

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

BENJAMIN FREEMAN,
Plaintiff/Appellant,

v.

STATE OF ARIZONA,
Defendant/Appellee.

No. 2 CA-CV 2021-0051
Filed August 20, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20201511
The Honorable Richard E. Gordon, Judge

AFFIRMED

COUNSEL

Benjamin Freeman, Florence
In Propria Persona

Mark Brnovich, Arizona Attorney General
By Paul E. Carter, Assistant Attorney General, Tucson
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Espinosa and Vice Chief Judge Staring concurred.

ECKERSTROM, Judge:

¶1 Benjamin Freeman, an inmate with the Arizona Department of Corrections, filed a free-standing special-action complaint with the trial court to challenge the constitutionality of A.R.S. § 31-201.01(L), which limits the types of lawsuits incarcerated felons may file.¹ The court declined to exercise special-action jurisdiction, granted the state’s motion to dismiss Freeman’s special-action complaint, and denied Freeman’s request for leave to amend that complaint. Freeman appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1). *See also* Ariz. R. Civ. App. P. 9(c). For the reasons that follow, we affirm.

Discussion

¶2 As Freeman concedes, special actions are reserved for extraordinary circumstances, and acceptance of special-action jurisdiction is “highly discretionary.” *Cicoria v. Cole*, 222 Ariz. 428, ¶ 4 (App. 2009); *see also* Ariz. R. P. Spec. Act. 3 bar committee note (“The special action requests extraordinary relief, and acceptance of jurisdiction of a special action is highly discretionary with the court to which the application is made.”). Here, the trial court noted that Freeman “has presented nothing

¹In particular, the statute provides:

A person who is convicted of a felony offense and who is incarcerated while awaiting sentence or while serving a sentence imposed by a court of law may not bring a cause of action seeking damages or equitable relief from the state or its political subdivisions, agencies, officers or employees for injuries suffered while in the custody of the state or its political subdivisions or agencies unless the complaint alleges specific facts from which the court may conclude that the plaintiff suffered serious physical injury or the claim is authorized by a federal statute.

FREEMAN v. STATE
Decision of the Court

extraordinary” to justify permitting him to challenge the statute through a free-standing special action – unconnected to any existing lawsuit in which the statutory defense might be invoked against him – rather than “through the usual course of litigation.” It therefore agreed with the state that Freeman’s challenge “should be brought in the context of an actual case, rather than theoretically or based on prior lawsuits or grievances.” Finding that “judicial restraint weighs heavily against resolving any challenge without a live controversy, much less the constitutional one presented here,” the court declined to accept special-action jurisdiction.

¶3 This decision was well within the trial court’s broad discretion to accept or decline special-action jurisdiction. *See Cicoria*, 222 Ariz. 428, ¶ 4; *see also Files v. Bernal*, 200 Ariz. 64, ¶ 2 (App. 2001) (when trial court declines special-action jurisdiction and does not rule on merits, only question on appeal is “whether the court abused its discretion in declining jurisdiction”). If Freeman initiates a lawsuit against the state or one of its employees in the future, and if § 31-201.01(L) is asserted as a defense, Freeman may challenge the constitutionality of the statute at that time. We find no abuse of discretion in the trial court’s refusal to address his constitutional challenge in the absence of a live, concrete dispute.

¶4 Freeman references an earlier lawsuit he brought in Maricopa County, in which the state successfully invoked the statute as a defense. But this supports rather than undercuts the trial court’s determination here. Freeman could have challenged the constitutionality of the statute in that case. But he did not do so, evidently failing to even respond to the state’s motion to dismiss. Nor does Freeman appear to have appealed the trial court’s grant of that motion. “Special actions may not be used as a substitute for an appeal.” *Jordan v. Rea*, 221 Ariz. 581, ¶ 8 (App. 2009).

¶5 Finally, the trial court denied Freeman’s request for leave to amend his special-action complaint on the ground that his proposed amendments would not cure the complaint’s deficiencies. We need not review that determination because Freeman failed to challenge it in his opening brief. Freeman’s attempts to remedy that failure in his reply brief are insufficient. We will not consider arguments raised for the first time in a reply brief, which our rules mandate must be “strictly confined to rebuttal of points made in the appellee’s answering brief.” Ariz. R. Civ. App. P. 13(c). Although he is not represented by counsel, Freeman is “given the same consideration on appeal as one who has been represented by counsel,” and he “is held to the same familiarity with court procedures and the same notice of . . . rules . . . as is expected of a lawyer.” *Higgins v. Higgins*, 194 Ariz. 266, ¶ 12 (App. 1999). His late argument regarding his motion to amend thus fails.

FREEMAN v. STATE
Decision of the Court

Disposition

¶6 For all these reasons, we affirm the ruling of the trial court.