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ARIZONA COURT OF APPEALS
DIVISION ONE

ARIZONA BOARD OF REGENTS,

Petitioner,

v.

OWEN ANDERSON

Respondent.

Court of Appeals Division One
No. 1 CA-SA 25-0007

Maricopa County Superior Court
No. CV2024-005713

BRIEF OF AMICI CURIAE PRESIDENT PETERSEN AND SPEAKER MONTENEGRO IN SUPPORT OF RESPONDENT'S RESPONSE TO PETITION FOR SPECIAL ACTION

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INTRODUCTION

Pursuant to ARCAP 16(b)(1)(B), Senate President Warren Petersen and House Speaker Steve Montenegro ("Amici") submit this amicus brief in support of Respondent Owen Anderson's Response to Petition for Special Action filed on February 14, 2025 ("Response"). This brief makes the following points.

First, § 41-1494 is a civil rights statue, and its "context, language, subject matter, effects, and purpose" all strongly point to it providing a right of action to enjoin a statutory violation. *See Chavez v. Brewer*, 222 Ariz. 309, 318 ¶25 (App. 2009). *See* Part I(A), *infra*. The Legislature enacted § 41-1494(A), (B) in part to prohibit discriminatory state and local government practices, including conduct that could qualify as, or lead to, a discriminatory work environment and even liability for the State or its political subdivisions. Given this purpose, there is an implied private right of action to enjoin a violation.

ABOR's contrary argument that § 41-1494 cannot be enforced privately would lead to absurd results. If accepted, a government agency could require its employees to undergo training that expressly instructs them that one race is morally and intellectually superior to another or that an individual should be discriminated against because of his or her race, and the only remedy for that clear violation of § 41-1494 would be a report related to the same. *See* Part I(B). This absurdity strongly counsels against adopting ABOR's interpretation.

Second, ABOR incorrectly assumes that absent an implied statutory right of action to enforce § 41-1494, then subject matter jurisdiction is lacking here. Petition at 3, 32. That is simply wrong. Arizona courts have long recognized an *equitable* cause of action for injunction by 1) a party with standing 2) to restrain unlawful conduct 3) by a public official or agency. A.R.S. § 12-1801; *see* Part II(A)(1).[1] Therefore, ABOR's burden is to prove that § 41-1494 not only lacks a private right of action but that its reporting requirement in subsection (C) is so "complete" as to provide the "exclusive remedy for violations" and preclude an otherwise available equitable cause of action. *See, e.g., Rodgers v. Huckelberry*, 247 Ariz. 426, 430 ¶¶15-17 (App. 2019); *State Comp. Fund v. Ireland*, 174 Ariz. 490, 495 & n.4 (App. 1992) ("[E]quitable claims also may be raised as a court has equity jurisdiction when a right exists that cannot be adequately protected by common law remedies"), *disapproved of on other grounds by Carter v. Indus. Comm'n of Arizona*, 182 Ariz. 128, 131 (1995). *See* Part II(A)(2), *infra*. ABOR simply cannot meet this high burden given the limited reporting requirement in § 41-1494(C).

[1] Anderson adequately plead this. *See, e.g., Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, 514 ¶14 (2021). The First Amended Complaint ("FAC") cites (at ¶12) A.R.S. § 12-1801 and § 12-1831, both of which form a statutory basis for obtaining equitable relief. Count I of the FAC alleges a violation of A.R.S. § 41-1494(A) and does not limit itself to a claim "at law." Finally, the FAC's Request for Relief (at ¶ D) seeks an injunction for violation of § 14-1494.

ABOR's private-right-of-action cases are all distinguishable because they involve claims for damages or to compel the payment of money by a government entity, or they involve a claim against a private party. *See* Part II(B), *infra*. Neither of these categories is applicable to a claim by 1) a party with standing 2) to restrain unlawful conduct 3) by a public official or agency.

INTEREST OF AMICI CURIAE

Amici are Speaker of the Arizona House of Representatives Steve Montenegro and President of the Arizona Senate Warren Petersen. They file this brief in their official capacities as the presiding officers of their respective chambers. *See* Ariz. Const. art. IV, pt. 2, § 8; Ariz. State Senate Rule 2(N); Ariz. House of Reps. Rule 4(K). In enacting § 41-1494, the Legislature acted to prohibit discriminatory practices by state and local governments. The conduct outlawed in that section—such as training employees that "[o]ne race, ethnic group or sex is inherently morally or intellectually superior to another race, ethnic group or sex"—has no place in government (or society more generally). The Speaker and President file this brief to vindicate that principle and ensure that Arizona courts continue to follow existing Arizona law that allows a party with standing to come to court and obtain lawful injunctive relief.

ARGUMENT

I. A.R.S. § 41-1494 Prohibits Discrimination By State And Local Governments

The fact that the Legislature enacted § 41-1494 in part to prohibit discriminatory practices by state and local governments is critical to "the context, . . . subject matter, effects, and purpose of the statutory scheme." *See Chavez*, 222 Ariz. at 318 ¶25. Moreover, the fact that § 41-1494 uses plain language—"may not"—prohibiting agencies from engaging in such practices is critical "language" further showing the existence of a private right by persons with standing to restrain statutory violations. *Id.*

ABOR's Petition for Special Action (the "Petition") ignores the key fact that § 41-1494 is in part a civil rights statute enacted to prohibit specific discriminatory practices against employees (and others) by government agencies and any use of public monies for such discriminatory practices. In fact, the term "civil rights" appears only once in ABOR's Petition (at page 25), and ABOR only briefly acknowledges that § 41-1494 is intended to prevent discriminatory acts (at page 15, and page 23 n.5). As ABOR ultimately must admit though, § 41-1494 is codified in Chapter 9 of Title 41, which relates to "Civil Rights" and is commonly referred to as the "Arizona Civil Rights Act" or "ACRA." *See, e.g.*, *Higdon v. Evergreen Int'l Airlines, Inc.*, 138 Ariz. 163, 164, 165 n.1 (1983).

A. By Enacting § 41-1494, the Legislature Added an Additional Protection Against Discrimination in Public Employment Related to Race and Sex

The fact that § 41-1494 is in part a civil rights statute that comfortably fits with longstanding prohibitions on employment discrimination supports the superior court's conclusion that it has jurisdiction to hear Respondent's claim and enjoin the prohibited practices by government officials. The scope of § 41-1494 relates to the employment context and the protected classes of "race" and "sex," which are subjects that have long been covered by both ACRA and the corresponding federal civil rights law, Title VII. *See* 42 U.S.C. §§ 2000e–2000e17 (as amended). Article 4 of ACRA relates to discrimination in employment. *See* A.R.S. §§ 41-1461 to -1468. And ACRA defines "employer" as a "person," which includes "one or more . . . governmental agencies [or] political subdivisions." A.R.S. § 41-1461(7)(a), (11).

The categories identified in § 41-1494(D) are also consistent with the protected classes throughout ACRA, including "race" and "sex." *See* A.R.S. § 41-1463(B) (making it an "unlawful employment practice" to "fail or refuse to hire" or to "limit, segregate or classify employees or applicants for employment in any way that would . . . adversely affect the individual's status as an employee, because of the individual's race, color, [or] sex." (emphasis added)). Consistent with that prohibition, § 41-1494 prohibits trainings, orientations, and therapy by state agencies and subdivisions that are discriminatory by suggesting that:

- One race, ethnic group or sex is inherently morally or intellectually superior to another race, ethnic group or sex;
- An individual, by virtue of the individual's race, ethnicity or sex, is inherently racist, sexist or oppressive;
- An individual should be invidiously discriminated against or receive adverse treatment solely or partly because of the individual's race, ethnicity or sex;
- An individual's moral character is determined by the individual's race, ethnicity or sex;
- An individual, by virtue of the individual's race, ethnicity or sex, bears responsibility for actions committed by other members of the same race, ethnic group or sex;
- An individual should feel discomfort, guilt, anguish or any other form of psychological distress because of the individual's race, ethnicity or sex; or
- Meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race, ethnic group or sex to oppress members of another race, ethnic group or sex.

A.R.S. § 41-1494(D). The Legislature could reasonably conclude that if a government agency is training its employees that one race is superior or inferior to another, or that people of one race are inherently racist, sexist, or oppressive, this

could well lead to additional discriminatory conduct, and even liability for the State and its subdivisions for employment discrimination under ACRA or other laws. The Legislature was within its authority to broadly prohibit "requir[ing]" this practice. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) ("Eliminating racial discrimination means eliminating all of it."). And given this purpose, the superior court correctly concluded that the Legislature created an implied private right of action.

B. ABOR's Argument That There Is No Remedy Other Than Reports for § 41-1494 Violations is Breathtakingly Broad and Leads to Absurd Results

It is also important to note the breadth and absurdity of ABOR's proposed interpretation. ABOR argues that § 41-1494's only authorized enforcement method is the report that merely lists state agencies in compliance with that section. Petition at 21.

A state agency that required and used public money to create and carry out a training that told its employees that "[o]ne race, ethnic group or sex is inherently morally or intellectually superior to another" and that "[a]n individual should be invidiously discriminated against . . . because of the individual's race, ethnicity or sex" would plainly be in violation of A.R.S. § 41-1494(A) and (B).

Imagine such a training for corrections officers, teachers, DCS employees, police officers, judges, or any other government employees who exercise authority

in a way that impacts the lives of countless Arizonans. In ABOR's view, no public employee subjected to that training could bring an injunction to retrain violation of § 41-1494(A) or (B). In ABOR's world, the sole "remedy" would be being left off of a list in a report. This is plainly absurd.

In contrast, the superior court correctly concluded that an employee has a private-right-of-action because § 41-1494's "primary purpose is to ensure that public employees are not required to undergo training 'that presents any form of blame or judgment on the basis of race, ethnicity or sex' as a condition of their employment." Under Advisement Ruling at 4. If this Court accepts jurisdiction, it should affirm the superior court's correct interpretation.

II. Arizona Courts Have Long Held that an *Equitable* Writ of Injunction To Restrain Government Officials Is a Proper Cause of Action In Cases Such As This

ABOR's Petition suffers from the fatal flaw that one of its necessary premises is contradicted by multiple published Arizona cases. The Petition states—with no citation to authority—"because subject matter jurisdiction cannot be based on a statute that does not create a private right of action this Court should accept special-action jurisdiction and grant relief … directing the trial court to dismiss Anderson's Complaint, with prejudice, because he lacks a private right of action under A.R.S. § 41-1494." Petition at 3, 32.

A critical problem with this argument is that ABOR fails to recognize that Respondent may maintain a claim *in equity* rather than just at law. A.R.S. § 12-1801.[2] "At law, the cause of action determined everything about the case, and there was a 1:1 relationship between the cause of action and the plaintiff's claim. But the equitable patterns were looser. … [T]he [U.S. Supreme] Court has looked to the traditional practices of equity to determine whether a particular equitable claim or remedy should be available." *See* Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 Notre Dame L. Rev. 1763, 1764-65 (2022); *United States v. Texas*, 599 U.S. 670, 701 (2023) (Gorsuch, J., concurring) (In a third case, the plaintiff sought "to enjoin enforcement of " an order of the Federal Communications Commission. ... That is a claim for traditional equitable relief, and indeed, the Court held that the complaint "state[d] a cause of action in equity" and remanded for further proceedings); *United States v. Texas*, 97 F.4th 268, 307 n.3 (5th Cir. 2024) (Oldham, J., dissenting) ("This is a suit at equity, and it is technically incorrect to say that a plaintiff needs a cause of action to bring a suit at equity. Nevertheless, a plaintiff cannot sue at equity unless his suit comes within some traditional head of 'equitable jurisdiction.' That is, to invoke equitable jurisdiction, a plaintiff is required to show that his grievance is the kind of grievance that equity has traditionally remedied." (citing Bray & Miller, *Getting into Equity*, 97 Notre Dame L. Rev. at 1764));

[2] Anderson adequately plead an equitable claim. *See* note 1, *supra*.

Republic of the Philippines v. Marcos, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc) (The Complaint "states an equitable cause of action and seeks equitable relief").

Applying that correct approach here, multiple Arizona cases have recognized the writ of injunction *itself* as a sufficient basis to maintain a suit restraining a state official or agency from taking actions that infringe on a person's civil rights or property rights. In fact, ABOR cites no Arizona case that declines to find an equitable cause of action when 1) a party with standing sues 2) to restrain unlawful conduct 3) by a public official or agency. Similarly, ABOR's brief suffers from the fatal flaw that it exclusively cites 1) cases involving claims for damages against government agencies for past conduct or otherwise seeking to compel the expenditure of public monies, or 2) a claim against a private party, not a government agency or official. Those categories are inapposite to an equitable claim for a negative injunction against a government agency or official.

A. A Writ of Injunction Is A Generally Available Cause of Action, and the Absence of an Express Cause of Action in § 41-1494 Shows the Legislature Has Not Created An Exclusive Legal Remedy

1. A Writ of Injunction to Restrain ABOR's Violation of § 41-1494 in Carrying out its Employment Powers is Available Here

Whether § 41-1494 itself creates a private right of action is simply not dispositive of whether Respondent may bring a claim to enjoin ABOR from violating that statute. That is because absent a statute creating a "complete remedy," "a

statutory remedy is merely cumulative to any common law remedies." *State Comp. Fund*, 174 Ariz. at 495 & n.4 ("[E]quitable claims also may be raised as a court has equity jurisdiction when a right exists that cannot be adequately protected by common law remedies"); *see also Rodgers*, 247 Ariz. at 430 ¶¶15-17 (rejecting argument that statutory remedy was exclusive and concluding "taxpayers had standing and a right of action to enjoin the allegedly illegal expenditures").

ABOR's brief ignores multiple binding cases dating back to statehood that recognize the availability of a writ of injunction to restrain officials. In 1912, State Senator H.A. Davis applied for an injunction against Secretary of State Sidney P. Osborne to restrain him from transmitting notices to hold a statewide candidate election that year. *State ex rel. Davis v. Osborne*, 14 Ariz. 185, 186-87 (1912). In finding jurisdiction, the Arizona Supreme Court recognized that "[t]he superior courts of the state are not limited to *the ordinary injunction in equity, the scope and purpose of which is limited to matters involving property or civil rights*; but the prerogative writ of injunction may be resorted to in all cases necessary to preserve the sovereignty of the state, its prerogatives and franchises." *Id.* at 188 (emphasis added). Therefore, from the earliest months of statehood, Arizona courts have recognized "the ordinary injunction in equity" for "matters involving property or civil rights." *Id.* This writ of injunction is also codified in A.R.S. § 12-1801.

Later cases—including one brought by ABOR as Plaintiff—have consistently held that an injunction is available to restrain a government official from acting beyond his or her authority, without the necessity of citing to a statutory cause of action. *See Bd. of Regents of Universities & State Coll. v. City of Tempe*, 88 Ariz. 299, 302 (1960) ("[T]his Court has on several occasions held an injunction to be a proper remedy where it is alleged that the statute . . . is being applied in an unauthorized manner."); *see also Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 62 ¶14 (2020) ("[L]ike all public officials, the Recorder may be 'enjoined from acts' that are beyond his power."); *Boruch v. State ex rel. Halikowski*, 242 Ariz. 611, 614 ¶6 (App. 2017) (permitting suit to advance for operating a water system that used plaintiffs' properties as "'ad hoc' overflow relief . . . without just compensation in violation of the Arizona Constitution."); *Berry v. Foster*, 180 Ariz. 233, 235 (App. 1994) ("[T]he [school] board is still prohibited from taking action [i.e., moving forward with meeting to censure one of its members] which it has no power to take under the governing statutes."); *Williams v. Super. Ct. In & For Pima Cnty.*, 108 Ariz. 154, 158 (1972) ("[W]here officers are acting in the execution of a public statute, they may be enjoined from acts which are beyond their power." (citation omitted)); *State ex rel. Goddard v. Coerver*, 100 Ariz. 135, 146 (1966) (case should properly be treated as an application for injunction and jurisdiction accepted); *Crane Co. v. Ariz. State Tax Comm'n*, 63 Ariz. 426, 445 (1945) (Government "officers . . .

may be enjoined from acts which are beyond their power."), *overruled on other groups by Valencia Energy Co. v. ADOR*, 191 Ariz. 565 (1998).

Here, ABOR has statutory authority to "[a]ppoint and employ . . . professors, instructors, [and] lecturers." A.R.S. § 15-1626(A)(3). The statute at issue here—§ 41-1494(A) and (B)—is a civil-rights statute that prevents ABOR from exercising its appointment and employment authority in a manner that violates employees' civil rights by requiring or using public monies for discriminatory trainings and other practices. Under the plethora of authority cited above, Anderson's claim to enjoin a violation of § 41-1494 clearly comes within a "traditional head of 'equitable jurisdiction'" in Arizona and is "the kind of grievance that equity has traditionally remedied." *Texas*, 97 F.4th at 307 n.3 (Oldham, J., dissenting).

Finally, the analytical approach described in this section is consistent with how the Arizona Supreme Court recently analyzed a similar issue. The court recognized it was presented with "a suit in equity," and "[t]he nature of the right—to be free from charges beyond the Medicaid reimbursement—lends itself to equitable relief." *Ansley v. Banner Health Network*, 248 Ariz. 143, 149 ¶17 (2020). It stated, "[c]ourts have broadly recognized equitable actions by plaintiffs seeking injunctive relief against state officials enforcing state regulations on federal preemption grounds." *Id.* Based on all of the cases cited above, the same

jurisdictional principle is true here of Anderson's complaint against ABOR seeking equitable relief to prevent a violation of § 41-1494.

For these reasons, ABOR's Petition fundamentally misses the mark and does not support reversing the superior court.

2. The Presence of Express Causes of Action for Other Articles of ACRA Supports the Conclusion that Respondent Can Bring His Claim as a Writ of Injunction

ABOR makes much of the fact that other articles in ACRA provide express causes of action (including claims for damages). *See* Petition at 25-26. That argument would be relevant if Respondent were bringing a claim for damages, but he is not. Instead, the absence of an express statutory right of action in § 41-1494 supports the conclusion that in enacting that statute, the Legislature did not intend to preclude "common law remedies." *State Comp. Fund*, 174 Ariz. at 495 & n.4; *see also Rodgers*, 247 Ariz. at 430 ¶¶15-17.

This makes sense given the breadth of § 41-1494(A) and (B). As repeatedly noted in this Amicus Brief, those statutes broadly prohibit "requir[ing]" or "us[ing] public monies" for purposes that could result in employment discrimination and even liability for state and local agencies. *See* page 5, *supra*. The Legislature therefore left open the availability of injunctive relief to restrain violations.

B. ABOR's Private-Right-of-Action Cases Are Distinguishable Because They Involve Claims for Damages or to Compel Expenditure of Public Monies, or Claims Against Private Parties

1. Claims Against the Government for Damages or Compelling Payment of Monies

ABOR's Petition cites three cases finding no private right of action against a governmental body for an alleged violation of Arizona statute, but those cases all involved claims for damages or seeking to compel the payment of public monies. None involved 1) a party with standing suing 2) to restrain unlawful conduct 3) by a public official or agency. These cases are thus all distinguishable.

The Petition (at 16, 18) cites *Burns v. City of Tucson*, 245 Ariz. 594 (App. 2018). Burns was not seeking prohibitory injunctive relief; he was seeking additional relocation assistance payments—i.e. the payment of government money. *Id.* at 596 ¶4 ("Burns argues our relocation-assistance statutes . . . imply a private right of action in favor of displaced persons aggrieved by the amount of relocation-assistance benefits an acquiring agency offers."). This type of claim for payment out of the treasury is a damages claim, not an injunctive claim. *Burns* says nothing about the availability of prohibitory injunctive relief.

The Petition (at 17, 18, 21, 22 and 31) cites *Guibault v. Pima County*, 161 Ariz. 446 (App. 1989). Like *Burns*, this was a damages claim. *Id.* at 447 ("The complaint seeks damages for injuries resulting from the wrongful denial of Guibault's application for medical assistance and a declaration that the Guibaults

'are immediately eligible for indigent health assistance pursuant to A.R.S. Sections 11–291 *et seq*.[.]'"). The court limited its analysis to the damages claim and concluded "[n]othing in the statutes evidences an intent to create or permit a separate cause of action for damages proximately caused by such a wrongful denial of benefits." *Id.* at 450.

Finally, the Petition (at 22) cites *Allen v. Graham*, 8 Ariz. App. 336 (1968). That case involved a claim for the denial of old-age assistance and sought to compel the payment of public monies. *Id.* at 337. The Court's analysis was focused on that critical aspect of the claim, and it says nothing about prohibitory injunctions.

2. Claims Against A Private Party

ABOR also cites (at 1, 16, 18, 21, 22, 23, 25, 26, 27, and 31) *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192 (App. 2014). That case involved a claim by qualified electors against a private party—a campaign committee—related to the committee transferring its funds to a different campaign committee. *Id.* at 193 ¶3. That case therefore has no applicability regarding a prohibitory injunction against a government agency or official for violation of a statute. *McNamara* is also easily distinguishable from both *Chavez* and the instant case, because as this Court noted regarding the statute at issue in *McNamara*, "we are not dealing here with a special class of voters for whose specific benefit [the statute at issue] was enacted." *Id.* at 195 ¶9.

In contrast, as the superior court correctly found here, § 41-1494's "primary purpose is to ensure that public employees are not required to undergo training 'that presents any form of blame or judgment on the basis of race, ethnicity or sex' as a condition of their employment." Under Advisement Ruling at 4. Public employees are thus a "special class … for whose specific benefit [the statute at issue] was enacted." *Id.*

CONCLUSION

For the foregoing reasons, if the Court accepts jurisdiction, it should affirm the superior court's conclusion that it has jurisdiction to hear Respondent's claims.

RESPECTFULLY SUBMITTED this 14th day of February, 2025.

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