ARIZONA COURT OF APPEALS

DIVISION ONE

Mark Gilmore and Mark Harder, Plaintiffs/Appellants, v. Kate Gallego, et al., Defendants/Appellees, American Federation of State, County and Municipal Employees, (AFSCME) Local 2384, Intervening Defendant/Appellee.	Case No. 1 CA-CV 22-0049 Maricopa County Superior Court Case No. CV2019-009033

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF APPELLANT

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Pursuant to Arizona Rules of Civil Appellate Procedure (ARCAP), Rule 16, the American Civil Liberties Union of Arizona (ACLU of Arizona) files this amicus brief in support of Appellant with respect to the fourth question on appeal only, whether the Superior Court properly awarded attorneys' fees to Defendant, the City of Phoenix ("City"), and Defendant/Intervenor, American Federation of State, County and Municipal Employees (AFSCME), Local 2384 (the "Union"), against Plaintiffs, two City employees who brought a First Amendment claim.

I. This Case Did Not "Arise Under" a Contract and is Therefore Outside the Scope of A.R.S. § 12-341.01.

A. This is a Civil Rights Case, Not a Contract Case.

The Superior Court in this case awarded substantial attorneys' fees to Appellee City of Phoenix, stating: "In its discretion, the Court finds that a fee award in favor of the City Defendants is justified based on the factors in A.R.S. § 12-341.01 and *Associated Indem. Corp. v. Warner*, 143 Ariz. 567 (1985)."[1] Order Granting the City Defendants' Application for Attorneys' Fees and Costs, Nov. 8, 2021, at 2. The Court used nearly identical language in granting the Union's request. *See* Order Re:

[1] While it is true that this court "may uphold a decision on attorney fees under § 12–341.01 if it has any reasonable basis, even if the trial court gave no reasons for denying the request for fees," *Tucson Ests. Prop. Owners Ass'n, Inc. v. McGovern*, 239 Ariz. 52, 56 (2016), the dearth of analysis gives this Court little to review. *See Warner*, 143 Ariz. at 571 ("it is the better practice to have a record which reflects the justification for the trial court's denial of fees").

Intervenor Defendant's Motion for Attorneys' Fees and Costs at 2 Nov. 8, 2021, at 2 ("After considering the six factors set forth in [*Warner*], five of the factors weigh in favor of Intervening Defendant and none weigh in favor of Plaintiffs for the reasons set forth in Intervening Defendants' Reply Memorandum.").

The referenced statute, A.R.S. § 12-341.01(A), provides that: "in any contested action *arising out of a contract*, express or implied, the court may award the successful party reasonable attorney fees." (emphasis added). This case, however, did not arise out of a contract because the primary issue in this case is whether or not certain political activities by "release time" employees, whose salaries were allegedly funded by Plaintiffs,[2] violated Plaintiffs' First Amendment rights of speech and association.

Because the requirement to provide such "release time" was created by the union contract between AFCSME and the City, the lower court found that this action arose out of a contract. While it is true that this lawsuit required the Superior Court to interpret certain provisions of the 2019-2021 Memorandum of Understanding

[2] The parties strongly dispute whether or not the Plaintiffs actually fund release time, and whether or not political activities conducted during release time, as opposed to job-related activities such as representing employees in disputes with the City, formed a significant part of that time. Again, this brief expresses no opinion on the proper resolution of these issues. Rather, it focuses on the arguments made by Plaintiffs which are assumed, for the purpose of Sections I to III of this Amicus Brief, to have been made in good faith.

between the City and the Union, this case is not a contract case in the ordinary sense. *Cf. Hale v. Amphitheater Sch. Dist. No. 10 of Pima Cnty.*, 192 Ariz. 111, 113 (1998) (awarding attorney's fees under A.R.S. § 12-341.01 in a dispute over the non-renewal of an employment contract). Fundamentally, this is a case in which two City employees sought to vindicate their First Amendment rights. *Cf. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) (holding that forcing public-sector workers to subsidize a union "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.").

B. An Action Does Not "Arise Under" a Contract to Which Plaintiffs Were Not, and Could Not Be, Parties.

Plaintiffs were undisputedly not parties to the union contract as they chose, in accordance with their rights under Arizona law, not to join the Union. See A.R.S. §§ 23-1301 to -1307 (Arizona's "right to work" statutes). While the City is correct that, "'arising out of a contract' is broad for the purposes of this statute," *ML Servicing Co. v. Coles*, 235 Ariz. 562, 570 (2014), the cases cited in the City's brief involve situations in which the parties had or were alleged to have had a contract, not situations in which one party alleged wrongdoing by another party but made no allegation that a contract existed between them.[3] There are two exceptions in the

[3] Examples given in *ML Servicing* include situations involving torts "interwoven"

cited cases, but both involve third-party beneficiaries.[4] In *ML Servicing*, the party who was awarded attorneys' fees was specifically named as the beneficiary of the life insurance contract from which the dispute arose. *Id.* at 566. Similarly, in *Nationwide Mutual Insurance Co. v. Granillo*, Nationwide, a party to the insurance contract, sought a declaratory judgment regarding which members of a family were covered by their contract with one family member. 117 Ariz. 389, 391 (1977).

Contrary to the City's assertion, *American Federation of State County & Municipal Employees AFL-CIO Loc. 2384 v. City of Phoenix*, 249 Ariz. 105, 106 (2020), does not undermine, but instead supports, Appellants' argument. There, the issue was "whether a one-time payout for unused vacation leave forms part of an employee's compensation for purposes of calculating that employee's pension benefit." *Id.* The case raised no significant constitutional issues, except for the application of the contract clause, and there was no dispute that the plaintiffs in that case were suing about the correct interpretation of language in their union contract

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with a contract between the parties, or where one party alleged that there was a contract with the other, but the court ultimately held that no such contact existed. *Id.* at 570 (*citing ASH, Inc. v. Mesa Unified Sch. Dist. No. 4,* 138 Ariz. 190, 191 (1983) (where plaintiffs "sought to invalidate the contract between Mesa Schools and All American and to compel Mesa Schools to award the contract to ASH," claiming that a contract should have existed between the parties.)).

[4] It is not clear from the lower court's holding that the award of attorneys' fees was based on any finding that they were third-party beneficiaries; Plaintiffs also, unlike other third party beneficiaries, expressly declined to be parties to the contract.

with the City. In upholding the attorneys' fees award, the Supreme Court held:

> This case is distinguishable from *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346, 350, 687 P.2d 354, 358 (1984), which stated that courts should generally refrain from awarding fees under § 12-341.01 against citizens who sue to challenge the legitimacy of government action because it would "chill" such suits. Here, Petitioners challenged A.R. 2.18 **as parties to a contract** rather than as aggrieved citizens.

Id. at 113 (emphasis added). *See also Piccioli v. City of Phoenix*, 249 Ariz. 113, 119, 466 P.3d 1166, 1172 (2020) (a similar case containing the exact same language on attorneys' fees). This case is the opposite of *Piccioli*—Plaintiffs are not parties to the contract, and they are not simply asking the court to interpret the contract in a way that benefits them financially. Instead, they are alleging that separate and independent constitutional rights are being violated, specifically their First Amendment rights.

Put another way, Plaintiffs' claim is not for a breach of the contract to which they are not parties, but rather that provisions of said contract result in the violation of their constitutional rights as third parties. In a similar way, if a police union contract contained provisions stating that officers could choose to work, or not work, during protests or parades based on their views about the content of the protected expression, resulting in the denial of a permit for a protest of police misconduct because not enough officers agreed to perform their duties during the event, that would likely violate the First Amendment rights of the protestors. *See Forsyth Cnty.,*

Ga. v. Nationalist Movement, 505 U.S. 123, 130, 112 S. Ct. 2395, 2401 (1992) ("any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message"); *MacDonald v. City of Chicago*, 243 F.3d 1021, 1033 (7th Cir. 2001) (*Forsyth* does not invalidate a permit scheme that takes into account whether enough officers are available to protect against traffic hazards—but the government official granting or denying the permit may not consider the content of the march in making that determination). *Cf. Akindes v. City of Kenosha*, No. 20-CV-1353-JPS-JPS, 2021 WL 4482838, at *12 (E.D. Wis. Sept. 30, 2021) (holding that police arresting only protestors, but not counter-protestors, based on the content of their messages would violate the First Amendment). The fact that the City based the denial of a permit on a flawed union contract should not convert the lawsuit from a First Amendment claim to an action "arising under" contract. To give another example, if a city and a police union entered a contract which dramatically restricted the city's ability to discipline officers for clear violations of residents' constitutional rights, residents should be permitted to challenge that policy's constitutionality without fear that they will be subject to a massive fee award under the statute. In both examples, the plaintiff-residents' claims should not be held to "arise out of" a contract which they are not, and could not be, a party to.

A final example of a civil rights case where attorneys' fees would be inappropriate despite the existence of a contract is *Toomey v. Arizona,* which is an

Equal Protection challenge the ACLU of Arizona brought to a blanket exclusion on gender-affirming care in the health plan offered to Arizona state university employees. *See* Complaint, 19-cv-00035-RM-LCK (D. Ct. Ariz., Jan. 23, 2019). Even though insurance contracts are involved in the case, it is not about a breach of contract by the insurer, but rather the inclusion of a provision in those contracts that violates the Constitutional rights of the plaintiff. Of course, A.R.S. § 12-341.01 does not apply in the federal courts, but parties should be able to bring constitutional claims in state court, perhaps under a state constitutional provision or because they desire a speedier resolution, without fear that they will be bankrupted by attorneys' fees.

II. Even if this were a Contract Action, the Statute is Merely a Gap-Filler, which Indicates that it Does Not Implicate Public Policy Concerns—and the Parties Should be Able to Contract Around It.

"In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser." *E.g., Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 602, 121 S. Ct. 1835, 1839 (2001) (*citing Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612 (1975)). This is called the "American Rule." *See id.* Despite the prevalence of the "American Rule," a statute can provide for the award of attorneys' fees, and Congress has done so in many civil rights statutes. S*ee id.* There are clear public policy reasons for doing so

in those types of cases. *See, e.g.*, *City of Riverside v. Rivera*, 477 U.S. 561, 577–78, 106 S. Ct. 2686, 2696 (1986) ("[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." (quoting the legislative history of 42 U.S.C. § 1988)). One reason is that otherwise the private bar would be unlikely to seek to vindicate rights which cause few economic damages. *See id.* Another reason is that monetary damages are simply insufficient to vindicate the rights at stake—especially in the First Amendment context. Courts have repeatedly held that the deprivation of constitutional rights constitutes "irreparable harm" that cannot be remedied with monetary damages, and that "[t]his is especially so in the First Amendment context." *Total Real Est. Grp., LLC v. Strode, No. 3:21-CV-01677-HZ*, 2022 WL 633670, at *14 (D. Or. Mar. 3, 2022) (*citing Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690 (1976)). In these types of cases, the statute allowing a prevailing party to collect attorneys' fees serves an important public policy purpose. But, just as the "policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant" in a civil rights case, *Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412, 418–19, 98 S. Ct. 694, 699 (1978), the policy reasons for awarding attorneys' fees in a civil rights case manifestly do not apply in a contract case.

In a contract case, the purpose of damages is to put the party in the position that they would have been in but for the breach. *E.g. Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 255 (1979) ("the applicable damages are always the sum which will put the party in as good a position as if the contract had been fully performed." (*citing* Restatement (First) of Contracts § 346 (1932))). *See also Rhue v. Dawson,* 173 Ariz. 220, 232 (1992) ("Generally, punitive damages are not appropriate in contract action" unless the plaintiff has "asserted a claim for fraud which supports the award of punitive damages," or has engaged in other "overt, dishonest dealings"). Thus, the award of fees under A.R.S. § 12-341.01 is not some important public policy provision to ensure parties can vindicate their rights, but rather a logical extension of the general principle of contract law—an award to make the non-breaching party whole. In this case, however, there was no breach of contract alleged between the parties—Plaintiff City employees and defendant City of Phoenix—so there is no way to put the Defendants in the position they would have been in but for the nonexistent breach.

Another basic principle of contract law is that the parties can contract around most statutory default rules, or "gap-fillers." *E & S Insulation Co. of Arizona v. E. L. Jones Const. Co.*, 121 Ariz. 468, 470 (1979) ("Parties have the legal right to make whatever contracts they desire, provided only that the contract is not for illegal purposes or against public policy."). "If a contractual term is not specifically

prohibited by legislation, courts will uphold the term unless an otherwise identifiable public policy clearly outweighs the interest in the term's enforcement." *CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 411–12 (2014) (*citing* Restatement (Second) of Contracts § 178 (1981)). This statute expressly provides that there is no such public policy, identifying the statute as a "gap-filler" that parties are free to contract around. A.R.S. § 12-341.01.A (providing that the statute "shall not be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney fees."). In other words, the parties to a contract are free to agree that each party should bear their own attorneys' fees, or that the prevailing party is always entitled to their attorneys' fees, rather than leaving the award to the court's discretion, or even that only one party is entitled to attorneys' fees if they prevail, while the other party may or may not be able to recover under the statute. *See, e.g.*, *Tucson Ests. Prop. Owners Ass'n, Inc. v. McGovern*, 239 Ariz. 52, 55 (2016). As the Arizona Supreme Court explained: "[a]s long as a contract is legal and enforceable, parties of course may fashion all aspects of an attorney fee provision . . . in whatever way they see fit." *Am. Power Prod., Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, 370 (2017).

Once again, the fundamental problem in this case is that the Plaintiffs were not parties to the contract between the City and the Union, and therefore it was impossible for them to exercise the right that every contracting party in Arizona has:

the right to contract out of the applicability of A.R.S. § 12-341.01. To force Plaintiffs to be bound by a provision of a contract (in this case, a default provision created by statute) that they are not parties to is fundamentally unfair.[5]

III. The Award of Attorneys' Fees in this Case Was an Abuse of Discretion.

A. Both the *Warner* Factors and the Precedent in *Witsuber* Demonstrate that a Fee Award Was Inappropriate in this Case.

Even if this Court finds that the action did "arise under" contract and A.R.S. § 12-341.01 applies, it should still hold that the award was an abuse of discretion in this case. In *Warner*, the Arizona Supreme Court noted that "the purpose of permissive awards of attorney's fees in contract actions has been elusive and has resulted in inconsistent application of the statute by the trial courts of this state." 143 Ariz. at 570. In a later case, however, the court explained that:

> The purposes of § 12–341.01(A) include: (1) mitigating the burden of the expense of litigation to establish a just claim or a just defense; (2) encouraging more careful analysis prior to filing suit by imposing the risk of paying the opposing party's attorneys' fees where legitimate settlement offers are rejected; and (3) promoting settlements and thus reducing caseloads involving contractual matters."

Hall v. Read Dev., Inc., 229 Ariz. 277, 282 (2012) (citations and quotation marks

[5] In addition, binding Plaintiffs to a provision in a Union contract as non-members of the Union would seem to violate the public policy contained in Arizona's "right to work" laws. *Cf. Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO, Loc. 2384 v. City of Phoenix*, 213 Ariz. 358, 363, (2006) (holding that contracts requiring non-members of a City Union to pay their "fair share" for the services provided by the union violate Arizona law, even though the amount was less than full union dues).

omitted). This is, again, not a "contractual matter," as Plaintiffs are not parties to the contract. And, as noted in Section I, *supra*, a "contractual matter" is one in which harms can be remedied with monetary damages; that is simply not true of First Amendment claims.

In *Warner*, the Supreme Court held that there is no presumption that fees should be awarded and set forth factors to guide the trial courts' discretion in deciding whether to award fees:

> 1. The merits of the claim or defense presented by the unsuccessful party.
>
> 2. The litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving the result.
>
> 3. Assessing fees against the unsuccessful party would cause an extreme hardship.
>
> 4. The successful party did not prevail with respect to all of the relief sought. . . . [5.] the novelty of the legal question presented, and [6.] whether such claim or defense had previously been adjudicated in this jurisdiction. We also believe that the trial court should consider [7.] whether the award in any particular case would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees.

143 Ariz. at 570. While the lower court did not engage in a lengthy analysis, it appears the court may have failed to consider the hardship caused by assessing such substantial fees against the Plaintiffs as well as the discouraging effect on other

parties.[6] The latter concern was specifically set forth in *Wistuber v. Paradise Valley Unified Sch. Dist*., 141 Ariz. 346 (1984), which involved a constitutional challenge to a collective bargaining agreement between a government agency and a union. In that case, the Arizona Supreme Court pointed out that:

> An award of attorney's fees would be contrary to public policy in this case because it would have a chilling effect on other parties who may wish to question the legitimacy of the actions of public officials. Where aggrieved citizens, in good-faith, seek a determination of the legitimacy of governmental actions, attorney's fees should not usually be awarded.

Id. at 350. That is precisely the situation here. While it is true that lower courts have been given incredibly broad discretion under A.R.S. § 12-341.01, in cases involving the vindication of non-contractual Constitutional rights, this Court should follow *Warner* and *Wistuber* and hold that the lower court abused its discretion by failing to expressly consider the deterrent effect of its fee award on future litigation.

B. The Large Fee Award Against Private Citizens Will Have a Chilling Effect on Arizonans Seeking to Vindicate their Constitutional Rights.

At the outset, it is important to note that this is an exceptionally high fee award for two private citizens who are, as they put it in their brief, "blue collar workers." Appellants' Brief at 47 n.14. The Superior Court awarded a total of $355,681 in fees and costs against Plaintiffs, $68,212.00 in attorneys' fees and $5,386.28 in costs to

[6] The mention of only six factors, rather than seven, further suggests the lower court failed to consider the chilling effect.

the Union and $287,469.00 in attorneys' fees and $6,616.70 in costs to the City. Judgment at 2 (Dec. 14, 2021).[7] This is roughly the value of a single-family home in some parts of Phoenix,[8] and an astonishing amount given that this was a declaratory judgment action that sought no damages.

The ACLU of Arizona agrees with Appellants that impact litigation intended to advance a legal position is itself a "mode[] of expression and association protected by the First and Fourteenth Amendments." *In re Primus*, 436 U.S. 412, 423, 98 S. Ct. 1893, 1900 (1978) (an ACLU case; *quoting Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 428–29, 83 S. Ct. 328, 335 (1963)). The Supreme Court has repeatedly held that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. Michigan Bar*, 401 U.S. 576, 585, 91 S.Ct. 1076, 1082 (1971). *See also Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n. 32, 97 S.Ct. 2691, 2705 (1977) (citing cases); *Bhd. of R. R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 84 S.Ct. 1113 (1964) (holding that the "First and Fourteenth Amendments prevent state proscription of a range of solicitation activities by labor unions seeking to provide low-cost, effective legal

[7] Costs were awarded under A.R.S. 12-341.

[8] *See* Realtor.com, *Central City, Phoenix, AZ, Real Estate Market*, at https://www.realtor.com/realestateandhomes-search/Central-City_Phoenix_AZ/overview (last accessed June 26, 2022).

representation to their members" (*quoting Michigan Bar*)). Like "the ACLU and its local chapters," the Goldwater Institute is "engage[d] in extensive educational and lobbying activities" and "also devote[s] much of [its] funds and energies to an extensive program of assisting certain kinds of litigation on behalf of [its] declared purposes." *In re Primus*, 436 U.S. at 427. While those purpose are often ideologically opposed to those of the ACLU, the First Amendment protects all viewpoints equally. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393, 113 S. Ct. 2141, 2147 (1993) (striking down a restriction on speech which was not "viewpoint neutral").

The argument in this case, however, is even stronger than in *Button* and its progeny, as those cases involved *attorneys* who were disciplined for activities, such as soliciting clients on behalf of the ACLU, that the Supreme Court held to be First-Amendment-protected activity. In this case, however, it is the interests of the individual plaintiffs, not their attorneys, that are at stake, as the fee awards were entered against the Plaintiffs themselves. It is certainly possible that Goldwater, or a donor, will pay these fees. The mere entry of such a high fee award, however, will have an adverse impact on these individuals and a chilling effect on the willingness of other individuals to step forward and try to vindicate their rights. Being a Plaintiff in a civil rights lawsuit can take a tremendous emotional and mental health toll on a person; the worry about an award of fees would unnecessarily compound this. *See*

Carrie Griffin Basas, *Advocacy Fatigue: Self-Care, Protest, and Educational Equity*, 32 WINDSOR Y.B. ACCESS TO JUST. 37, 46 (2015) ("litigants will continue to relive and re-enact [the] trauma [of discrimination] through the courts . . . the litigation process itself [is] a "trauma" where individuals who bring suit may endure injury from the very process through which they seek redress." (internal citations and quotation marks omitted)); Larry H. Strasburger, *The Litigant-Patient: Mental Health Consequences of Civil Litigation*, 27 J. AM. ACAD. PSYCH. L. 204 (1999); Julie E. Steiner, *Interim Payments and Economic Damages to Compensate Private-Party Victims of Hazardous Releases*, 98 MARQ. L. REV. 1313, 1336 (2015) (noting the "secondary type of harm social scientists describe as 'litigation-related trauma'" and citing studies).

IV. Rule 11 or A.R.S. § 12-349 Would be Better Provisions Under which to Award Attorneys' Fees in Appropriate Constitutional Cases.

In situations where one party is acting in bad faith and files a frivolous lawsuit or claim, the trial court has discretion to exercise its authority to award attorneys' fees under Rule 11. Ariz. R Civ. P. Rule 11 (by filing a pleading, the attorney warrants that "to the best of the [attorney's] knowledge, information, and belief formed after reasonable inquiry . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."). Rule 11 permits

the court to impose sanctions where "(1) there was no reasonable inquiry into the basis for a pleading or motion; (2) there was no chance of success under existing precedent; and (3) there was no reasonable argument to extend, modify or reverse the controlling law," *Wolfinger v. Cheche*, 206 Ariz. 504, 510 (2003). Similarly, A.R.S. § 12-349 provides that a court "shall assess reasonable attorney fees, expenses and, at the court's discretion, double damages" if a civil litigant "[b]rings or defends a claim without substantial justification," meaning that the claim "is groundless and is not made in good faith." Permitting a good faith argument for a change in the law is of course essential, otherwise the law could never evolve. Constitutional challenges such as the one brought by Goldwater in this case and by the ACLU in many others are often asking the court to expand on, overturn, or change existing law, and not every case of this nature will ultimately be successful.

That said, Appellees assert or strongly imply that they believe this case was groundless and frivolous.[9] For example, the City repeatedly asserts that the lawsuit was "not well-founded," and that Plaintiffs "should have known from the beginning (but certainly no later than the conclusion of discovery) that their claims would fail." City's Appellee Brief at 54. *See also* Union Appellee Brief at 42 (calling one of Plaintiffs' claims "baseless"). This is similar to the Rule 11 standards set forth in the

[9] The ACLU of Arizona expresses no opinion on whether Appellants' claims are in fact frivolous; this amicus simply notes that Appellees suggest or argue as much.

caselaw: "An attorney violates Rule 11 by filing an answer if he knows or should have known, by a reasonable investigation of fact and of law, that an asserted defense is insubstantial, frivolous, groundless or otherwise unjustified." *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 319–20 (1993). Defendants also seem to suggest that it is Goldwater, not its clients, who is "driving" this case; they make much of the fact that Plaintiffs could not answer "basic questions" about their claims.[10] City Brief at 24 n.8. In addition, the Union expressly stated that Plaintiffs' claims were "both groundless and frivolous" under A.R.S. § 12-349 and requested attorneys' fees under that provision, although the lower court did not address this argument. Intervening Defendant's Motion for Attorneys' Fees and Costs, Aug. 27, 2021, at 7-9.

Both Rule 11 and A.R.S. § 12-349 allow the court to determine whether it is appropriate to assess fees against an attorney, their client, or both, which allows the court to penalize only the attorney where there is no indication that the individual client was aware that the legal argument made by counsel was foreclosed to them. *See* A.R.S. § 12-349(B) ("The court may allocate the payment of attorney fees

[10] To be fair to Goldwater, it is sometimes the case that non-attorneys do not understand all the nuances of the legal claims filed by their attorneys. Appellees' argument seems to be that Plaintiffs' real concern was about their belief that they lost vacation time as a result of the union contract rather than any concern about the Union's expressive activity.

among the offending attorneys and parties"). *Cf. Wyatt v. Wehmueller*, 167 Ariz. 281, 287 (1991) ("There is, however, no deterrent value in a rule that punishes an unknowing, innocent client."). Under Rule 11, the court has great discretion in how much to award and could consider the client's ability to pay, *see, e.g.*, *Linder v. Brown & Herrick*, 189 Ariz. 398, 408–09 (1997), since the purpose of Rule 11 sanctions is to deter and punish inappropriate conduct rather than to make the other party whole. *See Waltz v. County of Lycoming*, 974 F.2d 387, 390 (3rd Cir. 1992) (holding that "the prime goal" of Rule 11 "should be deterrence of repetition of improper conduct"); *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990) (holding that "the primary, or 'first[,]' purpose of Rule 11 is to deter future litigation abuse").

If this Court finds that awarding fees under A.R.S. § 12-341.01 was improper or an abuse of discretion, it could remand the matter to the lower court to reconsider the fee award under Rule 11 or the Union's request for fees under A.R.S. § 12-349. If it is indeed the case that the lawyers in this case brought frivolous claims, the more appropriate remedy would be to award attorneys' fees against those lawyers, which will deter bad faith litigation by those attorneys in the future. Instead, the lower court used the contract statute to award damages in a constitutional case, which will deter all civil rights litigation anytime a contract is even remotely involved. The latter should be deemed an abuse of discretion.

Conclusion

For these reasons, the American Civil Liberties Union of Arizona respectfully asks this Court to hold that the award of attorneys' fees under A.R.S. § 12-341.01 against a litigant who is not a party to a contract with the defendant and who contends that their constitutional rights were violated is unlawful, either because the action does not "arise out of" the contract or, in the alternative, because such an award is an abuse of the court's discretion and contrary to public policy.

Respectfully submitted this 14th day of July, 2022.

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ARIZONA COURT OF APPEALS

DIVISION ONE

Mark Gilmore and Mark Harder, Plaintiffs/Appellants, v. Kate Gallego, et al., Defendants/Appellees, American Federation of State, County and Municipal Employees, (AFSCME) Local 2384, Intervening Defendant/Appellee.	Case No. 1 CA-CV 22-0049 Maricopa County Superior Court Case No. CV2019-009033

CERTIFICATE OF COMPLIANCE

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

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I hereby certify the attached *Amicus Curiae* brief was prepared in double-spaced 14 point, is double-spaced, and contains 5,214 words. The *Amicus Curiae* brief does not exceed the word limit as set forth by applicable ARCAP rules.

Respectfully submitted this 14th day of July, 2022.

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ARIZONA COURT OF APPEALS

DIVISION ONE

Mark Gilmore and Mark Harder, Plaintiffs/Appellants, v. Kate Gallego, et al., Defendants/Appellees, American Federation of State, County and Municipal Employees, (AFSCME) Local 2384, Intervening Defendant/Appellee.	Case No. 1 CA-CV 22-0049 Maricopa County Superior Court Case No. CV2019-009033

CERTIFICATE OF SERVICE

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

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I hereby certify that on July 14, 2022 *Amicus Curiae's* Brief, Certificate of Compliance and this Certificate of Service were electronically filed with the Clerk of the Court of Appeals, Division One, by using the Court's e-filing system. Copies of this filing were electronically mailed this date to:

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Respectfully submitted this 14th day of July, 2022.

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