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144 Arizona Cases Digest 4

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Roxanne PEREZ,
Plaintiff/Appellant,
v.
CIRCLE K CONVENIENCE STORES, INC., a foreign corporation,
***Defendant/Appellee*.**

No. CV-24-0104-PR
Filed March 12, 2025

Appeal from the Superior Court in Maricopa County
The Honorable Joan M. Sinclair, Judge
No. CV2020-010129
REVERSED AND REMANDED

Opinion of the Court of Appeals,
Division One
257 Ariz. 271 (App. 2024)
VACATED IN PART

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CHIEF JUSTICE TIMMER authored the Opinion of the Court, in which VICE CHIEF JUSTICE LOPEZ, JUSTICES BOLICK, BEENE, MONTGOMERY, KING, and PELANDER (Retired)* joined.

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

CHIEF JUSTICE TIMMER, Opinion of the Court:

¶1 While shopping in a Circle K convenience store, Roxanne Perez tripped over a store display of bottled water and injured herself. She sued Circle K Convenience Stores, Inc. ("Circle K") for negligence and premises liability. The issue here is whether courts should consider if the store display constituted an unreasonably dangerous condition when determining whether Circle K owed Perez a duty of care. We conclude that whether Circle K's store display was an unreasonably dangerous tripping hazard had no bearing on that duty issue. Because Perez was Circle K's business invitee, it owed her a duty to keep the store in a reasonably safe condition while she was in the market. Whether the display was an unreasonably dangerous condition is a consideration in determining whether Circle K breached the standard of conduct underlying its duty to Perez.

BACKGROUND

¶2 In March 2020, Perez went to a Circle K store she frequently patronized to buy ice cream. After getting the ice cream from a freezer, she turned to enter the next aisle when she tripped and fell over a single case of water set on the floor at the end of that aisle. Circle K had placed the case there as an "end-cap" display, which showcases the market's goods. Perez maintains she did not see the case of water before tripping.

¶3 Perez sued Circle K, alleging negligence and premises liability and seeking damages for injuries suffered from her fall. She alleged Circle K had notice that the single case of water was a dangerous condition and therefore breached its duty by failing to either remedy the condition or warn her of it.

¶4 The superior court granted Circle K's motion for summary judgment, finding as a matter of law that Circle K did not owe Perez a duty. The court reasoned that because the water display was an open and obvious condition, Perez would have seen it had she looked down, and the display therefore did not "pose[] an unreasonable risk of harm sufficient to impose a duty on Circle K to protect [Perez]." In a divided opinion, the court of appeals affirmed. *Perez v. Circle K Convenience Stores, Inc.*, 257 Ariz. 271, 273 ¶ 1 (App. 2024).

¶5 We granted Perez's petition for review because whether a court in a premises liability case properly considers whether a condition is unreasonably dangerous in deciding the existence of a duty is a potentially recurring issue of statewide importance. We have jurisdiction pursuant to article 6, section 5(3), of the Arizona Constitution and A.R.S. § 12-120.24.

DISCUSSION

¶6 "We review the entry of summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party." *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 373 ¶ 13 (2021). Summary judgment is appropriate "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Also, "[w]hether a duty exists is a legal issue we determine de novo." *Dinsmoor*, 251 Ariz. at 373 ¶ 14.

A. Perez Must Show That Circle K Owed Her A Duty Of Care To Prevail On Her Negligence And Premises Liability Claims.

¶7 Negligence and premises liability each require proof that (1) the defendant owed a duty to the

plaintiff to conform to a standard of conduct that protects the plaintiff from an unreasonable risk of harm; (2) the defendant breached that standard; (3) a causal connection exists between the defendant's acts or omissions and the plaintiff's injury; and (4) the plaintiff suffered actual damages. *See Cal-Am Props. Inc. v. Edais Eng'g Inc.*, 253 Ariz. 78, 81 ¶ 5 (2022) (negligence); *Dabush v. Seacret Direct LLC*, 250 Ariz. 264, 267 ¶ 9 (2021) (premises liability); *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 252 ¶ 23 (App. 2013) (premises liability). Here, we are concerned with duty. Duties are based either on special relationships recognized by the common law or on relationships shaped by public policy. *Dinsmoor*, 251 Ariz. at 373 ¶ 14; *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 565 ¶ 14 (2018).

¶8 One relationship that creates a duty is the business-invitee relationship. *See Tribe v. Shell Oil Co.*, 133 Ariz. 517, 519 (1982). This relationship forms when a business owner invites persons to enter or remain on property possessed by the owner for purposes directly or indirectly connected with its business dealings. *See Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 143 (1982). "The law is clear in Arizona that a proprietor of a business is under an affirmative duty to make the premises reasonably safe for use by invitees." *Tribe*, 133 Ariz. at 519; *see also Chiara v. Fry's Food Stores of Ariz., Inc.*, 152 Ariz. 398, 399 (1987); *Nicoletti*, 131 Ariz. at 143; *Preuss v. Sambo's of Ariz., Inc.*, 130 Ariz. 288, 289 (1981); *Walker v. Montgomery Ward & Co., Inc.*, 20 Ariz. App. 255, 258 (1973).

¶9 Indisputably, Circle K, as a business owner, has an affirmative duty to make and keep its markets reasonably safe for customers, who are invitees. *Tribe*, 133 Ariz. at 519. But Arizona law does not require business owners to insure their customers' safety by keeping the business premises absolutely safe. *See Preuss*, 130 Ariz. at 289. In slip-and-fall cases—or here, a trip-and-fall—the mere occurrence of the fall is insufficient to prove the owner's negligence. *See id.* Rather, to prove that the owner breached the standard of care imposed by the duty to invitees, the plaintiff must show the owner either (1) created the unsafe condition; (2) had actual knowledge or notice of it; or (3) should have discovered and remedied the unsafe condition before the fall. *See Walker*, 20 Ariz. App. at 258–59 (cited with approval in *Preuss*, 130 Ariz. at 289); *see also McMurtry*, 231 Ariz. at 252 ¶¶ 22–23 (stating that a hotel owed an invitee "a duty of reasonable care to make its premises safe for her use," which required the hotel to safeguard against or warn of unreasonably dangerous conditions).

B. Perez Does Not Have To Show That An Unreasonably Dangerous Condition Actually Existed At The Market To Establish That Circle K Owed Her A Duty Of Care.

¶10 The issue here is whether a business owner's duty exists absent evidence that an unreasonably dangerous condition actually existed on the business premises. Circle K argues that a business owner has no duty to its customers absent such a condition, and the court of appeals majority agreed. *See Perez*, 257 Ariz. at 278 ¶ 27 ("In determining duty, the superior court was permitted to examine facts sufficient to establish whether an 'unreasonably dangerous' condition existed to trigger a duty by Circle K under law."). Perez counters that because she was a business invitee, "Circle K automatically owed her a duty of care."

¶11 In urging their position, both Circle K and the court of appeals rely extensively on this Court's decision in *Dinsmoor*. That case arose from tragic events that ended in the murder-suicide of two high school students. *See Dinsmoor*, 251 Ariz. at 371 ¶ 1. The school had learned of an altercation between students Matthew and Raven; had investigated a claim by Ana, Matthew's then-current girlfriend, that Matthew had threatened Raven's safety; and had taken actions to protect Raven. *See id.* at 372 ¶¶ 3–8. On the day of her death, Ana told school officials she planned to meet Matthew after school but did not think he posed a threat to her safety. *Id.* at 373 ¶ 10. The school took no action but told Ana it would be unwise to meet with Matthew. *Id.* Ana met Matthew at a friend's house, where he shot and killed her and then himself. *Id.*

¶12 Dinsmoor, Ana's mother, sued the school district and its employees (collectively "the school") for negligence. Id. ¶ 11. The issue before us was whether the school owed a duty of care to Ana. *Id.* at 372 ¶ 1. We acknowledged that "the school-student relationship creates a duty to protect students from unreasonable risks of harm arising within the confines of the relationship." *Id.* at 376 ¶ 24. But we clarified that "[a] duty based on special relationships . . . applies only to 'risks that arise within the scope of the relationship,'" and "the scope of such relationships is [generally] 'bounded by geography and time.'" *Id.* at 374 ¶ 17 (first quoting *Boisson v. Ariz. Bd. of Regents*, 236 Ariz. 619, 623 ¶ 10 (App. 2015); then quoting Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 cmt. f. (Am. L. Inst. 2012)). Because nothing alerted the school that Matthew posed a threat to Ana before she left the school's custody and control, "a known and tangible risk of harm did not arise within the scope of the school-student relationship," and we therefore decided that the school "did not owe a duty to protect Ana from Matthew." *Id.* at 377 ¶ 28.

¶13 Notably, in deciding whether we could reach our decision as a matter of law, we addressed our prior opinion in *Gipson v. Casey*, 214 Ariz. 141, 145 ¶ 21 (2007), which stated that the existence of duty "is a legal matter to be determined *before* the case-specific facts are considered." *See Dinsmoor*, 251 Ariz. at 376 ¶ 26. We concluded that considering whether the risk to Ana arose while she was in the custody and control of the school in deciding duty was consistent with *Gipson*. *See id.* at 376–77 ¶ 27.

After noting that *Gipson* did not concern special relationships, we explained:

> Logically, a court cannot determine whether a duty arises from such relationships unless it considers whether an unreasonable risk of harm arose while, for example, persons were patronizing an inn, riding a bus, or, here, attending school. *See* Restatement § 40(b) (2012) (listing special relationships). Identifying the risk within the scope of the special relationship does not touch on concepts of breach or causation, so there is no danger of conflating duty with those elements. *See Gipson*, 214 Ariz. at 145 ¶ 21; *see also Dabush v. Seacret Direct LLC*, 250 Ariz. 264, 272 ¶¶ 33–35 (2021) (rejecting argument that court could not consider case-specific facts to determine as a matter of law that a defendant had not assumed a duty to plaintiff).

Id.; *see also Avitia v. Crisis Preparation & Recovery Inc.*, 256 Ariz. 198, 211 ¶ 63 (2023) (Timmer, V.C.J., concurring in part, dissenting in part, and concurring in the result) ("As we concluded in *Dinsmoor* . . . a court does not act contrary to *Gipson* by examining the case-specific facts to decide whether 'an unreasonable risk of harm' arose from a special relationship to trigger a duty.").

¶14 Circle K and the court of appeals majority extrapolate from *Dinsmoor* that in the premises liability context, the existence of duty depends on whether an alleged unreasonably dangerous condition was, in fact, unreasonably dangerous. *See Perez*, 257 Ariz. at 274–75 ¶¶ 12–13; *see also Ager v. A Better Today Recovery Servs. LLC*, No. 1 CA-CV 21-0081, 2021 WL 4757567, at *2 ¶¶ 8–11 (Ariz. App. Oct. 12, 2021) (mem. decision) (interpreting *Dinsmoor* in a similar manner). We disagree and now clarify *Dinsmoor*.

¶15 The purpose in examining case-specific facts in the duty inquiry involving a special relationship is determining *when* and *where* the alleged risk of harm arose—within or outside the scope of the special relationship—not *whether* the alleged risk actually constituted an unreasonably dangerous condition. *See Dinsmoor*, 251 Ariz. at 376 ¶ 26. Thus, in *Dinsmoor*, the "known and tangible risk of harm" was that Matthew would physically harm Ana. *See id.* But because nothing suggested that this risk arose while Ana was in the school's custody or control, and therefore within the school-student relationship, the school had no duty to Ana to protect her from Matthew once she left the school's custody and control. *See id.* at 377 ¶ 28. Similarly, in cases involving other special relationships like a common carrier with its passengers; an innkeeper with its guests; or a business with its invitees, courts may examine case-specific facts to determine whether the alleged risk of harm arose within the scope of those relationships. *See id.*; *see also* Restatement § 40(a)–(b) (providing that "[a]n actor in a special relationship" like those listed above "owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship"). In these examples, a court would ask whether the alleged risk of harm arose while the plaintiff was on the bus; in the inn; or shopping in the store. If so, the risks arose within the scope of the relationship, and a duty exists. *See Dinsmoor*, 251 Ariz. at 376 ¶ 24; Restatement § 40 cmt. f.

¶16 Adopting a contrary view would conflate the duty and breach inquiries and therefore conflict with myriad prior cases. This Court's opinion in *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352 (1985), illustrates the conflict. There, David, a teenager, was paralyzed after diving off a cliff into a shallow lake while on a camping trip in a state-leased recreation area. *Id.* at 354. In the subsequently filed negligence action, the superior court granted summary judgment for the state on the issue of duty, and the court of appeals affirmed. *Id.* at 353–54. The latter court reasoned that the state did not owe David a duty because "'the natural environment did not present an unreasonable risk of harm,' and because the danger was open and obvious." *Id.* at 354 (quoting *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 260, 264 (App. 1984)).

¶17 This Court reversed, concluding that the state owed a duty of care to David. *Id.* at 359. We reasoned that the state, as possessor of the recreation area, owed an affirmative duty to David, its invitee, "to use reasonable care to make the premises safe for use." *Id.* at 355. This standard of care included an obligation to discover and warn of hazards that the state should have reasonably foreseen as dangerous to invitees. *Id.* Importantly, we found a duty solely because at the time of the accident David was an invitee on land the state possessed. *Id.* In doing so, we disagreed that whether the cliff area presented an unreasonable risk of harm or whether the danger of diving into a lake of unknown depth was open and obvious affected the existence of duty. *Id.* at 355–56. Rather, we emphasized that these factual issues are properly considered in determining whether the state breached the standard of conduct imposed by the duty. *Id.*

¶18 Several other cases echo Markowitz on these points. *See, e.g.*, *Gipson*, 214 Ariz. at 145 ¶ 21 (stating that courts should not "defin[e] duties of care in terms of the parties' actions in particular cases" because "a fact-specific discussion of duty conflates the issue with the concepts of breach and causation"); *Coburn v. City of Tucson*, 143 Ariz. 50, 52 (1984) (defining standard of care as "[w]hat the defendant must do or must not do . . . to satisfy the duty" (quoting W. Prosser & W. Keeton, *The Law of Torts* § 53 at 356 (5th ed. 1984))); *Beach v. City of Phoenix*, 136 Ariz. 601, 603 (1983) (stating that "the nature [or obvious character] of the obstruction . . . is not important to determine whether the City owed a duty to the pedestrian, but rather to determine

whether the City breached the duty of reasonable care"); *Tribe*, 133 Ariz. at 519 (providing that whether a condition was dangerous or open and obvious "are issues to be decided by a jury . . . as triers of fact"); *Shaw v. Petersen*, 169 Ariz. 559, 561 (App. 1991) ("Whether a reasonable person would believe a pool was an open and obvious hazard . . . is a question that relates to the breach of duty, not its existence."); *McLeod ex rel. Smith v. Newcomer*, 163 Ariz. 6, 9–10 (App. 1989) (providing that whether a condition was unreasonably dangerous or open and obvious are questions of fact and considering them when determining breach).

¶19 The contrary view of *Dinsmoor* urged by Circle K and the court of appeals majority conflicts with *Markowitz* and like cases by resolving in the duty determination whether Circle K's end-cap display presented an unreasonably dangerous condition. But *Dinsmoor* did not alter the duty analysis in the *Markowitz* line of cases. Rather, *Dinsmoor* complemented the *Markowitz* analysis by focusing on whether, when a harm occurs outside the traditional time-and-space bounds of a special relationship, the risk of harm nonetheless arose within the special relationship to trigger a duty. In *Dinsmoor*, the school did not have a duty to Ana because the risk of harm from Matthew did not arise within the school-student relationship. *See* 251 Ariz. at 377 ¶ 28. Similarly, in *Markowitz*, had David been injured in a car accident on the way to or from the state recreation area, the state would not have owed a duty to him. The tangible risk of injury from a traffic accident away from the recreation area and outside the state's control would have existed outside the land possessor-invitee relationship. *See id.* But because the risk of harm presented by the cliff area existed while David was visiting the recreation area, which the state possessed, the state owed him a duty of care. *See id.*; *Markowitz*, 146 Ariz. at 355.

¶20 To summarize, as in *Dinsmoor*, sometimes certain antecedent facts must be considered in determining whether a duty exists—for instance, whether a statute applies to a circumstance to give rise to a duty; whether a person is an invitee, licensee or trespasser; or whether the alleged risk of harm occurred within the scope of a special relationship. *See, e.g.*, *Westerman v. Ernst*, No. 2 CA-CV 2023-0205, 2025 WL 261789, at *4 ¶ 17 (Ariz. App. Jan. 22, 2025) (concluding that a genuine issue of material fact concerning the plaintiff's status as an invitee or trespasser precluded summary judgment on the issue of duty). However, factual issues of breach and causation are not part of this inquiry. Rather, they generally are questions for the jury once a duty is established.

¶21 Circle K and the court of appeals majority's analysis conflicts with *Markowitz* by resolving within the duty determination whether Circle K's endcap display presented an unreasonably dangerous condition or was open and obvious. Instead, consistent with *Markowitz* and *Dinsmoor*, the proper inquiry in the duty analysis is whether a special relationship existed between the plaintiff and defendant and, if so, whether the risk of harm alleged to have injured the plaintiff arose within that relationship. Here, that means asking whether Perez was a business invitee at the time she tripped over the end-cap display (the risk of harm). She indisputably was. Thus, as a matter of law, Circle K owed a duty of care to Perez. Whether the end-cap display was unreasonably dangerous should be considered when addressing whether Circle K breached the standard of conduct. *See Markowitz*, 146 Ariz at 355–56. Then, considerations like the open and obvious nature of the display can be considered. *See Beach*, 136 Ariz. at 603; *Tribe*, 133 Ariz. at 519.

¶22 The court of appeals majority expressed concern that owners would never be entitled to summary judgment in premises liability cases if they owe a duty to invitees whenever the latter are injured on the premises by an alleged unreasonably dangerous condition. *See Perez*, 257 Ariz. at 275 ¶ 15. This concern is overstated. Although breach and causation are usually factual issues for the jury, they can be resolved as a matter of law when the record supports that result. *See McFarland v. Kahn*, 123 Ariz. 62, 63 (1979) (affirming directed verdict for a landlord in a premises liability case on the issue of breach); *Cummings v. Prater*, 95 Ariz. 20, 27 (1963) (affirming summary judgment for a landlord in a premises liability case on the issue of breach); *see also Gipson*, 214 Ariz. at 143 ¶ 9 n.1 (stating that summary judgment may sometimes be appropriate on issues of breach and causation); *Grafitti-Valenzuela ex rel. Grafitti v. City of Phoenix*, 216 Ariz. 454, 460 ¶ 18, 461–62 ¶ 28 (App. 2007) (affirming summary judgment for city because it did not breach its duty to keep a bus stop safe for users and the lack of shelter and lighting at the bus stop did not cause a child's abduction); *Coburn*, 143 Ariz. at 53 (finding as a matter of law that a city did not breach its duty to a child bicyclist to keep streets reasonably safe for travel); *Church of Jesus Christ of Latter Day Saints v. Superior Court*, 148 Ariz. 261, 263 (App. 1985) (same). Indeed, the specially concurring judge in the court of appeals would have affirmed the summary judgment because he concluded that "Perez failed to show a genuine issue of material fact that Circle K breached its duty of care to her when she shopped at the store." *See Perez*, 257 Ariz. at 278–79 ¶ 33 (Howe, J., specially concurring).

¶23 Finally, although a breach of duty issue can sometimes be resolved as a matter of law, we decline to decide now whether summary judgment was appropriate for Circle K on that basis. Circle K moved for summary judgment solely on the issue of duty. Therefore, we conclude that any other issues regarding premises liability should be fully briefed and decided in the trial court before appellate review.

CONCLUSION

¶24 For the foregoing reasons, we vacate the court of appeals' opinion except ¶¶ 30–31, which address an evidentiary issue not before us. We reverse the superior court's entry of summary judgment for Circle K and remand the case to that court for further proceedings.

* Due to the retirement of Justice Robert Brutinel, pursuant to article 6, section 3 of the Arizona Constitution, Justice John Pelander, retired Justice of the Arizona Supreme Court, was designated to sit in this matter.

Cite as
144 Arizona Cases Digest 8

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Gabriel GARIBAY; Deborah Martinez-GARIBAY; and Pima County,
Petitioners,
v.
Hon. Kellie Johnson, Judge of the Superior Court of the State of Arizona, in and for the County of Pima,
Respondent,
and
William FOX, the surviving spouse of Angela FOX, deceased, individually and on behalf of all those entitled by law to recover for the death of Angela FOX,
Real Party in Interest,

No. CV-24-0091-PR
Filed March 13, 2025

Appeal from the Superior Court in Pima County The Honorable Kellie L. Johnson, Judge No. C20231936
REVERSED AND REMANDED

Opinion of the Court of Appeals, Division Two
257 Ariz. 118 (App. 2024)
VACATED IN PART

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

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

VICE CHIEF JUSTICE LOPEZ, Opinion of the Court:

¶1 We consider whether the common law doctrine of judicial immunity shields constables from liability under A.R.S. § 11-449 for "any misconduct in the service or execution" of a writ of restitution.

¶2 We hold that § 11-449 limits rather than abrogates judicial immunity. Thus, a constable who

engages in "any misconduct" in the service or execution of a writ is subject to liability. "Misconduct" is an intentional violation of an applicable rule, standard, or norm. Within the meaning of the statute, "misconduct" involves a constable's willful or intentional failure to follow a court directive, law, or rule—here, execution of a writ of restitution. Thus, "misconduct" arises from a constable's failure to carry out a particular court directive, law, or rule, rather than mere negligence or gross negligence in the manner of its execution.

BACKGROUND

¶3 On August 25, 2022, Constable Deborah Martinez-Garibay ("Garibay")—less than six months into her tenure as a constable—attempted to serve a writ of restitution issued by a justice court on a tenant in an apartment complex in Tucson. The tenant was being evicted for threatening a resident with a gun and disturbing the peace. Garibay enlisted the apartment manager, Angela Fox ("Angela"), to accompany her while she served the writ. At the tenant's apartment door, Garibay knocked for several minutes, identified herself as a constable, announced her intent to serve the writ, and warned the tenant she would call the police if he did not open the door. The tenant fatally shot Garibay, Angela, and a visitor in an adjoining apartment before taking his own life.

¶4 Angela's surviving spouse, William Fox ("Fox"), filed a wrongful death action against Garibay's surviving spouse, as well as Pima County and the Arizona Constable Ethics, Standards and Training Board ("CESTB").[1] As relevant here, Fox's suit against Garibay's spouse alleged that Garibay was negligent and grossly negligent in failing "to protect and avoid exposing [Angela] . . . and the general public to harm" while serving the writ of restitution. Fox also alleged that Garibay "had cocaine, alcohol and other illicit substances in her system" while executing the writ.[2]

¶5 Garibay's spouse moved for judgment on the pleadings, arguing that Garibay, as a constable, enjoyed judicial immunity and owed no duty to Angela because constables are officers of the court. The superior court denied the motion.

¶6 Garibay's spouse filed a special action petition in the court of appeals, contending that Garibay, as a constable, was entitled to judicial immunity and owed no duty to Angela. The court accepted special action jurisdiction. In an opinion, the court held that Garibay was judicially immune from liability because, even if her actions were alleged to be negligent or grossly negligent, they did not constitute "misconduct" under § 11-449. *Garibay v. Johnson*, 257 Ariz. 118, 127 ¶ 26 (App. 2024). The court therefore reversed the superior court's denial of judicial immunity but did not consider whether Garibay owed a duty of care to Angela. *Id.* ¶¶ 27–28.

¶7 We granted review because whether the common law doctrine of judicial immunity shields constables from liability under § 11-449 is an issue of first impression, statewide importance, and likely to recur. We have jurisdiction under article 6, section 5(3) of the Arizona Constitution.

DISCUSSION

¶8 To determine whether Garibay is subject to liability under § 11-449 for "any misconduct in the service or execution" of the writ of restitution, we must answer the following questions: (1) does common law judicial immunity apply to a constable; (2) if so, does § 11-449 abrogate or limit common law judicial immunity; and (3) if judicial immunity does not shield Garibay from § 11-449's application, did Fox's complaint allege that Garibay committed "misconduct" within the statute's meaning?

¶9 A party is entitled to judgment on the pleadings when a "complaint fails to state a claim for relief." *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359 ¶ 2 (App. 1999). When we review a motion for judgment on the pleadings, we accept the complaint's factual allegations as true, but review the trial court's legal conclusions de novo. *Shaw v. CTVT Motors, Inc.*, 232 Ariz. 30, 31 ¶ 8 (App. 2013), *as amended* (Mar. 29, 2013). We review issues of statutory construction de novo. *Planned Parenthood Ariz., Inc. v. Mayes*, 257 Ariz. 137, 142 ¶ 13 (2024).

I.

¶10 We begin our analysis with the threshold question of whether Garibay, as a constable, is subject to common law judicial immunity. The court of appeals held that constables enjoy judicial immunity, reasoning that when constables execute writs they engage in a judicial function "closely tied to the judicial decision to issue the writ in the first place." *Garibay*, 257 Ariz. at 125 ¶ 15. We agree.

¶11 Constables are borne of a legislative act and their duties are codified in statute. *See* A.R.S. § 22-131. As relevant here, § 22-131(A) requires constables to attend courts and execute, serve, and return all processes, warrants, and notices as directed by a justice of the peace or competent authority. *Clark v. Campbell*, 219 Ariz. 66, 71 ¶ 18 (App. 2008). Moreover, courts may exercise control over constables and discipline them for non-performance of their judicial duties. *Id.* at 72 ¶ 21.

¶12 The common law doctrine of judicial immunity exists to ensure judges perform their work with independence and without fear of consequences. *Burk v. State*, 215 Ariz. 6, 9 ¶ 7 (App. 2007). But our courts have recognized that, to advance the independence and efficacy of the judiciary, judicial immunity should extend to court officers and others who perform functions intimately related to the judicial process. *See id.* ¶ 8.

¶13 Our courts have extended absolute judicial immunity to an array of court officers, employees, and agents who "assist the court in the judicial process." *Acevedo v. Pima Cnty. Adult Prob. Dep't*, 142 Ariz. 319, 322 (1984); *see also Burk*, 215 Ariz. at 9 ¶ 8 (recognizing application of judicial

immunity to "guardians ad litem, court-appointed psychologists, and probation officers"); *Yamamoto v. Santa Cruz Cnty. Bd. of Supervisors*, 124 Ariz. 538, 540 (App. 1979) (extending absolute immunity to a court clerk following a court's order).

¶14 We have emphasized that, although many employees work with and within the judicial system, judicial immunity only applies where these duties are essential to the judicial process. For example, in *Acevedo*, parents sued the Pima County Adult Probation Department for negligent supervision of a probationer who, despite a probation condition prohibiting contact with minors, was permitted to reside with young children and injured them. 142 Ariz. at 320. We recognized that probation officers are entitled to "absolute protection from suit for actions which are necessary" in preparing and submitting presentence reports to the court and enforcing court-imposed conditions of probation. *Id.* at 322. However, we clarified that not "all the activities of a probation officer in supervising a probationer are entitled to immunity." *Id.* Many probation officer duties are administrative or supervisory and, thus, are "not part of the judicial function." *Id.* We held that "[a] probation officer cannot assert for immunity unless the officer is acting pursuant to or in aid of the directions of the court." *Id.* Thus, the probation officer was not immune from the parents' suit because he permitted the probationer to reside with minor children in violation of the court's specific direction prohibiting contact with minors. *Id.* The exception to judicial immunity in *Acevedo* proves the rule.

¶15 In *Adams v. State*, 185 Ariz. 440, 441–43 (App. 1995), the court of appeals, applying the principles established in *Acevedo*, considered whether Department of Economic Security ("DES") adoption caseworkers enjoyed judicial immunity from suit by adopted children. The children alleged that their DES-approved adoptive parents molested them as a result of the caseworkers' negligent pre-adoption investigation and post-placement supervision. *Adams*, 185 Ariz. at 442. The court held that the caseworkers were not immune from suit for their investigative and supervisory actions because "their routine and statutorily-required investigative and supervisory functions were [not] conducted as an integral part of the judicial process." *Id.* at 446.

¶16 We distill from our jurisprudence the principle that common law judicial immunity applies to court officers, employees, and agents who "assist the court in the judicial process" by carrying out court orders or otherwise serving an integral part of the judicial process. *Acevedo*, 142 Ariz. at 322; *Adams*, 185 Ariz. at 445–46. Persons otherwise covered by judicial immunity, however, forfeit immunity if they act contrary to a court's directive. *Acevedo*, 142 Ariz. at 322. In executing writs, constables both assist the court in the judicial process and serve an integral part of the judicial process if they act consistent with a court's directive.[3] Thus, constables act as officers of the court and are entitled to judicial immunity when they execute court orders, including writs of restitution, § 22-131(A), as directed by the court. *See Clark*, 219 Ariz. at 72 ¶ 21; *cf. State ex rel. Andrews v. Superior Court*, 39 Ariz. 242, 248–49 (1931) (holding that a sheriff acts as an officer of the court when carrying out certain statutory duties of the office). As a constable, Garibay was entitled to common law judicial immunity when executing a writ of restitution.

II.

¶17 We next consider whether § 11-449 abrogates or limits Garibay's immunity. Fox argues that the "Arizona Legislature itself abolished any common-law or other judicial immunity in one specific area through § 11-449's plain words."

¶18 Section 11-449, titled "Liability relating to writs, levies or sales," provides:

> If a sheriff neglects to make due return of a writ or paper delivered to him to be served or executed, or is *guilty of any misconduct* in the service or execution thereof, he is liable to the party aggrieved for damages sustained, and, in addition, for a penalty of two hundred dollars.

(Emphasis added.) Although § 11-449 refers only to "sheriffs," the statute also applies to constables. *See* § 22-131(D) ("The provisions of law relating to sheriffs, as far as applicable, shall govern the powers, duties and liabilities of constables.").

¶19 Fox is correct that, under Arizona law, statutes may abrogate or limit the common law. *See* A.R.S. § 1-201 (declaring that the common law applies "only so far as it is consistent with . . . the laws of this state"); *see also Zambrano v. M & RC II LLC*, 254 Ariz. 53, 65 ¶ 43 (2022) (noting that common law rules only apply when legislative guidance is lacking). However, "if the common law is to be changed or abrogated by statute, the legislature must do so expressly or by necessary implication." *Pleak v. Entrada Prop. Owners' Ass'n*, 207 Ariz. 418, 422 ¶ 12 (2004). "Absent a clear manifestation of legislative intent to abrogate the common law, we interpret statutes with 'every intendment in favor of consistency with the common law.'" *Id.* (quoting *In re Thelen's Est.*, 9 Ariz. App. 157, 160–61 (1969)); *see also* § 1-201 (adopting the common law to the extent it is "not repugnant to or inconsistent with the Constitution of the United States or the constitution or laws of this state").

¶20 Here, § 11-449 evinces no legislative intent to abrogate judicial immunity or, as Fox contends, to "abolish[] any common-law or other judicial immunity in one specific area." In fact, the statute does not mention judicial immunity at all. There is no textual support for Fox's claim that the legislature intended the statute to abolish "any" judicial immunity in these circumstances.

¶21 Section 11-449, however, limits the scope of judicial immunity in specific circumstances. As relevant here, the statute imposes liability on constables who are "guilty of any misconduct in the service or execution" of a writ. To the extent constables may have been immune from suit under the common law for misconduct in the service or execution of a writ, the legislature has eliminated such immunity.[4] Thus, Garibay is not immune from Fox's suit if she was "guilty of any misconduct" in the service or execution of the writ of restitution.

III.

¶22 Although as a constable Garibay is entitled to judicial immunity, § 11-449 eliminates such immunity if she is "guilty of any misconduct" in the service or execution of the writ of restitution. Thus, this case turns on the meaning of "misconduct" in § 11-449.

A.

¶23 We begin with the text when interpreting a statute. *Franklin v. CSAA Gen. Ins. Co.*, 255 Ariz. 409, 411 ¶ 8 (2023). "We interpret statutory language in view of the entire text, considering the context and related statutes on the same subject." *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019). If a statute's text is plain and unambiguous, it controls unless it results in an absurdity or a constitutional violation. *4QTKIDZ, LLC v. HNT Holdings, LLC*, 253 Ariz. 382, 385 ¶ 5 (2022). However, "[i]f the statutory language is ambiguous—if 'it can reasonably be read in two ways'—we may use alternative methods of statutory construction, including examining the rule's historical background, its spirit and purpose, and the effects and consequences of competing interpretations." *Planned Parenthood Ariz., Inc.*, 257 Ariz. at 142 ¶ 17 (quoting *State v. Salazar-Mercado*, 234 Ariz. 590, 592 ¶ 5 (2014)).

¶24 Section 11-449 does not define "misconduct." Absent a statutory definition, we may consider dictionaries and written publications to discern the word's common meaning and usage, respectively, at the time the legislature enacted the statute. *Matthews v. Indus. Comm'n*, 254 Ariz. 157, 163 ¶ 33 (2022); *see also In re Drummond*, 257 Ariz. 15, 18 ¶ 7 (2024). The legislature first adopted the language that now appears as § 11-449 in 1901; it was readopted as a statute in 1913. *See* Ariz. Civ. Code, §§ 1089, 1090 (1901); Ariz. Civ. Code, §§ 2542, 2543 (1913). Therefore, we determine the common meaning of "misconduct" as that term was understood when first adopted in 1901. *Matthews*, 254 Ariz. at 165 ¶ 40 ("When a subsequent enactment imports unchanged earlier language, it imports the original meaning as well."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012) *(*"[W]hen a statute uses the very same terminology as an earlier statute, especially in the very same field, . . . it is reasonable to believe that the terminology bears a consistent meaning. One might even say that the body of law of which a statute forms a part—especially if that body has been codified—is part of the statute's context.").

1.

¶25 We begin by examining contemporaneous dictionary definitions. The Century Dictionary defines "misconduct" as "[w]rong conduct; misbehavior" and "[m]ismanagement." *Misconduct*, The Century Dictionary: An Encyclopedic Lexicon of the English Language (1897). Fox relies on several dictionary definitions that align with this general construction of "misconduct," but his sources fall outside the relevant time period. Although ordinary dictionary definitions are inconclusive, they establish that the ordinary meaning of "misconduct" embodies wrongdoing.

¶26 Fox also overlooks two legal dictionaries from the relevant time period that refine the meaning of "misconduct" and define "wrong conduct," "misbehavior," and "mismanagement." First, Judicial and Statutory Definitions of Words and Phrases ("First Judicial") defines "misconduct" as:

> [I]mplies a wrongful intention, and not a mere error of judgment . . . . In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand; and carelessness, negligence, and unskillfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite.

Misconduct, Judicial and Statutory Definitions of Words and Phrases (1904). Thus, First Judicial's definition juxtaposes the concept of misconduct with negligence, explaining that misconduct embodies wrongful intent rather than mere error.

¶27 Second, Black's Law Dictionary aligns with First Judicial's definition of "misconduct":

> Any unlawful conduct on the part of a person concerned in the administration of justice which is prejudicial to the rights of parties or to the right determination of the cause . . . . The term is also used to express a dereliction from duty, injurious to another, on the part of one employed in a professional capacity, as an attorney at law, ... or a public officer.

Misconduct, Black's Law Dictionary (2d. ed. 1910). Read together, First Judicial and Black's Law suggest the plain meaning of "misconduct" as an intentional violation of an applicable rule, standard, or norm. Relevant here, they denote "a dereliction from duty . . . on the part of . . . a public officer." *Id.*

2.

¶28 We next consider corpus linguistics to aid our understanding of the common usage of "misconduct" when the legislature enacted the statute. Corpus linguistics is a helpful tool in determining a word's common usage. *See Matthews*, 254 Ariz. at 163 ¶ 33. It is performed on "a massive database that enables date-specific searches for the possible, common, and most common uses of words or phrases as they were used in newspapers, books, magazines, and other popular publications." *Id.* Corpus linguistics research is helpful to ascertain a term's ordinary meaning "because the human brain understands words not in isolation but in their broader semantic (and pragmatic) context, [and] we may often miss the import of a given . . . term if we just separately look up its component words in the dictionary." Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Pa. L. Rev. 261, 283 (2019).

¶29 A search of the Corpus of Historical American English for "misconduct" as used between 1900 and 1919 yields seventy-six results. Search of "Misconduct" from 1900–1919, Corpus of Hist. Am. Eng., https://www.english-corpora.org/coha/?c=coha&q=122908439 (last visited Mar. 3, 2025). Of these seventy-six results, sixty-two refer to intentionally wrongful acts serious enough to justify consequences or removal from a position. *Id.* Notably, only one entry used "misconduct" interchangeably with "negligence," while thirteen sources used "misconduct" indiscernibly. Thus, the prevailing common usage of "misconduct" during the relevant period connotes intentional rather than negligent conduct.

¶30 Our corpus review is consistent with our linguistic analysis—"misconduct" refers to intentional violations of an applicable rule, standard, or norm. Dictionary definitions and corpus linguistics entries demonstrate the objective—clear duty or rule violation—and the subjective—intentional—components of "misconduct" as the word was commonly understood and used when the legislature adopted it.

3.

¶31 Our jurisprudence interpreting "misconduct" at the time the legislature first codified the term is also consistent with our dictionary and corpus linguistics analyses. In *Mooney v. Broadway*, 2 Ariz. 107, 113 (1886), a sheriff prematurely released property levied under a writ. We held that the sheriff committed "misconduct," even though the sheriff did not intentionally neglect his duty. *Mooney*, 2 Ariz. at 113. We reject any implication, however, that *Mooney* can be read to expand "misconduct" to include negligence. The "misconduct" in *Mooney* refers to the sheriff's failure to carry out the writ's terms. *Id.*

¶32 *In Stiles v. W. Union Telegraphic Co.*, 2 Ariz. 308, 311 (1887), the appellant sued for damages resulting from a delay in delivering a telegraphic message. We held the telegraph company liable for damages for failing to timely deliver the message and characterized the company's conduct as "gross negligence and palpable misconduct." *Stiles*, 2 Ariz. at 312. As in *Mooney*, the telegraph company's misconduct in *Stiles* arose from its intentional violation of a duty. The Court's allusion to "gross negligence" does not alter its fundamental point that the company's misconduct arose from the failure to meet its obligation to its customer.

¶33 *Mooney* and *Stiles* confirm our definition of "misconduct." In those cases, we characterized the intentional violation of a duty—whether to properly carry out a writ or to timely deliver a telegram—as "misconduct." *See Mooney*, 2 Ariz. at 113; *see also Stiles*, 2 Ariz. at 312. We have also acknowledged that sheriffs are liable for violations of clearly established duties when executing writs. *See Fid. & Deposit Co. of Md. v. McFadden*, 47 Ariz. 116, 120 (1936) ("[I]t was the duty of the sheriff to feed and properly care for the cattle [under the writ because] . . . public policy would not permit him to contract against liability for his personal negligence in caring for and feeding the cattle while in his actual possession."); *Schuster v. Merrill*, 56 Ariz. 114, 119 (1940) (stating that a sheriff violates his statutory duty to serve all process regular on its face where lack of authority for issuance of the process is "apparent on its face").

¶34 We therefore hold that "misconduct" in § 11-449 means an intentional violation of an applicable rule, standard, or norm. Here, the relevant applicable rules, standards, and norms that pertain to constables involve implementing a court directive, law, or rule. *See Clark*, 219 Ariz. at 71 ¶ 18. Consequently, under the statute, "misconduct" involves a constable's willful or intentional failure to carry out a court directive, law, or rule, rather than negligence in the manner of discharging such duties.

B.

¶35 We now must determine whether Fox's complaint alleges Garibay engaged in "misconduct," within the meaning of § 11-449, in executing the writ of restitution resulting in Angela's death.

¶36 Fox's complaint alleges that "[t]he wrongful death of Angela Fox occurred due to the negligence and/or gross negligence of Defendants," which includes Garibay. Specifically, he alleges that Garibay acted with negligence and/or gross negligence by inviting Angela to accompany her to execute the writ because Garibay knew that the tenant "was evicted for threatening a resident with a gun and disturbing the peace." Fox argues "[Garibay] should have never attempted this dangerous eviction alone or with a hapless civilian tagging along." On appeal, Fox argues that Garibay's acts involved "misconduct" because they "constituted improper conduct, mismanagement, wrong conduct, ill behavior, misbehavior, bad behavior, bad conduct."

¶37 We first address Fox's negligence claim. Although Fox initially argued that ordinary negligence always constitutes "misconduct" under § 11-449, he abandoned this claim at oral argument. We commend Fox for this concession. Negligence entails breach of a duty to conform to a standard of care, which causes injury and damages. *See Ryan v. Napier*, 245 Ariz. 54, 59 ¶ 17 (2018) ("A negligence claim focuses on the defendant's conduct; intent is immaterial."). Under this standard, it is not necessary to show "misconduct" to prove negligence.

¶38 We now turn to Fox's gross negligence claim. We have acknowledged that defining "negligence" and "gross negligence" "is, at best, inexact." *Weatherford ex rel. Michael L. v. State*, 206 Ariz. 529, 535 ¶ 20 n.4 (2003). Inexactitude aside, our courts recognize that gross negligence differs from ordinary negligence. *See, e.g.*, *Kemp v. Pinal County*, 13 Ariz. App. 121, 124–25 (1970) (noting that "[a] person can be very negligent and still not be guilty of gross negligence"). A party is grossly negligent if they know, or have reason to know, facts that would lead a reasonable person to recognize their conduct created an unreasonable risk of bodily harm and involved a high probability of substantial harm. *Noriega v. Town of Miami*, 243 Ariz. 320, 328 ¶ 35 (App. 2017); *see also Gross Negligence*, Black's Law Dictionary (12th ed. 2024) ("Gross negligence is traditionally said to be the omission of even such diligence as habitually careless and inattentive people do actually exercise in avoiding danger to their own person or property."). Thus, gross negligence requires a level of disregard beyond ordinary inattention but less than conscious indifference. *Noriega*, 243 Ariz. at 328 ¶ 36. Gross negligence does not encompass intentional malfeasance.

¶39 An illustration brings the distinction between gross negligence and misconduct into sharper relief. Gross negligence is playing with matches near a dry forest with a burn ban in effect: reckless, irresponsible, without regard for others, and with a high probability of substantial harm. Misconduct, on the other hand, is the intentional act of lighting a match with the purpose of causing a wildfire. This distinction matters. Gross negligence embodies extreme carelessness, but it falls short of the deliberate wrongdoing required for "misconduct."

¶40 We concur in the court of appeals' holding that mere allegations of negligence and gross negligence do not allege "misconduct" under § 11-449. *Garibay*, 257 Ariz. at 127 ¶ 26. Fox's allegations arise from Garibay's manner of executing a writ, a court directive she was required to follow. There is no allegation that Garibay failed, intentionally or otherwise, to comply with the court's command to execute the writ—the applicable rule, standard, or norm. Because Fox merely alleged that Garibay was negligent or grossly negligent in carrying out the court's order, he has not alleged that she engaged in "misconduct" under § 11-449. Thus, Fox's complaint fails to state a claim for relief because judicial immunity shields Garibay from suit on the allegations asserted in his complaint.

CONCLUSION

¶41 The legislature, in § 11-449, limited constables' judicial immunity, as relevant here, if a constable "is guilty of any misconduct" in the service or execution of a writ. The statute's effect on a constable's judicial immunity does not create liability for gross negligence in the service or execution of a writ. If the legislature intended to curtail constables' immunity in that manner, it would have done so. *See* A.R.S. § 12-820.02(A)(1) (adopting qualified immunity to protect officials from liability for ordinary negligence but not for gross negligence or intentional misconduct); *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 207 ¶ 42 (2001); *see also Spooner v. City of Phoenix*, 246 Ariz. 119, 124 ¶ 10 (App. 2018).

¶42 We therefore vacate ¶¶ 11–26 of the court of appeals' decision,[5] reverse the trial court's ruling, and remand to the trial court for further proceedings consistent with this Opinion.

TIMMER, C.J., concurring in the result.

¶43 I join the majority opinion and agree with its holding. I write separately to pump the brakes on embracing corpus linguistics as a reliable aid in statutory and constitutional interpretation. *See supra* ¶¶ 28–30.

¶44 In *Matthews v. Indus. Comm'n*, 254 Ariz. 157, 163 ¶ 33 (2022), this Court relied on corpus linguistics without the benefit of adversarial testing from the parties. *See* Peter Henderson et al., *Corpus Enigmas and Contradictory Linguistics: Tensions Between Empirical Semantic Meaning and Judicial Interpretation*, 25 Minn. J.L. Sci. & Tech. 127, 151 n.87 (2024) (hereafter, "Henderson") (including *Matthews* among the cases that have initiated and conducted a corpus linguistics analysis without party input). In my partial concurrence and dissent, I rejected use of corpus linguistics without further vetting. *See Matthews*, 254 Ariz. at 168 ¶ 58 (Timmer, V.C.J., concurring in part and dissenting in part) (lamenting the lack of sufficient information corpus linguistics and pointing out that the database used in that case "does not reflect oral usage" of words). This case presents the second time we have used corpus linguistics, and for the second time we are doing so without input and adversarial testing from the parties. In my view, this is short-sighted and may present problems in future cases.

¶45 To be clear, I am not opposed to corpus linguistics. Like any appellate judge, my eyes light up at the prospect of using an empirical, scientific tool to help identify textual meaning. But caution is warranted. Some scholars enthusiastically embrace corpus linguistics for use in interpreting legal texts, albeit with caveats. *See* Thomas R. Lee & Stephen Mouritsen, *Judging Ordinary Meaning*, 127 Yale

L.J. 788, 851–58 (2018). Others warn that using corpus linguistics "may sub silentio clash with express jurisprudential commitments." Henderson, *supra* ¶ 44, at 127; *see also Marshall v. PricewaterhouseCoopers, LLP*, 539 P.3d 766, 780 n.1 (Or. 2023) (James, J., dissenting) (opining that corpus linguistics is "problematic on many levels, including suffering from the limitations and biases of those who compile the corpus, manipulation through the choice of database, and potentially overly suggestive results due to the construction of the search terms and methods"). That gets my attention. Thus, in my view, we should not rely on corpus linguistics before receiving input and scrutiny from parties; ensuring ourselves that the database searched is a reliable tool for identifying ordinary meaning of words; and adopting a research and interpretive methodology that ensures we use the tool with an appropriate degree of precision.

¶46 This special concurrence is not the place to thoroughly analyze if and how corpus linguistics should be used to interpret legal texts. I am not an expert in linguistics, and I am unwilling to engage in scientific research without input from parties affected by the results. *See State v. Rasabout*, 356 P.3d 1258, 1264–66 ¶¶ 16–21 (Utah 2015) (criticizing sua sponte corpus linguistics research as unfair to parties and outside judicial expertise). Instead, I urge parties in future cases to examine the utility of corpus linguistics and advise this Court about if and how corpus linguistics should be used. This analysis may become particularly imperative as corpus linguistics interacts with artificial intelligence. *See* Henderson, *supra* ¶ 44, at 132 (warning that problems with corpus linguistics are likely to increase with the corresponding use of large language models "as meaning can include the arbitrary references of annotators or model creators").

¶47 From my cursory review of writings on legal corpus linguistics—and there are an untold number—several issues deserve consideration. There are likely more. I have plugged the questions that immediately come to mind into two broad categories.

¶48 First, parties should identify whether a database or mix of databases can be reliably used to identify the ordinary meaning of words used in legal texts. In doing so, parties should consider criticisms that databases "rely on foreign law to give meaning to U.S. constitutional or statutory provisions," which courts generally eschew; "offer subjective or strategic forms of legislative history" that do not reflect the ordinary meaning of the words used in text; and "represent[] elite rhetoric, not ordinary original public meaning." *See id.* at 131–32, 153 (emphasis removed).

¶49 Second, parties should identify the appropriate methodology for searching a database and interpreting the results. For example, what role does context play in the analysis? *See* Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 Cornell L. Rev. 1397, 1429 (2021) ("Legal corpus linguistics, with its obsessive focus on single words used in unconnected situations, to the exclusion of larger and more relevant contexts, encourages legal interpreters to neglect the real import of their decisions."). Should inquiries solely focus on use of words in a legal context? *See id.* at 1417 ("One key thing legal corpus linguistic inquiry tends to neglect is the *legal* context of legal language." (emphasis in original)). Are there any fallacies to avoid in using corpus linguistics? *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726, 735 (2020) (explaining the "nonappearance fallacy," which falsely "claim[s] that absence of a usage from a large corpus indicates that the usage is not part of the ordinary meaning"); *see also* Tammy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 Ga. St. U. L. Rev. 491, 500 (2020) (pointing out that the blue pitta, a bird of Asia, does not appear in the Corpus of Contemporary American English, but that does not make it any less a bird).

¶50 Corpus linguistics' promise of scientific objectivity is undeniably seductive. But it is the proverbial black box: I can see what goes in and what comes out, but I cannot see inside. And until "what's inside" is sufficiently probed by parties with a stake in the outcome, perhaps with the assistance of expert linguists, I believe the Court should rely exclusively on time-tested methods of statutory and constitutional interpretation. Here, dictionaries that were curated by lexicographers and caselaw support the plain meaning of "misconduct" identified by the majority. I think the analysis should stop there. For now, I continue to believe that we should not treat corpus linguistics as a settled part of our interpretive toolkit but instead view it as an intriguing *possible* tool and invite adversarial testing of that tool. With these thoughts in mind, and with respect to my colleagues, I concur in the opinion.

***** Due to the retirement of Justice Robert Brutinel, pursuant to article 6, section 3 of the Arizona Constitution, Judge Michael D. Peterson, Presiding Judge of the Graham County Superior Court, was designated to sit in this matter.

1 Fox's suit against Pima County and CESTB alleging vicarious liability under respondeat superior and negligent hiring, training, and supervision is not before us.

2 The toxicology report on Garibay was positive for five substances above the reporting limit, including an Ethanol level of 19 mg / dL, a Blood Alcohol Concentration of 0.019 g / 100 mL, an Amphetamine level of 34 ng / mL, a Benzoylecgonine level of 210 ng / mL, and a Cocaine level of 50 ng / mL.

3 Statutory immunity for constables may also exist pursuant to A.R.S. § 41-621(K), which shields state

officials from personal liability for "an injury or damage resulting from an act or omission in a public official capacity where the act or omission was the result of the exercise of the discretion vested in the officer, agent or employee and if the exercise of the discretion was done in good faith without wanton disregard of statutory duties." However, because neither party raised this argument, we do not address that statute. *See Jimenez v. Sears, Roebuck & Co.*, 183 Ariz. 399, 406 n.9 (1995) ("We do not ordinarily consider issues not raised in the trial court or court of appeals.").

4 Fox argues that § 11-449's "specific liability" "defeats any general statutory immunity" the legislature codified in A.R.S. § 12-820.01(A), which immunizes a "public entity" from liability for actions and omissions of its employes in the exercise of a judicial function. Invoking the principle that a specific statute prevails over a general one, *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974), Fox submits that §§ 11-449 and 12-820.01(A) can be harmonized to maintain "general judicial immunity for most judicial functions [in the latter], with the exception in this case of special liability [in the former]." Assuming, without deciding, that § 12-820.01(A) applies to constables as "public entities," we agree. Therefore, we need not address § 12-820.01(A).

5 Because we did not grant review on the issue of legislative immunity, we express no opinion on ¶¶ 6–10 of the court of appeals' opinion.

Cite as
144 Arizona Cases Digest 15

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE of Arizona,
Appellee,
v.
Robert ARMENDARIS,
Appellant.

No. 1 CA-CR 24-0267
FILED 03-13-2025

Appeal from the Superior Court in Maricopa County
No. CR2023-006577-001
The Honorable Michael W. Kemp, Judge
AFFIRMED

COUNSEL

Arizona Attorney General's Office, Tucson
By Jacob R. Lines, *Counsel for Appellee*
Maricopa County Public Defender's Office, Phoenix, By Damon A. Rossi
Counsel for Appellant

OPINION

Chief Judge David B. Gass delivered the opinion of the court, in which Presiding Judge Brian Y. Furuya and Vice Chief Judge Randall M. Howe joined.

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

GASS, Chief Judge:

¶1 Defendant Robert Armendaris appeals his convictions and sentences for luring a minor for sexual exploitation and attempted sexual conduct with a minor.

¶2 Armendaris's convictions arise out of his online communications with an adult undercover officer who posed as a minor on a website. Under Article II, Section 23 of the Arizona Constitution, Armendaris was entitled to a jury of 8 people because he did not face a sentence of at least 30 years. Even so, Armendaris asked the superior court to empanel a 12-person jury, arguing it was a requirement of the Sixth Amendment of the United States Constitution. The superior court denied the request, which Armendaris claims was error. Armendaris also argues the superior court should have allowed him to elicit testimony about whether the undercover officer committed the crime of computer tampering when she lied about her age.

¶3 Because the superior court did not err, Armendaris's convictions and sentences are affirmed.

FACTUAL AND PROCEDURAL HISTORY

¶4 An undercover police officer created an account on an adult website called MocoSpace. The

police officer posed as a 16-year-old girl named "Nancy" and used an age-regressed picture of herself for the profile. Because the website's terms of use forbid minors from creating accounts, she listed her age on the website as 18 years old.

¶5 Armendaris began a conversation with "Nancy" on MocoSpace. After exchanging some messages, he asked how old she was. She told him she was 16. They exchanged phone numbers and continued chatting through text messages and MocoSpace. Armendaris asked "Nancy" if she wanted to meet in person, and they made plans to meet.

¶6 The two sent multiple messages asking each other what they wanted to do when they met. At first, Armendaris suggested going to a restaurant, a movie, or "Nancy's" apartment. She replied, saying a movie was boring and she liked to have fun. He asked if she meant "kissing, hugging, that kind of fun." She responded with a smiley face and he asked if having sex was the kind of fun she was talking about. When she responded with a smiley face and hearts, he replied: "Is that what you want? I'm okay with that." She replied she did not want to be "16 and pregnant." He then asked if he should bring condoms.

¶7 They agreed to meet at "Nancy's" apartment. When Armendaris arrived at the apartment complex, the police arrested him and searched his vehicle. They found no condoms, but they did find a cell phone Armendaris used to communicate with "Nancy."

¶8 The officer who posed as "Nancy" interrogated Armendaris at the police station. Armendaris said he did not believe "Nancy" was 16 years old because Internet users often are not truthful. He also claimed he would have left if she had been 16.

¶9 The State indicted Armendaris for luring a minor for sexual exploitation, a class 3 felony, and attempted sexual conduct with a minor, a class 1 misdemeanor. Armendaris moved for a 12-person jury, which the superior court denied following oral argument.

¶10 The superior court seated an 8-person jury for Armendaris's 2-day trial. During the trial, defense counsel questioned the undercover officer about how impersonating "Nancy" violated the MocoSpace terms of use. But the superior court precluded him from asking about whether the officer's conduct amounted to the crime of computer tampering, reasoning it did not "appl[y] to the facts . . . ."

¶11 The jury convicted Armendaris on both counts. The superior court suspended his sentence and imposed a term of lifetime supervised probation for the class 3 felony and a 2-month jail term for the class 1 misdemeanor. The superior court also required Armendaris to register as a sex offender.

¶12 The court has jurisdiction over Armendaris's timely appeal under Article VI, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21.A, 13-4031, and -4033.A.1.

DISCUSSION

I. Armendaris was not entitled to a 12-person jury.

¶13 Armendaris argues the Sixth Amendment of the United States Constitution required the superior court to try him to a 12-person (not 8-person) jury. The court reviews "constitutional issues and purely legal issues de novo." State v. Moody, 208 Ariz. 424, 445 ¶ 62 (2004). Because Armendaris raised this issue before the superior court, the court conducts a harmless error review in which the State bears the burden "to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *State v. Strong*, ___ Ariz. ___, ___ ¶ 45, 555 P.3d 537, 553 (Ariz. 2024) (quoting *State v. Henderson*, 210 Ariz. 561, 567 ¶ 18 (2005)).

¶14 Armendaris is not the first defendant to raise this issue. In the past four years, four other defendants have made similar arguments. The court rejected those arguments in unpublished memorandum decisions. The Arizona Supreme Court declined to accept review in all four, and the United States Supreme Court denied certiorari in one.[1]

¶15 The Sixth Amendment guarantees criminal defendants "the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The Sixth Amendment applies to the states through the Fourteenth Amendment. *See Williams v. Florida*, 399 U.S. 78, 86 (1970). More than 50 years ago, the United States Supreme Court ruled the Sixth Amendment does not require a 12-person jury. *Id.* ("hold[ing] that the 12-man panel is not a necessary ingredient of 'trial by jury'"). Two years later, Arizona voters amended the Arizona Constitution to permit fewer than 12 jurors in criminal cases when the maximum permitted sentence is less than 30 years. Ariz. Const. art. II, § 23 (amended 1972); *see State v. Soliz*, 223 Ariz. 116, 118 ¶ 6 (2009).

¶16 Since then, the Arizona Supreme Court discussed *Williams* and said the Arizona legislature "reserved the 12-person jury only for the most serious offenses," as measured "by the potential sentence upon conviction." *Soliz*, 223 Ariz. at 118 ¶ 7 (discussing A.R.S. § 21-102). Section 21-102 requires a 12-person jury in criminal cases "in which a sentence of death or imprisonment for thirty years or more is authorized by law" and an 8-person jury in "any other criminal case." A.R.S. § 21-102.A, -.B. The Arizona Supreme Court concluded Arizona's jury laws passed Sixth-Amendment muster under *Williams*. *See Soliz*, 223 Ariz. at 118 ¶¶ 6 –7.

¶17 Despite this 50-plus-year history of express precedent, Armendaris argues the United States Supreme Court "effectively overruled" *Williams* in *Ramos v. Louisiana*, 590 U.S. 83 (2020). But *Ramos* did not address jury size. Instead, *Ramos* ruled the

Sixth Amendment required unanimous jury verdicts in criminal cases. 590 U.S. at 93. Though nothing in *Ramos* suggests the United States Supreme Court was abrogating the *Williams* holding regarding a 12-person jury, Armendaris argues *Ramos* abrogated the reasoning underlying *Williams* such that it is no longer controlling precedent.

¶18 Armendaris then argues, under *Ramos*, the court should look "at what the phrase *trial by an impartial jury*" meant at the time of the Sixth Amendment's adoption. Based on sources explaining the understanding of "impartial jury" in English common law and even post-ratification of the Sixth Amendment by the United States of America, he argues the phrase "meant [12] jurors" at the time of ratification. *See* Robert H. Miller, *Six of One Is Not A Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. Pa. L. Rev. 621, 643 (1998); *see also* James B. Thayer, *The Jury and Its Development*, 5 Harv. L. Rev. 295, 297 (1892).

¶19 But even if the Arizona Supreme Court or United States Supreme Court ultimately agrees with Armendaris' position, this court is bound by the holdings in *Williams* and *Soliz*. Arizona courts must follow United States Supreme Court precedent "with regard to the interpretation of the federal constitution." *See Pool v. Superior Ct.*, 139 Ariz. 98, 108 (1984); *see also Agostini v. Felton*, 521 U.S. 203, 207 (1997) (saying courts should not conclude the United States Supreme Court has overruled its earlier precedent by implication, "[r]ather, lower courts should follow the case which directly controls"). *Williams* still holds today. *See Khorrami v. Arizona*, 143 S. Ct. 22, 23 (Gorsuch, J., dissenting from denial of certiorari) ("Regrettably, the Court today declines to take up" reconsidering *Williams*). And this court is bound by the decisions of the Arizona Supreme Court. *See State v. Smyers*, 207 Ariz. 314, 318 ¶ 15 n.4 (2004); *see also Soliz*, 223 Ariz. at 118 ¶¶ 6–7 (recognizing the holding in *Williams*).

¶20 At bottom, Armendaris faced no more than 8.75 years in prison for count 1 and no more than 6 months in jail for count 2. *See* A.R.S. §§ 13-702, -707, -1405.B, -3554.C. Because the maximum possible sentence was less than 30 years, he was not entitled to a 12-person jury. *See* Ariz. Const. art. II, § 23; A.R.S. § 21-102; *Soliz*, 223 Ariz. at 118 ¶¶ 6–7. Based on controlling precedent, Armendaris has not established error.

II. The superior court did not err when it precluded questioning about the crime of computer tampering.

¶21 Armendaris argues the superior court erred when it precluded his testimony about whether the officer's conduct amounted to the crime of computer tampering. He argues precluding that line of questioning prevented him from presenting a complete defense because "he sought to show that persons such as [Armendaris] would plausibly not expect a minor on MocoSpace because obtaining a user profile would perhaps be illegal."

¶22 The court reviews the superior court's evidentiary rulings for an abuse of discretion. *State v. Blakley*, 204 Ariz. 429, 437 ¶ 34 (2003). Because Armendaris raised this issue before the superior court, the court conducts a harmless error review. *See Strong*, ___ Ariz. at ___ ¶ 45, 555 P.3d at 553.

¶23 Armendaris elicited testimony from the officer conceding she violated MocoSpace's terms of use by lying about her age and impersonating another person when she created a false profile. The officer further admitted she agreed under the terms not to promote false or misleading information, and if an underage "Nancy" pretended to be 18 years old on MocoSpace, she would be "committing a crime in Arizona."

¶24 With the above evidence admitted, the superior court did not err when it precluded Armendaris from questioning the officer about the specific crime of computer tampering. Armendaris does not establish how the crime would have applied to the officer's acts. And even if it would have, the superior court "could have precluded [the testimony] on the ground that [it] was so marginally relevant and cumulative of stronger testimony that its probative value was substantially outweighed by considerations of delay and confusion." *State v. Wargo*, 145 Ariz. 589, 589 –90 (App. 1985); *see also* Ariz. R. Evid. 403. Armendaris has shown no error.

CONCLUSION

¶25 Armendaris's convictions and sentences are affirmed.

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[1] *State v. Jose*, 2 CA-CR 2023-0224, 2024 WL 2118759, at *3–4 (Ariz. App. May 10, 2024) (mem. decision) (review denied Dec. 13, 2024); *State v. Zamanzadeh*, 1 CA-CR 23-0080, 2024 WL 380014, at *1 (Ariz. App. Feb. 1, 2024) (mem. decision) (review denied Aug. 19, 2024); *State v. Richardson*, 1 CA-CR 22-0321, 2023 WL 5934909, at *1 (Ariz. App. Sept. 12, 2023) (mem. decision) (review denied June 3, 2024); *State v. Khorrami*, 1 CA-CR 20-0088, 2021 WL 3197499, at *8 (Ariz. App. July 29, 2021) (mem. decision) (review denied Feb. 8, 2022), *cert. denied*, *Khorrami v. Arizona*, 143 S. Ct. 22 (2022).

Cite as
144 Arizona Cases Digest 18

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

Ronald A. SIMMS,
Plaintiff/Appellant/Cross-Appellee,
And
Arizona Department of Gaming,
Defendant/Appellee,
v.
Jeremy E. SIMMS, et al.,
Defendants/Appellees/Cross-Appellants.

No. 1 CA-CV 23-0139
FILED 03-18-2025

Appeal from the Superior Court in Maricopa County
No. LC2016-000505-001
The Honorable Timothy J. Thomason,
Judge, Retired
VACATED AND REMANDED

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OPINION

Judge Michael S. Catlett delivered the opinion of the Court, in which Presiding Judge Angela K. Paton and Judge James B. Morse Jr. joined.

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

CATLETT, Judge:

¶1 Arizona law now instructs courts to withhold deference to administrative agencies on questions of law and fact when reviewing agency action involving regulated parties. In 2018, the legislature amended the statute governing judicial review such that, in regulated-party proceedings, courts decide questions of law without deference. A.R.S. § 12-910(F); 2018 Ariz. Sess. Laws, ch. 180, § 1 (2d Reg. Sess.) (H.B. 2238). Three years later, the legislature again amended that statute such that, in regulated-party proceedings, courts decide questions of fact without deference. 2021 Ariz. Sess. Laws, ch. 281, § 1 (1st Reg. Sess.) (S.B. 1063). This court has not—until now—fleshed out these changes.

¶2 This is the latest chapter in a feud between brothers Ronald Simms ("Ron") and Jeremy Simms ("Jerry") over Turf Paradise, a horse-racing track in Phoenix. In 2013, Ron asked the Arizona Department of Racing ("Racing Department") for a racing license. The Racing Department denied that request. Ron appealed to an Administrative Law Judge ("ALJ"). He recommended Ron receive a license. The Arizona Department of Gaming ("Gaming Department") accepted that recommendation. Jerry then appealed to the Arizona Racing Commission ("the Commission"), which denied a license after concluding Ron lied to the Racing Department. The parties then traveled to the superior court, this court, the supreme court, and back to the superior court. They now return here after the superior court affirmed the Commission's decision. Applying the new framework for reviewing agency action, we vacate and remand to enter judgment for Ron.

FACTS AND PROCEDURAL HISTORY
I.

¶3 Turf Paradise is a thoroughbred and quarter-horse racetrack in Phoenix. In 2000, a group of investors including Ron and Jerry acquired Turf Paradise through TP Racing, L.L.L.P. ("TP Racing"). Jerry and Ron formed J & R Racing, LLC to manage TP Racing's affairs.

¶4 Jerry and Ron bought most of the land under Turf Paradise through their entities, J. Simms Enterprises (Jerry) and Bruin Corp. (Ron). For partnership in TP Racing, Ron and Jerry had those entities lease that land to TP Racing. Neither Jerry nor Ron contributed any actual capital.

¶5 In May 2000, the Racing Department's then-director issued horse-racing licenses to Jerry and Ron and a racing permit to TP Racing. Later that year, the Governor replaced that director after the Arizona Republic ran a story about Jerry's business dealings in California.

¶6 The Racing Department's new director then further investigated TP Racing's capital structure and land ownership. As a result, the Racing De-

partment required Jerry to own 50% of TP Racing, as its managing partner. During that investigation, the Racing Department acknowledged that "unlicensed entities" owned land under the racetrack. To remedy that issue, the Racing Department asked that "land currently held by Bruin Corporation and J. Simms Enterprises LLC necessary" for racing "be transferred without encumbrance to [TP Racing]."

¶7 For tax reasons, Jerry and Ron could not deed that land to TP Racing. Instead, they signed notes payable equal to the land's purchase price. Those notes were their capital contributions, but Jerry and Ron could pay off the notes by transferring the land to TP Racing.

¶8 Three years later, the Racing Department reviewed TP Racing's permit. During that review, Jerry and Ron agreed to transfer all land under the racetrack to TP Racing. Specifically, Jerry would transfer J. Simms Enterprises, LLC's land to pay off his $14 million note to TP Racing. That transaction would replace "a note (for which no payment was likely to be demanded by [TP Racing]) with real estate essential to its operations." TP Racing would give Bruin Corp. non-essential land in return for land under the track. Consistent with those plans, Jerry had J. Simms Enterprises, LLC give its land under the track to TP Racing to pay off his note, and Ron had Bruin Corp. trade its land under the track for land elsewhere under Turf Paradise. Because Bruin Corp. swapped one piece of land for another, Ron still owed on his note.

¶9 Things remained peaceful for seven years. But that changed in 2010, when Jerry complained that Ron had not paid off his note with Bruin Corp.'s land. Jerry wrote that "[i]f you recall, all of us agreed and expected that the land I utilized for a 1031 exchange as well as the land you utilized for a 1031 exchange would ultimately be . . . rolled into Turf Paradise. I did that. So far you have not." Jerry also recounted that "[a]ll that was ever contemplated [was] that the track would own the property," and "[t]hen the track would not have to worry about collecting a $4,635,000 note from you." Finally, Jerry thought Ron "had the best of both worlds" because if Bruin Corp.'s property value increased, Ron could pay off the note, and if it decreased, Ron could "roll" the property into TP Racing. Ron claims he then offered Bruin Corp.'s land to pay off his note, but Jerry "responded with a host of new and extortionate conditions," which Ron refused.

¶10 Litigation ensued, including two lawsuits and two injunctions against Jerry. *See Simms v. Simms*, 2012 WL 2795978, at *1 ¶ 1 (Ariz. App. July 3, 2012) (mem. decision) (enjoining Jerry from exceeding his managerial authority); *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 492 ¶¶ 5–6 (App. 2013) (enjoining Jerry from removing TP Racing's general partner without justification); *see also Simms v. Rayes*, 234 Ariz. 47 (App. 2014); *T.P. Racing L.L.L.P. v. Simms*, 2016 WL 423803 (Ariz. App. Feb. 4, 2016) (mem. decision).

II.

¶11 In 2012, TP Racing asked to renew its permit. During that process, the Racing Department's Director, Bill Walsh, discovered that Ron's license had expired. But that discovery was no happenstance. Instead, there was "evidence that Jerry sparked or stoked Ron's regulatory troubles by delivering ten binders of adverse information to Director Walsh." *Simms v. Ariz. Racing Comm'n*, 253 Ariz. 214, 216 ¶ 5 (App. 2022). Because Ron lacked a license, Director Walsh ordered that he "not take part in, directly or indirectly, or have any personal interest in the operation of [TP Racing]." *Id.* And he threatened to closely scrutinize Ron's future applications. *Id.*

¶12 Undeterred, Ron applied for a license. The Racing Department denied that request, but only after input from Jerry's counsel. In so doing, the Racing Department relied on statements Ron made to the Racing Department thirteen years earlier and his alleged failure to disclose exactly how he could pay off his note to TP Racing. Without a license, the Racing Department warned Ron that he could no longer participate in TP Racing.

¶13 That effectively ended Ron's involvement in TP Racing. The superior court dissolved the injunctions against Jerry, and TP Racing's partners dissociated Ron. They instead installed Bell Racing (a new entity Jerry formed) as TP Racing's general partner. "Jerry assumed control of Turf Paradise with these maneuvers, at least for the time being." *Id.* ¶ 7.

III.

¶14 Ron appealed to the Office of Administrative Hearings. It assigned an ALJ, who held a 21-day hearing. *See* A.R.S. § 5-104(D). The ALJ issued a 23-page decision recommending that Ron receive a license. The ALJ found that Ron truthfully testified that he told the Racing Department that he could pay off his note with cash or by giving land to TP Racing. In other words, the Racing Department knew Ron could pay off his note with Bruin Corp.'s land. Regarding Bruin Corp., the ALJ found that, until 2006, Ron incorrectly told the Racing Department that his wife owned Bruin Corp. But the ALJ found Ron truthfully explained his misstatements, so they were not knowingly false.

¶15 In July 2015, the legislature moved the Racing Department under the Gaming Department. 2015 Ariz. Sess. Laws, ch. 19, § 2 (1st Reg. Sess.) (S.B. 1480). As a result, the Gaming Department's director—not Director Walsh—considered the ALJ's recommendation. After the Gaming Department left the ALJ decision untouched for 30 days, it became the Gaming Department's decision ("Gaming Decision"). *See* A.R.S. § 5-104(D).

IV.

¶16 Jerry and TP Racing appealed to the Racing Commission. It allowed briefing on whether to uphold the Gaming Decision. Later, all the racing commissioners but one voted to deny Ron a license.

¶17 In its decision, the Commission modified five of the ALJ's factual findings and four of his legal conclusions, and it added its own legal conclusion. The Commission found that, until 2006, Ron said his wife owned Bruin Corp. After 2006, though, Ron admitted he owned Bruin Corp. The Commission acknowledged that, even after Ron told the Department he owned Bruin Corp., the Department raised no concern for seven years. But to explain that indifference, the Commission said the Racing Department thought Bruin Corp.'s only relationship to TP Racing was that of a landlord leasing non-essential land, so Ron's wife did not need a license. The Commission reversed the ALJ's finding that Ron truthfully explained why he said his wife owned Bruin Corp. But the Commission did not decide "who, in fact, owned Bruin from 2000 to 2006."

¶18 The Commission then addressed whether Ron disclosed how he could pay off his note to TP Racing. The Commission again reversed the ALJ's credibility finding. It found that Ron's "testimony regarding the conversation with [Racing Department] representatives in 2000" was not credible because Ron "presented no extrinsic evidence or witness testimony corroborating" that testimony. The Commission concluded that Ron provided "no credible evidence" supporting that the Racing Department knew that "the makers of the promissory notes" (Jerry and Ron) could pay off their notes with land. But the Commission did not decide whether Ron and Jerry agreed Ron could pay off his note that way.

¶19 Based on its findings, the Commission concluded that Ron lied to the Racing Department and did not tell it about material changes in the information he provided "in the application for a license or permit." The Commission also concluded Ron did not show that he "met his monetary obligations in connection with racing meetings held in this State." So the Commission denied Ron a license.

¶20 Vice Chair Feldmeier dissented. He thought it was "important to retain" the ALJ's decision for six reasons, including that "after the lengthy hearing . . . [the ALJ] provided numerous reasons why [Ron] should receive" a license. He thought Bruin Corp.'s ownership became irrelevant when Ron admitted ownership in 2006, and that ownership only became relevant again when Jerry encouraged Director Walsh to deny Ron a license. And he stated, "this has been a witch hunt all along, and it's about [Jerry] doing whatever he can to prevent [Ron] from getting his license. That's what it comes down to."

V.

¶21 Ron appealed to the superior court, arguing Jerry and TP Racing lacked standing to challenge the Gaming Decision. Ron also claimed the Commission did not give him due process, and the record did not adequately support the Commission's licensing decision. The superior court sided with Ron, concluding Jerry and TP Racing lacked standing. Jerry, TP Racing, and the Commission ("Commission Parties") appealed.

¶22 This court vacated and remanded. In doing so, this court concluded Jerry and TP Racing had standing because they were "'person[s] aggrieved' under the Commission's rules." *Simms*, 253 Ariz. at 220 ¶ 28. It then rejected part of Ron's due process claim based on Jerry's *ex parte* contacts with Director Walsh, explaining "Ron already received a fair and impartial hearing before the ALJ." *Id.* ¶ 30. It then remanded Ron's due process claim because it could not "meaningfully consider the issues on this record." *Simms v. Ariz. Racing Comm'n*, 2022 WL 1256594, *1 ¶ 4 (Ariz. App. Apr. 28, 2022) (mem. decision). With that conclusion, this court did not address Ron's merits challenge to the licensing decision. *Id.*

VI.

¶23 Back in the superior court, the parties briefed Ron's due process claim and his claim challenging the licensing decision. But the court rejected both. It concluded Ron did not carry his "substantial burden of showing the facts presented rise to the level of a" due process violation. And it rejected his challenge to the licensing decision. In so doing, the court viewed the "evidence in the light most favorable to affirming the Commission's decision" and asked whether substantial evidence supports it. After concluding substantial evidence supported the Commission's decision, the court affirmed.

¶24 Ron appeals, and the Commission Parties cross-appeal. We have jurisdiction. *See* A.R.S. § 12-913.

DISCUSSION

¶25 Ron raises two main challenges. One, he challenges the Commission's decision denying a license, asking us to reverse based on the judicial review standards in § 12-910(F) (we call that subsection "910(F)"). Two, he challenges whether the Commission gave him due process. In their cross-appeal, the Commission Parties argue the superior court erred in concluding the Commission must provide due process when resolving new license requests. Because we decide the licensing issue against the Commission Parties, we do not address the parties' due process arguments.

I.

¶26 Ron argues the superior court erred by reviewing the Commission's decision for substantial evidence. For example, the court thought it "must consider whether" substantial evidence supported "the Commission's reasons for denying Ron's license," but it also said it would "not give deference to any factual finding" the Commission made. To Ron, that "makes no sense." Instead, he suggests reviewing courts no longer defer to agencies in any respect; instead, they adopt the ALJ's factual findings so long as substantial evidence supports them.

¶27 For their part, the Commission Parties urge that reviewing courts review agency decisions for

substantial evidence. Because the agency decision here is the Commission's decision, they argue we must review it, not the ALJ's decision, for substantial evidence. They posit that whether substantial evidence exists is a legal question, so the amendment eliminating deference to agency factfinding is inapplicable. And they assert that substantial evidence supports the Commission's factual findings and its decision.

¶28 Neither side is quite right. On one hand, the Commission Parties are correct that the agency decision here is the Commission's decision, not the ALJ's. But they are incorrect that we review the Commission's decision for substantial evidence and that the amendments to 910(F) play no role. On the other hand, Ron is correct that 910(F) now says reviewing courts do not defer when "the regulated party" raises fact questions, which applies here. But Ron is mostly incorrect that reviewing courts instead defer to ALJ factual findings.

A.

¶29 The amendments to 910(F) reshaped how courts review agency action. To explain in what way, we recount how judicial review worked before those amendments and how it works now.

1.

a.

¶30 Before 2018, reviewing courts would sometimes defer to an agency's legal interpretations. *See, e.g.*, *Marlar v. State*, 136 Ariz. 404, 411 (App. 1983); *Indus. Comm'n v. Harbor Ins. Co.*, 104 Ariz. 73, 76 (1968). To be sure, courts often said that "the ultimate responsibility for interpreting a statute or regulation rests with the courts[.]" *Marlar*, 136 Ariz. at 411. And "[w]hen an administrative decision [was] based on an interpretation of law, we [would] review it *de novo*." *Saldate v. Montgomery*, 228 Ariz. 495, 498 ¶ 10 (App. 2012) (citation omitted). But courts occasionally deferred. For example, our supreme court once said that "the construction placed on a statute by the executive body which administers it, if acquiesced in for a long period of time, will not be disturbed unless such construction is manifestly erroneous." *Harbor Ins.*, 104 Ariz. at 76. Similarly, this court said an agency's interpretation of a regulation it implements is "entitled to great weight." *Marlar*, 136 Ariz. at 411.

b.

¶31 Now, in regulated-party cases, reviewing courts do not defer to an agency's legal interpretations. As 910(F) puts it, "[i]n a proceeding" involving "the regulated party," courts "decide all questions of law." Questions of law include "the interpretation of a constitutional or statutory provision or a rule adopted by an agency[.]" A.R.S. § 12-910(F). And reviewing courts no longer defer even when an agency has interpreted a statute or regulation in the same way for a long time. *Id.* (instructing courts to decide "all" legal questions "without deference to any previous determination that may have been made on the question by the agency"); *see also Batty v. Ariz. Med. Bd.*, 253 Ariz. 151, 154 ¶ 11 (App. 2022). Put differently, reviewing courts have the final say on what the law is.

2.

a.

¶32 Before 2021, courts were highly deferential when reviewing fact questions under 910(F). *See e.g.*, *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436 ¶ 11 (App. 2009); *Horne v. Polk*, 242 Ariz. 226, 230 ¶ 13 (2017). Reviewing courts had to "defer to the agency's factual findings and affirm them if supported by substantial evidence." *Gaveck*, 222 Ariz. at 436 ¶ 11 (citing *Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 557 ¶ 7 (App. 2002)); *Horne*, 242 Ariz. at 230 ¶ 13 ("The court affirms the agency's factual findings if they are supported by substantial evidence[.]"). That meant reviewing courts would affirm if, viewing the facts favorably to the agency, there was "evidence which would permit a reasonable person to reach the [agency's] result." *Sierra Club—Grand Canyon Ch. v. Ariz. Corp. Comm'n*, 237 Ariz. 568, 575, ¶ 22 (App. 2015) (citation omitted); *Hirsch v. Ariz. Corp. Comm'n*, 237 Ariz. 456, 459 ¶ 2 n.2 (App. 2015). And courts had to affirm agency findings even "if either of two inconsistent factual conclusions [were] supported by the record." *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 206 Ariz. 399, 409 ¶ 35 (App. 2003) (citing *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984)). Under those standards, the agency almost always won.

b.

¶33 Section 910(F) now instructs that "[i]n a proceeding brought by or against the regulated party, the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency." This means what it says—reviewing courts no longer defer on fact questions in proceedings involving "the regulated party." A.R.S. § 12-910(F). As we recently explained, "Arizona's courts have afforded deference to the factual findings of an administrative agency. But the legislature has now indicated otherwise[.]" *Batty*, 253 Ariz. at 155 ¶ 11 n.2 (internal citations omitted); *see also Marsh v. Atkins*, 256 Ariz. 233, 236 ¶ 10 (App. 2023) ("[I]n reviewing the evidence, no deference can be given to the agency's factual findings.").

¶34 Applying the new language, when a regulated party challenges agency factual findings, reviewing courts no longer review for substantial evidence. *See* A.R.S. § 12-910(F). They instead review "the administrative record and supplementing evidence," and determine independently whether the required quantum of evidence (usually, a preponderance of the evidence) supports a challenged factual finding. *Id.* Reviewing courts no longer ask whether a reasonable person viewing the evidence to favor the agency might make the same finding—they instead independently review it. That is, they decide anew

whether the record sufficiently supports the finding. If so, they affirm it. If not, they disregard it. Put differently,

> [i]n a true de novo review, we are not limited to considering whether there was sufficient evidence to support the [agency's] findings nor whether the [superior] court erred in its determination. Rather, in a true de novo review, we use the assignments of error as a guide to the factual issues in dispute and make an independent factual determination based upon the record.

Slack Nursing Home, Inc. v. Dep't. of Soc. Servs., 528 N.W.2d 285, 293 (Neb. 1995) (interpreting a statute like 910(F)).

¶35 We acknowledge that independently reviewing factual findings may feel foreign to reviewing courts, but that is what the legislature desired when it instructed that "the court shall decide all questions of fact without deference." A.R.S. § 12-910(F); *S. Ariz. Home Builders Ass'n v. Town of Marana*, 254 Ariz. 281, 286 ¶ 31 (2023) ("Statutory interpretation requires us to determine the meaning of the words the legislature chose to use."). We do not suggest, however, that reviewing courts must make their own factual findings. The record will usually include the ALJ's written decision with factual findings and legal conclusions. A.R.S. § 41-1092.08(A). If an agency rejects or modifies that decision, it will provide "a written justification setting forth the reasons for" doing so. A.R.S. § 41-1092.08(B). As has always been true, a regulated party challenging agency action must identify those factual findings with which it disagrees and explain why, thus creating a "question of fact." *See* A.R.S. §§ 12-909(A), 12-910(F). Reviewing courts should independently resolve those fact questions based on the administrative record.

¶36 When an agency modifies an ALJ's factual finding without adequate support, a reviewing court has two options—it can disregard the modified factual finding or adopt the ALJ's original finding if the record instead supports it. But in all cases involving "the regulated party," reviewing courts must decide each "question of fact" without deferring to the agency, just as 910(F) instructs.

c.

¶37 The Commission Parties urge that judicial review mostly remains the same. Section 910(F) authorizes reviewing courts to "affirm, reverse, modify or vacate and remand *the agency action*." (Emphasis added.) And it then instructs them to affirm unless "*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) (emphasis added). The Commission Parties urge the status quo because that second sentence still requires review for substantial evidence. The Commission Parties take that to mean we still review all aspects of the agency decision for substantial evidence in all cases. But that argument ignores the distinction between the "agency action" and the "administrative decision."

¶38 The second sentence in 910(F) requires courts to review "the agency's action," not the agency's administrative decision. An "appealable agency action" is "an action" determining a party's "legal rights, duties or privileges[.]" A.R.S. § 41-1092(4). An "administrative decision," on the other hand, is "any decision, order or determination" that an agency renders if it "affects the legal rights, duties or privileges of persons" and terminates administrative proceedings. A.R.S. § 12-901(2). When an agency takes an "appealable agency action," that starts the administrative review process, and when an agency issues an "appealable administrative decision," that usually ends it. *See* A.R.S. §§ 41-1092.02(A), 41-1092.03(B), 41-1092.08(A); *see also* A.R.S. § 5-104(D) ("The [racing] commission may hear any appeal of a decision of the director in accordance with title 41, chapter 6, article 10."). So the agency action is not the administrative decision—the two are distinct.

¶39 After administrative review ends, judicial review begins. *See* A.R.S. § 41-1092.08(H). With certain exceptions, 910(F) governs the scope of that review. A.R.S. §§ 12-910(C), (D). But, in describing such review, 910(F) references only "the agency action." It does not reference the administrative decision terminating administrative review. Based on that text, reviewing courts determine whether substantial evidence supports the agency action, not the agency decision. And because the agency action is not the same as the administrative decision, requiring courts to review the agency action for substantial evidence does not also require them to review all aspects of the administrative decision for substantial evidence.

¶40 But they should reference the administrative decision when undertaking review. When reviewing agency action, courts need to know the agency's reasons for taking or upholding (or not) an agency action. The ALJ and agency must issue written decisions making or modifying findings of fact and conclusions of law. A.R.S. § 41-1092.08(A)–(B). And the final administrative decision is what tells reviewing courts how the agency justified the challenged action. *See* A.R.S. §§ 41-1092.08(H), 12-904(A), 12-910(A). But using the justifications in the administrative decision to review agency action does not make the administrative decision the agency action referenced in § 12-910(F)—the agency action and the administrative decision remain distinct. *See* A.R.S. § 12-904(B) (differentiating between the "[t]he original agency action from which review is sought" and "the decision by the [ALJ] and any revisions or modifications to the decision").

¶41 When reviewing agency action, courts also need to know what standard of review to apply. Before 2021, in regulated and non-regulated party

proceedings alike, they reviewed fact questions for substantial evidence because that was the only standard in 910(F)—not because the administrative decision is the agency action. The legislature has now instructed that, when "the regulated party" challenges "the agency action," reviewing courts must decide legal and factual questions without deferring to the agency. A.R.S. § 12-910(F). In so doing, the legislature exempted fact findings in certain administrative decisions, when challenged, from substantial evidence review. So, in regulated-party proceedings, reviewing courts independently review legal and factual questions in the administrative decision before asking whether the decision provides substantial evidence for the agency action. That is the only way for the second, third, and fourth sentences in 910(F) to each do work in regulated-party proceedings. *See Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003) ("The court must give effect to each word of the statute.").

¶42 The Commission Parties also argue substantial evidence review still applies to fact questions because whether such evidence exists is a legal question we review independently. That argument's main premise is sound—substantial evidence is a legal question reviewed *de novo*. *Brown v. Ariz. Dep't of Real Est.*, 181 Ariz. 320, 323 (App. 1995) (citation omitted) ("Whether substantial evidence supports the decision is a question of law[.]"). But the conclusion the Commission Parties draw from it—that substantial evidence review is non-deferential—is wrong.

¶43 Yes, reviewing courts engage in substantial evidence review *de novo*. But that does not mean such review is non-deferential. Quite the opposite. Courts have repeatedly referred to substantial evidence review as deferential. *See, e.g.*, *Siler v. Ariz. Dep't of Real Est.*, 193 Ariz. 374, 382 ¶ 41 (App. 1998) ("[T]he record must be viewed with deference to the factual findings with inquiry into whether substantial evidence supports those findings."); *In re Non-Member of State Bar of Ariz., Van Dox*, 214 Ariz. 300, 305 ¶ 19 (2007) ("Because substantial evidence supports the Hearing Officer's finding, we defer to it."); *see also Horne*, 242 Ariz. at 230 ¶ 13 (referring to substantial evidence review as "deferential"). Even the Commission Parties tacitly recognize that substantial evidence review involves deference. They call it "a low threshold" and "limited," which are just different ways of saying deferential. But they fail to recognize that, if reviewing courts still apply substantial evidence review in regulated-party proceedings, those courts will still defer when resolving fact questions. And that would disregard the legislature's instruction to ditch deference. *See* A.R.S. § 12-910(F).

¶44 What is more, adopting a "substantial evidence is not deference" approach would make other parts of § 12-910 null or superfluous. Again, when a regulated party is involved, courts must decide *all questions of law* "without deference." A.R.S. § 12-910(F); *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 561 ¶ 28 (2018) ("The amendment [to § 12-910(F)] prohibits courts from deferring to agencies' interpretations of law."). Legal interpretations, like substantial evidence, are reviewed *de novo*. *Eaton v. Ariz. Health Care Cost Containment Sys.*, 206 Ariz. 430, 432 ¶ 7 (App. 2003) (citing *Jones v. County of Coconino*, 201 Ariz. 368, 370 ¶ 10 (App. 2001)). Using the Commission Parties' logic, we could still defer when answering legal questions so long as we did so during independent review. For example, during *de novo* review, this court could revert to giving "great weight" to agency interpretations of regulations they implement. *Marlar*, 136 Ariz. at 411. But, in applying that standard—even during *de novo* review—we would defer. And doing so would disregard the legislature's instruction to interpret the law "without deference." A.R.S. § 12-910(F). Succinctly put, applying deferential standards during independent review is still deference.

¶45 Applying substantial evidence to fact questions in regulated-party proceedings would also make § 12-910(G) superfluous. When the legislature eliminated deference on legal questions, it added § 12-910(G). 2018 Ariz. Sess. Laws, ch. 180, § 1. That provision states that, in certain health care appeals, the court must affirm the agency action unless it "is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(G). In those appeals, we review the agency action like we did before the amendments to 910(F), even when a "regulated party" is involved. If the Commission Parties are correct that judicial review also remains the same in all other regulated-party proceedings, it is hard to see what work § 12-910(G) does. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019).

¶46 Acknowledging the 2021 amendment must do some work, the Commission Parties suggest that non-deferential review is triggered only if the superior court had to make new factual findings. Nothing in the statute supports that position. Rather, 910(F) states that deference does not apply "[i]n a proceeding brought by or against the regulated party[.]" A "proceeding" is "[a]n act or step that is part of a larger action." *Proceeding*, Black's Law Dictionary (11th ed. 2019). When a party seeks judicial review—in the superior or appellate court—that is a "proceeding." *See Waetzig v. Halliburton Energy Servs., Inc.*, ___ U.S. ___, ___, 2025 WL 608110, *6 (Feb. 26, 2025) ("These definitions suggest that the term 'proceeding' encompasses all steps in an action[.]"). And, once there is a proceeding, the statute's text imposes only one more condition for non-deferential review— the proceeding must be "brought by or against the regulated party." A.R.S. § 12-910(F). The Commission Parties would add another condition—the superior court had to make new factual

findings—thereby limiting the 2021 amendment to a subset of regulated-party proceedings. If the legislature wanted to limit non-deferential review in that manner, it would have said so. We will not write-in missing conditions. *City of Phoenix v. Butler*, 110 Ariz. 160, 162 (1973) (internal citation omitted) ("[T]he courts [do not] rewrite statutes.").

d.

¶47 Ron argues that, in regulated-party proceedings, we should instead defer to the ALJ's factual findings. But that argument slants too far the other way. Under 910(F), judicial review applies to "the agency action." Again, an "agency action" triggers a regulated party's ability to pursue administrative review. A.R.S. §§ 41-1092.03(B); § 41-1092(4). Although the ALJ's recommendation is created during the administrative review process and becomes part of the record, it is not "the agency action" courts review.

3.

a.

¶48 Moving on from factual findings, agency action sometimes hinges on the legal effect of those findings—called mixed questions of law and fact. Arizona courts have long refused to defer on how to apply the law to facts. *See, e.g., Red Rover Copper Co. v. Indus. Comm'n*, 58 Ariz. 203, 214 (1941). For example, over eighty years ago, our supreme court asked whether the Industrial Commission could apply equitable principles. *Id.* Concluding the Commission could, the court reasoned that if the Commission "errs in its application of these rules its action is subject to review[.]" *Id.* And the court was confident such review would be meaningful because, while courts defer to the commission's factual findings, they had "never hesitated to consider the question of whether the law was properly applied to those facts independently." *Id.* Taking that cue, this court later confirmed that we "substitute our judgment for agency conclusions regarding the legal effect of its factual findings." *Sanders v. Novick*, 151 Ariz. 606, 608 (App. 1986) (citing *Gardiner v. Ariz. Dep't of Econ. Sec.*, 127 Ariz. 603, 606 (App. 1980)); *see also Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 178 ¶ 14 (App. 2004) (refusing to defer to the Board of Education's conclusion that a teacher engaged in unprofessional conduct).

b.

¶49 Reviewing courts still independently review mixed questions. If anything, 910(F) now dictates we do so. By requiring non-deferential review of factual *and* legal questions, the statute likely requires non-deferential review of mixed questions. *See Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 227 (2020) ("We conclude that the phrase 'questions of law'" includes "the application of a legal standard to undisputed or established facts."). But, regardless, nothing in 910(F) displaces the historical practice of independently deciding mixed questions. *See Sanders*, 151 Ariz. at 608; *Winters*, 207 Ariz. at 178 ¶ 14.

4.

a.

¶50 At times, agency action turns on witness credibility. Courts have always refrained from second-guessing ALJ credibility findings. *See W. States Petroleum, Inc. v. Ariz. Dep't of Env't Quality*, 232 Ariz. 252, 253 ¶ 7 (App. 2013) ("Issues regarding witness credibility are for the ALJ to decide, not the superior court or this court.") (citation omitted); *Siler*, 193 Ariz. at 382 ¶ 41 ("On questions of credibility, the administrative hearing officer is the proper judge."). That makes sense because the ALJ is the one who "had the opportunity to look the witness in the eye and reach a conclusion with respect to his veracity or lack thereof." *Adams v. Indus. Comm'n*, 147 Ariz. 418, 421 (App. 1985).

¶51 This court has, however, allowed agencies to second-guess ALJ credibility findings, even when agencies do not see or hear from any witnesses (on a cold record). *See Ritland v. Ariz. State Bd. of Med. Exam'rs*, 213 Ariz. 187, 191 ¶ 12 (App. 2006). In *Ritland*, this court attempted to reconcile "deference to the trier of fact with the [agency's] duty and authority to render the final decision." 213 Ariz. at 191 ¶ 11. It held that agencies are "not bound by the ALJ's findings of fact, including those related to credibility." *Id.* ¶ 12. But recognizing "the importance of the ALJ's observation of the demeanor and attitude of the witnesses," it instructed agencies to give ALJ credibility findings "greater weight than other findings of fact more objectively discernible from the record." *Id.* ¶ 13. It also instructed agencies not to reject ALJ credibility findings without including "factual support" for doing so. *Id.* ¶ 14. And, while reviewing courts should scrutinize an agency's "disagreements with an ALJ's credibility findings," we said courts should not reverse when "there is substantial evidence" supporting those disagreements. *Id.* at 191–92 ¶ 15.

b.

¶52 As revised, 910(F) puts courts in a difficult position when reviewing credibility findings in regulated-party proceedings. As explained, agencies—not ALJs—are responsible for issuing final administrative decisions subject to judicial review. But witness credibility is a question of fact, so 910(F) no longer allows reviewing courts in regulated-party proceedings to defer when agencies modify an ALJ's credibility finding. *Cf. State v. Harrison*, 111 Ariz. 508, 509 (1975) ("The credibility of witnesses is an issue of fact to be resolved by the jury[.]"); *State v. Hernandez*, 112 Ariz. 246, 248 (1975) ("[T]he credibility of witnesses when their stories conflict is a question of fact for the jury."); *Logerquist v. McVey*, 196 Ariz. 470, 488 ¶ 52 (2000) (noting the jury determines the credibility of testimony as an issue of fact). Section 910(F) instead requires reviewing courts to resolve credibility disputes without deferring to anyone.

¶53 But that creates challenges because reviewing courts are ill-equipped to make credibility findings on a cold record. *See Brooks v. Indus. Comm'n*, 24 Ariz. App. 395, 397 (1975) ("[W]here the credibility of witnesses is an issue, it is almost impossible to make that judgment from a written record."). Plus, our supreme court and the United States Supreme Court have suggested that reversing credibility determinations on a cold record raises due process concerns. *See Pima Cnty. Juv. Action No. J-63212–2*, 129 Ariz. 371, 375 (1981) (holding that a reviewing court "violated the Due Process Clause of the Fourteenth Amendment" because it "necessarily rejected the referee's credibility assessments without having personally heard the disputed testimony"); *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980) ("[W]e assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility . . . and substitute the judge's own appraisal; to do so without seeing and hearing the witness . . . whose credibility is in question could well give rise to serious questions[.]"); *cf. Johnson v. Finn*, 665 F.3d 1063, 1074 (9th Cir. 2011) (citations omitted) ("Taking the Supreme Court's various hints, [five circuits] have all held that a district judge may not reject the credibility finding of a magistrate judge without holding a new evidentiary hearing.").

¶54 We resolve the conundrum this way: When an agency does not hear live testimony before modifying an ALJ's credibility finding or making their own, a reviewing court defers only to the ALJ's credibility finding unless it is clearly erroneous. *Harte–Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499–500 (1984)) ("[C]redibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses[.]'").

¶55 This solution has at least four benefits. First, the ALJ's credibility finding is part of the administrative record, so deferring to that finding follows 910(F)'s instruction to "review[] the administrative record." Second, deferring to the ALJ recognizes that reviewing courts are ill-equipped to determine credibility on a cold record. *See Brooks*, 24 Ariz. App. at 397. Third, deferring avoids the serious constitutional questions that would arise if reviewing courts were to make credibility findings on a cold record. *See Sandra R. v. Dep't of Child Safety*, 248 Ariz. 224, 230 (2020) (citation omitted) ("[I]f possible, we will construe [a statute] to avoid rendering it unconstitutional."); *J-63212–2*, 129 Ariz. at 375; *Raddatz*, 447 U.S. at 681 n.7. And fourth, deferring aligns with prior caselaw saying that "[i]ssues regarding witness credibility are for the ALJ to decide, not the superior court or this court"—caselaw that remains valid. *W. States Petroleum*, 232 Ariz. at 253 ¶ 7 (quoting *Siler*, 193 Ariz. at 382 ¶ 41).

5.

a.

¶56 That leaves agency discretion and expertise. The legislature—within certain bounds—may delegate discretion to an agency in implementing a law. In other words, "the legislature may not delegate the authority to enact laws to a government agency, but it can give agencies discretion as to execution of the laws." *Lewis v. Ariz. Dep't of Econ. Sec.*, 186 Ariz. 610, 615 (App. 1996); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) ("In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion."). When a statute grants agency discretion, reviewing courts determine the outer bounds of that discretion (a legal question) and then whether the agency acted within those bounds. *See Lewis*, 186 Ariz. at 615; *Loper Bright*, 603 U.S. at 395. Traditionally, reviewing courts defer when deciding whether an agency acted within its discretion. *See Kisor v. Wilkie*, 588 U.S. 558, 633 (2019) (Kavanaugh, J., concurring) ("[A] judge" can "engage in appropriately rigorous scrutiny of an agency's interpretation of a regulation," and defer "to an agency's reasonable policy choices within the discretion allowed by a regulation[.]").

¶57 Agency action also sometimes involves expertise. This court has long recognized that reviewing courts "may not function as a 'super agency' and substitute its own judgment for that of the agency where . . . agency expertise [is] involved." *DeGroot*, 141 Ariz. at 336.

b.

¶58 Deference to agency discretion and expertise still plays a role in regulated-party proceedings under 910(F). Although reviewing courts must decide all legal and factual questions without deferring, if an agency uses discretion or expertise in other ways, reviewing courts can defer on those matters.

¶59 An example may help illustrate. The Commission has discretion to make certain licensing and permitting decisions. For example, the Commission "*may* refuse to approve" a permit to hold a racing meeting if "[t]he granting of a permit . . . in the locality set out in the application is not in the public interest or convenience." A.R.S. § 5-108(A)(2)(c) (emphasis added). So even when a permit in the locality requested is not in the public interest, the Commission "may" still grant the permit. *See* A.R.S. § 5-108(A)(2)(c). And when exercising that discretion, the Commission can use expertise about where racing meetings should be located.

¶60 Imagine the Commission decides that a particular locality is not in the public interest, but it still grants a permit. In making that decision, the Commission made factual findings about the "locality set out in the application." It also interpreted the phrase "locality" or "public interest

or convenience." And it applied its factual findings to the statutory standard to conclude the permit is not in the public interest. But, even after that conclusion, it still exercised discretion to grant the permit.

¶61 If that action is challenged, a reviewing court would not defer to the Commission's factual findings, legal interpretations, or applications of law to fact. But assuming the reviewing court agrees—without deferring—that the locality is not in the public interest, it could then defer to the Commission's discretionary decision to grant the permit.

B.

¶62 In short, the framework for reviewing agency action in regulated-party proceedings is this: First, a reviewing court should determine whether "the regulated party" is challenging agency action. Second, it should identify the agency action at issue. Third, it should determine whether the administrative decision terminating administrative review contains legal conclusions, factual findings, mixed questions of law and fact, or relies on agency discretion or expertise. When "the regulated party" challenges conclusions of law, factual findings, or mixed questions of law and fact, the reviewing court must not defer to the agency in resolving those challenges. Instead, it must independently resolve them. After doing so, the reviewing court should ask whether the administrative decision adequately supports the agency action. Ordinarily, that will require the reviewing court to determine whether its independent factual and legal conclusions, along with any unchallenged agency conclusions, provide substantial evidence supporting the agency action.

II.

¶63 We now apply that framework to the agency action here.

A.

¶64 We first ask whether Ron is "the regulated party." We need not pause long here because the Commission Parties do not dispute that Ron is "the regulated party." So the amendments to 910(F) apply.

B.

¶65 We next identify the agency action. Again, an "appealable agency action . . . determines the legal rights, duties or privileges of a party[.]" A.R.S. § 41-1092(4).

¶66 Recall that Ron applied for a license in November 2013. At that time, Arizona law provided that "[t]he director [of the Racing Department] shall license personnel and shall regulate and supervise all racing meetings[.]" A.R.S. § 5-104(B) (2013). And it explained when the Racing Department "may deny or refuse to renew a license." A.R.S. § 5-108(A)(3), (A)(4) (2013); *see also* A.R.S. § 5-101(10) (2013) (defining "Department" as "the Arizona department of racing").

¶67 In its notice, the Racing Department relied on § 5-108 to deny Ron a license, and it gave reasons for its denial. It also acknowledged that "[a] person to whom a license has been denied may request a hearing on this determination *as an 'appealable agency action'* pursuant to A.R.S. § 41-1092." (Emphasis added). Ron requested a hearing, so the administrative review process began. But, at least in this case, nothing that occurred during that process changes that the "agency action" we review is the Racing Department's license denial. *See* A.R.S. § 41-1092(4).

¶68 To determine whether substantial evidence supports that agency action, we review the justifications in the Commission's administrative decision. *See Sec. and Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 95 (1943) ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."); *see also Madsen v. Fendler*, 128 Ariz. 462, 466 (1981) (a court reviewing an agency action "is limited to the questions properly raised before the administrative hearing").

C.

¶69 Whether that decision justifies the agency action here turns mostly on factual findings. The decision does not rely on agency discretion or expertise. Thus, under 910(F), we decide whether to affirm the license denial by reviewing the administrative record and deciding all questions of law and fact without deferring to the Commission.

1.

¶70 The Commission's decision mostly relies on A.R.S. §§ 5-108(A)(3) and 5-108(A)(4). The former section says, "The department may deny . . . a license . . . for any person who has made a knowingly false statement of a material fact to the department." A.R.S. § 5-108(A)(3). The latter says, "The department may deny . . . a license . . . if the applicant has failed to meet any monetary obligation in connection with any racing meeting held in this state." A.R.S. § 5-108(A)(4). Both sections give the Commission discretion to deny a license, but only when the applicant has engaged in prohibited conduct.

¶71 For Ron to have made a knowingly false statement of material fact, he had to (1) make a statement, (2) that was false, (3) while knowing it was false, and (4) that was material to the Racing Department. *See* A.R.S. § 5-108(A)(3). For Ron to have breached a monetary obligation, he had to (1) breach, (2) a monetary obligation, (3) in connection with, (4) any racing meeting, (5) held in this State. *See* A.R.S. § 5-108(A)(4). Whether Ron engaged in prohibited conduct raises fact questions, which we independently decide. A.R.S. § 12-910(F); *supra* ¶ 34.

2.

¶72 The Commission found Ron knowingly made three false statements: (1) he did not disclose that he could pay off his note payable by causing Bruin Corp. to transfer land to TP Racing ("Note-Land

Swap Option"); (2) he lied about his wife owning Bruin Corp.; and (3) he lied about Bruin Corp.'s relationship to TP Racing. The Commission also found that Ron did not prove that he met all monetary obligations regarding racing meetings. Ron challenges each of those findings and conclusions.

a.

¶73 First, the Commission found that Ron did not tell the Racing Department about the Note-Land Swap Option.

i.

¶74 Contrary to that finding, Ron (or his agents) disclosed the Option. The Commission did not dispute that the Racing Department knew that Ron signed a promissory note as his capital contribution. The Commission instead found that Ron did not tell the Racing Department that he could pay off that note with land. We resolve that question differently.

¶75 Ron testified he told the Racing Department about the Note-Land Swap Option in 2000. After hearing that testimony, the ALJ found it credible. But the Commission concluded otherwise on a cold record. Whether Ron was credible is a fact question (which the Commission admitted during oral argument), so we no longer defer to the Commission. *See* A.R.S. § 12-910(F). Instead, we defer to the ALJ because he "saw witnesses, heard evidence and the manner in which it was given, and weighed that evidence before reaching a decision." *Ohlmaier v. Indus. Comm'n*, 161 Ariz. 113, 119 (1989); *see supra* ¶ 54. There is no basis in this record to conclude that the ALJ erred. We, therefore, adopt the ALJ's finding that Ron credibly testified that he told the Racing Department about the Note-Land Swap Option in 2000.

¶76 But even without that credibility finding, plenty of evidence corroborates Ron's testimony. To start, several TP Racing executives confirmed the Note-Land Swap Option's existence and purpose. For example, Buzz Alston, TP Racing's counsel, testified that "Jerry and Ron were going to . . . convey their land to [TP Racing] and their notes would be extinguished[.]" John Mangum, another lawyer for TP Racing, had a similar understanding. Patty Chakour, TP Racing's Chief Financial Officer, said she "view[ed] Ron's note as a placeholder . . . securing his promise to put the Bruin land into" TP Racing.

¶77 In 2000, TP Racing's outside auditors documented the Note-Land Swap Option and the Racing Department's role in it. The auditors explained the arrangement this way: "If Jerry does not give [TP Racing] the Land at the end of agreement He [sic] would have to pay [TP Racing] the $14,065,000 and [Ron] would have to pay [TP Racing] $4,635,000." And the auditors documented that the Note-Land Swap Option existed because the Racing Department "required [Jerry] to be a 50% owner of TP Racing[.]"

¶78 Then, in 2003, TP Racing applied to renew its permit. During that process, TP Racing provided the Racing Department with a balance sheet. It listed "Notes Receivable – Related Parties" for $18,700,000 (the combined amount of Jerry and Ron's notes) to end 2002. While interviewing a TP Racing representative, a Racing Department investigator asked whether that amount was "related to the 1031 property exchanges that you and the group affected to buy Turf back in June 2000 . . . because it is the same amount as the Section 1031[.]" The representative confirmed the amount was the same and it was "tied in" to the 1031 exchange.

¶79 During the permitting process, the Racing Department also hired a certified public accountant ("CPA"). He reported back with findings and recommendations. In so doing, he viewed the option for Jerry and Ron to pay off their notes with land as beneficial to TP Racing.

¶80 In his report, the CPA explained that "when horses race at Turf Paradise, they actually run on property owned by three separate entities." He observed that the land is "leased back to [TP Racing] through three separate lease agreements." But that arrangement would change. He explained that, because of meetings with the Racing Department, TP Racing would "accept[] the land owned by J. Simms Enterprises in exchange for a $14,065,000 note owed to [TP Racing] by [Jerry]." And TP Racing would receive land "which is essential to [its] operations" while giving Bruin Corp. land which is non-essential to racing. Following those transactions, TP Racing would directly own all essential real estate.

¶81 The CPA also noted that retiring the notes receivable would improve TP Racing's finances. He explained that TP Racing's "audited financial statements include $18,700,000 in current assets for notes receivable from [Jerry] and [Ron]." He confirmed those notes were unsecured and had not been paid off for three years, and he thought, given Jerry and Ron's significant net worth, "it is unlikely that [TP Racing] would make a demand for any significant payment under these notes" any time soon. He reiterated that, due to meetings with the Racing Department, TP Racing would "accept[] land owned by J. Simms Enterprises, LLC . . . for the $14,065,000 note owed" by Jerry. And he explained why doing so would improve TP Racing's finances: it would replace "a note (for which no payment would likely be demanded by [TP Racing]) with real estate essential to its operations."

¶82 Three days later, the Racing Department sent the Commission a written report about TP Racing's permit. The report attached the CPA's findings and recommendations. It disclosed that two entities leased land required for racetrack operations to TP Racing. Those two parcels, "owned by unlicensed entities, divide the actual track and auxiliary areas." To extend TP Racing's permit, the report

recommended that those two parcels "be transferred without encumbrance to [TP Racing]."

¶83 Shortly thereafter, Jerry caused J. Simms Enterprises to deed its land to TP Racing in exchange for cancelling Jerry's note. Similarly, Ron caused Bruin Corp. to trade land under the racetrack for land that is not. Neither transaction bothered the Racing Department. Rather, it encouraged those transactions to renew TP Racing's permit because they ensured TP Racing owned all land under the racetrack and, as to Jerry's transaction, traded a note receivable for a current asset.

¶84 Finally, Jerry confirmed everyone knew about the Note-Land Swap Option. In 2010, Jerry demanded that Ron pay off his promissory note by having Bruin Corp. transfer land to TP Racing. Jerry wrote,

> If you will recall, *all of us agreed* and expected that the land I utilized for a 1031 exchange would ultimately be . . . rolled into Turf Paradise. I did that. So far, you have not[.] All that was ever contemplated is that the track would own the property. Surely you can find a way to accomplish the transaction. *Then the track . . . would not have to worry about collecting a $4,635,000 note from you*.

(Emphasis added). Given the other evidence discussed, it is improbable that "all of us" did not include the Racing Department. In sum, the Racing Department knew that Jerry and Ron could pay off their promissory notes by having their entities transfer land to TP Racing.

ii.

¶85 Next, we turn to materiality. Even if Ron did not disclose the Note-Land Swap Option, we conclude that failure was immaterial because it would not have impacted the Racing Department's decisions.

¶86 Ordinarily, whether the failure to do something is material is a question of fact. *See J.W. Hancock Enters., Inc. v. Registrar of Contractors*, 126 Ariz. 511, 514 (1980) ("The findings of fact also clearly establish that appellant failed to conform to specifications. Whether such failure was material is also a question of fact."); *Hill v. Jones*, 151 Ariz. 81, 86 (App. 1986) ("Unless reasonable minds could not differ, materiality is a factual matter which must be determined by the trier of fact."). But one could argue— Ron's counsel did at oral argument—that materiality is a mixed question of law and fact. Either way, we determine materiality *de novo*. *See* A.R.S. § 12-910(F); *supra* ¶¶ 34, 49.

¶87 Materiality is "an objective standard." *Hirsh v. Ariz. Corp. Comm'n*, 237 Ariz. 456, 463 ¶ 27 (App. 2015). A statement is material if it is significant enough to affect the outcome of the agency's decision. *Cf. id.* at 463–64 ¶ 27 (internal quotation marks omitted) (quoting *Trimble v. Am. Sav. Life Ins. Co*, 152 Ariz. 548, 553 (App. 1986)) ("The requirement of materiality is satisfied by a showing of substantial likelihood that, under all the circumstances, the misstated or omitted fact would have assumed actual significance in the deliberations of a *reasonable* buyer."); A.R.S. § 13-2701(1) ("'Material' means that which could have affected the course or outcome of any proceeding or transaction."). Applying that standard, a statement is material if it was significant enough to affect the outcome of the Racing Department's licensing and permitting decisions in 2000 or 2003. Put differently, materiality hinges on whether the withheld information would have made the Racing Department less likely to grant Ron a license and TP Racing a permit.

¶88 We conclude the Racing Department would have granted Ron a license even if it knew about the Note-Land Swap Option. As explained, the Racing Department knew Jerry and Ron gave promissory notes for their capital contributions. The CPA who reviewed TP Racing's finances reported back that TP Racing was not likely to demand repayment of those notes anytime soon. But, because of meetings with the Racing Department, TP Racing agreed to accept land from J. Simms Enterprises to pay off Jerry's $14 million note. TP Racing would also accept Bruin Corp.'s land under the racetrack for non-essential land. The CPA thought both transactions would be beneficial—they would ensure TP Racing owned all land under the racetrack and improve TP Racing's finances.

¶89 There is no evidence the Racing Department thought Ron's note was any different than Jerry's. In fact, Jerry confirmed in 2010 that both notes were the same. And, though Jerry's note was larger than Ron's, nothing supports that the Racing Department would not have viewed the Note-Land Swap Option the same as Jerry's transaction—positively. After all, the Note-Land Swap Option would have the same benefits. It would allow Ron to transfer land under Turf Paradise (even if not essential to horse racing) and allow TP Racing to exchange a note receivable for a current asset, thereby improving TP Racing's finances. Even if the Racing Department did not know about the Note-Land Swap Option, disclosure would have made the Racing Department more likely (not less) to grant Ron a license and TP Racing a permit. Thus, any failure to disclose the Note-Land Swap Option was immaterial.

b.

¶90 Second, the Commission found Ron violated § 5-108(A)(3) by telling the Racing Department until 2006 that his wife owned Bruin Corp. Ron unquestionably made false statements about Bruin Corp.'s ownership. But we must determine whether those false statements were made knowingly and were material. *See* A.R.S. § 5-108(A)(3).

i.

¶91 We begin with the "knowing" requirement.That issue presents a fact question, which we review *de novo*. *See State v. Romero*, 248

Ariz. 601, 604, ¶ 12 (App. 2020) (whether the defendant knowingly engaged in conduct is a fact question because it "refers to factual knowledge"); A.R.S. § 12-910(F); *supra* ¶ 34.

¶92 Ron testified to the ALJ that his false statements about Bruin Corp.'s ownership were simply mistaken. He explained that they stemmed from thinking about Bruin Corp.'s ownership from a family standpoint, not a legal one. The ALJ found Ron's explanation credible.

¶93 Even if that explanation was credible, we disagree that it makes Ron's misstatements unknowing. The term "knowingly" means "only a knowledge that the facts exist that bring the act or omission within the provisions of the statute using such word." A.R.S. § 1-215(17)(a). This court has equated "knowingly" with "willfully." *State v. Burke*, 238 Ariz. 322, 326–27 ¶ 8 (App. 2015). And "willfully" is defined as "with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists." A.R.S. § 1-215(42).

¶94 Ron's explanation—that he was thinking about Bruin Corp. from a family standpoint, not a legal one—suggests that, from a legal standpoint, he knew his wife did not own Bruin Corp. There is also little doubt that Ron had access to information about who owned Bruin Corp. That makes Ron's misstatements objectively knowing, even if he subjectively mistook the information sought.

ii.

¶95 We next decide whether Ron's misstatements were material. Starting in 2006, Ron accurately disclosed that he owned Bruin Corp. So we focus on whether knowing that Ron, rather than his wife, owned Bruin Corp. was material to the Racing Department's licensing or permitting decisions from 2000 to 2006. We conclude such knowledge was immaterial because it would not have affected the outcome of those licensing and permitting decisions.

¶96 In fact, by inaccurately disclosing that his wife owned Bruin Corp., Ron made it less likely that the Racing Department would grant TP Racing a permit and more likely his wife would come under scrutiny. As discussed, in 2000, Bruin Corp. owned land under the racetrack at Turf Paradise and leased it to TP Racing. The Racing Department approved that arrangement, despite that a non-licensed entity held land under the racetrack beyond TP Racing's control.

¶97 Ron later had Bruin Corp. trade that land for non-essential land. But before that happened, the Racing Department's CPA flagged whether several unlicensed entities and individuals should be licensed. He identified Ronald A. Simms Perpetual Asset Shield Trust, Bruin Corp., J. Simms Enterprises, LLC, TP Plaza LLLP, and Ron's wife as unlicensed "related parties." He explained that Ron's wife was "the owner of Bruin Corporation and a guarantor of [TP Racing's] long-term bank debt." Because J. Simms Enterprises and Bruin Corp. agreed to transfer all essential land to TP Racing, the CPA concluded they would "no longer [have] any significant operating influence over" TP Racing. When completed, those transactions "would leave only Ronald A. Simms Perpetual Asset Shield Trust and [Ron's wife] as unlicensed entities that could have an influence over [TP Racing's] operations." But because "Ronald A. Simms Perpetual Asset Shield Trust is 100% controlled by a current licensee, [Ron], and [Ron's wife is] only a guarantor of [TP Racing's] debt by virtue of her marriage to [Ron], it would appear, from a general business perspective, to be unnecessary to license those entities."

¶98 The CPA recommended that the Racing Department "determine if [Ron's wife], Bruin Corporation and J. Simms Enterprises, LLC are required to be licensed." He explained that Ron's wife "owns 100% of Bruin [Corp.] and is a guarantor of [TP Racing's] bank debt" and neither was licensed. But TP Racing "is in the process of acquiring all real estate necessary for its daily operations," so "J. Simms Enterprises will no longer have any association with [TP Racing] and Bruin [Corp.] will own and lease land to [TP Racing] which is non-essential to horse racing operations." And he concluded that "[t]his course of action would appear to alleviate any need to license these entities and [Ron's wife.]" The Racing Department did not raise any licensing issues to the Commission.

¶99 Despite believing Ron's wife owned 100% of an entity that controlled land under the racetrack, the Racing Department did not require her to be licensed. In truth, Ron owned 100% of Bruin Corp., and so, like Ronald A. Simms Perpetual Asset Shield Trust, Bruin Corp. was "100% controlled by a current licensee, [Ron]," making it "unnecessary to license" that entity. Although Ron's wife guaranteed TP Racing's debt, the Racing Department knew she had done so, yet it did not require her to be licensed. Finally, the Commission found that, after Bruin Corp. transferred land under the racetrack to TP Racing, "there was no further concern over the ownership of Bruin and its authority over the race track until the denial of Mr. Simms' license application." We agree with that finding, but the conclusion we draw from it is that Ron's knowing misstatements about who owned Bruin Corp. were immaterial.

c.

¶100 Third, the Commission found that Ron made this misstatement of material fact to the Racing Department: "Bruin was nothing more than a landlord with respect to the race track." We conclude that statement was neither false nor material.

¶101 It was true because Bruin Corp. was, in fact, only a landlord in relation to the racetrack. The record does not suggest that Bruin Corp. ever had

anything but a landlord-tenant relationship with TP Racing. That Ron and TP Racing agreed that Ron could pay off his promissory note with Bruin Corp.'s land—an arrangement the Racing Department knew about— did not make Bruin Corp. more than a landlord to the racetrack. The Commission concluded that it "need not (and does not) decide whether an oral agreement existed between [Ron] and [Jerry] that would have permitted [Ron] to pay off his promissory note by transferring the Bruin land to TP." It is hard to square that non-conclusion with the Commission's conclusion that Bruin Corp. was more than a landlord.

¶102 After Bruin Corp. transferred land under the racetrack, Bruin Corp. had no relationship—landlord or otherwise—to the racetrack. Instead, if anything, Bruin Corp. was TP Racing's landlord as to land elsewhere within the Turf Paradise complex. Thus, Bruin Corp. was never anything more than a landlord vis-à-vis the racetrack, making Ron's statement about it true.

¶103 On materiality, the Racing Department knew how Ron and Jerry could pay off their promissory notes. *See supra* ¶ 84. And yet the Racing Department did not object. If nothing else, Ron and Jerry's ability to control their related entities' land and swap TP Racing's note receivables for current assets comforted the Racing Department. So Ron's statements about Bruin Corp.'s relationship with the racetrack were immaterial.

d.

¶104 Finally, the Commission concluded that it could not determine whether Ron met all "monetary obligation[s] in connection with any racing meeting held in this state." A.R.S. § 5-108(A)(4). The Commission could not do so, it thought, because of "ongoing civil litigation about whether [Ron] failed to pay off the promissory note he gave to" TP Racing. The Commission instead concluded that Ron failed to show he satisfied § 5-108(A)(4).

¶105 That conclusion requires us to interpret the phrase "in connection with any racing meeting held in this state." We do so *de novo*. *See* A.R.S. § 12-910(F); *supra* ¶ 31. The phrase "racing meeting" is defined as "a number of days of racing allotted by the commission in one permit." A.R.S. § 5-101(25). Applying that definition, Ron could only violate § 5-108(A)(4) by breaching a monetary obligation in connection with racing days allotted in TP Racing's permit. The record does not support that Ron's promissory note was made in connection with racing days allotted in TP Racing's permit. Rather, the promissory note was Ron's capital contribution. Ron did not violate § 5-108(A)(4).

D.

¶106 Our last task is to decide whether the Commission's decision provides substantial evidence supporting the Racing Department's denial of Ron's license application. To repeat, "[s]ubstantial evidence is evidence which would permit a reasonable person to reach the" agency's result. *Sierra Club-Grand Canyon Ch.*, 237 Ariz. at 575 ¶ 22.

¶107 We have found that Ron did not make a knowingly false statement of material fact or breach a monetary obligation in connection with any race meeting. Without Ron doing one of those two things, the Racing Department lacked discretion to deny Ron a license. The Commission's decision and the record do not support that Ron otherwise did anything allowing the Racing Department to deny him a license. Neither the Commission's decision nor the record provides substantial evidence supporting the agency action here.

ATTORNEY FEES AND COSTS

¶108 Ron requests attorney fees and costs from the Commission under A.R.S. §§ 12-341, 12-348, and 12-2030. As the prevailing party on appeal, Ron is entitled to recover his appellate attorney fees and costs from the Commission under §§ 12-341 and 12-348(A)(2) upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶109 Why would the legislature instruct courts to independently answer legal and factual questions when reviewing agency action? This case might demonstrate why. At the start, Jerry's counsel provided the Racing Department with evidence against Ron and then helped draft the document denying Ron's license. *Simms*, 253 Ariz. at 216 ¶¶ 5–6. During the Commission proceedings, Jerry had contact with various commissioners. *Simms*, 2022 WL 1256594, at *1 ¶¶ 2–3. Those proceedings produced an administrative decision setting aside the ALJ's credibility findings and relying on statements Ron made over a decade prior, despite that, in the interim, the Racing Department repeatedly granted Ron a license. Under the old regime, with deference to agency factfinding, we probably would have to affirm the agency action here. Under the new regime, with full-throated review of agency factfinding, the Racing Department's action cannot stand.

¶110 Although we cannot order the Commission to grant Ron a license, we vacate the superior court's judgment and remand to enter judgment for Ron on his challenge to the license denial. We deny all unresolved requests for judicial notice.

Cite as
144 Arizona Cases Digest 31

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

Jeff YAUCK,
***an individual*;**
and
Cody Alt,
an individual, Petitioners,
v.
WEST TOWN Bank & Trust,
an Illinois chartered bank, Respondent.

No. 1 CA-SA 24-0268
FILED 03-20-2025

Petition for Special Action from the Superior Court
in Maricopa County
No. CV2024-013134
The Honorable Dewain D. Fox, Judge
JURISDICTION ACCEPTED;
RELIEF GRANTED

COUNSEL
Gallagher & Kennedy, P.A. Phoenix
By Dale C. Schian, Christopher W. Thompson
Counsel for Petitioners
Provident Law, Scottsdale
By Timothy J. Watson, Aaron Lumpkin
Counsel for Respondent

OPINION
Judge Daniel J. Kiley delivered the opinion of the Court, in which Presiding Judge Michael J. Brown and Judge D. Steven Williams joined.

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

KILEY, Judge:
¶1 Petitioners Jeff Yauck and Cody Alt seek special action relief from orders granting an application for provisional remedies filed by Respondent West Town Bank & Trust ("West Town") and allowing West Town to conduct prejudgment discovery into Petitioners' financial condition. For the reasons that follow, we accept jurisdiction and grant relief.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Petitioners are the founders of, and former majority shareholders in, PureKana, LLC, ("PureKana"), which was in the business of selling "hemp-based cannabidiol-related products."

¶3 In 2020, West Town lent PureKana $10,000,000 pursuant to an agreement (the "Loan Agreement") that required full repayment after five years, with periodic payments in the interim. Under the Loan Agreement, the outstanding balance would be due upon an uncured "event of default," including, as relevant here, PureKana's filing of a bankruptcy petition. West Town and PureKana also entered into several ancillary agreements, including a security agreement (the "Security Agreement") that gave West Town a security interest in PureKana's inventory, equipment, and other tangible and intangible property.

¶4 When PureKana entered the Loan Agreement, Petitioners simultaneously executed separate guaranty agreements (the "Guaranty Agreements") in which they guaranteed full payment to West Town of amounts due under the Loan Agreement.

¶5 In May 2024, West Town sued Petitioners, alleging that PureKana defaulted under the Loan Agreement by filing a bankruptcy petition. West Town sought to recover from all sums due under the Loan Agreement, which amounts to principal and accrued interest of $10,250,391.10 along with attorney fees, costs, and other accruing charges.

¶6 West Town also filed an Application for Prejudgment Remedies of Attachment and Garnishment With Notice and Motion for Order Permitting Prejudgment Discovery of Assets in Aid of Enforcement of Provisional Remedies (the "Application") seeking the provisional remedies of attachment under A.R.S. § 12-1521(1) and prejudgment garnishment under A.R.S. § 12-1570(5).

¶7 In support of the requested attachment, the Application stated that Petitioners are liable for PureKana's obligations under the Guaranty Agreements. Without referencing West Town's security interest in PureKana's tangible and intangible property, the Application alleged that Petitioners' obligation under the Guaranty Agreements and Loan Agreement is "unsecured," thereby justifying attachment under A.R.S. § 12-1521(1).

¶8 In support of the requested prejudgment garnishment, the Application cited A.R.S. § 12-1570(4), which defines "judgment creditor" to include a defendant against whom an order granting a provisional remedy has been entered. The Application did not, however, include the information required to be included in an application for prejudgment garnishment. *See* A.R.S. § 12-1572(2). The Application did not, for example, identify a garnishee, nor did it set forth "good reason to believe" that a garnishee "has in [its] possession nonexempt personal property belonging to the judgment debtor." A.R.S. § 12-1572(2)(c).

¶9 In its Application, West Town requested leave to conduct discovery into Petitioners' assets. Acknowledging "the normal rule prohibiting the taking of discovery of a party's assets before judgment is entered," West Town argued that an exception was warranted in this case. According to

West Town, obtaining discovery of Petitioners' financial condition before judgment would help it determine whether litigating its claims on the merits would be cost-effective. "[I]t is possible that the plaintiff may never prevail in its case," West Town explained, and so "it makes no sense to waste the time and resources of the parties and their counsel dealing with issues about assets to enforce the plaintiff's judgment until after there has been an entry of judgment against the defendant [*sic*]."

¶10 Neither the Complaint nor the Application were supported by an affidavit. Nonetheless, the superior court set a "probable validity" hearing on the Application. *See* A.R.S. § 12-2410. The day before the hearing, West Town filed a verification (the "Verification") stating:

> 1. I, Mick Crawford, am the representative of [West Town].
> 2. I have read the Application for Provisional Remedies (with notice) filed May 24th, 2024, and I verify that the matters and things stated therein are true to the best of my knowledge.
> 3. I declare under penalty of perjury that the information contained in the Application for Provisional Remed[ies] is true and correct.

¶11 After the hearing, the superior court issued its ruling, finding that West Town had "satisfied the statutory requirements for issuance" of writs of attachment and garnishment and that West Town had established the probable validity of its claim as required by A.R.S. § 12-2410(C). The court therefore held that "West Town is entitled to the provisional remedies of attachment and non-earnings garnishment" upon posting a bond equal to "the payoff amount on the PureKana loan," or $10,649,395.61. The court granted West Town leave to "submit applications for pre-judgment writs of attachment and garnishment" to the clerk of the court, and authorized the clerk to issue the writs "if satisfied that West Town's applications comply with applicable law." The court further granted West Town leave to conduct discovery of Petitioners' assets "to aid in the execution of a potential judgment." Petitioners seek relief from the ruling by special action.

DISCUSSION

¶12 The decision to accept special action jurisdiction is "highly discretionary," *Prosise v. Kottke*, 249 Ariz. 75, 77, ¶ 10 (App. 2020) (citation omitted), but may be appropriate where no "equally plain, speedy, and adequate . . . remedy by appeal" exists, Ariz. R.P. Spec. Act. 2(b)(2).[1] Further, because the interpretation of statutes and court rules is a matter of law reviewed de novo, cases presenting such issues are "particularly appropriate for review by special action." *Sierra Tucson, Inc. v. Lee ex rel. County of Pima*, 230 Ariz. 255, 257, ¶ 7 (App. 2012).

¶13 West Town argues that the prejudgment attachment and garnishment writs here pose no risk of "permanent or irreparable harm" to Petitioners because the writs merely allow their assets "to be held" but "not disposed of, until [entry of] final judgment."

¶14 But the "freezing" of Petitioners' assets, even though temporary, is no trifling interference with their property rights. *See Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (noting that, although prejudgment attachment does not result in "a complete, physical, or permanent deprivation" of property, "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection"); *see also Fuentes v. Shevin*, 407 U.S. 67, 84-85 (1972) (stating that although "[a] deprivation of a person's possessions under a prejudgment writ of replevin . . . may be only temporary[,] . . . a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment" (citation omitted)). On the contrary, the wrongful deprivation of a person's property, even if only for a short while, violates due process. *Cf. Fuentes*, 407 U.S. at 86 ("The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property."); *Grimm v. City of Portland*, 125 F.4th 920, 926 (9th Cir. 2025) (holding that due process notice requirements apply to municipal vehicle towing procedures because a motor vehicle owner or operator "undoubtedly . . . has an interest against being even temporarily deprived of [the] vehicle").

¶15 West Town further asserts that a post-judgment appeal is an adequate remedy here because the bond it posted "provides Petitioners with security" to redress any harm they may suffer if the prejudgment writs are later determined to have been granted in error.

¶16 The statutory requirement that the plaintiff post a bond, though an important procedural safeguard, does not assure the property owner of full recompense for losses caused by a wrongful grant of a provisional remedy. *Cf. Fuentes*, 407 U.S. at 81-82 (noting that, although "[d]amages may . . . be awarded to" the owner "for the wrongful deprivation" of property, "no damage award can undo the fact" that the wrongful deprivation "has already occurred"; "This Court has not embraced the general proposition that a wrong may be done if it can be undone." (cleaned up)). The wrongful attachment of a defendant's assets could, among other things, "cloud[] title" to the property and "taint[]" the defendant's "credit rating," *see Doehr*, 501 U.S. at 11, while a wrongful garnishment could prevent the defendant from timely paying other debts as they come due, *see Am. Sur. Co. of N.Y. v. Nash*, 95 Ariz. 271, 275 (1964) (noting that "[p]roof that the [defendant debtor] . . . could no longer pay [its] debt" due to a "wrongful garnishment" would entitle debtor to "recover[] on the bond" posted by plaintiff (citation omitted)). Establishing and quantifying such losses may be difficult, thus

rendering a bond an imperfect safeguard against loss. For these reasons, and because this case raises questions of the proper interpretation of statutes and court rules, which are legal questions "appropriate for review by special action," *see Sierra Tucson, Inc.*, 230 Ariz. at 257, ¶ 7, we accept special action jurisdiction, *see Bancamerica Commercial Corp. v. Brown*, 167 Ariz. 308, 309 (App. 1990) (accepting special action jurisdiction to review order quashing writ of attachment because plaintiff was "without an adequate remedy by means of an appeal"); *see also In re Argyll Equities, LLC*, 227 S.W.3d 268, 273 (Tex. App. 2007) (holding that defendant had no adequate remedy by appeal to challenge erroneous writ of attachment that would "freeze assets needed to meet [defendant's] present operating costs and . . . hinder its ability to conduct business").

I. West Town's Claim Against PureKana's Assets in its Bankruptcy Proceeding Does Not Preclude West Town from Simultaneously Seeking Relief, Including Provisional Remedies, from Petitioners.

¶17 Petitioners complain that West Town is not entitled to seek provisional remedies here because it "filed a proof of claim" in PureKana's bankruptcy proceeding "asserting a claim . . . for $10,205,256.56, secured by PureKana's business assets." According to Petitioners, West Town "should not be permitted to tie up [their] assets while it simultaneously takes active steps to collect the same amount in a separate proceeding."

¶18 We are aware of no authority for the proposition that a creditor's claim in a debtor's bankruptcy proceeding precludes it from simultaneously seeking repayment from the guarantors of the debt. *Cf. In re Chugach Forest Prods., Inc.*, 23 F. 3d 241, 246 (9th Cir. 1994) (noting that 11 U.S.C. § 362(a)'s provision for an automatic stay of proceedings against debtor in bankruptcy "does not stay actions against guarantors . . . or other non-debtor parties liable on the debts of the debtor" (cleaned up)). Certainly, nothing in Arizona statute makes provisional remedies unavailable to creditors who simultaneously pursue recovery from debtors in bankruptcy proceedings and from guarantors in separate litigation. Because the Arizona Legislature did not restrict the availability of provisional remedies in this manner, it is not up to this Court to read such a limitation into the provisional remedies statutes. *See Dep't of Child Safety v. Lang in and for County of Maricopa*, 254 Ariz. 539, 542-43, ¶ 11 (App. 2023) (noting that courts "lack the authority to add statutory requirements not included by the Legislature").

¶19 Of course, a creditor cannot recover twice on the same debt, and West Town does not suggest otherwise. On the contrary, West Town acknowledges that "[a]ny amount secured through the bankruptcy proceedings will . . . offset amounts recoverable . . . in this matter." As far as the record before us shows, however, West Town has not, at least to date, recovered anything in the bankruptcy case. In any event, the proof of claim West Town filed in PureKana's bankruptcy case does not, by itself, prohibit West Town from seeking relief, including provisional remedies, against Petitioners.

A. Although an Application for Provisional Remedies Must Be Supported by Affidavit, the Two Need Not Be Filed Simultaneously, and so West Town's Failure to File an Affidavit Along With Its Application Did Not, By Itself, Require that the Application Be Denied.

¶20 Petitioners complain that "the Application was not verified or made under oath" at the time it was filed. They acknowledge that West Town served a verification later, but assert that the verification was untimely because it was not filed "until several months" after the Application was filed, only "days before the [probable validity] hearing." Because West Town "did not even bother to attempt to verify the Application until four (4) months after it was filed," Petitioners contend, "the trial court should have denied the Application."

¶21 As West Town correctly argues in response, however, its failure to submit an affidavit or verification with its Application, though a "procedural misstep," was not, by itself, fatal. Although an application for provisional remedies must be made "under oath," A.R.S. § 12-2404(A), nothing in statute requires that the application and affidavit be filed contemporaneously. A trial court cannot, of course, properly grant an application for a provisional remedy that is not supported by affidavit, and may properly refuse to schedule a probable validity hearing on an unverified application until the applicant cures the defect by supplying the required affidavit. But the fact that an application for a provisional remedy is not accompanied by an affidavit at the time it is filed does not, by itself, require that the application be denied.[2]

B. West Town Failed to Satisfy Statutory Requirements to Obtain a Writ of Attachment.

¶22 Petitioners assert that the Application "failed to strictly adhere to the requirements for obtaining" a writ of attachment and therefore should have been denied. West Town argues that the court properly granted its request for a writ of attachment because the remedy is available "for the payment of money which is not fully secured" and the testimony presented at the probable validity hearing established that the debt claimed in this case is "unsecured."

¶23 A.R.S. § 12-2403 provides that a request for a provisional remedy with notice may not be granted unless:

> 1. All statutory requirements for the issuance of such provisional remedy have been complied with by the party seeking such remedy.

> 2. An application and notice for issuance of any provisional remedy has been filed with the clerk of the court and a copy of such notice and application have been served on the party against whom any remedy will operate.
> 3. The party against whom any provisional remedy is sought has been afforded an opportunity for a hearing or a hearing has been held as provided in this article.

A.R.S. § 12-2403.

¶24 The requirements to obtain the provisional remedy of attachment are set forth in A.R.S. §§ 12-1521 to -1539 and -2401 to -2412. Because these statutory requirements are intended to safeguard defendants' due process rights, courts require strict adherence with the statutes' terms. *Valley Nat'l Bank of Ariz. v. Educ. Credit Bureau, Inc*., 23 Ariz. App. 148, 149-50 (1975) (citing case law for the proposition that "pre-judgment summary remedies provided by statute [must] be strictly followed" to "protect the owner . . . of property from undue hardship and deprivation of its full use and enjoyment prior to a final adjudication of the creditor's right, if any, to the property").

¶25 Section 12-1521 permits prejudgment attachment of property

> [i]n an action upon a contract, express or implied, for payment of money which is not fully secured by real or personal property, or, if originally so secured, the value of such security has, without any act of the plaintiff or the person to whom the security was given, substantially diminished below the balance owed.

A.R.S. § 12-1521(1). Section 12-1522 requires that a writ of attachment be supported by an affidavit that "show[s] any one or more of the requirements for a writ of attachment as set forth in section 12-1521."

¶26 Petitioners argue that the Verification that West Town submitted "failed to provide sufficient foundation" to establish the legal and factual basis for the Application. Among other things, Petitioners contend, the Verification "did not lay sufficient foundation from an individual with personal knowledge that the debt [claimed by West Town] is unsecured."

¶27 We agree. Section 12-1522 requires that an affidavit in support of an application for a writ of attachment make a "showing" of statutory grounds for issuance of the writ. Because conclusory affidavits are without evidentiary value, the factual showing required by § 12-1522 cannot be made by an affidavit consisting of conclusory assertions by an affiant who fails to establish personal knowledge of the matters set forth therein. *See* Ariz. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *cf. Florez v. Sargeant*, 185 Ariz. 521, 526 (1996) ("[A]ffidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment." (citation omitted)); *State v. Krum*, 183 Ariz. 288, 290, 294 (1995) (affirming trial court's denial of relief to criminal defendant who sought post-conviction relief based on affidavits of third parties asserting that "the victim recanted her allegations"; "[T]he trial court could properly discount the affidavits" because they "do not say when or where or to whom the victim supposedly recanted," and thus "lack any reliable factual foundation.").

¶28 Here, the Verification contains nothing more than conclusory statements to the effect that the declarant believes that the allegations in the Application are true "to the best of [his] knowledge." The Verification includes no information that would support a finding that the declarant has personal knowledge of the matters set forth in the Application. Nothing in the Verification provides any indication of the declarant's position with West Town or his role in this case, nor does anything in the Verification give cause to believe that the declarant has any knowledge of Petitioners' financial condition or of the debt they purportedly owe. The vague and conclusory statements in the Verification wholly lack evidentiary value, and so fail to "show" any of the requirements for attachment.

¶29 Because, as Petitioners correctly argue, West Town's Application "fail[ed] to meet basic statutory requirements necessary to secure the [requested] prejudgment remedies," the Application was defective on its face and could not properly have been granted.

¶30 West Town insists that the superior court did not abuse its discretion in granting its request for a writ of attachment because the court held a probable validity hearing at which Petitioners had the opportunity to cross-examine West Town's witnesses and present evidence of their own, had they chosen to do so. Any information lacking from the Application and the supporting Verification, West Town suggests, was cured by the evidence presented at the probable validity hearing.

¶31 Under § 12-2403, a provisional remedy with notice cannot be granted unless the requirements of *all three* statutory subsections are met. Subsection 1 requires that the applicant comply with "[a]ll statutory requirements for the issuance of such provisional remedy," while Subsection 3 requires that "a hearing," or at least "an opportunity for a hearing," be afforded to "[t]he party against whom [the] provisional remedy is sought." Although the requirements of Subsection 3 were satisfied when the court held the probable validity hearing, the requirements of Subsection 1 have never been met because, for the reasons set forth above, *see supra* ¶¶ 27-29, West Town's Application did not satisfy the statutory requirements for issuance of a writ of attachment. Because the requirements of Subsection

1 of § 12-2403 were not met, the trial court erred in granting the Application. *See Benson v. Casa De Capri Enterprises, LLC*, 252 Ariz. 303, 306, ¶ 13 (2022) ("Since garnishment is a creature of statute, garnishment proceedings are necessarily governed by the terms of those statutes and courts may not allow garnishment proceedings to follow any course other than that charted by the legislature." (cleaned up)); *see also Parsons v. Ariz. Dep't of Health Services*, 242 Ariz. 320, 323, ¶ 11 (App. 2017) ("When [a] statute's language is clear and unambiguous, we must give effect to that language without employing other rules of statutory construction." (citation omitted)).

C. West Town Failed to Satisfy Statutory Requirements to Obtain a Writ of Garnishment.

¶32 The requirements for the provisional remedy of garnishment are set forth in A.R.S. §§ 12-1570 to -1597 and -2401 to -2412. Again, strict compliance is required. *See Benson*, 252 Ariz. at 307, ¶ 17 ("Courts narrowly construe the garnishment statutes and apply them as prescribed by the legislature.").

¶33 A.R.S. § 12-1572 authorizes issuance of a writ of garnishment upon an application that "contain[s]," as is relevant here, "[a] statement that the applicant has good reason to believe . . . [t]hat the garnishee has in the garnishee's possession nonexempt personal property belonging to the judgment debtor." Here, neither the Complaint, the Application, nor the Verification satisfy this provision. None of these documents contains a statement that West Town has good reason to believe that any garnishee holds non-exempt property belonging to Petitioners. Indeed, none of these documents even identifies a garnishee.

¶34 West Town argues that the court did not "issue a writ of garnishment," but merely "grant[ed] [its] Application for the provisional remedies, including garnishment, subject to" its later submission of "proposed forms of writs of garnishment naming specific garnishees as required" by statute. West Town asserts, in other words, that after the probable validity hearing, the court entered what amounts to the provisional grant of the provisional remedy of garnishment, subject to West Town's subsequent submission of proposed writs of garnishment that meet statutory requirements.

¶35 The purpose of a probable validity hearing is, in part, to afford the defendant an opportunity to assert "claims of personal property exemptions" relating to the property against which the provisional remedy will operate. A.R.S. § 12-2410(C)(1). Unless the property against which the remedy will operate has been identified, however, a defendant cannot determine what exemptions from garnishment, if any, may apply. Because, when the probable validity hearing was held, West Town had never identified any account that it claimed was subject to garnishment, Petitioners were denied an opportunity to present evidence in support of potentially applicable exemptions.

¶36 Because West Town failed to comply with statutory requirements for either attachment or garnishment, the court erred in granting the Application.

II. Prejudgment Discovery

¶37 Finally, Petitioners assert that the trial court erred in authorizing West Town to conduct prejudgment discovery of their assets. Because this issue is likely to recur in further superior court proceedings in this case, we address it. *See Gila River Indian Community v. Dep't of Child Safety*, 238 Ariz. 531, 536, ¶ 19 (App. 2015).

¶38 In authorizing West Town to conduct prejudgment discovery of Petitioners' assets, the court concluded that, "read together," Rules 64 and 69 "allow pre-judgment discovery of assets to aid in the execution of a potential judgment when the provisional remedies of attachment and garnishment are granted." Petitioners argue that neither Rule 64 nor Rule 69 authorize "pre-judgment discovery concerning a defendant's assets to aid in the request for a provisional remedy." In response, West Town asserts that the court acted within its discretion in so ordering, contending that the identification of assets through its requested discovery "advances the purpose of the provisional remedy."

¶39 Rule 64 provides as follows:

> (a) Remedies--Generally. At the commencement of and throughout an action, every remedy authorized by law is available for the seizure of a person or property to secure satisfaction of a potential judgment.
>
> (b) Specific Kinds of Remedies. The remedies available under this rule include the following--however designated and regardless of whether the remedy is ancillary to the action or requires an independent action:
>
> (1) arrest;
> (2) attachment;
> (3) garnishment;
> (4) replevin;
> (5) sequestration; and
> (6) other corresponding or equivalent remedies.

Ariz. R. Civ. P. 64. A "remedy" is a judgment, order, or other form of relief that a court or other tribunal is authorized to grant to protect or vindicate a right or redress a wrongful act. *See* Black's Law Dictionary (12th ed. 2024) (defining "remedy" as "[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief"). Although Rule 64 authorizes a claimant to seek "remedies" throughout the pendency of an action, Rule 64 does not authorize discovery because discovery is not a "remedy."

¶40 Rule 69, in turn, provides in part that "[a] party may execute on a judgment -- and *seek relief in proceedings supplementary to and in aid of judgment or execution* -- as provided in these rules,

statutory remedies, and other applicable law." Ariz. R. Civ. P. 69(a) (emphasis added). Rule 69 thus contemplates the use of discovery as provided in the Arizona Rules of Civil Procedure in aid of execution on a judgment. Nothing in the rule's provisions, however, authorizes the use of discovery before a judgment is obtained.

¶41 Prejudgment discovery is generally limited to matters "relevant to any party's claim or defense." Ariz. R. Civ. P. 26(b)(1). As courts have long recognized, restricting discovery of a defendant's assets until judgment is obtained serves to protect the defendant from being subjected to harassment, invasion of privacy, and unnecessary litigation costs. *See Arpaio v. Figueroa*, 229 Ariz. 444, 447, ¶ 9 (App. 2012) (explaining basis for limits on financial discovery when claim for punitive damages asserted); *see also Richards v. Superior Court*, 86 Cal. App. 3d 265, 271, 150 Cal. Rptr. 77, 80 (1978) ("Respon[ding] to discovery seeking financial information places a severe burden on the responder. [At] a minimum, there is the time and expense necessary to the compilation of a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to" a claim for damages "which may never be awarded.").

¶42 Because a defendant's financial condition is generally not relevant to any party's claim or defense, a majority of courts that have considered the issue have declined to allow discovery into a defendant's assets before the plaintiff has obtained a judgment. *See, e.g., SierraPine v. Refiner Prods. Mfg., Inc.*, 275 F.R.D. 604, 609 (E.D. Cal. 2011) ("[D]istrict courts across the country generally do not allow pre-judgment discovery regarding a defendant's financial condition or ability to satisfy a judgment" because "such discovery is not relevant to the parties' claims or defenses and is not reasonably calculated to lead to the discovery of admissible evidence." (citations omitted)); *2245 Venetian Ct. Bldg. 4, Inc. v. Harrison*, 149 So.3d 1176, 1179 (Fla. Dist. Ct. App. 2014) ("In the prejudgment context, a party is entitled only to the opponent's financial records that pertain to the pending action. But in postjudgment discovery, the dispute in the original civil action has been resolved and therefore the matters relevant for discovery are those that will enable the judgment creditor to collect the debt." (cleaned up)); *Travelers Ins. Co. v. Hindle*, 748 A.2d 256, 259 (R.I. 2000) ("Ordinarily, the federal discovery rules and similar state rules do not permit the discovery of facts concerning a defendant's financial status or ability to satisfy a judgment, since such matters are not relevant to the trial issues and cannot lead to the discovery of admissible evidence." (cleaned up)).

¶43 To be sure, discovery concerning an adverse party's assets is generally permissible if relevant to the merits of a claim or defense asserted in the litigation. *See* Ariz. R. Civ. P. 26(b)(1). Prejudgment financial discovery is permissible, for example, if the plaintiff asserts a claim for punitive damages, as long as the plaintiff makes the requisite *prima facie* showing of the defendant's liability for punitive damages. *See Larriva v. Montiel*, 143 Ariz. 23, 26 (App. 1984). Likewise, prejudgment discovery of a defendant's finances may be warranted if the plaintiff's claim is predicated on an "alter ego" theory of liability. *See Deutsche Credit Corp. v. Case Power & Equip. Co*., 179 Ariz. 155, 160 (App. 1994) (citations omitted) (noting that "commingling of . . . funds" and parent company's "payment of salaries and other expenses of [the] subsidiary" are relevant to establish alter ego relationship); *see also In re Marriage of Gromicko*, 387 P.3d 58, 63, ¶ 35 (Colo. 2017) (holding that wife in marital dissolution action was entitled to "such discovery as would reasonably have been necessary to allow her to attempt to establish" an alter ego relationship between husband and his business). Further, discovery of the defendant's financial affairs may be appropriate when the wrongful exercise of dominion and control over assets is an element of a claim being asserted. *See, e.g., Hett v. Barron-Lunde*, 290 So. 3d 565, 568, 571 (Fla. Dist. Ct. App. 2020) (rejecting challenge to order requiring defendant to produce personal financial information and holding that such evidence was relevant to plaintiff's claims for "civil theft, conversion, breach of fiduciary duty, [and] unjust enrichment" based on defendant's removal of funds from cognitively impaired man's bank accounts). And a defendant may be entitled to discovery of the plaintiff's financial information when relevant to the plaintiff's claim for compensatory damages, such as when the plaintiff seeks damages for lost profits. *See Uni-Splendor Corp. v. Remington Designs, LLC*, 2017 WL 10581102 at *2 (C.D. Cal. Sept. 5, 2017) ("In cases alleging damages based on lost sales or offset, courts have required production of corporate financial information such as tax returns; general ledgers, sales registers, and income statements; annual financial statements; and financial analyses, projections and budgets." (citations omitted)).

¶44 Additionally, a court may properly authorize prejudgment discovery of a party's finances if evidence suggests that the party is concealing or disposing of assets to render uncollectible any judgment that may be entered. *See, e.g., EEOC v. Ian Schrager Hotels, Inc*., No. CV99-0987GAFRCX, 2000 WL 307470, at *4 (C.D. Cal. Mar. 8, 2000) (unpublished) (rejecting defendants' objection to plaintiff's discovery requests for financial documents; "Clearly, plaintiff may obtain defendants' financial information . . . to determine whether defendants have attempted to transfer, or have transferred, income or assets to others to avoid potential liability if defendants lose the pending litigation."). Prejudgment remedies are statutorily authorized to prevent the dissipation of assets during the pendency of litigation to frustrate post-judgment

recovery, *see* A.R.S. §§ 12-1521(2), -2402(1), and nothing in this opinion precludes trial courts from authorizing creditors to conduct financial discovery when necessary to give effect to those statutory remedies.

¶45 But the mere fact that a party has been granted a provisional remedy does not, without more, entitle the party to conduct discovery into its adversary's assets or financial condition. Unless the defendant's finances are relevant to a claim or defense, the general rule barring prejudgment discovery of a defendant's finances governs when prejudgment remedies are sought to secure an unsecured or under-secured debt. Accordingly, we hold that, because West Town's claim for provisional remedies was based solely on its contention that Petitioners are liable for an unsecured debt, the court erred in granting West Town's request to conduct prejudgment discovery of Petitioners' financial condition.

III. Attorney Fees and Costs on Appeal.

¶46 Both parties claim an award of attorney fees and costs pursuant to A.R.S. §§ 12-341.01(A) and -2411. In our discretion, we deny without prejudice each party's request for an award of fees, deferring to the superior court to determine whether to award fees incurred in this special action to the successful party at the conclusion of the proceedings on the merits. *See L.H. v. VandenBerg*, 256 Ariz. 44, 50, ¶ 22 (App. 2023) (denying petitioners' request for award of attorney fees without prejudice and authorizing the superior court to award "fees incurred in this special action" after resolving pending motion "on the merits"); *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 204, ¶ 37 (App. 2007) (denying appellant's request for award of attorney fees on appeal, "deferring this request to the trial court's discretion pending resolution of the matter on the merits"). We award Petitioners their costs under Ariz. R. Spec. Act. P. 17(c), subject to their compliance with the requirements of that rule.

CONCLUSION

¶47 For the foregoing reasons, we accept special action jurisdiction and grant relief by vacating the orders granting provisional remedies and prejudgment discovery.

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1 The Arizona Supreme Court revised the Arizona Rules of Procedure for Special Actions, effective January 1, 2025. These new rules apply in all special actions pending on that date, including this one, unless doing so would be infeasible or cause injustice. *See* Ariz. R.P. Spec. Act. 1 Application Note. As applying the new rules in this case would not be infeasible or cause injustice, we apply them here.

2 The Arizona Rules of Civil Procedure (the "Rules") provide that when "*these rules require*" that a matter be supported by affidavit, an unsworn declaration may be used instead of an affidavit as long as the declaration meets certain requirements. Ariz. R. Civ. P. 80(c) (emphasis added). The requirement that an application for attachment be supported by affidavit is, however, one of statute, not a requirement of the Rules. *See* A.R.S. § 12-1522. Because Petitioners have not argued that West Town's reliance on a declaration instead of an affidavit does not satisfy A.R.S. § 12-1522, we need not consider that issue. Instead, we assume, without deciding, that the Verification is not invalid on the grounds that it is an unsworn declaration rather than an affidavit.

Cite as
144 Arizona Cases Digest 38

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF
Amy FARNSWORTH,
Petitioner/Appellee,
and
Richard GILLIES,
Respondent/Appellant.

No. 2 CA-CV 2024-0236-FC
Filed March 20, 2025

Appeal from the Superior Court in Pima County
Nos. D20220308 and D20220397 (Consolidated)
The Honorable Helena Seymour,Judge Pro Tempore
REVERSED AND REMANDED

COUNSEL

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By Kristi A. Reardon, Taylor S. House, and Sally M. Colton
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OPINION

Presiding Judge Eckerstrom authored the opinion of the Court, in which Judge Vásquez and Judge Sklar concurred.

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

ECKERSTROM, Presiding Judge:

¶1 In this appeal, we are asked to interpret the meaning of A.R.S. § 25-409(C)(2). That statute allows for third-party visitation with a minor child when the child was born out of wedlock and, as relevant here, "the child's legal parents are not married to each other at the time the petition is filed." Because the trial court improperly concluded that the statute requires the child to have two legal parents before granting third-party visitation, we reverse and remand.

Factual and Procedural Background

¶2 In December 2009, Amy Farnsworth ("Mother") was pregnant with M.F. when she began dating Richard Gillies ("Stepfather"). Mother gave birth to M.F. in August 2010. Mother and Stepfather married in 2012.

¶3 The putative biological father of M.F., J.P., never established paternity. At some point during the parties' marriage, J.P. signed a voluntary relinquishment to allow Stepfather to begin the adoption process. Thereafter, Mother began the process for Stepfather to adopt M.F. but never completed it. The trial court found that Stepfather was the only father M.F. had ever known.

¶4 In February 2022, Mother and Stepfather both filed petitions for dissolution of their marriage, which the trial court consolidated. Stepfather also petitioned for third-party rights with M.F., seeking joint legal decision-making authority and parenting time or "significant visitation" with M.F. In August 2022, the court denied Stepfather's petition for third-party legal decision-making and placement because he had failed to establish it would be significantly detrimental to be placed in the care of Mother, and Arizona law does not allow a court to award joint legal decision-making authority to a legal parent and a third party.

¶5 In June 2024, the trial court found it "lack[ed] jurisdiction" to grant Stepfather non-parental visitation rights with M.F.under § 25-409(C)(2) because, as Mother is M.F.'s only legal parent, "the requirement that the child's legal parents are not married to each other cannot be satisfied."[1] However, the court nevertheless evaluated the required factors under § 25-409(E) for whether to grant Stepfather non-parental visitation "in the event that" we concluded its "determination of lack of jurisdiction" was legally erroneous. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

Discussion

¶6 Stepfather argues the trial court incorrectly interpreted § 25-409(C)(2). Specifically, he argues that subsection (C)(2) is satisfied when there is only one legal parent.[2] The parties do not dispute that M.F. was born out of wedlock. Nor do they dispute that M.F. had no legal parents married to each other at the time the petition for visitation was filed. They do dispute the applicability of the dual grounds of § 25-409(C)(2) for non-parental visitation when a child, like M.F., has only one legal parent.

¶7 We review the interpretation of a statute de novo. Duckstein *v. Wolf*, 230 Ariz. 227, ¶ 8 (App. 2012). "If a statute's language is clear and unambiguous, we apply it without resorting to other methods of statutory interpretation." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 268 (1994). If there is more than one rational interpretation, courts will resolve that doubt by considering the statute's subject matter and context, the spirit and purposes conveyed by that language and, if necessary, its legislative history. *Id.*; *State ex rel. Ariz. Dep't Revenue v. Tunkey*, 254 Ariz. 432, ¶¶ 31-32 (Bolick, J., concurring) (allowing courts to consider legislative history as secondary interpretative tool but requiring courts to choose "plain meaning over legislative intent when the two diverge").

¶8 Subsection 25-409(C) governs third-party visitation rights. "[A] person other than a legal

parent may petition . . . for visitation with a child," which "[t]he superior court may grant . . . on a finding that the visitation is in the child's best interests" and one of the situations in subsections (C)(1)-(4) is true. Subsection (C)(2) provides, in full: "The child was born out of wedlock and the child's legal parents are not married to each other at the time the petition is filed." The legislature has defined "legal parent" as "a biological or adoptive parent whose parental rights have not been terminated" and "does not include a person whose paternity has not been established pursuant to § 25-812 or 25-814." A.R.S. § 25-401(4). Section 25-812 provides for a voluntary acknowledgement of paternity, while § 25-814 explains when a man is presumed to be the father of a child.

¶9 Here, Mother is a legal parent of M.F. while J.P. is not. Mother is the biological parent of M.F. and her parental rights have not been terminated. See id. J.P. is M.F.'s putative biological father. *See David C. v. Alexis S.*, 240 Ariz. 53, ¶ 17 (2016) ("A putative father is a man who is or claims to be the father of the child and whose paternity has not been established."). But the record contains no indication that J.P. is entitled to a presumption of paternity under § 25-814, nor that he voluntarily acknowledged paternity under § 25-812.[3] Thus, J.P. was never M.F.'s legal parent, leaving Mother as the only legal parent.

¶10 In this case, we must decide whether subsection (C)(2) implicitly requires a non-parent who is seeking visitation to show that the child has more than one legal parent. We start with the plain meaning of the pertinent clause. *See Hayes*, 178 Ariz. at 268. That clause conditions non-parent visitation on a finding that "the child's legal parents are not married to each other." § 25-409(C)(2). It contains no language expressly conditioning non-parental visitation on the existence of multiple legal parents.

¶11 Mother contends, however, that the use of the plural "parents" implies such a requirement. But the legislature has generally instructed us to read "words in the plural number" so as to "include the singular." A.R.S. § 1-214(B). And we would require a far less obtuse cue in the language of the statute to override that canon of construction here. For these reasons, we decline to add requirements to the statute that the legislature did not more clearly articulate. *See AAA Cab Serv., Inc. v. Indus. Comm'n*, 213 Ariz. 342, ¶ 6 (App. 2006) ("This court cannot write a term into the statute that the legislature did not include.").

¶12 Furthermore, the legislature's use of the plural "parents" in the clause before us can be readily explained by mere grammatical necessity: the clause refers to the status of marriage. That status, when it exists, logically involves more than one person. Indeed, the clause would be both grammatically incorrect and logically impossible if it had employed the singular of parent in that context. *See* § 1-214(B) (implicitly acknowledging challenges in use of singulars and plurals in drafting and clarifying that each are intended to include other). Yet, the plain language of the statute also clearly includes the circumstance presented here: M.F. was born out of wedlock, and no marriage existed between any legal "parents" at the time of the petition.

¶13 Nor can Mother's reading be harmonized with the purpose of subsection (C)(2) as conveyed by the entirety of § 25-409: to preclude non-parental visitation when the child already possesses a legally recognized two-parent family. *See* § 25-409(C); *see also PNC Bank, N.A. v. Coury*, 257 Ariz. 25, ¶ 8 (App. 2024) (courts construe statutes and their subsections as consistent and harmonious whole). Under this broader purpose, children with only one legal parent, like M.F., would plainly qualify for potential non-parental visitation upon a finding that such visitation would be in their best interests.

¶14 Our reading is confirmed by the other statutory grounds for non-parental visitation set forth in § 25-409(C). Each of those grounds articulates circumstances under which children lack, or will lack, two legal parents in their home. *See* § 25-409(C)(1), (3), and (4) (non-parental visitation potentially available when one legal parent is deceased or missing and, for non-parents with elevated status, when marriage dissolved or petition for marriage dissolution pending).

¶15 Thus, M.F.'s one-parent status does not disqualify her from receiving non-parental visitation. Rather, it places her at the heart of the body of circumstances potentially justifying such visitation. Although we have never squarely addressed the question presented here, this court has previously assumed that § 25-409(C)(2) applies equally to children without two legal parents. *See Goodman v. Forsen*, 239 Ariz. 110, ¶¶ 3-4, 9 (App. 2016) (finding child eligible for non-parent visitation when mother never married father whose parental rights had been severed), *abrogated on other grounds by In re Marriage of Friedman & Roels*, 244 Ariz. 111, ¶ 19 (2018) (disavowing *Goodman* "insofar as it purports to subject a nonparent to a heightened burden of proof beyond that required" by other prior caselaw). Mother contends that the provisions of § 25-409(C) address only those circumstances where "there is a legal division of parental authority." But the very first provision of that subsection stands at odds with her theory. Subsection (C)(1) allows for non-parental visitation when a parent is "deceased or . . . missing"—circumstances that do not present any division of parental authority. Although Mother suggests a division of legal authority occurs when one of two legal parents die, we disagree because upon that death, only one parent exists to have such authority.

¶16 In conclusion, the plain language of § 25-409(C)(2), the manifest purpose conveyed by that

language, and the broader statutory context all demonstrate that the legislature intended to allow third-party visitation petitions when a child is born out of wedlock and her legal parents are unmarried. No language in the statute articulates any intention by the legislature to exempt children with one legal parent from that potential benefit. The trial court erred in concluding otherwise.

Disposition

¶17 For the foregoing reasons, we reverse the trial court's rejection of Stepfather's petition for third-party visitation under § 25-409(C)(2). Because the court included M.F. in its discussion of the factors under § 25-409(E) "in the event that the . . . lack of jurisdiction as to [M.F.] is determined to be inappropriate," and the parties did not dispute those findings on appeal, we remand for the court to enter an order regarding Stepfather's third-party visitation with M.F., including making any further findings required to enter such an order. As the prevailing party, Stepfather is entitled to an award of costs in compliance with Rule 21, Ariz. R. Civ. App. P. *See Motley v. Simmons*, 256 Ariz. 317, ¶ 20 (App. 2023).

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1 Although the trial court determined "it lack[ed] jurisdiction," § 25-409(C)(2) is not jurisdictional. *See Sheets v. Mead*, 238 Ariz. 55, ¶ 9 (App. 2015) ("Here, the court's power to conduct visitation and parenting time proceedings is provided by A.R.S. § 25-402, and § 25-409 simply sets forth the substantive criteria that govern visitation petitions."); *see also Taliaferro v. Taliaferro*, 186 Ariz. 221, 223 (1996) (distinguishing between authority of court to do particular thing and power of court to entertain action of particular subject matter).

2 The trial court also found the conditions set forth by subsections (C)(1), (C)(3), and (C)(4) were not satisfied. Stepfather only argues the conditions of subsection (C)(2) on appeal.

3 The parties do not appear to dispute that J.P. signed a voluntary relinquishment in regards to M.F. However, the relinquishment is not part of our record on appeal, and the parties do not discuss the relinquishment's content or whether it was filed pursuant to § 25-812(A).

SUPREME COURT OF ARIZONA

In the Matter of	)	Arizona Supreme Court
	)	No. R-24-0060
RULE 77, RULES OF FAMILY LAW PROCEDURE	)	
	)	**FILED 03/21/2025**

ORDER

In January 2022, three superior court judges submitted a rule petition, R-22-0007, proposing to amend Rule 77 of the Rules of Family Law Procedure and to adopt a new Rule 77.1 of the same rules. The proposed rule changes would authorize, with party consent, an informal family law trial ("IFLT") program that would replace the current adversarial system with a less formal proceeding managed by the trial court. Since that time, the petition has been continued pending the completion of a pilot program and further consideration by the Committee on Family Court ("the Committee").

In December 2024, the Committee submitted this rule petition, which set forth a "hybrid" version of the rule changes proposed in R-22-0007. The petition asked the Court to consider giving counties the choice of adopting IFLT rules that would apply only if the parties consented to them or adopting IFLT rules that would apply unless a party requested that they not apply in that party's case.

On March 7, 2025, the Committee moved to amend its petition to substantially scale back its proposed rule changes. The amended petition no longer proposes the adoption of its earlier proposed IFLT rules. Instead, it proposes to amend Rules 22 and 77 of the Rules of Family Law Procedure merely to direct trial judges to conduct the direct-examination of every self-represented party in a case.

Upon consideration,

IT IS ORDERED granting the Committee's motion to amend its petition in this matter.

IT IS FURTHER ORDERED that the deadline for submitting a comment on this petition, as amended, is extended from May 1, 2025 to May 23, 2025, and the deadline for the Committee to submit a reply is extended from June 2, 2025 to June 13, 2025.

DATED this 21st day of March, 2025.

/s/
ANN A. SCOTT TIMMER
Chief Justice
