must have granted relief under Rule 26 based on the court's own authority, *precisely* as the UAR states it did. *See* ROA 126 at ep 15–16 (noting, "The power is there by rule and can be used by the court when necessary and appropriate.") (emphasis added).

A painting of a pipe is still a pipe, no matter the caption, and an order granting sanctions under Rule 26 is a Rule 26 order. The question of whether the award was proper under Rule 26 is hardly moot.

Obviously hoping to side-step this landmine, Clayton shrugs his shoulders and suggests the lengthy Rule 26 analysis in the UAR does not actually mean Rule 26 was invoked. Like Magritte, Clayton points to an unmistakable painting of a pipe and proclaims, "That's no pipe."

According to Clayton, the court's lengthy discussion of Rule 26 was pure illusory fluff; academic surplusage and nothing more; "The court included detailed findings about the Rule 26 issue in the UAR, but the court ultimately only awarded attorney fees and costs under Title 25 statutes based on *relative financial positions, unreasonable positions, and discovery and disclosure violations*." AB at 21 (emphasis added).

Or did it? Ignoring that the court did rely on Rule 26, even if it did not, there are three other significant problems with Clayton's argument.

First, contrary to Clayton's suggestion, the court *declined* to award fees based on "relative financial positions". On that, the UAR was unambiguous: "THE COURT FINDS there is no substantial disparity of financial resources between the parties." [ROA 126 at ep 17].

Second, Clayton is correct the court based its decision, in part, on "unreasonable positions", but what unreasonable position did Laura take? Again, the UAR leaves no doubt: "THE COURT FURTHER FINDS that Petitioner acted unreasonably in the litigation. Specifically, Petitioner acted unreasonably when she initiated litigation without basis or merit." [ROA 126 at ep 17] (emphasis added). So, per the court, Laura's "unreasonable position" was *the same Rule 26 violation* raised in Clayton's Rule 26 motion. This time, the painting and the caption say the same thing: "This *is* a pipe."

This leads to the third, and perhaps biggest, problem with Clayton's argument – it ultimately does not matter whether fees were awarded under Rule 26 or some other authority (such as the court's inherent authority). That was *precisely* the point of cases cited in Laura's Opening Brief like *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772 (9th Cir. 2001).

Radcliffe held the safe harbor of Rule 11/26 protects litigants from life-changing sanctions when they are accused of litigation misconduct. The

rule gives accused wrongdoers a safe harbor to correct (or stop) the alleged violation and thereby "*escape sanctions*." *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998) (emphasis added). A safe harbor that offers protection from sanctions under one legal authority, while offering no shelter from sanctions for the identical conduct under a different legal authority, is no safe harbor at all.

As the Ninth Circuit explained in *Radcliffe*, to ensure the law works as intended, the safe harbor cannot grant *partial* safety (otherwise it's just a screen door on a submarine). For that reason, a court cannot "fix" a defective motion by awarding sanctions *sua sponte* (precisely as happened here); "It would render Rule 11(c)(1)(A)'s 'safe harbor' provision meaningless to permit a party's noncompliant motion to be converted automatically into a court-initiated motion, thereby escaping the service requirement." *Radcliffe*, 254 F.3d at 789. Yet that is exactly what happened here.

This Court is free, of course, to disagree with the Ninth Circuit's decision in *Radcliffe*. On page 25 of his response, Clayton argues for that result. In support, Clayton cites *dicta* from cases like *Caranchini v. Nationstar Mortgage, LLC*, 97 F.4th 1099 (8th Cir. 2024), but on closer inspection, *Caranchini* supports Laura's position, not Clayton's.

Caranchini involved a vexatious litigant who filed multiple lawsuits trying to avoid foreclosure on her home. In the fourth such case, Ms. Caranchini was represented by attorney Gregory Leyh. One of the defendants, a trustee named Martin Leigh, was dismissed from the case for reasons not explained in the decision. *See Caranchini*, 97 F.4th at 1011.

Two months *after* Mr. Leigh was dismissed from the case, he served Ms. Caranchini's attorney (Leyh) with a draft Rule 11 motion, "and a letter warning that the motion would be filed with the district court after thirty days 'unless [the issue was] resolved to the firm's satisfaction.'" *Id*. Of course, by that point, Ms. Caranchini's claims against Mr. Leigh had already been dismissed, leaving her way to "withdraw or correct" the alleged Rule 11 violation; the violation was an unfixable *fait accompli*.

Mr. Leigh's Rule 11 motion was filed. The court granted it and awarded $107,710.10 in fees plus an additional $50,000 penalty. The outcome of *Caranchini* is thus *extremely* similar to this case.

As this Court should do, the Court of Appeals *reversed*. Indeed, despite finding the underlying action was frivolous and filed in bad faith, the Court of Appeals held the sanctions award was improper, and this part is key — the award was improper because it was imposed in a manner that deprived

Mr. Leyh of any chance to take the safe harbor (this part should sound *very* familiar):

> Here, Martin Leigh served its motion for sanctions on October 5, 2018, a month and a half after it had been dismissed from the case. Thus, [attorney] **Leyh was not afforded an opportunity to remedy the sanctionable conduct *and avoid the sanction***. The district court speculated that even if Leyh had been given the opportunity, he would not have dismissed the claims, given his colorable record in this case. But assumptions do not excuse compliance with the text of Rule 11. Therefore, the imposition of Rule 11 sanctions against Leyh cannot be sustained.

Id. at 1102 (emphasis added).

In *dicta*, the Court strongly condemned Mr. Leyh's conduct in filing the frivolous action. In that criticism, the Court offered closing comments which Clayton cites as support for his position:

> The tactics employed by Leyh were an abuse of the legal system. Unfortunately, Martin Leigh did not follow the safe-harbor requirements outlined in Rule 11(c)(2). To be sure, this does not mean Leyh was protected from all sanctions. The district court could have imposed sanctions pursuant to Rule 11(c)(3), awarded costs through 28 U.S.C. § 1927, or used its inherent powers to impose sanctions. But because none of these alternative avenues were pursued, we are left with no other choice but to reverse the district court's sanction award.

Id. (emphasis added).

The problem, of course, is that these statements are pure *obiter dicta*. Because the lower court did *not* impose *sua sponte* sanctions (but rather just

granted Mr. Leigh's motion for Rule 11 sanctions), the Court of Appeals merely assumed in passing, without actually deciding, that an award under *other* authority *might* have been legally proper. But again, that exact issue *was* considered and *rejected* by the Ninth Circuit in *Radcliffe*, where the court held a *sua sponte* award was *not* proper.

In the face of these adverse authorities, Clayton offers a wistful warning: this Court should not "assign a *talismanic* quality to Rule 26" because doing so would have undesirable consequences:

> Under Laura's interpretation, the offending filer would have an unconditional right to opt out of the litigation no matter how egregious their conduct or unreasonable their positions if the opponent invokes the rule. However, if a party never invokes Rule 26, instead pleading a request for attorney fees under A.R.S. § 25-324 (or other applicable statutes), then the "safe harbor" opportunity would never materialize.

AB at 25.

OKAY…right. So? What's wrong with that? Clayton sees these scenarios as conflicting, but clearly they are not. *Any* litigant who thinks the opposing party has violated Rule 11/26 has a choice – they can: A.) send an immediate notice threatening sanctions (and hope the opposing party responds by dismissing the case, as Laura did here) or B.) they can wait; litigate the case, win, and *then* seek fees under any available authority.

Here, Clayton took neither approach, at least not exactly. Instead, he allowed the case to languish for over four months, to the point it was set for administrative dismissal due to inactivity. Then, once the case was already functionally dead, he retained counsel who threatened Laura with *retroactive* sanctions (à la *Caranchini*).

In response, Laura immediately moved to drop her petition, which by then was moot (à la *Caranchini*). Clayton inexplicably *opposed* this, putting Laura in a position where she was given no chance "to remedy the sanctionable conduct *and avoid the sanction*." (à la *Caranchini*).

This is where the heart of the procedural error lies – had the law been followed correctly, the trial court would have *granted* Laura's dismissal request on December 28, 2023 (because Rule 26(c)(B) gave her the absolute right to invoke the safe harbor in response to a threat). That would have terminated the case, *before* either party incurred any significant fees. That outcome is exactly the result Rule 26 was written to achieve, but which was *not* achieved here, solely based on Clayton's dilatory invocation of the rule and the trial court's erroneous refusal to apply the rule correctly.

Instead of granting Laura the safe harbor to which she was entitled, the trial judge erred by rejecting Laura's attempt to drop her petition. The

court then further erred by forcing Laura to involuntarily litigate the case, ultimately ordering her to pay $150,000 in fees for acting "unreasonably" by: A.) filing the case without a sufficient basis, *and* B.) by *continuing to litigate the case against her will*.

Here, there is nothing unfair or inappropriate about a rule which gives a party accused of misconduct the option (indeed, the unconditional right) to *stop that conduct*. That is exactly what the rule was intended to *encourage*. Rules 11/26 were adopted for the express purpose of *permitting* litigants to drop claims *without facing sanctions*, no matter how egregious the violation.

The problem here (aside from the fact that Clayton could and should have invoked Rule 26 four *months* earlier) is the trial court *refused* to allow Laura to take the safe harbor. The court then punished Laura (severely) for continuing to litigate the case even though she was forced to do so against her will.

This is *exactly* the wasteful, absurd result Rule 26 was designed to prevent. The trial court's refusal to grant Laura the safe harbor was a pure error of law. That error standing alone requires reversal of the judgment below. This Court should therefore remand with instructions to dismiss the case with prejudice without regard to any other issues.

B. Issue 2 – Structural Error

Let's assume this Court rejects Laura's Rule 26 arguments. Further assume the Court finds the safe harbor of Rule 26 does not affect the trial court's ability to award fees under *other* authorities. Does that mean the $150,000 judgment in Clayton's favor may be affirmed? Absolutely not.

Laura alleges the trial judge violated her Constitutional right to due process by performing a secret, undisclosed investigation into the facts. This resulted in the court making a key finding (that Planned Parenthood is closed on Sunday) which was supported by no admitted trial evidence.

Laura argues these facts constitute structural error because they prove the trial judge was biased, as shown by the judge's decision to engage in unlawful conduct which violated Laura's right to due process. Laura further claims the *only* available remedy for this violation is automatic reversal of the judgment and a new trial before a different judge (bearing in mind – Laura also maintains there is nothing left to try here).

Understandably, Clayton challenges each point, except the main one – that the trial court's finding about Planned Parenthood's business hours was *not* supported by any admitted trial evidence. Clayton calls this a "harmless error", and he argues the issued of Planned Parenthood's business hours

was "cumulative" and thus unimportant. He also suggests that even though the trial court never claimed it took judicial notice of Planned Parenthood's business hours, it could hypothetically have done so.

Laura firmly disagrees with every aspect of Claytons' response.

i. Structural Error Applies In Family Court

To begin, Clayton argues structural error does not apply in Arizona family courts, because: "Counsel cannot find any example of Arizona courts applying structural error analysis in a family law case." AB at 35. Laura agrees this is a question of first impression (at least in family court)[4] and for good reason — serious acts of judicial misconduct such as occurred in this case are thankfully rare in Arizona, especially in family court.

But as this case shows, judicial misconduct *does happen*. And as Laura explained in her Opening Brief and other pleadings (see ROA 128 & ROA 132), many other courts agree — *any* independent factual investigation by a trial judge is unlawful, shows bias, and it constitutes structural error as a

[4] The question of whether structural error might apply in family court, or in a civil vexatious litigant proceeding arising from a divorce case, was briefly mentioned in *Contreras v. Bourke*, 556 P.3d 291 (App. 2024). There, this Court held the issue was waived since it was raised for the first time on appeal, so the question was not decided.

matter of law; "The [U.S. Supreme] Court has limited structural errors to the following: the complete denial of counsel; a biased trial judge … ." *State v. Torres*, 208 Ariz. 340, 344 (Ariz. 2004); *see also State v. West*, 168 Ohio St. 3d 605, 623 (Ohio 2022) ("The presence of a biased judge on the bench is, of course, a paradigmatic example of structural constitutional error, which if shown requires reversal without resort to harmless-error analysis.") (citing extensive authorities).

Laura does not dispute that it appears no published (or unpublished) Arizona opinions have considered the question of whether structural error analysis applies *in family court*. Clayton suggests otherwise, claiming something similar occurred in *Black v. Black*, 114 Ariz. 282 (Ariz. 1977), which he calls "extremely instructive" to the point "[t]he relevance of *Black* is difficult to overstate." AB at 44.

There are two reasons why *Black* is not remotely helpful. First, *Black* was decided in 1977 – nearly 50 years ago, more than a decade *before* the United States Supreme Court adopted the modern structural error doctrine which is, of course, binding law in Arizona. Structural error itself is a function of the due process clause, and while courts have always wrestled with the remedy for specific types and degrees of due process violations,

the modern-day application of structural error was not fully embraced until *Arizona v. Fulminante*, 499 U.S. 279 (1991) and refined in later cases such as *Neder v. United States*, 527 U.S. 1 (1999).

That is why *Black* limited its discussion to harmless error and never mentioned structural error – because the modern rule did not exist (at least not in the current form) when *Black* was decided. *See State v. Ring*, 204 Ariz. 534, 552 (Ariz. 2003) (discussing origins of structural error, and citing *Fulminante*). Clearly, in light of more recent decisions applying structural error analysis to judicial misconduct, whether *Black* remains valid law is questionable at best.

The second reason *Black* is not helpful is it appears Clayton misstates the facts of that case. Specifically, *Black* involved a petition to change custody of two minor children. At some point, "the trial court conducted an off-the-record interview with the Black children. This was done without a stipulation by the parties." Based on the interview, the Court changed custody, finding, among other things, "Both children have expressed the opinion *to the Court* that they do not want to continue living with their mother …." *Black*, 114 Ariz. at 284 (emphasis in original).

Clayton says *Black* is thus analogous; "In *Black*, just as Laura alleges occurred below, the trial judge independently investigated material facts without notice to the parties. The parties only learned about the interview via one finding in the final judgment …." AB at 44 (emphasis added).

Uh, not so fast. Clayton appears to have invented these "facts" from thin air. Nothing in *Black* says the trial judge "investigated material facts *without notice to the parties*" nor does the case say the parties only learned of the interview by reading the final judgment. Rather, the case merely says the parties did not *stipulate* to the interview occurring, not that the parents were unaware of it.[5]

Here, Laura agrees she did not stipulate to allow the trial judge to secretly scroll through social media posts after the trial and then make factual findings based solely on those posts while discussing the case with her father. In that regard, this case is marginally similar to *Black*.

[5] *Black* does not explain the specific circumstances of how the interview took place, but children were just six and eight years old. Presumably, a family court judge would not have access to interview such young children without at least one parent's direct involvement, and nothing in the case suggests the interview was done *ex parte* without the other parent's knowledge (which would have been a separate problem). The case simply says the interview was not stipulated to by both parties.

But unlike in *Black*, the trial judge's horrific misconduct in this case is not subject to harmless error review. This misconduct was structural in every sense, because it completely deprived Laura of her fundamental right to a fair hearing before an unbiased judge. While this question is a matter of first impression for Arizona, the issue is hardly novel.

Multiple courts in other states agree structural error applies in family court. For example, in *Marchese v. Aebersold*, 530 S.W.3d 441 (Ky. 2017), the Supreme Court of Kentucky considered the question of structural error in a family court case where the trial judge independently investigated the criminal history of a party. In an extensive and well-reasoned opinion, the Court held the family court's independent secret investigation of a single fact constituted structural error requiring automatic reversal.

Indeed, in *Marchese*, the Kentucky Supreme Court *rejected* many of the same arguments Clayton presents here. Specifically, in *Marchese*, during a hearing on a petition for a domestic violence restraining order, the trial judge called a recess, then asked the respondent to provide his social security number, which he "reluctantly did". When the hearing resumed, the judge informed the respondent he had a criminal charge from another jurisdiction.

As the Kentucky Supreme Court's opinion tersely explains, "At no time did the trial judge disclose the source of her knowledge of the alleged Virginia Beach assault conviction or describe the legal grounds upon which that information was interjected into the DVO hearing; nor did the judge give Marchese an opportunity to address the issue." *Marchese*, 530 S.W.3d at 445 (emphasis added). The Kentucky Supreme Court unanimously held the judge's misconduct constituted structural error:

> [W]e conclude that the trial judge's undertaking to obtain and use as evidence extrajudicial information relating to a party in the case caused her disqualification from proceeding further as the presiding judge in this matter. Her failure to recuse at that point was structural error undermining the integrity of the resulting DVO. Because structural error supersedes harmless error review, we need not review the finding of the Court of Appeals that the error was harmless.

Marchese, 530 S.W.3d at 449.

Notably, the Court reached that conclusion even though the source of the trial judge's research was unknown (because, as in this case, the judge failed to explain where the "extrajudicial" information came from). Here, like in *Marchese*, the trial judge never disclosed the fact of her investigation, nor did she ever disclose the source of the knowledge gained.