ARIZONA COURT OF APPEALS
DIVISION ONE

SHAWN E. FULLER, Plaintiff/Appellee,	)	Court of Appeals No. 1 CA-CV 24-0785
v.	)	Maricopa County Superior Court
CITY OF SCOTTSDALE, et al., Defendants/Appellants.	)	No. CV2020-052874

BRIEF OF AMICUS CURIAE LEAGUE OF ARIZONA CITIES AND TOWNS IN SUPPORT OF DEFENDANTS/APPELLANTS CITY OF SCOTTSDALE AND SHERRY SCOTT

(LODGED WITH MOTION FOR LEAVE TO FILE)

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INTEREST OF AMICUS CURIAE

This amicus curiae brief ("Brief") is submitted by the League of Arizona Cities and Towns ("League") pursuant to Rule 14 and Rule 16 of the Arizona Rules of Civil Appellate Procedure ("ARCAP") in support of Defendants/Appellants City of Scottsdale ("City") and Sherry Scott ("Ms. Scott"). The League is neither a party nor controlled by any party to the appeal. No person or entity other than the League provided financial resources for the preparation or submission of this Brief. The League requested consent to file the Brief from all the parties. The City and Ms. Scott consented, but Plaintiff/Appellee Shawn E. Fuller ("Mr. Fuller") opposed. For this reason, the Brief was lodged with a Motion for Leave to File Amicus Curiae Brief in accordance with ARCAP 16(b).

The League is a voluntary association of all 91 incorporated cities and towns in Arizona, representing approximately 79% of Arizona's total population. The League provides collective advocacy, education, training, technical assistance, and information-sharing for and amongst its member municipalities. This includes assistance and training regarding the application of Arizona's public records law. The League also files amicus briefs in cases with potential statewide impacts on League members like this case.

The League read the filings in this case and is familiar with the questions involved in this appeal. While the League agrees with the arguments in the City's Opening Brief, this Brief is focused on the issue of privilege.

Resolution of this case is important to League members because it could expose every municipal official and employee in Arizona to defamation liability for the simple act of complying with the law. League members produce, receive, and release a considerable number of public records every day, including communications from residents that criticize or defame municipal officials and employees. As a result, League members are deeply affected by legal interpretations that could expose them to defamation liability for the release of a public record pursuant to Arizona's public records law, A.R.S. §§ 39-121 through 39-129 ("PRL").

Like private employers, League members also regularly conduct employment investigations in accordance with employment laws and policies; however, unlike private employers, the League's members must release investigation reports and other written employment records subject to specific exceptions under PRL. If litigants can pursue defamation claims based on the release of these records, the threat of liability could lead municipalities to change how they handle employee complaints and investigations to the detriment of transparency and accountability.

The threat of liability could also deter employees from reporting perceived misconduct and from speaking frankly to investigators and their employers, eroding both federal and state anti-discrimination laws.

The League respectfully requests this Court to avoid such results and recognize that the defamation should have never proceeded against the City and Ms. Scott.

INTRODUCTION

The occasion for the Cronin Report and its release to the media pursuant to PRL are privileged as a matter of law. Privilege promotes openness, transparency, and accountability in government. These interests are fundamental to a healthy democracy, but they are also crucial to fostering healthy workplaces and holding public officials and employees accountable by encouraging the free exchange of information regarding their performance. Transparency and accountability are particularly important with municipal prosecutors who hold positions of authority in local governments and have responsibilities that directly affect the welfare and rights of residents.

Upon entering any new role in local government, every municipal official and employee in Arizona is made aware of PRL and the assumption that all, or nearly all, records created or held related to their work are subject to public inspection.

Embracing this presumption fosters the expectations of transparency and public accountability. The Cronin Report is a public record that was released pursuant to PRL and Mr. Fuller has not pointed to any recognized exception that would permit the City to withhold the Cronin Report or redact any statement. No such exception exists. To allow a municipality to withhold or redact content solely based on the possibility that it might be defamatory would lead to absurd results. Records custodians would be forced to analyze all communications from constituents and other records line-by-line to redact information they deemed potentially defamatory toward anyone. Such censorship would run contrary to PRL and the principles of accountability and transparency in government.

To deny privilege in this case would place municipal officials and employees in an impossible position. If they comply with PRL and release a public record, they put the municipality and themselves at risk of defamation liability. If they refuse to comply with PRL, they risk a lawsuit for violating PRL. *See generally* A.R.S. § 39-121.02. Exposure to defamation liability for the simple act of complying with the law is unconscionable. *See, e.g.*, *Farmers Educ. & Co-op. Union of Am. v. WDAY, Inc*., 360 U.S. 525, 531 (1959). The League urges this Court to avoid such a result because public officials and employees *must* be allowed to comply with PRL and employment laws without fear of defamation liability.

ARGUMENT

As a defense to defamation, the law recognizes that "conduct which would otherwise be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *Green Acres Trust v. London,* 141 Ariz. 609 (1984). This protection is described as privilege, which may be absolute or qualified. *See Id.* at 616. Whether conduct is privileged is a question of law. *See id.*

I. THE CRONIN REPORT IS ABSOLUTELY PRIVILEGED.

A. Complying with Public Records Law is Absolutely Privileged.

Absolute privilege protects speakers regardless of their "motive, purpose, or reasonableness." *Id.* at 613. While the Arizona Supreme Court adopted a general rule of qualified privilege, it recognized that absolute privilege may be necessary in limited cases, such as "when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy." *Chamberlain v. Mathi*s, 151 Ariz. 551, 558 (1986) (citation omitted). Absolute privilege is necessary in this case. When municipalities are *required* by PRL to release a record, they should not incur liability for that release.

"Arizona views the Restatement as authority for resolving questions concerning rules in defamation cases." *Burns v. Davis,* 196 Ariz. 155 (App. 1999); *see also Green Acres Trust,* 141 Ariz. at 609 (citing Restatement (Second) Torts § 595 (1997)); *Selby v. Savard,* 134 Ariz. 222 (1982) (citing Restatement (Second) Torts § 598 (1997)); *Miller v. Servicemaster by Rees,* 174 Ariz. 518 (App. 1993) (citing Restatement (Second) Torts § 594 (1997)). The Restatement provides in part that "[o]ne who is required by law to publish defamatory matter is absolutely privileged to publish it." Restatement (Second) of Torts § 592(A) (1997), at 257; *see also* Comment b to § 592(A), at 258 (recognizing that 592A "will apply whenever the one who publishes the defamatory matter acts under legal compulsion in so doing.") This position is consistent with cases where defendants were entitled to absolute privilege for complying with a legal obligation. *See, e.g*., *Carlson,* 141 Ariz. at 519 (holding the sheriff was entitled to absolute privilege because he had a duty to make an offense report containing inmate's assault complaint and to release it pursuant to a public records request); *Freier v. Indep. School Dist. No. 197,* 356 N.W.2d 724, 729–30 (Minn. Ct. App. 1984) (school board absolutely privilege to disclose decision discharging employee because disclosure was required by law); *Johnson v. Dirkswage*r, 315 N.W.2d 215, 223 (Minn. 1982) (welfare commissioner was absolutely privileged to disclose defamatory material contained in a letter

terminating an employee because disclosure was required by law); *LeBaron v. Minnesota Bd. of Pub. Def.*, 499 N.W.2d 39, 42-43 (Minn. Ct. App. 1993) (chief public defender was absolutely privileged because responding to a request for information from the state public defender was a duty required by statute); *Cucinotta v. Deloitte & Touche*, L.L.P., 302 P.3d 1099, 1101-03 (Nev. 2013) (firm was absolutely privileged to communicate illegal activities to a corporation's audit committee pursuant to federal securities law); *William Loveland Coll. v. Distance Educ. Accreditation Comm'n*, 347 F. Supp. 3d 1, 18-19 (D.D.C. 2018) (public notification required of an educational accrediting institution by a federal regulation was absolutely privileged); *Becker v. Philco Corp*., 372 F.2d 771, 772 (4th Cir. 1967) (employer was absolutely privileged for alleged defamatory statements in a report that was made under the terms of a defense contract).

In Arizona, PRL creates a presumption that *requires* the disclosure of "public records and other matters." *See* A.R.S. § 39–121 ("[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours"); *Griffis v. Pinal Cnty.*, 215 Ariz. 1, 4 (2007) (affirming the presumption of openness). While the phrase "public records and other matters" is not defined in statute, PRL requires "[a]ll officers and public bodies" to maintain "all records, including records as defined in § 41-151, reasonably necessary or

appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state." A.R.S. § 39–121.01(B). "Records" in A.R.S. § 41-151 are defined as:

> " . . . all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film or electronic media pursuant to § 41-151.16, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained in the record . . . and [i]ncludes records that are made confidential by statute.

A.R.S. § 41-151(2) (citation omitted). As the Arizona Supreme Court recognized, the language in PRL creates a "statutory mandate which, in effect, requires all officers to make and maintain records reasonably necessary to provide knowledge of all activities they undertake in the furtherance of their duties." *Carlson v. Pima Cnty*., 141 Ariz. 487, 490 (1984) (discussing virtually identical predecessor statute to A.R.S. § 39–121.01(B)).

In 2008, the Legislature adopted another statute to specify that public employers must maintain and disclose "all records that are reasonably necessary or appropriate to maintain an accurate knowledge of disciplinary actions, including the employee responses to all disciplinary actions, involving public officers or

employees of the public body" subject to specific redactions. A.R.S. § 39–128 (added by 2008 Ariz. Legis. Serv. Ch. 277 (H.B. 2159) (WEST)).

Here, the Cronin Report is a public record that was released pursuant to PRL, which privilege the City and its City Attorney from liability. It is a public record under *both* A.R.S. §§ 39–121.01(B) and 39–128. The Cronin Report documents the activities of an investigator who was contracted by the City to perform an investigation regarding the perceived misconduct of a City employee, and it includes the findings of said investigation. Mr. Fuller has not identified a recognizable exception that would allow the City to withhold its release or redact any allegedly defamatory statement.

Mr. Fuller alleges the Cronin Report is not a public record "as it cannot be considered a "disciplinary record." (Answering Br. at 50) (citation omitted). Mr. Fuller argues it is not a disciplinary record because it "did not exist" during his employment. (Answering Br. at 51) Nothing in PRL exempts *any* record from disclosure based on the date it was created. All public records in the City's custody may be subject to disclosure unless a specific exception applies, regardless of when it was created or how it ended up in the City's possession. Even if it is not a "disciplinary record," it is still a public record under PRL.

In sum, the defamation claim should have never proceeded because the release of a public record pursuant to a legal duty under PRL is entitled to absolute privilege.

B. Reporting Perceived Attorney Misconduct is Absolutely Privileged.

Absolute privilege in the defamation context promotes important public policies and helps protect victims, witnesses, and investigators of harassment and other misconduct. Municipal officials and employees should be allowed and *encouraged* to report, investigate, and stop any misconduct in the workplace. *See e.g.*, *Busch v. Bates*, 323 Ill. App. 3d 823 (5th Dist. 2001) (informing police superiors of perceived misconduct was absolutely privileged); *Anderson v. Beach*, 386 Ill. App. 3d 246, 250 (1st Dist. 2008) (reporting a police officer's misconduct in writing to the police chief was absolutely privileged because it was required by the department's rules). The United States Supreme Court has recognized the compelling interest in ridding workplaces of sexual harassment and an obligation for employers to "take all steps necessary to prevent sexual harassment from occurring" and "to establish a complaint procedure designed to encourage victims of harassment to come forward." *Faragher v. City of Boca Raton,* 524 U.S. 775, 806 (1998) (quoting 29 C.F.R. § 1604.11(f) (1997)). Without privilege, victims and employers with a goal of preventing harassment would be "handcuffed" by a fear of defamation liability. *See, e.g., Thomas v. Petrulis,* 125 Ill. App. 3d 415, 421–22 (1984) (finding

that "important policy considerations weigh in favor of protecting the statements in an EEOC charge with an absolute privilege").

Absolute privilege is also important to promote open communication and the reporting of perceived attorney misconduct. Arizona courts have long applied absolute immunity for State Bar complaints filed by attorneys against other lawyers, *see, e.g.*, *Drummond v. Stahl*, 127 Ariz. 122, 126 (App. 1980) (finding that absolute privilege protected attorney who filed bar complaint against another attorney); *Sobol v. Alarcon*, 212 Ariz. 315, 318, ¶¶ 14-15 (App. 2006) (providing absolute immunity to attorney reporting unauthorized practice of law); *see also Bailey v. Superior Court*, 130 Ariz. 366, 368 (App. 1981) (holding absolute privilege applied to statements in complaint about justice of the peace filed with Commission on Judicial Qualifications). As the Supreme Court explained in *Drummond:*

> We must weigh the possible harm to attorneys in the filing of a malicious complaint against the need to encourage the reporting of unethical conduct. In weighing these conflicting interests, it is our opinion that public policy demands the free reporting of unethical conduct if we are to continue to enjoy the privilege of a self-regulating profession.

Drummond, 127 Ariz. at 126. Similarly, the Court of Appeals in *Sobol* said:

> We can conceive of no reason why a person who reports allegedly unethical conduct by a lawyer should be protected by absolute immunity while a person who reports allegedly unethical conduct by a certified legal document preparer should be subjected to the risk of civil liability. Given the public's need for access to legal services and the importance of regulating those who

> provide such services, there should be no distinction. The proper, fair and efficient administration of justice demands no less.

Sobol, 212 Ariz. at 318; *see also Desert Palm Surgical Grp., P.L.C.*, 236 Ariz. 568, 580, ¶ 32 (App. 2015) (recognizing an absolute privilege for those reporting professional misconduct to administrative agencies) (citing *Drummond*, 127 Ariz. at 125–26).

In *Ledvina v. Cerasani*, 213 Ariz. 569, 570, ¶ 2 (App. 2006), the plaintiff sued for defamation based on the defendant's report to law enforcement alleging the plaintiff had slashed the tires of his car. Relying on the Restatement (Second) of Torts §§ 587–88 and 598 comment (e), this Court held that the defendant's report was absolutely privileged, noting that "both formal and informal complaints and statements to a prosecuting authority [are] part of the initial steps in a judicial proceeding, and as such [are] entitled to absolute immunity from an action for defamation." *Id.* at 572–73, 575, ¶¶ 10–11, 16 (citation omitted). This Court was guided, in part, by the Victim's Bill of Rights. *See id.* at 573, ¶ 12; *see also* ARIZ. CONST. art. II, § 2.1(A)(1) (providing that victims of all crimes are to "be free from intimidation, harassment, or abuse, throughout the criminal justice process"). The rationale behind granting absolute immunity to avoid the chilling of complaints to law enforcement is equally applicable in the employment context. The mere

possibility of retaliatory defamation claims could discourage employees from reporting perceived misconduct and ethical violations.

Both the City and Ms. Scott are entitled to absolute privilege. As the chief legal officer for the city, a city attorney's job involves hiring, training, and overseeing prosecutors. In some cases, the supervisory function may involve initiating employment investigations and obtaining written findings. The written findings and investigation reports can be useful to the city attorney in determining whether the alleged misconduct occurred and, if so, what disciplinary measures are necessary. The freedom of city attorneys to initiate these investigations and obtain truthful findings is essential to the performance of their functions and compliance with their ethical obligations. *See e.g.,* ARIZ. R. SUP. CT. 42, ER 8.3 (requiring lawyers to report others for violations of the Rules of Professional Conduct). If a city attorney believes an investigation or report may subject their clients (or themselves) to possible defamation liability, they may hesitate to initiate an investigation.

Similarly, if investigators believe their reports may become the subject of potential defamation liability, they may hesitate to prepare anything more than a bland report that will be less useful to management in any subsequent disciplinary action. Instead of preparing a detailed report, investigators may be tempted to leave out certain details, saving those for a potential disciplinary proceeding or litigation

when any testimony would be absolutely privileged under the judicial privilege. *See, e.g.*, *Green Acres*, 114 Ariz. at 613.

If co-workers and victims believe that making statements during the investigation may subject them to possible civil liability, it may deter them from reporting misconduct or from providing accurate and complete answers to the investigator. The risk of retaliatory defamation claims could foster an unhealthy "culture of silence" in the workplace.

When an employee is the subject of an investigation, the investigation report often plays a significant role if the employee appeals the findings or disciplinary outcome. An employee who might improve substandard job performance through constructive criticism may lose this opportunity (and their job) because the employer would be wary of making any negative statement to the employee. Additionally, an employee falsely accused of misconduct could be needlessly terminated because, never confronted with the reason for the discharge, the employee would not have the chance to rebut the false accusation. *See generally Yetter v. Ward Trucking Corp*., 401 Pa. Super. 467, 471 (1991) (recognizing the absolute privilege of employers to publish defamatory matter in notices of employee termination to encourage the resolution of disputes between employers and employees and to encourage employers to communicate the reasons for termination).

In conclusion, absolute privilege is necessary in this case to avoid discouraging the reporting and investigating of perceived misconduct of public employees and city prosecutors.

II. AT THE VERY LEAST, THE CRONIN REPORT IS CONDITIONALLY PRIVILEGED.

Qualified immunity protects executive government officials from liability when they undertake official acts that require the exercise of judgment or discretion. *Chamberlain,* 151 Ariz. at 554–55. The protection is predicated on the official's objective good faith. *Id.* at 554; *Carroll v. Robinson,* 178 Ariz. 453, 456 (App. 1994). Qualified immunity is unavailable if the official "knew or should have known that he was acting in violation of established law or acted in reckless disregard of whether his activities would deprive another person of their rights." *Chamberlain,* 151 Ariz. at 558. The plaintiff must establish proof of such malice by an objective standard. *Id.* at 559. "Thus, in a defamation case, qualified immunity will protect a public official if the facts establish that a reasonable person, with the information available to the official, 'could have formed a reasonable belief that the defamatory statement in question was true and that the publication was an appropriate means for serving the interests which justified the privilege." *Id.* (citation omitted)

First, statements about public officials are conditionally privileged under Arizona law. *Lewis v. Oliver,* 178 Ariz. 330, 335 (App. 1993) (holding that a

defendant's complaint to a government hotline about a Federal Aviation Administration investigator was conditionally privileged because it related to a potential administrative proceeding).

Second, information is conditionally privileged if the circumstances if it is reasonable to believe that it "affects a sufficiently important public interest, and . . . the public interest requires the communication of the defamatory matter to a public officer . . . who is authorized or privileged to take action if the defamatory matter is true." Restatement (Second) of Torts § 598. This privilege protects the public's interest "in the honest discharge of their duties by public officers...." Restatement (Second) of Torts § 598, comment d; *see, e.g.*, *Carroll*, 178 Ariz. at 457 (qualified privilege to report suspected child abuse); *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132 (App. 2010) (same).

Third, a publication is also conditionally privileged when a defendant had a duty or interest to make the communication to another person having a corresponding interest or duty. *See e.g.*, *Carlson*, 141 Ariz. at 491 (sheriff's actions in releasing offense report were "privileged" as a matter of law because the sheriff had a duty to make the offense report containing inmate's assault complaint and a duty to release it in response to a public records request); *Patterson v. City of Phoenix,* 103 Ariz. 64 (1968) (officer's actions in investigating offense and telling

employer of suspect's alleged involvement was conditionally privileged); *Roscoe v. Schoolitz*, 105 Ariz. 310, 313 (1970) (reports made by private investigators to their employer were conditionally privileged); *East v. Bullock's Inc.*, 34 F. Supp. 2d 1176, 1183 (D. Ariz. 1998) (conditional privilege applied to a vice president of human relations who informed the company's senior managers that an employee was terminated for falsifying company records).

Here, the occasion for the Cronin Report is conditionally privileged as a matter of law because it concerns the performance of a city prosecutor. A prosecutor can also be analogized, albeit imperfectly, to police officers, who have been recognized as public officials by Arizona courts. *See, e.g., Turner v. Devlin,* 174 Ariz. 201 (1993); *Godbehere v. Phoenix Newspapers, Inc.,* 162 Ariz. 335 (1989); *Rosales v. City of Eloy,* 122 Ariz. 134 (App. 1979). Furthermore, if a public school teacher, *see Sewell v. Brookbank,* 119 Ariz. 422 (App. 1978), a student senator, *see Klahr v. Winterble,* 4 Ariz. App. 158 (1966), and an FAA inspection, see *Lewis*, are public officials, then, *a fortiori*, the head City prosecutor is too.

The alleged defamatory statements in the Cronin Report were obtained by a third-party investigator who was contracted by the City to conduct an employment investigation regarding the perceived misconduct of Mr. Fuller and to report the findings to Ms. Scott and the City. Courts have recognized that employers and

employees have a conditional privilege to report on perceived acts of sexual harassment. *See Miller,* 174 Ariz. at 520 (statements made by individuals and employers who report perceived acts of sexual harassment were conditionally privileged). This privilege extends to the City as the employer of Mr. Fuller and Ms. Scott who supervises the City Prosecutor. *Id.* (privilege extends to the reporter and employer). The findings were memorialized in the Cronin Report at the request of Mr. Fuller. Since it is a public record, its release to the media is mandatory under PRL. The findings and the information contained in the public record affected important interests of the City as Mr. Fuller's employer, Mr. Scott as his supervisor, the complainants, and members of the community who may be impacted by the actions of a City prosecutor. *See generally* Restatement § 595 (1)(a), (b). The City terminated Mr. Fuller in good faith based on a reasonable belief that the findings were true. Mr. Fuller has not presented any evidence of malice on the part of the City or Ms. Scott. Thus, the facts demonstrate that the occasion for the Cronin Report and its release to the media were conditionally privileged as a matter of law.

CONCLUSION

Based on the foregoing, the City and Ms. Scott are entitled to reversal of the judgment against them.

RESPECTFULLY SUBMITTED this 21st day of April 2025 by:

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