With no operating pumps, Magma allowed the underground workings to flood with infiltrating groundwater.

¶9 In 1989, Magma began the process of dewatering the mine. Magma also resumed ore production and underground exploratory drilling. The results of the exploratory drilling suggested the possibility of undiscovered copper. In 1994–1995, Magma discovered a new, large copper-ore body beneath the eastern portion of the mine (the "Eastern Deposit"). Magma, however, did not extract copper ore from the Eastern Deposit at that time.

¶10 In 1996, a new entity, Broken Hill Proprietary Company Ltd. ("BHP"), acquired the mine, forming a wholly owned subsidiary, BHP Copper, Inc. ("BHP Copper"). BHP Copper continued mining operations from Shaft 9, depleting the remaining reserves in that area. BHP Copper ceased mining operations but continued exploration efforts by drilling deep holes in the area of the Eastern Deposit. In 1998, BHP Copper ceased all operations and turned off its dewatering pumps, allowing the mine's underground workings to flood with water. In addition, some of the underground workings at the mine were backfilled.

¶11 In 2001, BHP entered into an exploration agreement with an entity that was a wholly owned subsidiary of Rio Tinto (collectively "Rio Tinto"). Thereafter, Rio Tinto commenced a deep exploratory drilling program focused on outlining the Eastern Deposit.

¶12 In 2004, Rio Tinto acquired a majority interest in the mine. Rio Tinto then formed

Resolution as a joint venture with BHP's successor, BHP Billiton, to continue efforts aimed at extracting copper ore from the Eastern Deposit. Beginning in 2005, Resolution resumed exploratory drilling and conducted a study to assess viable methods of extracting copper ore from the Eastern Deposit. Resolution also decided to construct a new mine shaft and other support structures that would enable it to access and study the Eastern Deposit. Through years of exploration efforts, it was determined that the Eastern Deposit begins around 4,500 feet below ground surface level and proceeds down to about 7,000 feet. It covers an area of about one square mile, and the ore body is approximately 1,600 feet in thickness.

¶13 From 2007 to 2009, Resolution began developing and sinking Shaft 10. Shaft 10 is located about 300 feet from Shaft 9 in the eastern portion of the mine. Shaft 10 descends nearly 7,000 feet underground; in contrast, Shaft 9 descends roughly 5,000 feet. Shaft 10 is not drilled directly into the Eastern Deposit. In 2014, Resolution completed construction of Shaft 10 and its surface components, including a hoist and structural supports that enable the transport of supplies to and from the base of Shaft 10.

¶14 During Shaft 10's construction, Shaft 9 was used for support purposes (e.g., ventilation and dewatering underground mine workings). Resolution plans to continue to use Shaft 9 for support but not for ore extraction.[1]

¶15 Around the time of Shaft 10's construction, Resolution performed other work at the mine: (1) rehabilitating and extending the Never Sweat Tunnel; and (2) constructing a new cooling tower, additional rock stockpiles, wash bays, and a mine water treatment plant.[2] Resolution used the Never Sweat Tunnel to transport development rock from its activities to the western portion of the mine for storage and future processing. Shaft 9 and the eastern portion of the mine remain connected with the western portion of the mine via the Never Sweat Tunnel.

¶16 Resolution uses Shaft 10 to explore and study the Eastern Deposit, ventilate and dewater the underground workings, and transport supplies. Shaft 10 also provides another point of entry and exit for individuals working at the mine. Resolution has not used Shaft 10 or other new features for the commercial extraction of copper ore from the Eastern Deposit. Resolution uses preexisting infrastructure at the mine to support Shaft 10's functions. Resolution's operation requires it to control stormwater and other water used in the mining process, as well as remove groundwater from the underground workings of the mine through dewatering. To accomplish this, Resolution drains water from Shaft 9 to the base of Shaft 10 and then pumps the water up to and through the Never Sweat Tunnel to the western portion of the mine. From there, it is combined with water that has been collected from Shaft 8, which is used to dewater the western portion of the mine. Then, Resolution sends all combined water west to the water treatment plant for treatment and storage.[3]

¶17 According to Resolution's General Plan of Operations, after water is treated at the water treatment plant, Resolution will attempt to reuse the water internally for ore processing, dust suppression, equipment washing, drinking water, cooling, or fire protection. In the event of excess treated water, Resolution has a contract with the New Magma Irrigation and Drainage District, thirty miles southwest of the mine, to pipe that water to the irrigation district. If the irrigation district does not have capacity, Resolution is authorized to pipe the treated water into a tributary that flows into Queen Creek. To date, however, Resolution has not discharged any water into Queen Creek; instead, it has sent all excess treated water to the irrigation district. Although circumstances could change, Resolution intends to continue sending its treated water to the irrigation district, rather than discharging it into Queen Creek.

¶18 Many of the originally constructed shafts and tunnels are no longer in operation or accessible. But Shaft 6 is used to ventilate the Never Sweat Tunnel. And, as noted, Shafts 8 and 9 and the Never Sweat Tunnel remain in use, and Resolution plans to continue their use. Resolution may use other preexisting shafts in the future, but not other tunnels.

¶19 Resolution's plan is to access the Eastern Deposit using a technique called panel caving. This method involves cutting the rock underneath the ore deposit, removing its ability to support the overlying rock material and causing it to collapse into a collection zone. As the ore is extracted from the bottom of the mine, the deposit will continue to collapse in on itself, thereby continuing to replenish the extractable ore. Occurring entirely underground, a series of conveyors, rail lines, tunnels, hoists, and other equipment will then transport the ore from beneath the deposit up and to the western portion of the mine for storage and processing. This method differs from that previously implemented at the mine through the use of adits and tunnels. *See Development Document, supra,* at 29–30 (describing an "adit" as a "passageway or opening driven horizontally into the side of a hill generally for the purpose of exploring or otherwise opening a mineral deposit," and it "is open to the atmosphere at one end"); *see also Development Document, supra,* at 557.

B. The Distinction Between A "New Source" And "Existing Source"

¶20 We must determine whether Resolution's sinking of Shaft 10 created a "new source" under the CWA. The CWA treats "new sources" differently from "existing sources." *See* 40 C.F.R. § 122.29(a)(3) ("Existing source means any source which is not a new source or a new discharger."). A

"new source" is subject to the CWA's new source performance standards. *See* 33 U.S.C. § 1316(a)(1) (defining "standard of performance" as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which [the EPA] determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants"); *see also* Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54598–600 (Dec. 3, 1982) (referring to the standards as "new source performance standards").

¶21 "The classification of a facility as a new or existing source is important because under the CWA existing sources are subject to best available technology (BAT) and best conventional technology (BCT) requirements, while new sources are subject to the generally more stringent new source performance standards . . . under section 306 of the CWA." NPDES Permit Regulations, 49 Fed. Reg. 37998, 38043 (Sept. 26, 1984). The distinction between a "new source" and an "existing source" "is based on the concept that new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies." *Id.*

C. Water Discharge Permits

¶22 Since the CWA began requiring discharge permits, all past and present owners of the mine have obtained the necessary permit and permit renewals to discharge water from the mine. The permit renewal at issue here is the "Authorization to Discharge under the Arizona Pollutant Discharge Elimination System," which ADEQ issued to Resolution on January 19, 2017 (Permit No. AZ0020389) (the "2017 Permit Renewal"). The 2017 Permit Renewal became effective on January 23, 2017 and expired on January 22, 2022.

¶23 The 2017 Permit Renewal subjected Resolution to certain requirements for purposes of complying with the CWA's water quality standards. If Resolution complied with such requirements, the 2017 Permit Renewal authorized Resolution

> to discharge mine site stormwater runoff from Outfall 001 and treated mine water, industrial water and seepage pumping from Outfall 002 from the Superior Operations in Pinal County, Arizona to an unnamed wash, tributary to Queen Creek in the Middle Gila River Basin . . . in accordance with discharge limitations, monitoring requirements and other conditions set forth herein, and in the attached "Standard [Arizona Pollutant Discharge Elimination System] Permit Conditions."

¶24 As noted, the 2017 Permit Renewal authorized the discharge of waters "to an unnamed wash, tributary to Queen Creek in the Middle Gila River Basin." Queen Creek has been designated an "impaired waterway" due to the levels of copper present in it. *See* 33 U.S.C. § 1313(d)(1)(C) (requiring states to identify waters that do not meet water quality standards and establish for those waters a "total maximum daily load . . . at a level necessary to implement the applicable water quality standards"); *see also* 40 C.F.R. § 131.31(b); Ariz. Admin. Code tit. 18, ch. 11, art. 1, app. B. ADEQ's 2017 Permit Renewal subjected Resolution to effluent limitations for copper that are more stringent than federal new source performance standards for copper. *See* 40 C.F.R. § 440.104.

D. Procedural History

¶25 The San Carlos Apache Tribe (the "Tribe") challenged ADEQ's issuance of the 2017 Permit Renewal with the Arizona Water Quality Appeals Board (the "Board"). The Tribe claimed that the construction of Shaft 10 and other new features created a "new source," 40 C.F.R. §§ 122.2, 122.29(b), rather than an "existing source," 40 C.F.R. § 122.29(a)(3), under the CWA. The Tribe maintained that, as a "new source," Shaft 10 needed to satisfy additional provisions of the CWA before ADEQ could properly issue a permit renewal.

¶26 An administrative law judge ("ALJ") from the office of administrative hearings conducted a seven-day hearing and issued findings of fact and conclusions of law. The ALJ determined that ADEQ generally did not act arbitrarily and capriciously when it issued the 2017 Permit Renewal, but ADEQ should have first analyzed whether Shaft 10 and the other new features were a "new source" under § 122.29(b). The ALJ, therefore, concluded that "the matter should be remanded to ADEQ to allow it to conduct an analysis as required by 40 C.F.R. § 122.29(b)."

¶27 In response to the ALJ's decision, the Board entered an order remanding the matter to ADEQ to conduct a "new source" analysis. ADEQ did so and concluded that Shaft 10 and the new features were "existing sources" (not "new sources") under the CWA. The Board issued a final administrative decision, which adopted all the ALJ's findings of fact and affirmed ADEQ's issuance of the 2017 Permit Renewal.

¶28 The Tribe appealed the Board's decision to the superior court under A.R.S. § 12-905. The superior court affirmed the Board's decision, concluding that Shaft 10 and the new features did not constitute a "new source" under the CWA.

¶29 The court of appeals reversed the superior court in a split opinion. *San Carlos Apache Tribe v. State*, 254 Ariz. 179, 193 ¶ 61, 195 ¶ 72 (App. 2022). The majority concluded that "[t]he CWA treats the new mine shaft as a 'new source' because it is substantially independent of the non-contiguous original deposit at the mining site." *Id.* at 183 ¶ 1. Thus, Shaft 10 "is a new source and Resolution's mining site is subject to [new source

performance standards] under 40 C.F.R. § 440.104(a)." *Id.* at 193 ¶ 61. The majority also determined that because Shaft 10 is a "new source" and Queen Creek is an "impaired waterway," ADEQ may not renew Resolution's discharge permit until (1) ADEQ finalizes a total maximum daily load plan for Resolution's discharge of water into Queen Creek, and (2) Resolution demonstrates other requirements prescribed in 40 C.F.R. § 122.4(i). *Id.* at 183 ¶¶ 2, 4, 193 ¶¶ 62–63.

¶30 The dissent disagreed with the order in which the majority approached the CWA regulations for the "new source" determination, explaining that the regulations should be evaluated "in the order they are presented in the text of the regulation." *Id.* at 197–98 ¶¶ 74–76 (Paton, J., dissenting). Conducting the analysis in that order, the dissent concluded that "Shaft 10 is not a new source that would require ADEQ to issue [a total maximum daily load plan] before permitting discharge from Shaft 10." *Id.* at 202 ¶ 99.

¶31 We granted review because this case presents an issue of statewide importance. Although the 2017 Permit Renewal has expired, the issue presented is one that is likely to arise again and evade review. We have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution.

II. DISCUSSION

¶32 "We interpret statutes and administrative rules de novo, 'apply[ing] the same rules in construing both statutes and rules.'" *Saguaro Healing LLC v. State*, 249 Ariz. 362, 364 ¶ 10 (2020) (alteration in original) (quoting *Gutierrez v. Indus. Comm'n*, 226 Ariz. 395, 396 ¶ 5 (2011)). "We do not defer to the agency's interpretation of a rule or statute." *Id.* We "affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(F).

A. What Is The Test For Determining Whether A Construction Is A "New Source" Under The CWA?

¶33 In 1972, Congress passed the CWA with the "objective . . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA prohibits the "addition of any pollutant to navigable waters from any point source" without a permit. 33 U.S.C. § 1362(12)(A); *see also* 33 U.S.C. § 1311(a); 40 C.F.R. § 122.1(b)(1). The CWA also requires the EPA to establish "standards of performance" for "new sources" from which there are or may be discharges of pollutants for certain industries. 33 U.S.C. § 1316(b)(1)(B).

¶34 The Tribe claims that Shaft 10 is a "new source" under the CWA. According to the Tribe, this designation matters because Queen Creek is an "impaired waterway" and the CWA regulations provide:

> No permit may be issued . . . [t]o a new source . . . if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source . . . proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by . . . [the] CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate . . . that: (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. § 122.4(i). The Tribe maintains that the 2017 Permit Renewal was improper because ADEQ issued it before a copper total maximum daily load for Queen Creek was finalized and before Resolution met its burden under § 122.4(i)(1) and (2). Conversely, Resolution and ADEQ contend that Shaft 10 is not a "new source" that would trigger these requirements, and therefore ADEQ properly issued the 2017 Permit Renewal.

¶35 At the outset, we must determine the proper framework for determining whether a construction is a "new source" under the CWA.[4] Section 122.29(b) provides the "[c]riteria for new source determination." We agree with the court of appeals' dissent that we should "approach the CWA regulations in the order they are presented in the text of the regulation." *San Carlos Apache Tribe*, 254 Ariz. at 197 ¶ 74; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (discussing the "whole-text canon" that "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts").

¶36 Section 122.29(b)(1) begins: "Except as otherwise provided in an applicable new source performance standard, a source is a 'new source' if it meets the definition of 'new source' in § 122.2." *See also* 40 C.F.R. § 122.29(a)(1) (providing that "[n]ew source" is "defined in § 122.2"). Therefore, the test *first* examines the definition of "new source" in , which states:

> New source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced: (a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or (b) After proposal of standards of performance in

> accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

See also 33 U.S.C. § 1316(a)(3) (defining "source" as "any building, structure, facility, or installation from which there is or may be the discharge of pollutants"); 40 C.F.R. § 122.29(a)(2) (same); 33 U.S.C. § 1316(a)(2) ("The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.").

¶37 If that provision is satisfied, § 122.29(b)(1) instructs that we *next* evaluate the three criteria in § 122.29(b)(1)(i)–(iii):

> [A] source is a "new source" if it meets the definition of "new source" in § 122.2, *and* (i) It is constructed at a site at which no other source is located; or (ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or (iii) Its processes are substantially independent of an existing source at the same site.

40 C.F.R. § 122.29(b)(1) (emphasis added); *see also Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 568 (D.C. Cir. 2002) (explaining that the new source performance standards apply "only to sources that meet the 'new source' definition in 40 C.F.R. § 122.2, *as well as* one of the following three criteria" in 9(b)(1)(i)–(iii)).

¶38 If those provisions are satisfied, the "new source" test concludes with an evaluation of § 122.29(b)(2): "A source meeting the requirements of paragraphs (b)(1)(i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. See § 122.2."[5]

¶39 The "new source" test, therefore, begins with the broadest criteria—identifying both the general physical characteristics of the construction (whether it is a "building, structure, facility, or installation") and when its construction commenced. *See* 40 C.F.R. §§ 122.2, 122.29(b)(1). The test then evaluates additional criteria that are narrower in scope (e.g., the source's relationship with other features where the source is located). *See* 40 C.F.R. § 122.29(b)(1)(i)–(iii), (b)(2). *See also Nat'l Wildlife Fed'n*, 286 F.3d at 568 ("If new construction does not satisfy 40 C.F.R. § 122.2 *and* one of the three criteria set forth in 9(b)(1), then the construction is generally classified as a 'modification' and is not subject to the [new source performance standards].").

¶40 Accordingly, the following three-step test should be used to determine whether a construction is a "new source" under the CWA:

1. Step One: Does the construction meet the definition of "new source" under ? (a)(2), (3).
   a. Has there been a construction of a building, structure, facility, or installation from which there is or may be the discharge of pollutants? ; *see also* (a)(3); 40 C.F.R. § 122.29(a)(2).
   b. Has construction commenced? 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(2).
   c. Did construction commence after the promulgation (or proposal) of standards of performance under section 306 of the CWA that are applicable to such source? 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(2).

   If the answer to any subpart is no, the construction is not a new source.
2. Step Two: If the answer to all subparts of step one is yes, does the construction meet any of the following definitions of a "new source" in 40 C.F.R.§ 122.29(b)(1)?
   a. Is the construction at a site at which no other source is located? 40 C.F.R. § 122.29(b)(1)(i).
   b. Does the construction totally replace the process or production equipment that causes the discharge of pollutants at an existing source? 40 § C.F.R 122.20(b)(1)(ii).
   c. Are its processes substantially independent of an existing source at the same site? 40 C.F.R. § 122.29(b)(1)(iii).

   If the answer to all subparts is no, the construction is not a new source.
3. Step Three: If the answer to all subparts of step one and any subpart of step two is yes, is there a new source performance standard that is "independently applicable" to the source? 40 C.F.R. 122.29(b)(2).
   a. If yes, the source is a new source. *Id.*
   b. If no, the source is not a new source. *Id.*

This three-step test is consistent with the text and sequence of the "criteria for new source determination" expressly set forth in § 122.29(b). *See, e.g.*, *Nat'l Wildlife Fed'n*, 286 F.3d at 568.

B. Is Shaft 10 A "New Source" Under The Three-Step Test?

¶41 We must now apply the three-step test to determine whether Shaft 10 is a "new source" under the CWA.

1. Step One
   a. Is Shaft 10 a building, structure, facility, or installation from which there is or may be a discharge of pollutants?

¶42 The Board found that Shaft 10 and other mine features are "facilities" under § 122.2. In this Court, the parties do not dispute that Shaft 10 is a "building, structure, facility, or installation from

which there is or may be a 'discharge of pollutants.'" See 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1316(a)(3); 40 C.F.R. § 122.29(a)(2). Copper effluent is a pollutant under the CWA. 40 C.F.R. § 401.15(22).

b. Has construction of Shaft 10 commenced?

¶43 It is undisputed that construction of Shaft 10 has commenced. *See* 40 C.F.R. ; *see also* 33 U.S.C(a)(2).

c. What was the timing of Shaft 10's construction?

¶44 The final issue at step one is whether the construction of Shaft 10 commenced after the promulgation (or proposal) of standards of performance under "section 306 of CWA which are applicable to such source." *See* 40 C.F.R. ; *see also* 33 U.S.C. (a)(2).

¶45 We begin by determining the meaning of "applicable to such source"—does "such source" refer to the mine or to the new construction at issue? We do not interpret this specific text in isolation, but instead read it within the context of the CWA "new source" criteria. *See Columbus Life Ins. v. Wilmington Tr., N.A.*, 255 Ariz. 382, 385 ¶ 11 (2023) (stating that we "determine the plain meaning of the words the legislature chose to use, viewed in their broader statutory context"); *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 558 ¶ 16 (2018) ("We interpret agency regulations according to principles of statutory construction."); *see also* Scalia & Garner, *supra*, at 167 (explaining that courts must interpret a statute's plain language in context because "[c]ontext is a primary determinant of meaning").

¶46 There are noteworthy differences in the text of the "new source" criteria that assist in our interpretation. Step one considers whether new source performance standards "are *applicable* to such source." *See* 40 C.F.R. (emphasis added); *see also* 33 U.S.C. (a)(2). Step three provides that "[a] source . . . is a new source only if a new source performance standard is *independently applicable* to it." 40 C.F.R. § 122.29(b)(2) (emphasis added). We cannot ignore the text of "independently applicable" at step three when determining the meaning of "applicable" at step one. *See Columbus Life Ins.*, 255 Ariz. at 385 ¶ 11 (noting "we view 'the statute as a whole' to 'give meaningful operation to all of its provisions'" (quoting *Wyatt v. Wehmueller*, 167 Ariz. 281, 284 (1991))); *Silver*, 244 Ariz. at 558 ¶ 16.

¶47 This textual distinction reveals that "applicable to such source" at step one addresses whether a new source performance standard is applicable to the mine. And "independently applicable to" the source at step three addresses whether a new source performance standard applies independently to the shaft. This interpretation gives meaning to each term and ensures that the criteria in step one and step three are not redundant. *See State v. Eddington*, 228 Ariz. 361, 363 ¶ 9 (2011) ("[I]f the terms mean the same thing, then one subsection is redundant, and we generally construe statutes so that no part is rendered redundant or meaningless."); *see also* Scalia & Garner, *supra*, at 174 (stating that no provision "should needlessly be given an interpretation that causes it to duplicate another provision or have no consequence").

¶48 Moreover, this interpretation that step one addresses general applicability to the mine is consistent with the fact that the "new source" test begins with the broadest criteria at step one. *See* Part II(A) ¶ 39. The subsequent steps evaluate criteria that are narrower in scope. *Id.*

¶49 Next, we must identify (1) when the construction of Shaft 10 commenced, and (2) when the new source performance standards were promulgated that would be applicable to Shaft 10 as part of the regulated copper mine. See ; (a)(2). And finally, we must determine whether the construction of Shaft 10 commenced after the promulgation of the new source performance standards that would be applicable to Shaft 10 as part of the regulated copper mine. *Id.*

¶50 Resolution began developing and sinking Shaft 10 between 2007 and 2009. The EPA promulgated the new source performance standards for the Ore Mining and Dressing Point Source Category on December 3, 1982. See Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. at 54598–621; *see also* 40 C.F.R. § 440.100(a)(1) (stating that provisions in Subpart J of Part 440 for Ore Mining and Dressing Point Source Category are applicable to "discharges from . . . [m]ines that produce copper" by "open-pit or underground operations"); 40 C.F.R. §§ 440.100 to .105 (providing effluent limitation guidelines for certain mines and mills).[6] The construction of Shaft 10 commenced after the promulgation of new source performance standards that are applicable to Shaft 10 as part of the regulated copper mine. Therefore, step one of the "new source" test is met.

2. Step Two

¶51 In order to meet step two, one of the three criteria in § 122.29(b)(1)(i)–(iii) must apply to Shaft 10. Here, we only consider the applicability of one subsection: § 122.29(b)(1)(iii) (evaluating whether "[i]ts processes are substantially independent of an existing source at the same site"). We accepted review on § 122.29(b)(1)(iii), which was presented in ADEQ's petition for review. Further, the Tribe's briefing in this Court focused on whether Shaft 10 met the criteria in § 122.29(b)(1)(iii). The Tribe did not develop an argument under § 122.29(b)(1)(i) or (ii). Accordingly, we decline to consider whether § 122.29(b)(1)(i) or (ii) are satisfied. *See State v. Johnson*, 247 Ariz. 166, 180 ¶ 13 (2019) (declining to consider an argument that a party failed to develop).[7]

¶52 Section 122.29(b)(1)(iii) requires us to determine whether Shaft 10's "processes are substantially independent of an existing source at the same site." As § 122.29(b)(1)(iii) instructs, "[i]n determining whether these processes are substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source."

a. To what extent is the new facility integrated with the existing plant?

¶53 The record demonstrates that Shaft 10 is integrated with existing sources and operations of the mine. Shaft 10 works with existing infrastructure, including Shaft 9 and the Never Sweat Tunnel, to ventilate and dewater the underground workings of the mine.

¶54 The "management of mine drainage is an integral part of most mining systems." Ore Mining and Dressing Point Source Category; Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 25682, 25684 (June 14, 1982). Without proper mine drainage management, water will flood the mine's underground workings and disrupt operations. *See id.* at 25685 ("Water is a natural feature that interferes with mining activities."). To that end, Resolution drains water from Shaft 9 to the base of Shaft 10, pumps the water up to and through the Never Sweat Tunnel, combines that water with water collected from Shaft 8, and sends the water west to the water treatment plant for treatment and storage. Resolution has integrated these functions of Shafts 8, 9, and 10 and the Never Sweat Tunnel. Shaft 10 depends on existing infrastructure to serve the essential functions of ventilation and dewatering, which it does not do independently.

¶55 The Tribe claims that "Shaft 10 is not integrated into prior operations; those facilities are integrated into Shaft 10." But § 122.29(b)(1)(iii) does not draw this fine distinction. Instead, it expressly provides that we consider "the extent to which the new facility is integrated with the existing plant." 40 C.F.R. § 122.29(b)(1)(iii). And the record here demonstrates that Shaft 10 is materially integrated with existing infrastructure for purposes of performing the essential functions of ventilating and dewatering underground workings, which are necessary for the continued pursuit of copper ore. There is no evidence that Shaft 10 alone can ventilate and dewater the underground workings in the manner necessary for exploration and extraction of copper ore at the mine. Shaft 10 is integrated with existing features of the mine for its proper functioning. And the mere fact that Resolution extended the Never Sweat Tunnel does not change this determination. Shaft 10 is also substantially integrated with Shaft 9, which provides further support for the integrated workings. Thus, existing features and Shaft 10 facilitate the continued and integrated workings necessary for the pursuit of copper ore.

¶56 The Tribe points to a provision in the Federal Register where the EPA notes that "a minor change" to a process (like "a new purification step") does not make a facility a "new source"; but "if the only connection between the new and old facility is that they are supplied utilities such as steam, electricity, or cooling water from the same source or that their wastewater effluents are treated in the same treatment plant, then the new facility will be a new source." *See* NPDES Permit Regulations, 49 Fed. Reg. at 38043. This provision does not support Shaft 10 being a "new source" in this case. Shaft 10 is integrated with existing infrastructure—the Never Sweat Tunnel and Shaft 9—to provide ventilation and dewatering, which are essential components of the mining process. These interconnected systems of ventilation and drainage are essential physical features of the mine structure. Thus, the integration here materially differs from a situation where the *only* connection between facilities is that "they are supplied utilities . . . from the same source" or that their water is "treated in the same treatment plant." *Id.*

b. To what extent is the new facility engaged in the same general type of activity as the existing source?

¶57 We now consider the extent to which Shaft 10 "is engaged in the same general type of activity as the existing source." 40 C.F.R. § 122.29(b)(1)(iii). Shaft 10 supports the ventilation and dewatering of underground workings, which are necessary for the exploration, study, and extraction of copper ore. These are the same general types of activities as the existing source (i.e., the original workings of the mine that also supported ventilation and dewatering).

¶58 The Tribe argues that Shaft 10's activity is different from prior activity at the existing mine. In particular, the Tribe claims that dewatering Shaft 10 will be independent of the dewatering that previously took place at a different point of extraction; the mine has not been used to excavate copper ore for a period of time; and Resolution plans to extract from a new, untouched ore body using a different mining technique (panel caving) that will produce lower grade copper ore and increase the amount of ore production.

¶59 But these arguments miss the mark. The issue is whether Shaft 10 "is engaged in the same general type of activity as the existing source." 40 C.F.R. § 122.29(b)(1)(iii) (emphasis added). It is not focused on the specific manner by which "the same general type of activity as the existing source" is conducted, such as a precise mining technique, volume of production, time period, or location. *See also* NPDES Permit Regulations, 49 Fed. Reg. at 38044 (noting there is not a new source "if a facility increases capacity merely by adding additional equipment in one or two production steps"). Here,

the historical mining operation in existence for over a century sunk new shafts and provided the ventilation and dewatering necessary to discover, study, and extract new bodies of copper ore as the mine expanded in an eastward direction. Shaft 10 is engaged in that "same general type of activity"—providing ventilation and dewatering necessary to discover, study, and at some point extract copper ore (i.e., copper mining). 40 C.F.R. § 122.29(b)(1)(iii); *see also* NPDES Permit Regulations, 49 Fed. Reg. at 38044 ("The second clarifying factor that EPA has added is the extent to which the construction results in facilities or processes that are engaged in the same general type of activity as the existing source. Under this second factor, if the proposed facility is engaged in a sufficiently similar type of activity as the existing source, it will not be treated as a new source.").

¶60 The Tribe also points to the following language from the EPA's guidance: "Of course, to the extent the construction results in facilities engaged in the same type of activity because it essentially replicates, without replacing, the existing source, the new construction would result in a new source." NPDES Permit Regulations, 49 Fed. Reg. at 38044. But Resolution's sinking of a new shaft 300 feet from Shaft 9 to pursue more ore does not "replicate" the existing source. This is unlike the situation described in the Federal Register where "a power company builds a new, but identical and completely separate power generation unit at the site of a similar existing unit," in which case "the new unit will be a new source." *Id.* Resolution constructed Shaft 10 and the mine's other new features to mine copper ore adjacent to the copper-ore deposits that were exhausted. There is no "replication" in this case where those ore deposits were exhausted. Merely pursuing a new ore deposit in a mining area (as mines often do) does not make a construction a "new source" by default—instead, the "new source" criteria must be evaluated.

¶61 A construction is not a "new source" if it merely *could* operate substantially independently of the existing facility. The focus is on whether it actually *does* operate substantially independently. *See id*. (noting the EPA's agreement that it "should consider whether the new facility *actually* operates substantially independently of the existing facility, not whether it *could* operate substantially independently" (emphasis added)). The record does not establish that Shaft 10 does anything on its own. It is instead fully integrated into the mining process.

¶62 Ultimately, § 122.29(b)(1)(iii) requires us to determine whether Shaft 10's "processes are substantially independent of an existing source at the same site." "Site" is broadly defined as "the land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the facility or activity." 40 C.F.R. § 122.2. Shaft 10, the mine water treatment plant, and the other new features, such as the cooling tower, rock stockpiles, and wash bays, are included in and integrated into the same "site." With Shaft 10 being just 300 feet from Shaft 9, Resolution will continue operating in the area where copper-ore mining previously took place within the confines of an earlier permit renewal.

¶63 We agree with ADEQ's explanation in its "new source" analysis: "The new features added to the mine are supporting the same process that has always existed at the site, which is extracting ore by any means or methods. Therefore, there are no processes that are substantially independent of the existing process to extract ore." The record before us supports this determination. Shaft 10 does not meet the criteria in § 122.29(b)(1)(iii), and it therefore fails to meet the definition of "new source" at step two.

3. Step Three

¶64 Although we conclude that Shaft 10 is not a "new source" at step two, we proceed to apply the remainder of the test at step three to clarify this issue of statewide importance.

¶65 Section 122.29(b)(2) provides that "[a] source meeting the requirements of paragraphs (b)(1)(i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it." Thus, step three requires us to consider whether a new source performance standard is "independently applicable" to Shaft 10. In essence, this step differentiates between a "new source" and a "new discharger," because "[i]f there is no such independently applicable standard, the source is a new discharger." 40 C.F.R. § 122.29(b)(2).

¶66 The CWA sets forth new source performance standards that apply to "discharges from . . . [m]ines that produce copper." 40 C.F.R. § 440.100(a)(1); *see also* 40 C.F.R. § 440.104(a) (explaining that the effluent limitations in the new source performance standards apply to "pollutants discharged in mine drainage from mines that produce copper"). The CWA does *not* provide a new source performance standard for a single "shaft." But the Tribe argues that Shaft 10 is "in and of itself a mine" under the CWA.

¶67 A "mine" is "an active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits by any means or method." 40 C.F.R. § 440.132(g). "'Active mining area' is a place where work or other activity related to the extraction, removal, or recovery of metal ore is being conducted . . . ." 40 F.R. § 440.132(a).

¶68 These definitional provisions describe a "mine" as a broader geographic area made up of "all land and property" used in or resulting from the work of extracting ore by any means or method.[8] *See All*, Merriam-Webster, https://www.merriamwebster.com/dictionary/all (last visited June 10, 2024) (defining "all" as "the whole amount,

quantity, or extent of; as much as possible; every member or individual component of; the whole number or sum of"). The descriptions of "*all* land and property" and "a place where *work or other activity related to* the extraction, removal, or recovery of metal ore is being conducted" include Shafts 9 and 10, the Never Sweat Tunnel, and other features that work together to ventilate and dewater the underground workings necessary for Resolution to explore the Eastern Deposit and extract copper ore. *See* 40 C.F.R. § 440.132(a), (g) (emphasis added). These provisions do not describe a single shaft which "is the surface opening to the mine." *See Development Document*, *supra*, at 49–50.

¶69 The Tribe claims that "Resolution will use Shaft 10 to extract copper ore from an untouched ore body." Resolution, however, asserts that "Shaft 10 would be used for dewatering and ventilation, not to remove ore." The Tribe has not introduced any evidence to support a finding that Resolution plans to excavate or remove copper ore in the Eastern Deposit from Shaft 10. According to Resolution's General Plan of Operations, in the event of future ore extraction, two new shafts "will be production shafts dedicated to hoisting ore and other rock material from the Mine"—these will be Shafts 11 and 12. The Plan of Operations does not state that Shaft 10 will be used for ore extraction. Thus, we cannot speculate about such alleged future use of Shaft 10. But even if Shaft 10 is at some point used to extract a new ore deposit, this does not automatically make it a "new source." The CWA's "new source" criteria applicable to mines could have stated that a construction used to extract a new ore deposit is a "new source." But the CWA does not take this rigid approach. Instead, when ADEQ considers a discharge permit renewal, it must consider each step of the "new source" criteria and the evidence relevant to each step during the applicable time period.

¶70 The ALJ's findings of fact—which the parties do not challenge here—include testimony describing Shaft 10 as a structure "related to the extraction, removal or recovery of metal ore."[9] Shaft 10 is not drilled directly into an ore body; it works with other features to conduct activities related to ventilating and dewatering underground workings. It is therefore a component of the mine and is not itself a "mine" under § 440.132(g).

¶71 Shaft 10 does not have a new source performance standard "independently applicable" to it. *See, e.g.*, *Mahelona v. Hawaiian Elec. Co.*, 418 F. Supp. 1328, 1335 (D. Haw. 1976) ("[W]hile there are standards of performance governing steam electric generating plants, there are no regulations applicable solely to discharge facilities." (internal citation omitted)). Because Shaft 10 does not meet step three of the "new source" test, for this additional reason, it is not a "new source" under the CWA. *See* 40 C.F.R. § 122.29(b)(2).

III. CONCLUSION

¶72 We vacate paragraphs 1–20 and 30–72 of the court of appeals' opinion.[10] We affirm the superior court's decision that Shaft 10 is not a "new source" and that ADEQ acted within its discretion by issuing the 2017 Permit Renewal to Resolution.

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1 Resolution plans to extend Shaft 9 to about the same depth as Shaft 10 at some point.

2 Resolution also has plans to build a concentrator at the western portion of the mine, as well as another tunnel connecting the western and eastern portions of the mine.

3 Resolution also captures stormwater runoff using a channeling system that diverts the water to a specific area. From there, it can be pumped to another location for evaporation or to the water treatment plant. The main source of water sent to the water treatment plant is from dewatering the underground mine workings, but small volumes of industrial water and stormwater are sent as well.

4 The federal CWA statutes and regulations at issue here may have a corresponding state statute or regulation due to implementation of the Arizona Pollutant Discharge Elimination System Program. *See, e.g.*, Ariz. Admin. Code R18-9-A905(A)(1)(e) (incorporating by reference 40 C.F.R. § 122.29 ("New sources and new dischargers") for the Arizona Program Standards). In this Court, however, the parties exclusively relied upon federal statutes and regulations rather than citing any corresponding state statute or regulation. Thus, we cite to the federal provisions. No party has challenged the validity, enforceability, or applicability of the CWA regulations.

5 As the ALJ noted, the Tribe originally contended Resolution developed a "new discharger" but later withdrew that allegation and presented no substantial evidence on the issue. We were not asked to determine whether Shaft 10 is a "new discharger" under the CWA, *see, e.g.*, 40 C.F.R. § 122.2 (providing a definition of "new discharger"). We therefore do not address that issue or any requirement applicable to a "new discharger."

6 At step one, we do not determine whether Shaft 10 is itself a "mine" because new source performance standards are applicable to copper mines in Subpart J, 40 C.F.R. §§ 440.100 to .105.

7 The Tribe suggests that this "Court might remand for a determination of whether Shaft 10 totally replaces the prior mine(s) under subsection (b)(1)(ii)." We will not do so for the reasons stated. But even if we were inclined to do so, any remand would be futile because we conclude that the "new source" test fails at both steps two and three, see Part II(B)(2), (3) ¶¶ 63, 71.

8 The fact that a new mining method will be used for the Eastern Deposit—panel caving—does not change the analysis because the definition of "mine" includes extraction "by any means or method." 40 C.F.R. § 440.132(g).

9 The court of appeals explained that "the Tribe did not challenge any specific factual determinations below" and "[g]iven the parties have not raised any factual issues on appeal, we need not resolve any questions of fact." *San Carlos Apache Tribe*, 254 Ariz. at 186 ¶ 28. The same is true in this Court.

10 Paragraphs 21–29 address issues of mootness, timeliness, and deference to factual determinations below that no party challenged before this Court.

Cite as
125 Arizona Cases Digest 49

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

BEN TOMA, et al.,
Plaintiffs/Appellants,
v.
ADRIAN FONTES, et al.,
Defendants/Appellees,
and
KRISTIN MAYES, et al.,
Intervenors/Appellees.

No. 1 CA-CV 24-0002
FILED 06-27-2024

Appeal from the Superior Court in Maricopa County
No. CV2023-011834
The Honorable Timothy J. Ryan, Judge
AFFIRMED IN PART; REVERSED IN PART; REMANDED

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OPINION

Acting Presiding Judge Michael S. Catlett delivered the opinion of the Court, in which Judge James B. Morse Jr. and Judge Jennifer B. Campbell joined.

This opinion is subject to revision before publication in the Pacific Reporter.

CATLETT, Judge:

¶1 Arizona voters approved Proposition 211, also known as the "Voters' Right to Know Act" ("the Act"), in November 2022. The Act attempts to regulate "dark money," which it describes as "the practice of laundering political contributions, often through multiple intermediaries, to hide the original source." To accomplish that purpose, the Act requires a "covered person" to disclose the original source of donations exceeding $5,000 and used for "campaign spending." The Act also delegates authority to the Arizona Clean Elections Commission ("the Commission") "to enforce its disclosure requirements."

¶2 Two sections of the Act are at issue. First, the Act grants the Commission authority to "[p]erform any other act that may assist in implementing this chapter." A.R.S. § 16-974(A)(8). Second, the Act provides that "[t]he [C]ommission's rules and any commission enforcement actions pursuant to this chapter are not subject to the approval of or any prohibition or limit imposed by any other executive or legislative governmental body or official." A.R.S. § 16-974(D).

¶3 The Speaker of the House of Representatives, Ben Toma, and the President of the Senate, Warren Petersen (collectively, "the Legislature"), seek to enjoin the Act and three rules the Commission issued after the Act became effective. The Legislature claims the two statutory provisions violate the separation of powers, the nondelegation doctrine, and the Voter Protection Act, and it claims the Commission lacked authority to issue the three rules. The Legislature seeks to have the Act preliminarily enjoined in full.

¶4 We conclude the Legislature has standing to challenge § 16- 974(D) insofar as it prevents the Legislature from limiting or prohibiting the Commission's rules or enforcement actions. But the Legislature lacks standing to challenge § 16-974(A)(8) and the Commission's three rules. We conclude § 16-974(D) is unconstitutional in part but is severable. We therefore preliminarily enjoin § 16-974(D), but only in part.

STATUTORY AND REGULATORY BACKGROUND

I.

¶5 The Act "establishes" that Arizonans have "the right to know the original source of all major contributions used to pay, in whole or part, for campaign media spending." 2022 Ariz. Legis. Serv. Prop. 211 § 2(A). It also "empower[s] the [Commission] and individual voters to enforce its disclosure requirements" and imposes "significant civil penalties" for violating those requirements. 2022 Ariz. Legis. Serv. Prop. 211 § 2(D).

¶6 Under the Act, "covered persons" who surpass a set amount of "campaign media spending" are required to disclose to the Secretary of State particular information about certain donors. A.R.S. §§ 16-971(7)(a), (10)(a)–(b); 16-973(A)(6). With some exceptions, a "covered person" is "any person whose total campaign media spending or acceptance of in-kind contributions to enable campaign media spending, or a combination of both, in an election cycle is more than $50,000 in statewide campaigns or more than $25,000 in any other type of campaigns." A.R.S. § 16-971(7)(a). "Campaign media spending" includes "spending monies or accepting in- kind contributions to pay for" a variety of political activities and public communications, as well as any "[r]esearch, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with" certain political activities or public communications. A.R.S. § 16-971(2)(a)(i)–(vii). "Covered persons" must notify donors that their funds may be used for "campaign media spending" and let them elect not to have their funds used for that purpose. A.R.S. § 16-972(B). Absent consent, a donor's funds may not be used or transferred for "campaign media spending" for 21 days. A.R.S. § 16-972(C).

¶7 Violating the Act carries a steep penalty—"at least the amount of the undisclosed or improperly disclosed contribution and not more than three times that amount." A.R.S. § 16-976(A). "Any qualified voter" in Arizona may file a complaint against any person for violating the Act's requirements or the Commission's rules. A.R.S. § 16-977(A).

¶8 The Act designates the Commission as "the primary agency authorized to implement and enforce" the Act. A.R.S. § 16-974(A). The Commission may (1) adopt and enforce rules, (2) issue and enforce civil subpoenas, (3) initiate enforcement actions, (4) conduct fact-finding hearings and investigations, (5) impose civil penalties, (6) seek relief in court as necessary, and (7) establish the records regulated parties must maintain. A.R.S. § 16-974(A)(1)–(7). The Act also contains a catch-all grant of authority, allowing the Commission to "[p]erform any other act that may assist in implementing [Chapter 6.1]." A.R.S. § 16-974(A)(8).

¶9 Finally, the Act insulates the Commission. Its rulemaking is exempt from the Arizona Administrative Procedures Act. A.R.S. § 16-974(D). Its rules and enforcement actions "are not subject to the approval of or any prohibition or limit imposed by any other executive or legislative governmental body or official." *Id.* And if there is a conflict between the Act and state law, the Act prevails. A.R.S. § 16-978(B). But the Act allows "the legislature, a county board of supervisors or a municipal government" to enact "more stringent disclosure requirements for campaign media spending." A.R.S. § 16-978(A).

II.

¶10 "The Arizona Citizens Clean Elections Act, passed by initiative in 1998, created a voluntary public financing system to fund the primary and general election campaigns of candidates for state

office." *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011). That Act also created the Commission and gave it enforcement authority. *See* A.R.S. §§ 16-955(A); 16-956(A)(7).

¶11 The Commission is comprised of five commissioners, no more than two of whom can be from the same political party or county. A.R.S. § 16- 955(A). Each commissioner serves a five-year term and "shall be a qualified elector who has not, in the previous five years in this state, been appointed to, been elected to or run for any public office . . . or served as an officer of a political party." A.R.S. §§ 16-955(B), (D), (I). The commissioners are not elected; various elected officials appoint them. The Governor and other statewide officials selected the first set of commissioners, and those elected officials select replacements as vacancies occur. A.R.S. §§ 16- 955(C)–(D), (F); *see Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 518 ¶ 3 (2000).

¶12 By design, the Commission has little political accountability. Commissioners must "act quite independently of elected officials." *Myers*, 196 Ariz. at 523 ¶ 29. "They are not subordinates of the Governor or any other official who may have appointed them." *Id.* The Governor may remove a commissioner, but only "with concurrence of the senate" and "for substantial neglect of duty, gross misconduct in office, inability to discharge the powers and duties of office or violation of [§ 16-955]." A.R.S. § 16- 955(E). Moreover, "[n]o commissioner, during the commissioner's tenure or for three years thereafter, shall seek or hold any other public office[.]" A.R.S. § 16-955(I).

III.

¶13 The Commission has adopted three rules relevant here. *See* A.R.S. § 16-974(A). A.A.C. R2-20-801 explains when certain activities listed in § 16-971(2)(a)(vii) qualify as "campaign media spending." The rule says those activities—"research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with" other activities listed in § 16- 971(2)(a)—do not qualify as "campaign media spending" except when "specifically conducted in preparation for or in conjunction with" other campaign media spending. A.A.C. R2-20-801(B).

¶14 A.A.C. R2-20-803 permits donors to opt out of campaign media spending after the 21-day notice period in the Act. The rule states that "[i]f a donor does not opt out after the initial notice period, a covered person may make subsequent written notices to a donor of their right to opt out[.]" A.A.C. R2-20-803(D). It also allows "[a] donor" to "request to opt out at any time after the initial notice period." A.A.C. R2-20-803(E). If a donor does so, the "covered person" must acknowledge the request in writing within 5 days. *Id.* Then, the "donor shall be treated as having opted out by the covered person." *Id.*

¶15 A.A.C. R2-20-808 allows the Commission to issue advisory opinions. Within 60 days of receiving a request for an advisory opinion, and if a majority of the commissioners approve, "the Commission shall issue . . . a written advisory opinion." A.A.C. R2-20-808(C)(1). The Commission also created a safe harbor—any person who, in good faith, relies on an advisory opinion cannot be sanctioned. A.A.C. R2-20-808(C)(4).

PROCEDURAL BACKGROUND

¶16 The Legislature filed a three-count verified complaint, to which it later added a fourth count. The Legislature named the Arizona Secretary of State and the Commission as defendants. The Legislature claimed the Act violates the separation of powers, the nondelegation doctrine, and the Voter Protection Act ("VPA"), and it sought declaratory and injunctive relief. The Arizona Attorney General and Voters' Right to Know, the Act's sponsoring organization, intervened to defend the Act. For ease, we refer to the Commission, Secretary of State, Attorney General, and Voters' Right to Know as "Defendants."

¶17 The Legislature sought a preliminary injunction and moved to consolidate the hearing on that motion with the trial on the merits. Defendants opposed both requests. The Attorney General and Voters' Right to Know moved to dismiss for lack of standing.

¶18 The superior court declined to consolidate the preliminary injunction hearing with a trial on the merits. Then, after oral argument, the court denied the preliminary injunction and the motions to dismiss. The Legislature timely appealed the preliminary injunction decision; we have jurisdiction. *See* A.R.S. § 12-2101(A)(5)(b).

DISCUSSION

¶19 The Legislature sought, but the superior court denied, a preliminary injunction. We review that decision for an abuse of discretion. *Fann v. State*, 251 Ariz. 425, 432 ¶ 15 (2021). We review legal conclusions *de novo*. *State ex rel. Mitchell v. Palmer in and for Cnty. of Maricopa*, __ Ariz. __, 546 P.3d 101, 104 ¶ 11 (2024). The superior court abuses its discretion if it commits a legal error during a discretionary decision. *Id.*

¶20 One seeking a preliminary injunction must establish four factors: (1) a strong likelihood of success on the merits, (2) irreparable harm, (3) the balance of hardships favors that party, and (4) public policy supports an injunction. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410 ¶¶ 9–10 (2006). We analyze those factors on a sliding scale and do not inflexibly count them. *See id.* at 410 ¶ 10. So, for example, "probable success on the merits and the possibility of irreparable injury" is sufficient, and so is "the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party." *Id.* (cleaned up).

I.

¶21 We start with the likelihood of success on the merits.

A.

¶22 The Arizona Constitution provides that "[t]he judicial power shall be vested in an integrated judicial department[.]" Ariz. Const. art. 6, § 1. It also prohibits the judiciary from exercising legislative and executive powers. Ariz. Const. art. 3. So "a litigant seeking relief in the Arizona courts must first establish standing," *Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 19 (2003), which ensures courts do not give advisory opinions and issues are fully developed. *Mills v. Ariz. Bd. of Technical Registration*, 253 Ariz. 415, 423 ¶ 23 (2022). To have standing, "a plaintiff must allege a distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998). "[A] generalized harm shared by all or by a large class of people is generally insufficient." *Mills*, 253 Ariz. at 423 ¶ 24.

¶23 The Legislature seeks relief here under the Uniform Declaratory Judgments Act ("UDJA"). The UDJA allows courts "to declare rights, status, and other legal relations[.]" A.R.S. § 12-1831. A claim under the UDJA requires standing. *Mills*, 253 Ariz. at 423 ¶ 25. But actual injury is not required for standing under the UDJA—actual injury is sufficient but not necessary. *Id.* at 424 ¶ 29. If actual injury is lacking, standing still exists if there is an actual controversy between interested parties. *Id.* at 424 ¶ 25.

¶24 Defendants think the Legislature lacks standing because, first, it did not specifically authorize Speaker Toma and President Petersen to bring this action and, second, the Act's provisions are not causing the Legislature institutional injury. We address those arguments in that order.

1.

¶25 Defendants argue the Legislature did not sufficiently authorize Speaker Toma and President Petersen to sue on its behalf because it must authorize litigation on a case-by-case basis. Without such authorization here, Defendants contend Speaker Toma and President Petersen lacked authority to bring this action. We disagree.

¶26 The Arizona Constitution provides that "[e]ach house, when assembled, shall . . . determine its own rules of procedure." Ariz. Const. art. 4, pt. 2, § 8. That provision "textually commits to the legislative houses the authority to determine their own internal procedures." *Puente v. Ariz. State Legislature*, 254 Ariz. 265, 269 ¶ 10 (2022). "That authority is absolute and continuous, meaning each successive embodiment of a house is empowered to establish its own procedures." *Id.* at 270 ¶ 14.

¶27 At the start of the 56th Legislature, each legislative house adopted rules authorizing Speaker Toma and President Petersen to assert claims on their behalf. The House of Representatives authorized Speaker Toma to bring any claim "arising out of any injury to the House's powers or duties under the Constitution or Laws of this state." The Senate similarly authorized President Petersen to bring any claim "arising out of any injury to the Senate's powers or duties under the constitution or laws of this state."

¶28 Defendants do not dispute that the claims here fall within those authorizations. Rightly so—the Legislature's claims assert an injury to its constitutional powers and duties. Defendants also do not contend that authorizing litigation is an improper subject for a legislative rule. Instead, Defendants argue the authorizations here were not specific enough, and we should require case-by-case authorizations.

¶29 We will not superintend the specificity with which the Legislature authorizes litigation. As explained, the Constitution commits the power to craft internal rules to the Legislature, not to the courts. That commitment "means each house can interpret, amend, enforce, or disregard those rules with almost limitless impunity." *Puente*, 254 Ariz. at 269 ¶ 12. At most, courts can review legislative rules for constitutional violations or to determine whether they reasonably relate to their intended result. *Id.* Defendants bring neither challenge.

¶30 Defendants instead assert that "courts have seemingly treated it as a given that legislator-plaintiffs must obtain approval for a *particular* action." For support, they cite case law where *individual* legislators *lacked* legislative authorization. They do not cite any decision where the judiciary has imposed a specificity requirement for authorizing legislative litigation. The closest they come is *Bennett*, where our supreme court said the plaintiffs "ha[d] not been authorized by their respective chambers to maintain this action." 206 Ariz. at 527 ¶ 29. Defendants seize on the phrase "this action" as supporting a specificity requirement. But there was no question in *Bennett* that the individual legislators were not authorized to sue on the Legislature's behalf, and thus the court had no occasion to decide whether courts can dictate how *specific* legislative authorizations must be.

¶31 Defendants also cite *Arizona State Legislature v. Arizona Independent Redistricting Commission*, but that opinion cuts against them. 576 U.S. 787 (2015). There, both legislative houses authorized their leaders to "file suit, and join or intervene in any suit in both state and federal court to defend the authority of the [Legislature] related to redistricting under the Constitutions of both the United States and the State of Arizona." The authorizations did not mention any specific legal action. Yet the Court allowed the Legislature to proceed, explaining that the situation there was different than one where an individual legislator with *no authorization* sues. *Id.* at 802. Likewise, the situation at hand—one where there is authorization—is different than one where authorization is missing.

¶32 Finally, Defendants think it would be easy for the Legislature to authorize litigation on a case-by-

case basis. But the practical ease of Defendants' proffered requirement is beside the point. The Constitution vests the Legislature with the power to create rules authorizing litigation. *See Puente*, 254 Ariz. at 270 ¶ 14. The Legislature authorized Speaker Toma and President Petersen to bring litigation, and the claims here fall within that authorization—that is the end of the matter so far as the judiciary is concerned.

2.

¶33 With authorization verified, we analyze whether the Legislature can otherwise establish standing.

a.

¶34 Defendants insist that "the sole basis for [the Legislature's] standing is [its] erroneous legal conclusion about [§ 16-974(D)]'s meaning." They claim the phrase "legislative governmental body" does not include the Legislature. And if true, then § 16-974(D) is not injuring the Legislature.

¶35 Standing does not turn on the *merits* of a party's arguments. We instead accept a plaintiff's allegations and then analyze whether there is standing. *See Brewer v. Burns*, 222 Ariz. 234, 238 ¶ 14 (2009); *see also Ariz. State Legislature*, 576 U.S. at 800. In other words, "[D]efendants cannot defeat standing merely by assuming" victory. *Brewer*, 222 Ariz. at 238 ¶ 14.

¶36 *We therefore will not definitively interpret "legislative governmental body" as part of our standing inquiry so long as a proper understanding of "legislative governmental body" could* encompass the Legislature. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (standing in public disputes turns on whether the "statutory provision on which the claim rests properly can be understood" the way the plaintiff claims). Because the phrase "legislative governmental body" "properly can be understood" to include the Legislature (*see infra* ¶¶ 57-67), Defendants' alternative interpretation of that phrase, even if ultimately correct on the merits, cannot defeat standing. *Id.*

b.

¶37 Defendants next argue the Legislature lacks standing because it is not suffering institutional injury. The Legislature counters that the Act "and its related rules inflict a direct institutional injury on the Legislature's otherwise plenary power to enact laws[.]"

¶38 Legislative standing based on institutional injury turns on the facts and circumstances in each case. *See Biggs v. Cooper ex rel. Cnty. of Maricopa*, 236 Ariz. 415, 419 ¶¶ 13–14 (2014); *Bennett*, 206 Ariz. at 526–27 ¶ 28; *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 486–87 ¶¶ 14–15 (2006). Institutional injury does not "zero[] in on any individual [m]ember." *Ariz. State Legislature*, 576 U.S. at 802. Instead, it is "[w]idely dispersed" and "necessarily impact[s] all [m]embers of [a legislature] equally." *Id.* (cleaned up). The Legislature suffers institutional injury when there is "a particularized injury to the legislative body as a whole." *Forty- Seventh Legislature*, 213 Ariz. at 486 ¶ 14.

¶39 Vote nullification plays a leading role in legislative standing based on institutional injury. In *Arizona State Legislature*, the Court observed that the Legislature's injury was like a "nullification" injury. 576 U.S. at 803–04. In that case, giving redistricting power to a commission "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan," so the Legislature had standing. *Id.* at 804. Similarly, in *Forty-Seventh Legislature*, our supreme court concluded the Legislature could challenge the Governor's line-item veto because if the veto was invalid, "the Legislature's right to have the votes of a majority given effect has been overridden and the Legislature, as an institution, has sustained a direct injury to its authority to make and amend laws[.]" 213 Ariz. at 487 ¶ 15. And, in *Biggs*, our supreme court found institutional injury based on nullification of the plaintiffs' "power, as a group, to have defeated the bill, if a supermajority was required for passage." 236 Ariz. at 419 ¶ 15; *see also Bennett*, 296 Ariz. at 526 ¶ 26 (rejecting standing because "no legislator's vote was nullified by interference in the legislature"). We must therefore determine whether the Act or the Commission's rules are directly injuring the Legislature's powers, including by nullifying its power to make and amend laws. *See Forty-Seventh Legislature*, 213 Ariz. at 487 ¶ 15.

i.

¶40 The Legislature first challenges § 16-974(D). Again, that section says the Commission's rules and enforcement actions "are not subject to the approval of or any prohibition or limit imposed by any . . . legislative governmental body[.]" The Legislature argues it has standing because that section "disrupts the legislative process by barring the Legislature from being able to" pass laws regulating campaign spending. Defendants respond that the Legislature has not alleged a concrete harm stemming from § 16-974(D). We conclude the Legislature has standing to challenge § 16-974(D).

¶41 If the Legislature is correct that § 16-974(D) stops it from legislating when doing so prohibits or limits a Commission rule or enforcement action, then it is sustaining a direct injury to its constitutional authority. *See Forty-Seventh Legislature*, 213 Ariz. at 487 ¶ 15. According to the Legislature, without § 16-974(D), it could pass legislation, subject to constitutional restraints (like the VPA), even if doing so would prohibit or limit a Commission rule or enforcement action. *See Earhart v. Frohmiller*, 65 Ariz. 221, 224–25 (1947). Under that view, § 16-974(D) "would completely nullify any vote by the Legislature now or in the future" if it resulted in a law prohibiting or limiting a Commission rule or enforcement action. *Arizona State Legislature*, 576 U.S. at 804 (cleaned up).

Thus, "the Legislature, as an institution, has sustained a direct injury to its authority to make and amend laws[.]" *Forty-Seventh Legislature*, 213 Ariz. at 487 ¶ 15.

¶42 Defendants argue the Legislature must identify specific legislation it wants to pass that the Act prohibits. The superior court agreed, finding that the Legislature has "not contended . . . that any legislator hopes to run a bill in the 2024 session that may affect [the Act], much less evidence that a legislator is forgoing any legislative act because of supposed uncertainty about [the Act]."

¶43 The Legislature need not identify specific legislation it would have passed or wants to pass but for the Act. In *Arizona State Legislature*, the Redistricting Commission argued the Legislature's injury was not concrete "absent some 'specific legislative act that would have taken effect but for Proposition 106.'" 576 U.S. at 800. The United States went further, arguing the Legislature had to present a redistricting plan to the Secretary of State and have it rejected. *Id.* The Court discarded both arguments because, "[t]o establish standing, the Legislature need not violate the Arizona Constitution." *Id.* at 801. Similarly, in *Brewer*, our supreme court concluded the Governor's claims were not premature even if "the Legislature was still in session and" presentment must only occur "before the Legislature adjourns." 222 Ariz. at 238 ¶ 15. If the Governor's interpretation was correct, "she suffered a constitutional injury." *Id.* Finally, in *Biggs*, the Governor argued "that the plaintiff legislators had other remedies available to them, such as attempting to repeal the law or seeking a referendum on it." 236 Ariz. at 419 ¶ 17. Yet the court concluded the claim was not premature, explaining that the legislators "need not exhaust all alternative political remedies before filing suit." *Id.* So, to have standing, the Legislature need not violate the Act, identify specific legislation that would do so, or exhaust other political remedies.

¶44 Finally, Defendants argue that any injury the Legislature claims to be suffering from § 16-974(D) stems exclusively from the VPA. Not so. The VPA prohibits the Legislature from repealing or amending an approved initiative measure unless certain conditions are met. *See* Ariz. Const. art. 4, pt. 1, § 1(6)(C). But, according to the Legislature, § 16-974(D) goes further and prohibits it from passing any legislation prohibiting or limiting Commission rules or enforcement actions, even if the VPA would not apply or would allow such legislation. By doing so, the Legislature claims § 16-974(D) nullifies its authority to pass laws. That view, which is not inconsistent with a proper understanding of § 16-974(D), gives the Legislature standing. *See Forty-Seventh Legislature*, 213 Ariz. at 487 ¶ 15; *Warth*, 422 U.S. at 500.

ii.

¶45 We next address § 16-974(A)(8), which allows the Commission to "[p]erform any other act that may assist in implementing this chapter." The Legislature says that section "usurps legislative authority by delegating legislative power to the Commission." Defendants counter that "the Legislature cannot be harmed simply because voters" delegated authority to the Commission. We conclude the Legislature lacks standing to challenge § 16-974(A)(8).

¶46 The Legislature has broad—but not unbounded—discretion to delegate authority to the executive branch. *See State v. Ariz. Mines Supply Co.*, 107 Ariz. 199, 205–06 (1971). The Legislature has often exercised that authority, including in areas as essential as elections and emergency management and obscure as eradicating the Pink Bollworm of Cotton. *See, e.g.*, A.R.S. § 16-452(A); A.R.S. § 26-303(E)(1); *State v. Wacker*, 86 Ariz. 247, 248–49 (1959).

¶47 The people made the delegation here, but ultimately that makes no difference. "The legislative power of the people is as great as that of the legislature." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 6 ¶ 15 (2013) ("*Cave Creek*"). Like the Legislature, the people can enact laws that include broad—but again not unbounded—delegations to the executive branch. And, like the Legislature, the people have occasionally done so. *See, e.g.*, A.R.S. § 36-2854(A); A.R.S. § 36-601.01(G)(11).

¶48 The flaw in the Legislature's theory is this: delegating authority does not, standing alone, nullify legislative power. To the contrary, when the Legislature delegates, it can still legislate, including on subjects falling within the delegation. For example, delegating authority to conduct elections or manage emergencies did not stop the Legislature from later passing laws on those subjects. The Legislature similarly retains lawmaking power (subject to the VPA, if applicable) when *the people* delegate authority to the executive branch. Thus, § 16-974(A)(8), by itself, cannot properly be understood as stopping the Legislature from passing laws, or otherwise causing it institutional harm. *See Warth*, 422 U.S. at 500.

¶49 The institutional injury the Legislature attributes to § 16- 974(A)(8) is instead *traceable* to two other laws. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 405 ¶ 23 (App. 2020) ("[A] party must first establish 'a causal nexus between the defendant's conduct and [its] injury.'"). First, because the people approved the Act, the Constitution prohibits the Legislature from repealing or amending the text of § 16-974(A)(8) unless the VPA's conditions are met. *See* Ariz. Const. art. 4, pt. 1, § 1(6)(C), (14); *Cave Creek*, 233 Ariz. at 4 ¶ 9. Second, once the Commission issues a rule or pursues an enforcement action, the Legislature alleges that it can no longer legislate if doing so would prohibit or limit that rule or enforcement action. In neither situation, however, does injury stem from § 16-974(A)(8)—in the first,

injury stems from the VPA, in the second, injury stems from § 16-974(D). The Legislature does not challenge the VPA and it has standing to challenge § 16-974(D) (*see supra* ¶ 41). Because § 16-974(A)(8), no matter how it might be construed, is not causing "a direct injury to [the Legislature's] authority to make and amend laws," the Legislature lacks standing to challenge that provision. *Forty-Seventh Legislature*, 213 Ariz. at 487 ¶ 15; *cf. Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 17 (2005) (rejecting standing despite plaintiff alleging "that *she* was injured by the requirement in the ordinance").

¶50 The Legislature argues that, even if injury is lacking, there is standing because there is an actual controversy between interested parties about the Act's validity. *See Mills*, 253 Ariz. at 424 ¶ 25. The Legislature argues it has "a real and present need" to know whether the Act is valid. But the Legislature's "interested party" argument focuses on § 16-974(D). It argues that once the Commission issues a rule, "§ 16-974(D) operates to shrink the constitutional scope of the Legislature's power to pass laws concerning the same subject." That argument does not establish that the Legislature is sufficiently interested in the constitutionality of § 16- 974(A)(8). The argument instead underscores that the Legislature's injury is traceable to § 16-974(D).

iii.

¶51 We turn last to the three Commission rules the Legislature claims are *ultra vires*. The Legislature argues the rules are injuring it because they are "an 'excursion' into lawmaking by promulgating legislative policy" and "shrink the constitutional scope of the Legislature's powers." Defendants disagree, arguing the Legislature "is not constrained or affected in any way by the Commission issuing advisory opinions (under R2-20-808) or interpreting and implementing the statutory text (R2-20-801, 803(E))." We agree the Legislature lacks standing to challenge the rules.

¶52 None of the three rules regulate the Legislature as an entity and none can be understood as nullifying legislative power. Because the delegation in § 16-974(A)(8) does not nullify legislative power, neither do the three rules at issue, even assuming they were promulgated using that delegation. Any institutional injury the Legislature is suffering from those rules is instead *traceable* to the limits in § 16-974(D).

¶53 The Legislature cites *Cochise County v. Kirschner*, 171 Ariz. 258 (App. 1992), to support standing. We said there that "[a]ny excursion by an administrative body beyond the legislative guidelines is" a "usurpation of constitutional powers vested only in the major branch of government." *Id.* at 261–62. Though that statement is correct, *Kirschner* did not involve a claim by the Legislature and did not make that statement in the context of legislative standing. Rather, the quoted passage merely supported this court's broader (but still correct) statement that "[a]n agency . . . has no powers other than those the legislature has delegated to it." *Id.* at 261.

c.

¶54 The Legislature alternatively asks us to waive standing because this matter involves a controversy "between the highest branches of state government" and "[t]ime is of the essence" with the 2024 election approaching. Because the Legislature has standing to challenge § 16- 974(D), we need not waive standing as to that section.

¶55 As to § 16-974(A)(8) and the Commission's rules, we decline to waive standing. Our supreme court has indicated it might ditch standing "in exceptional circumstances." *Sears*, 192 Ariz. at 71 ¶ 25. But we are unaware of any instance where *this court* has done so. With standing missing, the controversy over whether and how the Act should delegate authority to the Commission remains a political dispute between the legislative and executive branches of government. We are "naturally reluctant" to referee such a dispute. *Bennett*, 206 Ariz. at 525 ¶ 20. And, in any event, we question the propriety of waiving standing when determining whether there is a likelihood of success on the merits for purposes of a preliminary injunction.[1]

B.

¶56 We next consider whether § 16-974(D) is constitutional. To do so, we first answer the question Defendants sought to have us answer during our standing analysis, but that we reserved for the merits (*see infra* ¶ 36)—whether the Legislature is a "legislative governmental body." And, if the Legislature is such a body (preview: it is), we then address § 16- 974(D)'s constitutionality.

1.

¶57 The parties offer competing interpretations of the phrase "legislative governmental body." The Legislature contends that phrase includes it. Defendants contend that phrase covers only the Administrative Rules Oversight Committee ("the Committee"). The superior court agreed with Defendants. We are of a different mind—the phrase "legislative governmental body" includes the Legislature.

¶58 We interpret statutes "according to the plain meaning of the words in their broader statutory context," unless directed to do otherwise. *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286 ¶ 31 (2023). "Clear and unequivocal language determines a statute's meaning, reading each word, phrase, clause, and sentence in such a way to ensure no part of the statute is void or trivial." *Planned Parenthood Arizona, Inc. v. Mayes*, ____ Ariz. ____, 545 P.3d 892, 897 ¶ 15 (2024). "When the statute's language is clear and unambiguous, we must give effect to that language without employing other rules of statutory construction." *Parsons v. Ariz. Dep't of Health Servs.*, 242 Ariz. 320, 323 ¶ 11 (App. 2017). Only if

statutory language is ambiguous may we "use alternative methods of statutory construction, including examining the [statute's] historical background, its spirit and purpose, and the effects and consequences of competing interpretations." *Planned Parenthood Ariz., Inc.*, 545 P.3d at 897 ¶ 17.

¶59 The Act does not define the phrase "legislative governmental body" or any of its terms. *See* A.R.S. § 16-971 (defining terms in the Act). Thus, we "may look to dictionary definitions." *In re Drummond*, ___ Ariz. ___, 543 P.3d 1022, 1025 ¶ 7 (2024); *see also* A.R.S. § 1-213.

¶60 The Merriam-Webster Dictionary defines "legislative" as "having the power or performing the function of legislating."[2] The Oxford Advanced Learner's Dictionary defines "legislative" as "connected with the act of making and passing laws."[3] Merriam-Webster defines "governmental" as "the body of persons that constitutes the governing authority of a political unit or organization."[4] Merriam-Webster defines "body," as relevant here, as "a group of persons or things: such as a group of individuals organized for some purpose," and the Oxford Dictionary defines "body" as "a group of people who work or act together, often for an official purpose[.]"[5] Combining those definitions, the phrase "legislative governmental body" means this: a group of people constituting the governing authority of a political unit and having the power or performing the function of legislating.

¶61 Applying that definition, the Legislature is a "legislative governmental body." The Legislature is a group of people— representatives and senators—constituting the governing authority of the state and having the power to legislate. The Arizona Constitution provides that "[t]he legislative authority of the state shall be vested in the legislature[.]" Ariz. Const. art. 4, pt. 1, § 1(1); *see also Earhart*, 65 Ariz. at 224. So the phrase "legislative governmental body" in § 16-974(D) includes the Legislature.

¶62 Prior case law supports that conclusion. Our supreme court has referred to the Legislature as a "legislative body." In *Queen Creek Land and Cattle Corporation v. Yavapai County Board of Supervisors*, the court explained that "the constitutional reservation of initiative and referendum powers establishes the electorate as a coordinate source of legislation with the constituted *legislative bodies*." 108 Ariz. 449, 451 (1972) (emphasis added). The court identified those "legislative bodies" as "the Legislature and the inferior law-making bodies." *Id.* Later, in *Robbins v. Arizona Department of Economic Security*, this court interpreted the phrase "legislative body" as including the Navajo Nation Council, which the Navajo Nation Code "established [as] the Legislative Branch of the Navajo Nation Government." 232 Ariz. 21, 22, 24 ¶¶ 2, 14–17 (App. 2013).

¶63 Defendants argue that "legislative governmental body" does not refer to the Legislature because the Act later references the Legislature in § 16-978, thereby creating surplusage if we adopt the Legislature's interpretation. Section 16-978(A) allows "the legislature, a county board of supervisors or a municipal government" to enact "additional or more stringent disclosure provisions for campaign media spending." That the Act returns some power to three governmental bodies does not render the more general restriction on "any other . . . legislative governmental body" superfluous if that phrase includes the Legislature. Instead, the Act identifies a broad class of entities subject to § 16-974(D) and then clarifies in § 16-978 that three specific governmental bodies retain some power in the realm of campaign media spending.

¶64 We also disagree that "legislative governmental body" refers *only* to the Committee. The Committee has eleven members—five members each from the House and Senate and the Governor or the Governor's designee—and it reviews agency rules "for conformity with statute and legislative intent." A.R.S. §§ 41-1046, -1047. The Committee is not the governing body of a political unit and has no legislative power. Voters therefore would not have *widely* understood the phrase "legislative governmental body" to refer exclusively to the Committee. It is unlikely *any* voter would have done so.

¶65 The structure of § 16-974(D) also supports our interpretation. Recall that the second sentence in § 16-974(D) exempts the Commission's rules "from title 41, chapters 6 and 6.1." The Committee's process for reviewing agency rules and policies is found in title 41, chapter 6. *See* A.R.S. §§ 41-1047, -1048. That means § 16-974(D)'s second sentence exempts the Commission's rules from Committee review. So interpreting "legislative governmental body" in the first sentence to refer *only* to the Committee risks superfluidity—the first sentence would exempt the Commission from Committee oversight when the second sentence also does so. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019). Moreover, the Committee is tasked with reviewing and commenting on agency rules. It does not have the power to prohibit or limit agency rulemaking or enforcement actions. *See* A.R.S. § 41-1047. Thus, Defendants' interpretation of "legislative governmental body" would merely result in the Committee being prohibited from exercising power it does not possess, thereby rendering § 16-974(D) partly illusory.

¶66 Moreover, § 16-974(D) refers to "*any other* . . . legislative governmental body." (Emphasis added.) Interpreting that broad phrase as referring *only* to the Committee would contradict the common meaning of "any other" and the general terms canon. *See City of Phoenix v. Tanner*, 63 Ariz. 278, 280 (1945) ("[T]he word 'any' is, in its ordinary sense, broadly inclusive[.]"); Antonin Scalia & Bryan A.

Garner, Reading Law: The Interpretation of Legal Texts 101-03 (2012) (general terms canon instructs that terms like "all persons" and "any property" not be arbitrarily limited).

¶67 The superior court adopted Defendants' definition, relying on the constitutional avoidance canon. That canon does not allow us to rewrite a statute to avoid constitutional conflict. *See Fann*, 251 Ariz. at 433–34 ¶ 23. Instead, it applies only "in the choice of fair alternatives that one construction may raise serious constitutional questions avoided by another." *United States v. Rumely*, 345 U.S. 41, 45 (1953); *see also Skilling v. United States*, 561 U.S. 358, 423 (2010) (Scalia, J., concurring in part and in the judgment). Defendants' interpretation is not a fair alternative to the common meaning of "legislative governmental body." That phrase is not susceptible to an interpretation that includes only the Committee. Instead, the phrase's common meaning includes the Legislature.

2.

¶68 We next address whether § 16-974(D) unconstitutionally restricts the Legislature's lawmaking power. The Commission conceded during oral argument that, if the Legislature is a "legislative governmental body," then § 16-974(D) is unconstitutional in part. We agree.

a.

¶69 The framers of the Federal Constitution knew well what happens when one individual possesses too much governmental power. As Madison said, "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 293 (James Madison) (Bantam Classic ed., 1982). So the framers separated the federal government into three branches—legislative, executive, and judicial. And they split the legislative branch into two bodies—the House of Representatives and the Senate. *See* U.S. Const. art. I, § 1.

¶70 Arizona's framers concluded the separation of powers remained a vital bulwark against government overreach. *See* Ariz. Const. art. 3; *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988). But they went further than their federal counterparts. Not only did they split the legislature into two bodies—the House and the Senate—but they gave the people direct lawmaking power. *See* Ariz. Const. art. 4, pt. 1, § 1(2).

¶71 Here is another relevant difference between the Federal and Arizona Constitutions: the Arizona Constitution is not one of granted powers, "but instead [is a] limitation[] thereof." *Earhart*, 65 Ariz. at 224. Thus, the Legislature need not ground its lawmaking in an express grant of authority. *Id.* Instead, it "may deal with any subject within the scope of civil government," unless the Constitution says otherwise. *Id.*

¶72 The same is true for the people's lawmaking power. The Arizona Constitution says, "Any law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative." Ariz. Const. art. 22, § 14; *see also Tilson v. Mofford*, 153 Ariz. 468, 470 (1987). The converse is also true—the people may not exercise their lawmaking authority in a way the Legislature cannot. As the Constitution puts it, "Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people." Ariz. Const. art. 22, § 14.

b.

¶73 Without § 16-974(D), the Legislature could enact laws prohibiting or limiting the Commission's rules or enforcement actions, subject to the VPA if applicable. But § 16-974(D) nullifies that power. The portion that does so is unconstitutional.

¶74 History tells us that one legislature cannot limit the lawmaking powers of future legislatures. Blackstone observed that "Acts of parliament derogatory from the power of subsequent parliaments bind not." 1 William Blackstone, Commentaries on the Laws of England 90 (1765). Chief Justice Marshall explained "that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. 87, 135 (1810). And the Supreme Court has since reaffirmed that principle. *See Manigault v. Springs*, 199 U.S. 473, 487 (1905); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932).

¶75 The Arizona Constitution, too, prohibits one legislature from stopping a future legislature from passing laws. According to our supreme court, "it is axiomatic that any [legislative] body may alter, limit, or repeal, in whole or in part, any statute by a preceding one[.]" *Higgins' Est. v. Hubbs*, 31 Ariz. 252, 264 (1926). Moreover, it is "undoubted" that one legislature cannot "limit or bind the acts of a future one." *Id.* More recently, the court reiterated that "one legislature generally cannot restrict the lawmaking powers of a future legislature." *Cave Creek*, 233 Ariz. at 6 ¶ 16. For support, the court quoted a Washington Supreme Court opinion, which said, "Implicit in the plenary power of a legislature is the principle that one legislature cannot enact a statute that prevents a future legislature from exercising its law-making power." *Id.* (quoting *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wash.2d 284 (2007)).

¶76 If one legislature cannot stop a future legislature from passing laws, then neither can a voter-approved *statute*. *See* Ariz. Const. art. 22, § 14. Yet that is precisely what § 16-974(D) does—it restricts future legislatures from passing laws prohibiting or limiting the Commission's rules or enforcement actions. In fact, § 16-974(D) does not just restrict the Legislature from legislating in defined areas. It instead lets the Commission choose when future legislation is off limits—in whatever

areas the Commission promulgates rules or pursues enforcement actions.

¶77 Of course, the VPA limits legislative power, including when a voter- approved statute restricts legislative discretion, and nothing in our analysis impacts the VPA. *See Cave Creek*, 233 Ariz. at 6 ¶ 17. But the VPA is contained in the Constitution, and it restricts the Legislature's power to amend or repeal voter-approved *statutes*. Section 16-974(D) goes further and statutorily prohibits the Legislature from passing any law limiting or prohibiting any Commission *rule or enforcement action*, even when the VPA does not apply, or its requirements are met.

¶78 *Cave Creek* does not save § 16-974(D). There, the Legislature passed a school-funding bill and referred portions of it to the people. 233 Ariz. at 3 ¶ 3. Among the provisions referred was "a requirement that the [L]egislature make annual inflation adjustments to the budget for K-12 public schools." *Id.* Beginning in 2010, the Legislature did not budget for the required inflation adjustments. *Id.* at 3 ¶ 4. When challenged, the State argued that the Legislature need not do so because "the electorate, through a voter-approved statute . . . cannot bind future legislatures." *Id.* at 6 ¶ 17. The court disagreed that the budget requirements were not VPA-protected: "[H]aving chosen to refer the measure to the people, who then passed it, the [L]egislature is subject to the restrictions of the VPA[.]" *Id.* The court reasoned that "[t]he VPA expressly limits the legislature's powers relating to a[n approved] 'referendum measure.'" *Id.* at 6 ¶ 18.

¶79 This case is different. The Legislature is not ignoring a voter- approved directive, thereby effectively repealing a voter-approved statute. *See id.* at 7 ¶ 25 (noting that "[t]he State conceded" that the statute at issue "violated the VPA by effectively repealing, amending, or superseding § 15- 901.01"). In *Cave Creek*, the Constitution, through the VPA, restricted the Legislature's budgeting discretion. Here, a *statute* nullifies legislative power whenever the Commission enacts a rule or pursues an enforcement action. Also, in *Cave Creek*, the Legislature referred the law in question to the people, so the court "presume[d] that . . . the legislature acted 'with full knowledge of relevant constitutional provisions,' including the VPA." *Id.* at 5 ¶ 11. No such presumption applies here.

¶80 We conclude § 16-974(D) is unconstitutional in part because it prohibits the Legislature from passing any law prohibiting or limiting the Commission's rules or enforcement actions, even when the VPA does not apply, or its requirements are met.

C.

¶81 We arrive at severability. The Legislature argues that because § 16-974(D) is unconstitutional in part, the whole Act must fall. We disagree.

¶82 The Act contains a severability clause, providing that "[i]f any provision of this [A]ct or application of a provision to any person or circumstance is held to be unconstitutional, the remainder of this [A]ct . . . shall not be affected by the holding." 2022 Ariz. Legis. Serv. Prop. 211 § 4. Through that clause, the people expressed their will that courts should respect any part of the Act not deemed unconstitutional. One could argue our analysis should end there. *See Myers*, 196 Ariz. at 523 ¶ 25; *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality opinion).

¶83 Yet our supreme court uses a severability test for initiatives. *See Randolph v. Groscost*, 195 Ariz. 423, 427 ¶ 15 (1999). Thereunder, "we ask whether the valid portion can operate without the unconstitutional provision and, if so, [whether] the result is so . . . irrational that one would not have been adopted without the other." *Myers*, 196 Ariz. at 522 ¶ 23.

¶84 The Legislature argues that "without § 16-974(D), the Commission's rulemaking will be subject to executive and legislative oversight." But that does not establish that the Act is unworkable if § 16- 974(D) is unenforceable against the Legislature. There is no executive official here challenging § 16-974(D), so we do not address whether § 16- 974(D) is enforceable against executive officials. Also, if § 16-974(D) is enjoined as to the Legislature, then the Commission will be subject to some legislative oversight, but that can be said of most administrative agencies. Moreover, the Act's core will remain—its disclosure requirements will still be enforceable. The Act will be workable.

¶85 Nor will the result be so absurd or irrational that we can say the electorate would not have adopted the Act. Importantly, the Act will remain subject to the VPA's restrictions on lawmaking. As such, the Commission will be in the same situation as other agencies delegated authority through a VPA-protected measure. And, through the express severability clause, the people expressed their desire to have the Act's unchallenged provisions remain. *See Myers*, 196 Ariz. at 523 ¶ 25. The Legislature is not likely to succeed on its request to enjoin the Act in full.

* * *

¶86 In sum, the Legislature has shown a strong likelihood of success on its challenge to § 16-974(D) because it has standing and that section unconstitutionally restricts its lawmaking power. The Legislature is unlikely to succeed on its claim that the unconstitutional portion of § 16- 974(D) is not severable. And the Legislature is unlikely to succeed on its challenge to § 16-974(A)(8) and the Commission's three rules because it lacks standing.

II.

¶87 We turn briefly to the other preliminary injunction factors— irreparable harm, the balance of hardships, and public policy. *Smith*, 212 Ariz. at 410 ¶¶ 9–10.

¶88 The Legislature is suffering irreparable harm. Harm is irreparable when it is "not remediable by

damages." *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990); *see also City of Flagstaff v. Ariz. Dep't. of Admin.*, 255 Ariz. 7, 13 ¶ 18 (App. 2023). "An award of monetary damages generally is an adequate remedy when damages are calculable with reasonable certainty and 'address the full harm suffered.'" *City of Flagstaff*, 255 Ariz. at 13 ¶ 18. Ordinarily, *ongoing* constitutional violations cannot be remedied through monetary damages, rendering the harm caused by such a violation irreparable. *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017). Thus, irreparable harm ordinarily exists when a statute is *both* violating the separation of powers *and* that violation is directly harming the plaintiff.

¶89 Defendants have not established that the harm § 16-974(D) is causing the Legislature—nullification of its lawmaking powers (*see supra* ¶ 76)—is remedial by money damages or any other legal remedy. The Legislature's underlying claim for declaratory relief cannot result in money damages. *See* A.R.S. § 12-1831 *et seq.* And Defendants have not identified any other claim the Legislature might have brought to remedy the harm it is suffering. Moreover, that harm is not speculative or remote. Section 16- 974(D) is *currently* in effect and nullifying the Legislature's lawmaking power. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 212 (2020) ("[W]hen such a provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court."). Just as the Legislature need not violate § 16- 974(D) to establish standing, it need not do so to show irreparable harm.

¶90 The balance of hardships and the public interest also favor injunctive relief. On one hand, the Legislature is suffering harm to its authority to enact laws. That also harms the people of Arizona, who have a paramount interest in having elected representatives carry out their will. On the other hand, a preliminary injunction as to § 16-974(D)'s restriction on the Legislature is narrow and the Act's primary provisions remain, thereby minimizing any harm to the electorate that approved the Act. Moreover, Defendants argue the Legislature is not a "legislative governmental body" covered by § 16-974(D). Although we reject that interpretation, enjoining § 16-974(D)'s restriction on the Legislature has the same impact as that interpretation—§ 16-974(D) does not apply to the Legislature. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("The Defendants cannot be harmed by an order enjoining an action they will not take."). Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.*

III.

¶91 The Legislature seeks attorney fees and costs, as do Defendants. Because this is a split decision, in the exercise of our discretion, each side shall bear their own fees and costs. *See State ex rel. Brnovich v. Ariz. Bd. of Regents*, 250 Ariz. 127, 134 ¶ 30 (2020).

CONCLUSION

¶92 Each of the preliminary injunction factors supports the Legislature's request to preliminarily enjoin § 16-974(D) in part. We therefore reverse in part the superior court's denial of a preliminary injunction. Defendants and their agents are enjoined during the pendency of this litigation from enforcing § 16-974(D) to prohibit the Legislature from passing legislation prohibiting or limiting the Commission's rules or enforcement actions. *See* A.R.S. § 12-120.21(A)(3); Ariz. R. Civ. App. P. 7(c). We remand to the superior court for further proceedings consistent herewith. The existing stay of trial court proceedings shall lift when the mandate is issued.

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1 We therefore take no view on the merits of the Legislature's argument that § 16-974(A)(8) violates the separation of powers or the non-delegation doctrine.

2 *Legislative*, Merriam-Webster, https://www.merriam-webster.com/dictionary/legislative (last visited June 26, 2024); *see also Windhurst v. Ariz. Dep't. of Corrections*, 256 Ariz. 186, 191 ¶ 19 (2023) (using the Merriam-Webster dictionary to define a statutory term).

3 *Legislative*, Oxford Advanced Learner's Dictionary, https://www.oxfordlearnersdictionaries.com/definition/english/legislative?q=legislative (last visited June 26, 2024); *see also Windhurst*, 256 Ariz. at 191 ¶ 19 (using the Oxford Dictionary to define a statutory term).

4 *Governmental*, Merriam-Webster, https://www.merriam-webster.com/dictionary/governmental (last visited June 26, 2024).

5 *Body*, Merriam-Webster, https://www.merriam-webster.com/ dictionary/body (last visited June 26, 2024); *Body*, Oxford Advanced Learner's Dictionary, https://www.oxfordlearnersdictionaries.com/definition/english/body?q=body (last visited June 26, 2024).

Cite as
125 Arizona Cases Digest 60

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

Joseph SILENCE,
Plaintiff/Appellee,
v.
Shane T. BETTS,
Defendant/Appellant.

No. 1 CA-CV 23-0178
FILED 06-27-2024

Appeal from the Superior Court in Maricopa County
No. CV2019-000419
The Honorable Richard F. Albrecht,
Judge Pro Tempore
AFFIRMED

COUNSEL
Jaburg & Wilk, P.C., Phoenix, By Thomas S. Moring, Corrinne R. Viola, Kate A. Myers
Counsel for Plaintiff/Appellee
By Shane Betts, *Defendant/Appellant*

OPINION
Presiding Judge Anni Hill Foster delivered the opinion of the Court, in which Judge Brian Y. Furuya and Vice Chief Judge Randall M. Howe joined.

This opinion is subject to revision before publication in the Pacific Reporter.

FOSTER, Judge:
¶1 Defendant Shane Betts appeals the superior court's denial of his motion to quash a continuing lien under a writ of garnishment obtained by Joseph Silence and his motion for reconsideration. This case requires this Court to consider how Proposition 209, a voter initiative related to debt collection, affects ongoing wage garnishments.
¶2 Among other things, Proposition 209 amended the statute defining a debtor's disposable earnings subject to garnishment. Ariz. Legis. Serv. Prop. 209 § 6. But Proposition 209 contains a Saving Clause stating it "applies prospectively only" and "does not affect rights and duties that matured before the effective date of this act." Id. at § 10. Recently, this Court rejected a constitutional challenge to the Saving Clause, but the parties in that case lacked standing for this Court to decide "how [Proposition 209] impacts individual garnishment proceedings." *Ariz. Creditors Bar Ass'n, Inc. v. State*, 1 CA-CV 22-0765, 2024 WL 1876307, slip op. at *4, ¶¶ 21 (Ariz. App. Apr. 30, 2024) (mem. decision). This Court has also addressed garnishment proceedings arising *after* Proposition 209's effective date when those garnishments are based on a judgment obtained before Proposition 209 became effective. *Id.* at *7, ¶ 32 (citing *HJ Ventures, LLC v. Candelario*, 1 CA-CV 23-0331, 2024 WL 449970, at *2, ¶¶ 13–14 (Ariz. App. Feb. 6, 2024) (mem. decision)). Now this Court must address the effect of Proposition 209 when the judgment and garnishment arose before the effective date.
¶3 Because Silence's rights in the judgment were vested before Proposition 209's enactment, this Court affirms the superior court's denial of Betts's motion to quash and motion for reconsideration. But because the amount of each future paycheck subject to the garnishment order has not yet been determined, Proposition 209's statutory changes affect the amount that may be garnished from each pay period after Proposition 209 became effective.

FACTS AND PROCEDURAL HISTORY

¶4 In 2020, Silence obtained a superior court judgment against Betts for unpaid legal services he provided and for attorneys' fees and costs awarded. On appeal, this Court affirmed the judgment. *Betts v. Samuel E. Carr, D.C., P.C.*, 1 CA-CV 21-0008, 2021 WL 5575195, at *3, ¶ 14 (Ariz. App. Nov. 30, 2021) (mem. decision). During the appeal, the superior court issued a writ of garnishment ordering Betts's employer to turn over Betts's future nonexempt earnings to Silence, also issuing a continuing lien. The employer complied.
¶5 In November 2022, Arizona citizens passed Proposition 209. Betts moved to quash or amend the continuing lien and garnishment because of the changes Proposition 209 made to the law and because he works and receives earnings outside Arizona. But the court denied the motion, finding that the judgment arose before Proposition 209 became effective and that Proposition 209 did not affect rights and duties that matured before the effective date. Betts moved for reconsideration, which the court denied, and Betts timely appealed.
¶6 This Court has jurisdiction under A.R.S. §§ 12-120.21(A)(1) and 12- 2101(A)(1).

DISCUSSION

¶7 This Court reviews motions to quash for an abuse of discretion. *See Leach v. Hobbs*, 250 Ariz. 572, 577, ¶ 23 (2021) (motion to quash subpoena); *Abbey v. City Court*, 7 Ariz. App. 330, 331 (1968) (motion to quash complaints). Similarly, this Court reviews the superior court's denial of a motion to alter or amend under Arizona Rule of Civil Procedure (Rule) 59 for an abuse of discretion. *See Mullin v. Brown*, 210 Ariz. 545, 547, ¶ *2* (App. 2005). A court abuses its discretion when its discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Tilley v. Delci*, 220 Ariz. 233, 238, ¶ 16 (App. 2009). This Court also reviews motions for reconsideration for an abuse of discretion. *Worldwide Jet Charter, Inc. v. Christian*, 255 Ariz.

67, 70, ¶ 10 (App. 2023). But "issues of law, including statutory interpretation," are reviewed *de novo*. *4QTKIDZ, LLC v. HNT Holdings, LLC*, 253 Ariz. 382, 385, ¶ 5 (2022).

I. The Superior Court Has Jurisdiction.

¶8 Betts argues that Arizona has no jurisdiction to garnish wages that are neither earned nor paid in Arizona. He contends the court relied on what Arizona's Supreme Court declared a "legal fiction" in *Harris v. Balk*, 198 U.S. 215 (1905), to improperly exercise *quasi in rem* jurisdiction over his out of state wages. "[T]he *Harris* fiction [is] that a debt follows the debtor and is located wherever the debtor can be found." *State v. W. Union Fin. Servs., Inc.*, 220 Ariz. 567, 574, ¶ 22 (2009); *accord Harris*, 198 U.S. at 222 ("The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes."). Betts's reliance on *Harris* is misinformed because the superior court relied on personal jurisdiction, not *quasi in rem* jurisdiction. Betts also relies on several other cases for his position that Arizona needs *in rem* jurisdiction over his earnings before it can garnish them. None support his position.

¶9 Betts cites *First Nat'l Bank & Trust Co. v. Pomona Mach. Co.*, 107 Ariz. 286 (1971) (stating that though the court lacked personal jurisdiction over the defendants, it held *in rem* jurisdiction existed because the garnishee was served with the writ in Arizona, the garnishee admitted the debt was owed and the property was located in the state), *W. Union Fin. Servs., Inc.*, 220 Ariz. at 567–68, ¶ 1 (which was distinguished from a post-judgment garnishment case because it involved seizure of wired funds between parties outside the state), and *Polacke v. Superior Court*, 170 Ariz. 217 (App. 1991) (where the court was asked to enforce a judgment from another state where there were no Arizona contacts) to support his appeal. But each of these cases are inapposite because they do not involve similar facts — a garnishment that was issued in Arizona for payments that are made in Arizona.

¶10 An analogous case to Betts's is *Ellsworth Land and Livestock Inc. v. Bush*, 224 Ariz. 542, 545 (App. 2010). There, the superior court awarded a judgment, and the prevailing party sought a continuing lien against a Canadian company to garnish annuity payments to the debtor. *Id.* at 543, ¶¶ 1–2. By relying on the Restatement (Second) of Conflict of Laws (1988) and finding that the annuity payments were a debt, the court concluded garnishment was proper if the trial court had personal jurisdiction over the Canadian company. *Id.* at 544–545, ¶¶ 10–11. Similarly, here, the superior court correctly exercised personal jurisdiction over Betts's employer; a summons was properly served on its authorized agent within the state. *See* Ariz. R. Civ. P. 4.1(a), (i) (allowing service on a corporation by delivering a summons on the corporation's authorized agent). Thus, the court had jurisdiction to garnish Betts's earnings from his employer.

II. Arizona's Garnishment is Enforceable.

¶11 Between the time of the initiation of the garnishment proceedings and the passage of Proposition 209, Betts worked and received his earnings in Colorado and Texas. Betts argues that those earnings were exempt because Colorado and Texas law prohibited garnishing wages. He cites *Dalton v. Dalton*, 551 S.W.3d 126 (Tex. 2018) as an example of a foreign state not being able to garnish wages earned and paid in Texas. But *Dalton* involved a party attempting to have Texas enforce a non-Texas order. *Dalton*, 551 S.W.3d at 129. While giving full faith and credit to the foreign judgment, the Texas court acknowledged that it could follow its procedures for enforcing a judgment without adopting the practices of the other state. *Id.* at 135–36. Here, Arizona is enforcing an Arizona judgment, and the relevant inquiry is "whether the garnishee is subject to the specific or general jurisdiction of the forum state." *Ellsworth Land and Livestock Inc.*, 224 Ariz. at 545, ¶ 12. Arizona has general jurisdiction over Betts's employer.

III. Betts's Request for Relief for Mistake or Fraud Was Untimely.

¶12 Betts argues that the superior court abused its discretion by denying his motion to quash based on mistake, fraud, or change of law. Although a party may seek relief from a judgment because of a mistake or fraud under Rule 60, Betts made no such Rule 60 motion here. Moreover, to be proper, such a motion must be made "within 6 months after the entry of the judgment or order." Ariz. R. Civ. P. 60(b)(1), (c)(1). In addition, with exceptions not applicable here, a Rule 59 motion to alter or amend (which Betts filed here) "must be filed no later than 15 days after the entry of judgment." Ariz. R. Civ. P. 59(d). The garnishment order that Betts seeks relief from was issued in April 2021. Any motion to quash would have been due in October 2021. But he did not file his motions until November 2022 and February 2023, over a year late. Although the superior court issued a judgment in June 2022, the court merely awarded attorneys' fees and costs incurred upon Betts's unsuccessful appeal; that judgment did not extend the appeal deadline for the underlying garnishment order Betts sought to quash.

IV. Proposition 209 Affects Betts's Nonexempt Earnings After Its Effective Date but Does Not Affect the Order of Continuing Lien.

¶13 Betts contends that the passage of Proposition 209 affords him relief from the judgment. Proposition 209 was a voter initiative passed in 2022 that amended A.R.S. § 33-1131 relating to the portion of a debtor's disposable earnings subject to garnishment. *See* 2022 Prop. 209, § 6 (initiative measure approved Nov. 8, 2022). Before Proposition 209, the amount exempt from garnishment for any workweek was the lesser of 75% of the debtor's disposable earnings or thirty

times the federal minimum wage. A.R.S. § 33-1131(B) (2021). Afterward, the exempt amount became the greater of 90% of the debtor's disposable earnings or sixty times the higher of federal, state, or local minimum wage, as applicable. A.R.S. § 33-1131(B) (2023). Silence contends that Proposition 209 does not affect the judgment or garnishment because they arose before Proposition 209 became effective.

¶14 Generally, legislation applies only prospectively unless it "contain[s] an express statement of retroactive intent." *Aranda v. Indus. Comm'n of Ariz.*, 198 Ariz. 467, 470, ¶ 10 (2000) (citing A.R.S. § 1- 244 ("No statute is retroactive unless expressly declared therein.")). Proposition 209's Saving Clause expressly states it "applies prospectively only" and "does not affect rights and duties that matured before the effective date of this act." Ariz. Legis. Serv. Prop. 209 § 10. The reference to "matured" in this context is synonymous with "vested." Rights become vested when "every necessary event has occurred" so that the rights are certain to be implemented, and they are not contingent on some future event or merely expectant. *Aranda*, 198 Ariz. at ¶¶ 20–21. Thus, given the Saving Clause, Proposition 209 does not affect the underlying judgment's amount because every necessary event occurred for Silence to obtain it, and the award became immediately enforceable and payable before the enactment of Proposition 209.

¶15 Similarly, Proposition 209 by its own terms does not retroactively apply to wages garnished before its effective date. However, Betts argues for the prospective application of Proposition 209 to eliminate or reduce the amounts garnished. Though Proposition 209 changed some of the statutory provisions related to garnishment, it did not change A.R.S. § 12-1598.11(B), which established that a garnishee has a duty during "each pay period" to "complete the nonexempt earnings statement." The term "nonexempt earnings" is defined as "those earnings or that portion of earnings which is subject to judicial process including garnishment." A.R.S. § 12-1598(10).

¶16 Here, the individual payments from Betts's wages were contingent on Betts's nonexempt earnings during each pay period. *See* A.R.S. § 12-1598.01(A) (providing that earnings become wages to be garnished upon their disbursement by the employer). At the time of the issuance of the garnishment, that amount was no more than 25% of Betts's wages. After enactment of Proposition 209, that amount decreased to 10%. The employer is responsible for determining the nonexempt portion of Betts's earnings, and it must do so "for each pay period." A.R.S. § 12- 1598.11(B). Before calculating and withholding that amount, any nonexempt earnings for that pay period are unknown, let alone payable or immediately enforceable. Thus, the amounts subject to garnishment each pay period after Proposition 209 became effective had not yet matured, and Proposition 209's changes therefore affect the garnishment prospectively. This Court concludes that after Proposition 209's effective date, Betts's employer must impound and pay only those portions of Betts's wages that are nonexempt under the statute as amended by Proposition 209. Betts requested that the superior court quash or amend its order of continuing lien. The order for the continuing lien merely directs Betts's employer to "immediately pay over to the Judgment Creditor, Joseph Silence, all non- exempt earnings withheld from [Betts's] wages . . . after service of the Writ of Garnishment on March 29, 2021."

¶17 Inasmuch as it is directed at nonexempt earnings, the language in this order complies with Arizona statute and was not made inconsistent with the changes made effective under Proposition 209. *See* A.R.S. § 12–1598.10(A) (after service of a writ of garnishment and in the absence of an objection, a court must "order that the garnishment is a continuing lien against the *nonexempt* earnings of the judgment debtor" (emphasis added)); A.R.S. § 12-1598(10) (defining "nonexempt earnings" as "those earnings or that portion of earnings which is subject to judicial process including garnishment."). Because the order of continuing lien remains consistent with Arizona law, the superior court did not err in denying Betts's motion to quash or modify it because of Proposition 209's changes. For the same reason, the court did not err in denying Betts's motion for reconsideration.

CONCLUSION

¶18 For the reasons above, this Court affirms the superior court's rulings denying Betts's motion to quash the continuing lien and his motion for reconsideration.

SUPREME COURT OF ARIZONA

In the Matter of	)	Arizona Supreme Court
	)	No. R-16-0010
ARIZONA RULES	)	
CIVIL PROCEDURE	)	
(ALL)	)	
	)	**FILED 06/26/2024**

THIRD ORDER AMENDING 9/2/16 ORDER

On September 2, 2016, this Court entered an order adopting, effective January 1, 2017, a restyled and amended version of the Rules of Civil Procedure. The Court recently discovered that in restyling and amending Rule 45(d)(2), the amended Rule 45(d)(2)inadvertently left out the phrase "of a party" between the phrases "commanding attendance" and "at a trial or hearing." This oversight mistakenly broadened the rule to say that fees and mileage did not need to be tendered for any witness's attendance at a trial or hearing, and not just the attendance of a party. To correct this oversight,

IT IS ORDERED that Rule 45(d)(2) of the Rules of Civil Procedure is amended in accordance with the attachment to this order, effective immediately.

DATED this _26th_ day of June, 2024.

/s/
ROBERT BRUTINEL
Chief Justice

ATTACHMENT[1]

RULES OF CIVIL PROCEDURE

Rule 45. Subpoena.

(a)-(c) [No change]

(d) Service.

(1) **[No change]**

(2) *Exceptions to Tendering Fees*. Fees and mileage need not be tendered when the subpoena commands attendance of a party at a trial or hearing or is issued on behalf of the State of Arizona or any of its officers or agencies.

(3)-(5) **[No change]**

(e)-(f) [No change]

1 Additions to the text of the current rule are shown by underscoring.