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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THE STATE OF ARIZONA,

Plaintiff,

vs.

KELLI WARD (001),
NANCY COTTLE (003)
JACOB HOFFMAN (004),
ANTHONY KERN (005),
JAMES LAMON (006),
SAMUEL MOORHEAD (008)
LORRAINE PELLEGRINO (009),
MICHAEL WARD (011),
RUDY GIULIANI (012)
JOHN EASTMAN (013),
BORIS EPSHTEYN (014),
CHRISTINA BOBB (016),
MICHAEL ROMAN (017),
MARK MEADOWS (018)

Defendants.

Case No.: **CR2024-006850-001**
CR2024-006850-003
CR2024-006850-004
CR2024-006850-005
CR2024-006850-006
CR2024-006850-008
CR2024-006850-009
CR2024-006850-011
CR2024-006850-012
CR2024-006850-013
CR2024-006850-014
CR2024-006850-016
CR2024-006850-017
CR2024-006850-018

LIMITED RESPONSE TO DEFENDANTS' ANTI-SLAPP MOTIONS ADDRESSING THE PRIMA FACIE PROOF STANDARD

(Assigned to the Hon. Bruce Cohen)

The Defendants forged electoral certificates and sent those certificates to Congress so they could pressure congressional officials and the Vice President to overturn the results of a lawful democratic election. To convince the public that scheme was legitimate, they lied about the 2020 election, falsely claiming widespread election fraud, and they used lawsuits as "legal cover" for their actions. For their participation in this scheme, an independent State Grand Jury comprised of citizens from across Arizona, choose to indict the 18 named Defendants with conspiracy, frauds, and forgery, finding they had the requisite criminal intent to commit each offense.

The crux of Defendants' anti-SLAPP motions is an *ipse dixit*—conspiracy, frauds, and forgery involve their First Amendment Rights because they say so, and the charges are "substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of [this] constitutional right" because they say so. A.R.S. § 12-751(B). But characterizing statements as "political" does not make them protected speech. *See U.S. Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42, 57 (D.D.C. 2021) ("[T]here is no blanket immunity for statements that are 'political' in nature: ... [T]he fact that statements were made in a 'political 'context' does not indiscriminately immunize every statement contained therein.") (*quoting Weyrich v. New Republic, Inc.*, 235 F.3d 617, 626 (D.C. Cir. 2001)). Indeed, the First Amendment has never granted individuals license to use political speech as a vehicle for validly punishable criminal conduct.

As for the so-called political retaliation: the Attorney General can campaign on prosecuting crime, including election crimes; she can prosecute members of a different political party; and she can make political statements all without any "desire to deter,

retaliate against or prevent the lawful exercise" of the Defendants', or anyone's, constitutional rights. A.R.S. § 12-751.

Facts—not Defendants' declarations—matter. The State Grand Jury was told by the Attorney General's Office on multiple occasions that it had the discretion to indict no one. Far from being politically biased, the Attorney General's Office, despite the Grand Jury's interest in doing so, asked the Grand Jury to consider not indicting Donald Trump; 28 Republican members and members-elect of the Arizona Legislature who had signed onto a document falsely purporting to be "A Joint Resolution of the 54th Legislature, State of Arizona to the 116th Congress," on December 14, 2020; an attorney for the Arizona Republican Party; and others associated with Defendants. In fact, the lead investigator had the following exchange with the State Grand Jury:

> Grand Juror: At any time, have you ever received any indication from the current Attorney General, Kris Mayes that she wants a specific outcome from your investigation?
>
> The Witness: Absolutely not.
>
> Grand Juror: At any time have you gotten any indication from any member of the Attorney General's Office that they want a specific outcome from your investigation?
>
> The Witness: Absolutely not.
>
> Grand Juror: So you have been free to come up with whatever the evidence you can find suggests?
>
> The Witness: Exactly.
>
> Grand Juror: And all the opinions and things that I have asked you have been—is the result of what evidence you uncovered?
>
> The Witness: Correct.

SGT 4/8/24, pt. 2, at 57-58.

Ignoring the actual evidence presented to the State Grand Jury in this case, Defendants Eastman, Hoffman, Lamon, Kelli Ward, Michael Ward, Bobb, and Epshteyn, joined by several other Defendants (collectively, the "Anti-SLAPP Defendants"), now ask this Court to dismiss the indictment in the name of protecting the same First Amendment interests they are accused of endangering through their fraud scheme. When facts are considered, the Anti-SLAPP Defendants' motions to dismiss under A.R.S. § 12-751 fail to "establish[] prima facie proof" that this criminal prosecution is "substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right."[1]

They are unable to make this showing because (1) the State Grand Jury's independent investigation and indictment eliminates any claim that this criminal prosecution is motivated by a desire to deter, retaliate against, or prevent the lawful exercise of a constitutional right, (2) the First Amendment does not protect fraud schemes and conspiracy, and (3) mere speculation of political animus is insufficient to meet the prima facie proof standard or rebut the presumption of regularity that attaches to criminal prosecutions.

The purpose of anti-SLAPP statutes is to provide an efficient procedure to dismiss a case that will ultimately be dismissed because it was brought in bad faith just to punish

[1] In its notice of pending motions filed August 1, 2024, the State provided a chart detailing which Defendants have filed anti-SLAPP motions or joined another Defendant's anti-SLAPP motion. *See* State's Notice of Pending Motions, at 3-4.

the defendant. To that end, it creates no new privileges or immunities. A.R.S. § 12-751(I)(2). To be sure, each defendant charged here is entitled to the presumption of innocence, to challenge the State's evidence of specific intent to defraud, and to explain their statements in presenting their defense. Interpreting and applying the anti-SLAPP statute to require more in this case, however, risks both: (1) undermining the role of the State Grand Jury and (2) converting the First Amendment's guarantees from a shield against government overreach to a sword to be wielded by those who falsely cloak their crimes in the guise of political expression.

DISCUSSION[2]

I. Like any other claim of selective, vindictive, or retaliatory prosecution, courts must exercise caution when entertaining a motion to dismiss a criminal prosecution under the anti-SLAPP statute because the Executive Branch is afforded broad discretion in enforcing the law.

Because A.R.S. § 12-751 was only recently extended to criminal prosecutions, no case law establishes what quantum of evidence a criminal defendant must put forward to satisfy the "prima facie proof" standard. The statute itself provides no guidance, simply stating that a defendant must "establish[] prima facie proof that the legal action was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right." A.R.S. § 12-751(B). The term "prima facie proof" is ambiguous. *See* D.C. v. R.R., 182 Cal. App. 4th 1190, 1217 (Cal. App. 2010) (in an anti-

[2] The indictment conveys the facts of this case in detail. Therefore, the State has not included a statement of facts in this Limited Response.

SLAPP case, noting that "the term 'prima facie' can be a source of confusion because it has several meanings").

Eastman acknowledges that Arizona's anti-SLAPP statute does not define "prima facie proof" or provide guidance as to what would suffice to establish "prima facie proof" in this context. Eastman Mot., at 4. He is the only defendant who attempts to define the scope of "prima facie proof," providing an array of similarly worded definitions. *See id.* at 4-6. Lamon, Kelli and Michael Ward, Hoffman, Bobb, and Epshteyn make no attempt to define their burden of proof and instead baldly assert they have met it. *See* Lamon Mot., at 9-10; Ward Mot., at 2; Hoffman Mot., at 2, 11-12; Bobb Mot., at 14; *see generally* Epshteyn's Notice of Joinder.

As explained below, this Court should apply the same burden of proof required of defendants who raise claims of selective, vindictive, or retaliatory prosecution.

A. For criminal prosecutions, the anti-SLAPP statute must be read in a way that avoids violating separation of powers.

"The Arizona Constitution, like its federal counterpart, charges the executive branch with the duty to ensure that the 'laws be faithfully executed.'" *Jones v. Sterling*, 210 Ariz. 308, 315, ¶ 31 (2005). "The executive is thus afforded 'broad discretion' in enforcing the law." *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). Decisions about who should be arrested and prosecuted are, in general, "not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 607. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and

what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

As evidenced by Defendants' motions in this case, claims of selective, vindictive, or retaliatory prosecution are "easily asserted," and "responding to such a charge may be expensive, time consuming, and unduly distracting." *Jones*, 210 Ariz. at 315, ¶ 32. Thus, courts must exercise caution with such motions. *See United States v. Armstrong*, 517 U.S. 456, 463-64 (1996) (selective prosecution standard imposes a "demanding" standard of proof as a "significant barrier to the litigation of insubstantial claims").

B. An overview of the burdens of proof for selective, vindictive, and retaliatory prosecution claims.

The burdens of proof for selective, vindictive, and retaliatory prosecution claims are well defined in case law, and each claim shares some elements with A.R.S. § 12-751(B). All three claims require the claimant to first make a prima facie showing of selective, vindictive, or retaliatory prosecution. Only after the claimant makes the prima facie showing is the government then required to rebut the claim. At least some of the defendants appear to agree these claims provide a template for interpreting the anti-SLAPP statute. For example, Hoffman cites *Gonzalez v. Trevino*, 144 S. Ct. 1663 (2024), a retaliatory arrest case. *See* Hoffman Mot., at 11.

1. Selective Prosecution

A defendant contending that the government has engaged in selective prosecution against him "bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of

the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith[.]" *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). A defendant seeking to show discriminatory purpose must show "that the decisionmaker … selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Wayte*, 470 U.S. at 610 (cleaned up). The standard for demonstrating selective prosecution is "a demanding one," because the claim asks the court "to exercise judicial power over a 'special province' of the Executive." *Armstrong*, 517 U.S. at 463-64.

The standard for discovery into a claim of selective prosecution is "'correspondingly rigorous,' ... but of course not identical to the standard applied to the merits." *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (quoting *Armstrong*, 517 U.S. at 468; *see also United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018); *United States v. Hare*, 820 F.3d 93, 99 (4th Cir. 2016). To establish entitlement to discovery, a defendant must "produce some evidence that similarly situated defendants of other [suspect classes] could have been prosecuted, but were not[.]"[3] *Armstrong*, 517 U.S. at 469; *see also Jones*, 210 Ariz. at 316, ¶ 33 (adopting the *Armstrong* discovery

[3] The State is not aware of any others in Arizona who submitted false electoral ballots to Congress and actively deceived the public about election fraud, and used that deception to pressure public officials, including the Vice President to accept the false ballots. But for Vice President Pence's actions, the scheme may have actually worked. This case involves unique conduct, but routine application of established criminal statutes.

standard for evaluating whether to appoint an expert, and requiring a defendant to first "present[] credible evidence of both discriminatory effect and intent").

2. Vindictive Prosecution

Because "a certain amount of punitive intent ... is inherent in any prosecution," a claim of vindictive prosecution presents "the delicate task of distinguishing between the acceptable 'vindictive' desire to punish [a defendant] for any criminal acts, and 'vindictiveness' which violates due process." *State v. Mieg*, 225 Ariz. 445, 448, ¶ 12 (App. 2010) (quoting *United States v. Doran*, 882 F.2d 1511, 1518 (10th Cir. 1989)). A defendant can demonstrate prosecutorial vindictiveness in two ways—actual vindictiveness or presumptive vindictiveness. A defendant may prove actual vindictiveness by "proving 'objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.'" *State v. Brun*, 190 Ariz. 505, 506 (App. 1997) (quoting *State v. Tsosie*, 171 Ariz. 683, 685 (App. 1992). But because actual vindictiveness is difficult to prove, "a defendant in some circumstances may rely on a presumption of vindictiveness." *Tsosie*, 171 Ariz. at 685 (citing *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974)). But such a presumption is warranted only when "all of the circumstances, ... taken together, support a realistic likelihood of vindictiveness." *Id.* (quoting *United States v. Meyer*, 810 F.2d 1242, 1246 (D.C. Cir. 1987)).

To establish an actual vindictive motive, a criminal defendant must show that "(1) the prosecutor harbored genuine animus toward the defendant, or was prevailed upon to bring the charges by another with animus such that the prosecutor could be considered

a 'stalking horse,' and (2) [the defendant] would not have been prosecuted except for the animus." *United States v. Koh*, 199 F. 3d 632, 640 (2nd Cir. 1999). A defendant claiming vindictive prosecution "must prove objectively that the prosecutor's charging decision was a 'direct and unjustifiable penalty,' that resulted 'solely from the defendant's exercise of a protected legal right.'" *United States v. Sanders*, 211 F.3d 711, 716-17 (2nd Cir. 2000) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11, 384 n.19 (1982)).

The United States Supreme Court has declined to adopt an "inflexible presumption of prosecutorial vindictiveness in a pretrial setting" because, before trial, "the prosecutor's assessment of the proper extent of prosecution may not have crystallized." *Goodwin*, 457 U.S. at 381. A prosecutor can legitimately re-charge a defendant in the pretrial context for various reasons, including when "[i]n the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." *Id.*; *see also Meyer*, 810 F.2d at 1246-47.

The Arizona Court of Appeals has explained that "to make the requisite prima facie showing [of vindictiveness] in the pretrial context, a defendant 'must do more than prove that the state increased charges after the defendant exercised a legal right.'" *State v. Dansdill*, 246 Ariz. 593, 598, ¶ 8 (App. 2019). "Additional facts must also exist ... which, combined with the increased charges, support a determination that the state's action is more likely than not explainable only as an effort to penalize the defendant for asserting his legal rights." *Id.* (internal quotations and citations omitted).

3. Retaliatory Prosecution

A First Amendment retaliation claim is also analogous to Arizona's anti-SLAPP statute. *See, e.g.*, *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, a board of education decided not to rehire a teacher based on unprofessionalism. 429 U.S. at 281-283. The teacher filed a First Amendment retaliation claim, claiming he was fired for protected speech. *Id.* The Court placed the initial burden of proof on the teacher to show both that (1) his speech was protected and (2) the protected speech was a "substantial" or "motivating" factor in the board's decision to fire him. *Id.* at 287. The *Mt. Healthy* standard is similar to A.R.S. § 12-751(B)'s requirement that plaintiffs "establish[] prima facie proof that the legal action was substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right."

The *Mt. Healthy* standard applies to most First Amendment retaliation claims, but an additional burden is placed on plaintiffs raising retaliatory arrest and prosecution claims because of the presumption of regularity that attaches to criminal prosecutions. In retaliatory prosecution claims, plaintiffs must also show the absence of probable cause for the underlying criminal prosecution. *Nieves v. Bartlett*, 587 U.S. 391, 404 (2019). And "proving the link between the defendant's retaliatory animus and the plaintiff's injury ... 'is usually more complex than it is in other retaliation cases.'" *Lozman v. Riviera Beach*, 585 U.S. 87, 97 (2018) (quoting *Hartman v. Moore*, 547 U.S. 250, 261 (2006)). Unlike most retaliation cases, in retaliatory prosecution cases the official with the malicious motive does not carry out the retaliatory action—the decision to bring charges is instead made by a prosecutor, who is generally immune from suit and whose

decisions receive a presumption of regularity. *Id.* at 97-99. Thus, even when an official's animus is clear, it does not necessarily show that the official "induced the action of a prosecutor who would not have pressed charges otherwise." *Hartman*, 547 U.S. at 263.

To account for this "problem of causation" in retaliatory prosecution claims, the Supreme Court requires plaintiffs to first show the absence of probable cause for the underlying criminal charge. *See id.* at 265-266. That requirement provides a "distinct body of highly valuable circumstantial evidence" that is "apt to prove or disprove" whether retaliatory animus actually caused the injury: "Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Id.* at 261. The existence of probable cause will be at issue in "practically all" retaliatory prosecution cases and "can be made mandatory with little or no added cost." *Id.* at 265. Imposing that burden on claimants is necessary before suspending the presumption of regularity underlying the prosecutor's charging decision—a presumption the Court "do[es] not lightly discard." *Id.* at 263, 265. Thus, *Hartman* requires plaintiffs in retaliatory prosecution cases to show more than the animus of an officer and a subsequent injury; plaintiffs must also prove as a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause. *Nieves*, 587 U.S. at 400-01.

C. A workable standard of proof for anti-SLAPP motions in criminal prosecutions.

Taking the principles from these claims, a workable standard of proof is as follows: to satisfy the prima facie proof standard, a criminal defendant must (1) show the absence of probable cause for the underlying charge; and (2) provide some credible evidence showing at least a realistic likelihood that the prosecution was "substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right." A.R.S. § 12-751(B). As explained in *Anderson*, the "some credible evidence" standard is "rigorous," and it cannot be supported by mere speculation or overly general accusations of selective, vindictive, or retaliatory prosecutions.

To be sure, Arizona's anti-SLAPP statute does not distinguish between what constitutes "prima facie proof" in civil and criminal cases. *See* A.R.S. § 12-751(B). But to overcome the presumption of regularity that attaches to criminal prosecutions, and to avoid separation of powers concerns, this Court should apply *Hartman*'s "no-probable-cause" requirement to anti-SLAPP claims raised in criminal prosecutions, or when the claims involve a grand jury, require evidence the grand jury was not independent. *See* *Bordenkircher*, 434 U.S. at 364 ("So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

II. Defendants fail to allege, let alone show, the absence of probable cause.

Defendants assume the "state actor" bringing the "legal action" is the Attorney General initiating the investigation that ultimately led to the indictment, and thus direct their focus on her statements about this case-statements made primarily before she was even elected to the office. *See, e.g.*, Hoffman Mot., at 11, Lamon Mot., at 3. None of the defendants acknowledge, let alone attempt to address, the fact that an independent body—the State Grand Jury—made the ultimate decision as to who to indict and on what charges. *Sanchez v. Ainley*, 234 Ariz. 250, 253, ¶ 8 (2014) ("A grand jury is an investigative body whose mission is to bring to trial those who may be guilty and to clear the innocent.") (cleaned up).

"Unlike a court, … the grand jury can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) (cleaned up); *State v. Young*, 149 Ariz. 580, 584 (App. 1986) ("The power to initiate and control inquiries into public offenses rests with the grand jury and not the prosecutor."). The grand jury need not identify the offender it suspects, or even "the precise nature of the offense" it is investigating. *Blair v. United States*, 250 U.S. 273, 282 (1919). A grand jury swears in its own witnesses and has authority to exclude "unauthorized persons." Ariz. R. Crim. P. 12.4. The grand jury also deliberates in total secrecy. *See United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424-425 (1983).

"It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made." *Branzburg v. Hayes*,

408 U.S. 665, 702 (1972); *see also* A.R.S. § 21-413 ("The grand jury shall return an indictment charging the person under investigation with the commission of a public offense if, from all the evidence taken together, it is convinced that there is probable cause to believe the person under investigation is guilty of such public offense."). At the request of the grand jury, the prosecutor may "draft indictments." A.R.S. § 21-408. And, once the State Grand Jury issues an indictment, by statute, the Attorney General "or [her] designee shall prosecute all indictments returned by a state grand jury." A.R.S. § 21-427.

Here, the State Grand Jury, an independent body, heard 18 days of testimony. The Attorney General's Office repeatedly told the Grand Jury that the Grand Jury controlled the investigation and the prosecutors would follow its direction. *See, e.g.*, SGT 1/16/24, at 73; SGT 1/22/24, 58-59; SGT 3/25/24, at 96; SGT 4/8/24, pt. 2, at 11, 13. The Grand Jury was frequently admonished that it must conduct its investigation with impartiality and was the sole arbiter of the evidence. *See, e.g.*, SGT 2/26/24, pt. 2, at 20 ("[I]t is my duty to state to you that if any member of this grand jury has a state of mind in reference to the above-mentioned matter, or to any party interested therein, which would prevent the juror from acting impartially and without prejudice to the substantial rights of any party, the juror is directed to retire from the grand jury room at this time.").

For example, when Hoffman demanded that Grand Jurors receive a letter drafted by his attorney, stating "The grand jury must exercise its independent judgment, as is its authority and right to determine what evidence to consider and if, and when, any indictments should issue," SGJ Ex. 26, at 12, the Grand Jury responded:

> Grand Juror: I hope the author knows to quote this sentence here: The grand jury must exercise its independent judgment and its authority and right to determine what evidence to consider.
>
> We are. You can relay that message.

SGT 4/8/24, at 10, 32.[4]

Similarly, the State repeatedly reminded the State Grand Jurors that they could choose to indict no one. SGT 2/20/24, at 46; SGT 3/18/24, at 32; 3/25/24, 104-05, 121, 147; SGT 4/8/24, pt. 2, at 132-33. Take for example:

> Mr. Klingerman: No. That's fine. I was going to say one of the things that we have planned to do, hopefully in the near future, as we have went through a lot of these witnesses or answered questions and talked about this is present a draft indictment like we normally would to you all, and then have that discussion about changes that you'd like to do and feedback, and then incorporate those.
>
> If you don't want any charges, then that's up to you too. But to frame that to see that that looks like for your consideration, have a bigger discussion about who's included and who is not included and run through the evidence one last time, if you will, to make sure that we got it right, and that was kind of the idea.

[4] Much of Hoffman's letter criticized the subpoena for his appearance, particularly after notifying the State that he planned to invoke to all questions under the Fifth Amendment. SGJ Ex. 26. To be clear, it was the Grand Jury that identified Hoffman as a target and requested that he, and the other witnesses, testify even if they planned to invoke. SGT 4/8/24, pt. 2, at 22 ("You have advised him [Hoffman's attorney] that it was the action of the grand jury that is compelling the witness."). In fact, the Grand Jury understood Hoffman's letter as "essentially ... saying the spectacle of someone constantly invoking their Fifth Amendment is supposedly supposed to bias us in such a way against the witness, and this is a deliberate attempt by the Attorney General's Office to manipulate our decision making by forcing us to participate in this public spectacle." *Id.* at 20-21. In response, the Grand Jury noted, "[t]hey don't know us do they? We're not that crowd" and "we just want to hear. Tell us what their story is. We're open minded. Tell us." *Id.* at 21. Nevertheless, the State reminded the Grand Jurors "to not harass ... somebody who consistently invokes." SGT 4/8/24, pt. 2, at 21.

> So that's coming. I think with the next week break you'll see that probably in the next couple weeks.

SGT 3/25/24, at 147.[5]

The State Grand Jury determined who it would investigate and ultimately indict, and on what charges. *See* SGT 3/18/24, at 44-49 (providing prosecutors with a list of targets for investigation); SGT 4/8/24, pt. 2, at 121 (requesting draft indictment); SGT 4/23/24, at 5-16 (reviewing draft indictment, incorporating feedback from grand jurors); *id.* at 34-35 (voting to indict); SGJ Ex. 17 (listing potential charges).

However, during discussions with the Grand Jury on potential charges, the State requested that the Grand Jury not indict Donald Trump and 28 other members, or members elect, of the Arizona Legislature.[6] Starting first with Donald Trump, the State prepared a PowerPoint reviewing the United States Department of Justice's Petite Policy. SGT 4/22/24, at 92-98; SGJ Ex. 31; U.S. Dep't of Justice, *Justice Manual*, § 9-2.031, *available at https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031*. After a lengthy discussion of that policy, the State explained:

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[5] Preceding this discussion was how to handle the person who ultimately became "Unindicted Coconspirator 5," where the Grand Jury was told "if you choose to list [Unindicted Coconspirator 5]" as a coconspirator, but do not choose to allege a charge against him, he would be a non-indicted coconspirator." SGT 3/25/24, at 146. The State had asked the Grand Jury not to indict Unindicted Coconspirator 5. *See* SGT 3/25/24, at 120-21; SGT 4/22/24, at 22. The State also told the Grand Jury that his law partner "was not … a target ... . [H]e is not culpable." SGT 3/25/24, at 128.

[6] The "Resolution" was signed by 30 Republican members, or members-elect, including Kern and Hoffman, who were indicted by the Grand Jury.

> Our time was—you know, this was an extension. It was limited. If we had a year or two together maybe that would change. I have a clear insight from who you would like to investigate, and it-and I am respectful or your authority to direct the investigation.
>
> When you consider—and then I mentioned this before—indicting somebody, even the president, is—is a big deal—even if I was to dismiss it because I don't know if I have all the evidence to prosecute it at this moment. I think you should weigh this policy heavily. And that would be—that is why I have not recommended that in the draft indictment, despite clear indications from you all that there's an interest in pursuing a charge against him.
>
> I am—I am happy to have—to answer any questions. But that—that is—that is my analysis. That's why you do not see that. And I know that may be disappointing to some of you. I understand. But it's—you—I've heard you say today, [w]e worked up the other way because of this policy, and that's where we're at.

SGT 4/22/24, at 96-97.

Next, 22 Republican members of the legislature, and 8 members elect signed a "Resolution" on December 14, 2020. That document was not a Resolution because the Legislature was not in session. Nevertheless, it was mailed to Congress as legitimate and encouraged Vice President Pence to accept Defendants' forged electoral college certificates. The Grand Jury had listed the 30 individuals, all Republican members, or members-elect, as targets, and had inquired about charging them. In response, the State explained the political process and told the Grand Jury, "I would be very cautious finding an intent to fraud with all 30 members that signed that." SGT 4/22/24, at 103; *id.* at 98-107. The State concluded by explaining:

> It's—my recommendation still is for all those other ones that you have not heard evidence on, I would say give them the benefit of the doubt at this point. But ultimately I don't want to make you—I can't tell you how to deliberate or decide a case. That's my advice to you, legally speaking.

SGT 4/22/24, at 106-07.

Defendants have not alleged, nor shown, that the Grand Jury's probable cause determination for its indictment was somehow controlled, interfered with, or determined the Attorney General's Office. At every turn, the State deferred to the Grand Jury's independence. Although some Defendants raise arguments that the indictment fails to allege a "clearly established" criminal offense, *see, e.g.*, Hoffman Mot., at 22-38; Bobb Mot., at 13-14, or that the acts alleged in the indictment are protected by the First Amendment, *see, e.g.*, Hoffman Mot., at 13-17; Defs. Ward Mot., at 3-9, these are separate questions from whether the State Grand Jury's indictment lacked independence.[7] Defendants can more appropriately raise those claims in a Rule 16.4 motion, as one already has. *See* Lamon Rule 16.4 Mot.

Thus, this Court should find Defendants fail to establish prima facia proof because they fail to show the absence of probable cause or interference with the Grand Jury's independence. The Grand Jury's independent finding of probable cause defeats any claim that this prosecution was substantially motivated by a desire to "deter, retaliate against or prevent the lawful exercise of a constitutional right." A.R.S. § 12-751(B); *cf. Slade v.*

[7] Hoffman also argues that the Attorney General lacked jurisdiction to bring this indictment. Hoffman Mot., at 23-24. However, the State Grand Jury determines its own jurisdiction, and clearly has jurisdiction to investigate and indict violations of fraudulent schemes and artifices, A.R.S. § 13-2310, and "offenses or violations of law arising out of or in connection with" fraudulent schemes and artifices. A.R.S. § 21-422(B)(5). Regardless, it is irrelevant for this anti-SLAPP motion.

City of Phoenix, 112 Ariz. 298, 301 (1975) (a finding of probable cause "constitutes a complete and absolute defense to an action for malicious prosecution").[8]

III. Defendants fail to provide credible evidence showing a realistic likelihood that this criminal prosecution is substantially motivated by a desire to deter, retaliate, or prevent the lawful exercise of a constitutional right.

As stated above, Arizona's anti-SLAPP statute also requires Defendants to show: (1) the conduct alleged in the indictment must involve the lawful exercise of a constitutional right, and (2) some credible evidence the prosecution was "substantially motivated by a desire to deter, retaliate against or prevent the lawful exercise of a constitutional right." A.R.S. § 12-751(B). Defendants fail on both counts.

A. Defendants fail to show the conduct alleged in the indictment involved the lawful exercise of a constitutional right.

1. The anti-SLAPP statute requires Defendants to show that this prosecution involves protected First Amendment activities.

Nearly all of the Anti-SLAPP defendants implicitly concede they bear the burden of showing that this prosecution concerns the lawful exercise of their First Amendment rights. *See, e.g.*, Hoffman Mot., at 13-17; Lamon Mot., at 3-8; Defs. Ward Mot., at 3-9; Bobb Mot., at 9-11. Eastman alone argues that such an analysis is unnecessary. Eastman Mot., at 8, n.2. Relying on California's interpretation of its anti-SLAPP statute, Cal Civ. Code § 426.16, Eastman contends that whether the Anti-SLAPP Defendants' statements, as outlined in the indictment, are alleged to be unlawful is irrelevant to the prima facie stage of the statute. Eastman Mot., at 8, n.2.

[8] Of course, Defendants cannot inquire into the Grand Jury's deliberations. *See* Ariz. R. Crim. P. 12.4(b).

In doing so, however, Eastman ignores a meaningful difference between Arizona's and California's respective anti-SLAPP laws. Under A.R.S. § 12-751(A) and (B), both the right to bring a motion to dismiss under the statute and the required prima facie showing are expressly conditioned on a person's *lawful* exercise of their First Amendment Rights. California's anti-SLAPP statute, on the other hand, merely requires the defendant to show that the cause of action arises from "any act ... in furtherance of the person's right of petition or free speech." Cal Civ. Code § 425.16(b)(1). This language, combined with § 425.16(b)(1)'s requirement that the plaintiff prove a probability of success on the merits once the burden has shifted, is the reason California courts have found the application of First Amendment exceptions irrelevant to the defendant meeting the prima facie stage of its anti-SLAPP statute. *See Navellier v. Sletten*, 52 P.3d 703, 712-13 (Cal. 2002).

Accordingly, Eastman's reliance on California law is misplaced. Indeed, the differences between California's and Arizona's anti-SLAPP statutes reinforce an interpretation of A.R.S. § 12-751 that mandates the defendant demonstrate their prosecution involves and was substantially motivated by a desire to target protected First Amendment activity. Otherwise, the term "lawful" would be nullified in the statute. *See Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019) (cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision).

Moreover, failing to afford the term "lawful" force would untether A.R.S. § 12-751 from its purpose. As Eastman acknowledges, the goal of Arizona's anti-SLAPP statute is to preserve the free exercise of individuals' political rights from the use of

litigation to intimidate them into silence. Eastman Mot., at 2. The underlying presumption in this goal, however, is that the individual being subjected to litigation was actually engaging the legitimate exercise of their rights, and not some activity prohibited by the law. Thus, the term "lawful" must be given meaning to ensure those who invoke the anti-SLAPP statute actually merit its protection.

2. Defendants have not shown that this prosecution involves the lawful exercise of their First Amendment rights.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Article 2, Section 6 of the Arizona Constitution likewise "guarantees each individual's right to speak freely," *State v. Stummer*, 219 Ariz. 137,142, ¶ 14 (2008). Neither the First Amendment nor the Arizona Constitution's free speech provision protects all speech, however. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992); Ariz. Const. art 2, § 6.

It is settled, for example, that fraudulent speech-in other words, knowingly false or misleading speech made with intent to deceive another and secure some benefit as a result-is not protected under the First Amendment. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 723 (2012) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations ... it is well established that the Government may restrict speech without affronting the First Amendment."); *United States v. Glaub*, 910 F.3d 1334, 1338 (10th Cir. 2018). As explained in a recent decision concerning a conspiracy to commit election-related fraud:

> This exception can be attributed to the particulars of history, but it can also be understood as acknowledging the irrelevance of fraudulent acts to the values protected by the First Amendment, such as the free exchange of ideas, the furtherance of deliberative democracy, the ability to hold institutions accountable, and the import of personal expressive fulfillment. Regardless of its justification, fraud is not covered speech under the First Amendment.

United States v. Mackey, 652 F. Supp. 3d. 309, 348 (E.D.N.Y. 2023).

The First Amendment also offers no protection to speech "when it is the very vehicle of the crime itself," or to speech that is integral to criminal conduct. *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970); *State v. Crisp*, 175 Ariz. 281, 283 (App. 1993). "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *Mackey*, 652 F. Supp. 3d at 344 ("Treason is still treason if it is spoken aloud. Conspiracy is still criminal if it is communicated verbally. A supervisor who publicly orders a subordinate to discriminate has violated anti-discrimination laws, despite acting through their utterances.").

Finally, the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993); *State v. Ochoa*, 189 Ariz. 454, 460 (App. 1997); *cf. Reichle v. Howards*, 566 U.S. 658, 668 (2012) (observing that protected speech is often a "wholly

legitimate consideration" for officers when deciding whether to file charges or to make an arrest) (citing *Wayte*, 470 U.S. at 612-613).

Here, the State does not dispute the importance Defendants' right to engage in political speech and petitioning activity. *See McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 344, 346 (1995); *BE & K Const. v. NLRB*, 536 U.S. 516, 524-25 (2002). There is no question that Defendants were entitled to express support for former President Trump and to even make false statements concerning the 2020 election, as a general matter. *Alvarez*, 567 U.S. at 719 ("[F]alsity alone may not suffice to bring the speech outside the First Amendment.").

But this case is not about those types of speech, despite Defendants' attempts to muddy the waters. The conspiracy, fraud, and forgery charges at issue here do not implicate protected political speech. Instead, the indictment, and each statement referenced within it, falls within the three categories outlined above: that is, (1) speech that constitutes fraud (the Fraudulent Schemes and Forgery charges); (2) speech that either is the vehicle by which a crime is committed or that is integral to the offense (the Conspiracy Charge); and (3) speech that provides evidence of the Defendants' intent and motives.

Consider, for example, Defendants' contention that the submission of an "alternate" slate of Presidential Electors, in the abstract, constitutes a lawful exercise of the right to petition the government for redress. Eastman Mot., at 9-13; Hoffman Mot., at 5-10; Lamon Mot., at 5-8, Exh. 3. This principle says nothing about whether the slate at issue *in this case* crossed the line from protected speech to unprotected fraud. As alleged

in the indictment, which this Court must take as true for purposes of this motion, Defendants knowingly and intentionally:

1. Conspired to create, prepared, and submitted a Presidential Electors slate that misrepresented they were the "duly elected and qualified" Presidential Electors for the state of Arizona;

2. Misrepresented to the public that the slate was prepared only as a contingency in the event a legal challenge to the election succeeded; and

3. Engaged in a campaign at nearly every level of local, state, and federal government to have the fake slate accepted over the genuine slate, even though no legal challenge successfully changed the outcome of Arizona's 2020 Presidential Election.

Indeed, the indictment even outlines evidence that the legal challenges filed by Defendants were a mere pretext to conceal Defendants' efforts to overturn the election by any means necessary. Indictment at 26 ("Also just FYI—I recall now there was a rush to file our petition in order to give legal 'cover' for the electors in AZ to 'vote' on the 14th ... ."").

Under these circumstances, the First Amendment provides no safe harbor for the Defendants' actions. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) ("The first amendment interests involved in private litigation ... are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims."). And the distinction between these categories of speech and protected political speech is not arbitrary. Just as there is a profound difference between lobbying and bribery, there is an equally profound difference between the legitimate airing of grievances, and a fraudulent effort to change lawful election results. *See United States v. Ferreiro*, 866 F.3d 107, 125 (3rd Cir. 2017) (distinguishing right to petition the government and bribery law); *United*

States v. Ambort, 405 F.3d 1109, 1117 (10th Cir. 2005) (rejecting defendants' attempt to characterize knowing and intentional submission of fraudulent tax returns as "good faith" exercise of right to challenge tax laws); *United States v. Trump*, Case No. 1:23-cr-00257-TSC, 2024 WL 3638344, at *1 (D.D.C. Aug. 3, 2024) (mem. opinion) (denying selective and vindictive prosecution claims and rejecting Donald Trump's "improper reframing of the allegations against him" as merely a prosecution for "disput[ing] the outcome of an election and work[ing] with others to propose alternate electors").

Taking Defendants' argument, the list of potential offenses that would essentially be unprosecutable would be extensive. The entirety of Title 16 involves voting, including multiple crimes for engaging in specific conduct relating to elections. A.R.S. Title 16, Chapter 7, Article 1. Turning to Title 13, crimes such as homicide, drug possession, and sexual offenses could "involve" religious freedoms under the First Amendment. Gang offenses, criminal syndicates, illegal enterprises, hazing, terrorism, riot, and family related offenses could involve freedom of association. Assault, threatening, forgery, frauds, obstruction of public administration, bribery, perjury, interference with judicial proceedings, false reporting, residential picketing, and obscenity-related offenses could all involve freedom of speech. The weapons and explosives offenses in Title 13, Chapter 31, involve the Second Amendment. But simply asserting some crime has a relationship to a constitutional right does not mean prosecuting its commission interferes with those rights. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940) ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.").

Of course, Defendants are entitled to assert their innocence and contest the State's theory regarding their intent and actions. But that is a question for a jury to resolve at trial, not for the Court at this stage in the proceedings. *McCormick v. United States*, 500 U.S. 257, 270 (1991) ("It goes without saying that matters of intent are for the jury to consider.").

B. Defendants fail to present credible evidence that the prosecution was substantially motivated by a desire to deter, retaliate against, or prevent the lawful exercise of a constitutional right.

Even if the Court believes this case involves the lawful exercise of Defendants' First Amendment Rights, Defendants still bear the burden to present prima facie proof under A.R.S. § 12-751(B). Although the Defendants' briefs speculate as to the State's motives, they ultimately offer no credible evidence that the prosecution in this case was motivated by a desire to assault the Defendants' First Amendment rights.

1. The Attorney General's and Chief Deputy's statements and social media posts amount to little more than speculation concerning the State's political bias.

Each defendant relies heavily on Attorney General Mayes' statements during her campaign for the Office of the Attorney General and, to a lesser degree, statements after she took office, to argue that the prosecution is motivated by a desire to punish them for and deter them from raising concerns regarding the integrity of Arizona's elections.

Every defendant for example, cites campaign statements by Attorney General Mayes expressing her belief that Defendants' conduct during the 2020 election

constituted a crime that merited investigation.[9] Hoffman Mot., at 18-19; Eastman Mot., at 17-22; Lamon Mot., at 3-4; Defs. Ward Mot., at 1-3; Bobb Mot., at 5. These statements, Defendants contend, show that this prosecution was born from the Attorney General's political bias and desire to punish defendants for engaging in speech she disfavored. But Attorney General Mayes' opinion that Defendants committed a crime, or that potential crime should be investigated, says nothing about a desire to punish individuals for the lawful exercise of their rights.[10] The Attorney General's duty is to enforce the law; to say that this duty does not encompass the ability to express a belief that the law has been violated is baseless. *Cf. United States v. Knott*, 256 F.3d 20, 32 (1st Cir. 2001) (finding

[9] Hoffman writes that "the Attorney General melodramatically branded this effort the 'Fake Electors Scheme.'" Hoffman Mot at 6. Actually, that was done by one of their attorneys in a December 8, 2020 email, writing that "we would just be sending in 'fake' electoral votes to Pence." It became common language in the media. Alan Feuer & Katie Benner, *The Fake Electors Scheme, Explained*, N.Y. Time. (Updated Aug. 3, 2022), *available at https://www.nytimes.com/2022/07/27/us/politics/fake-electors-explained-trump-jan-6.html*. The Defendants were even referred to as the "fake electors" in the Select Committee to Investigate the January 6th Attack on the United States Capitol's Executive Summary. *See, e.g.*, SGJ Ex. 7, at 107 ("President Trump, through others acting at his behest, submitted slates of fake electors to Congress … .").

[10] Prosecutors frequently comment on crimes they are investigating. For example, Maricopa County Attorney Rachel Mitchell commented on the Gilbert Goons investigation while it was ongoing, stating, "I don't know where the name of 'Gilbert Goons' came from it, ... It doesn't seem to capture the seriousness of this. These are criminal acts. And we, of course, if they are doing this through an organized street gang-type situation, we will look at the enhancement of gang charges or whether it was in furtherance of a street gang." AZ Family Digital News Staff, *Maricopa County Attorney Says Preston Lord's Murder, Teen Assault Cases a 'Monumental Task,'* Ariz. Family (Jan. 24, 2024), *available at https://www.azfamily.com/2024/01/25/maricopa-county-attorney-says-preston-lords-murder-teen-assault-cases-monumental-task/*. That did not somehow mean she prosecuted the Gilbert Goons to suppress their freedom of association, perhaps, because like here, they had no right to associate to commit crimes.

standard press releases from the U.S. Attorney and EPA following indictment did "not suggest any intent to vex"); *United States v. Avenatti*, 433 F. Supp. 3d 552, 566-71 (S.D.N.Y. 2020) (rejecting defendant's arguments that press statements concerning his arrest showed any bias, malice, or animus).

Moreover, Defendants' arguments also do not align with the timeline of events between the Attorney General's taking office and indictment here. If, as Defendants assert, this prosecution was a foregone conclusion born from the Attorney General's animus to their political views, one would expect the Attorney General's Office to have rushed to subject the Defendants to criminal proceedings.

Instead, the Attorney General's Office has continuously investigated the Fake Electors Scheme since April 2023. It has conducted numerous interviews with witnesses across the country, served search warrants and subpoenas, and collected publicly available information. SGT 4/8/24, pt. 2, at 46. To date, it has disclosed over 62,000 pages of material. The lead investigator testified that he had never "[a]t any time ... gotten any indication from any member of the Attorney General's Office that they want a specific outcome from your investigation," including the Attorney General herself. *Id.* at 57-58. These facts, simply put, belie any claim that this prosecution was anything but the Attorney General and her subordinates doing their jobs. *See Trump*, 2024 WL 3638344, at *7 (finding "the timing of this case's prosecution 'is evidence only of restraint and careful pursuit of potential investigative leads, not vindictive prosecution,' especially given that 'probable cause [was] found by a grand jury for indictment.'") (quoting *United States v. Oseguera Gonzalez*, 507 F. Supp. 3d 137, 177 (D.D.C. 2020)).

Several defendants also claim that statements by Attorney General Mayes that "[t]here has to be a deterrent to this happening again," reveal her intention to use this prosecution to deter Defendants from engaging in lawful political activity. Eastman Mot., at 21; Hoffman Mot., at 19; Lamon Mot., at 3-4. But a law enforcement official's expressed desire to deter conduct she believes is criminal in nature, and therefore outside the First Amendment's protection, is not improper, let alone an indication of any intent to prejudice an individual's First Amendment rights. A key goal of investigating and prosecuting particular individuals, and, indeed, of the criminal justice system as a whole, is to deter future criminal conduct. *See State v. Wideman*, 165 Ariz. 364, 369 (App. 1990); *United States v. Catlett*, 584 F.2d 864, 867-68 (8th Cir. 1978) (discussing government's legitimate interest in prosecuting individuals "based in part upon the potential deterrent effect on others" in a tax case).

Next, Hoffman and Eastman claim that the Attorney General's bias towards their speech activities is evidenced by her interactions with the Arizona legislature. Hoffman Mot., at 20-21; Eastman Mot., at 20. Hoffman in particular decries the Attorney General's response to Anthony Kern's decision, as the head of the State Senate Judiciary Committee, to open a senate inquiry into the Attorney General. Hoffman Mot., at 21. But neither Hoffman nor Eastman make any attempt to establish a connection between these events and this prosecution. *See United States v. Biden*, ___ F. Supp. 3d ___, 2024 WL 1603774, at *6 (D. Del. Apr. 12, 2024) ("[T]he Court has been given nothing credible to suggest that the conduct of ... lawmakers (or anyone else) had any impact whatsoever on the Special Counsel. It is all speculation."); *Trump*, 2024 WL 3638344, at *5 (rejecting

Trump's "speculation and his opinion that the Government indicted him 'to suppress a viewpoint it does not wish to hear,' ... rather than to dutifully enforce the criminal law, as the court is bound to presume"); *see also id.* at *6 (finding news articles and Truth Social posts failed to show the "prosecutorial team 'upp[ed] the ante' by filing 'increased charges in order to retaliate against' [Trump] in response to his public criticism of the 2020 election, President Biden and his relatives, and the Special Counsel").

Finally, Hoffman and Eastman also assert that Chief Deputy Dan Barr's comments regarding various political issues, including the Defendants and facts surrounding this case, demonstrate political bias. Hoffman Mot., at 19-20; Eastman Mot., at 18-20. As an initial matter, one of the articles cited by both Lamon and Eastman as "proof" of animus torpedoes their claim. In that article, written just as the investigation was starting, Barr is quoted as stating, "This is something we're not going to go into thinking, 'Maybe we'll get a conviction,' or 'Maybe we have a pretty good chance.' ... 'This has to be ironclad shut.'" *See* Lamon Mot., Exh. 1, at pdf page 16. The cited examples of Barr's statements discuss Trump or the charged Fake Electors. Yet, the Office advocated not to charge Trump and also to give 28 Republican members or members-elect, the "benefit of the doubt." SGT 4/22/24, at 106-07.

2. Defendants' prominence cannot satisfy their prima facie burden.

Several defendants, including Bobb, Eastman, and Lamon, imply throughout their briefs that the State's decision to prosecute them stems from their status as prominent

figures on the local and national stage.[11] Self-claimed, or actual, political or social prominence, even being a member of an opposing party, is not prima facie evidence of retaliatory prosecution. "Absent some evidentiary predicate, direct or circumstantial ... merely chanting the mantra of prosecutorial vindictiveness" does not carry Defendants' burden. *United States v. Ortiz-Santiago*, 211 F.3d 146, 150 (1st Cir. 2000). The indictment in this case focuses entirely on the Defendants' conduct and references their backgrounds only to the extent necessary to contextualize that conduct.

First, Bobb suggests she was made a target because she failed to comply with a subpoena. Bobb Mot., at 5. The State Grand Jury transcripts dispels this speculation. The State Grand Jury, on its own and after hearing substantial evidence, made Bobb a target of its investigation. *See* SGT 3/18/24, at 47. This occurred a month after the Attorney General's Office told Bobb she was not a target of the investigation. At no point was the State Grand Jury told Bobb had refused to testify. And in any event, "[p]rosecutorial actions following 'routine invocations of procedural rights' do not normally give rise to presumptions of vindictiveness." *Oseguera Gonzalez*, 507 F. Supp. 3d at 177 (quoting *United States v. Meadows*, 867 F.3d 1305, 1313 (D.C. Cir. 2017)).

[11] As this Court recently noted in an order modifying release conditions, Defendants are "not entitled to greater or lesser consideration of requested relief because of [their] alleged status or stature. Any suggestion to the contrary goes against all concepts of justice." July 18, 2024 Order Re: Modifications of Release Conditions for Giuliani.

Bobb next claims that she is "unique among defendants" because she was "a full-time professional journalist for One America News Network."[12] Bobb Mot., at 1-2. She asserts that during the 2020 election she "garnered a loyal following among Trump supporters ... [and] thousands of Arizonans who distrust Arizona's handling of the 2020 election." *Id.* at 2-3. Accordingly, Bobb concludes that her charges stem from an "audacious attempt to silence the State's most outspoken critical reporter." *Id.* at 4.

Bobb's status as a reporter has nothing to do with this case. It is her role as a member of the team that conspired and assisted in the creation of the Fraudulent Electors Scheme, as well as her role in perpetuating that scheme up to and including January 6, 2021, that is at issue in this case. Bobb, for example, wrote to someone in a Twitter Direct Message on January 6th: "I'm here with Rudy [Giuliani]. We're safe. It is not over. Working lots, but nothing has been certified," and "We definitely need pray. The fact that the [electoral] votes were t [sic] counted is good." Unsurprisingly, the State has not limited Bobb's reporting at anytime, before or after the indictment. She has since gone on numerous podcasts and remains active on X.com.

Second, Eastman implies his prosecution stems from his status as "a lawyer, a former law professor, a former dean of Chapman University School of Law and a well-known Constitutional scholar [and] founding director of the Center for Constitutional Jurisprudence." Eastman Mot., at 13. But Eastman was charged because of his actions in

[12] That is not entirely accurate. Bobb worked for the Trump Campaign with Giuliani between November 2020 and February 2021. On November 15, 2020, Bobb wrote to Jenna Ellis, "So excited to be on the team. Keeping it under wraps though."

the wake of the 2020 election, not for his alleged status as a respected legal scholar. Indeed, contrary to his claims, the indictment specifically alleges that Eastman abandoned his role as a legal advisor to pressure numerous individuals, including Vice President Pence, to engage in conduct he knew was unlawful. The indictment also alleges he did so for the express purpose of aiding the Fake Electors Scheme to overturn the election.

Lamon extensively outlines his success as a businessman, his status as a veteran, his charitable activities, and his bid for United States Senate during the 2020 election. Lamon Mot., at 2-4. Lamon states that "his Senate bid only increased the size of the target on his back." *Id.* at 3. This claim is false. Lamon is being prosecuted for his role in the fraudulent electors scheme, full stop, as the Grand Jury Transcripts make clear. In fact, the Grand Jury was told that Lamon said that "he believed there was a contingency because Kelli Ward told him so." SGT 4/8/24, pt. 2, at 109. The Grand Jury chose to indict him regardless. *See id.* at 135 ("[I]f we think that they might be pulling a string we can say, that's not good faith. They're not telling us the whole story.").

3. A prosecutorial agency's decision to re-evaluate and re-investigate potential criminal conduct does not provide evidence of a desire to punish defendants' for exercising their First Amendment rights.

Eastman also contends that the current administration's decision to investigate and prosecute the Defendants reveals political bias when contrasted against former Attorney General Mark Brnovich's previous investigation. Eastman Mot., at 17-18.

This argument, however, is antithetical to the Executive Branch's discretion in executing the law, which requires flexibility in the prosecuting agency's assessment of

the proper extent of prosecution. *Goodwin*, 457 U.S. at 381. This interest is even more compelling during the initial investigation and charging phase of a potential criminal case. And in this case, it is beyond dispute that substantial developments, such as the January 6th Committee, provided additional information for investigators.

CONCLUSION

For these reasons, the State respectfully requests this Court find the anti-SLAPP defendants have failed to meet their burden of showing prima facie proof that the charges were brought for an improper purpose.

Respectfully submitted August 5, 2024.

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ORIGINAL of the foregoing e-filed
this 5th day of August, 2024 with:

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The Honorable Bruce Cohen
Maricopa County Superior Court

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