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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

OWEN ANDERSON, a resident of Arizona; and D. LADD GUSTAFSON, a resident of Arizona, Plaintiffs, vs. ARIZONA BOARD OF REGENTS, an Arizona corporate body, Defendant.	Case No: CV2024-005713 **BRIEF OF AMICI CURIAE PRESIDENT PETERSEN AND SPEAKER TOMA IN SUPPORT OF PLAINTIFFS' RESPONSE TO MOTION TO DISMISS** (Assigned to the Hon. Melissa Julian)

INTRODUCTION

Senate President Warren Petersen and House Speaker Ben Toma ("Amici") submit this amicus brief in support of Plaintiffs' Response to Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint filed on August 7, 2024 ("Response"). This brief makes the following points.

First, this is a civil rights case. A.R.S. § 41-1494(A) and (B) were enacted 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. Given these objectives, the statute's "context, . . . subject matter, effects, and purpose" all strongly point to allowing for a private right of action to enjoin a violation of the statute in addition to reporting. *See Chavez v. Brewer*, 222 Ariz. 309, 318 ¶25 (App. 2009). *See* Part I(A), *infra*.

Second, the practices prohibited by § 41-1494 are broader than retaliatory employment actions such as firing or discipline. This defeats ABOR's arguments regarding ripeness and failure to state a claim. Here, § 41-1494(A) and (B) prevent simply "requir[ing]" an employee to engage in training or "us[ing] public monies" for a training. This is in accord with longstanding employment discrimination laws where publishing or printing a discriminatory notice is itself a complete violation—no additional discriminatory action is required. *See* A.R.S. § 41-1464(B); 42 U.S.C. § 2000e-3(b); *see also 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."). Accordingly, the Complaint need not allege that ABOR has taken further action against Plaintiff Anderson (or anyone else) beyond publishing the training and telling employees it is required or, alternatively, using public monies for it. *See* Part I(B), *infra*.

Third, ABOR's private-right-of-action argument is breathtakingly broad and would lead to absurd results. If accepted, a government agency could carry out a training for its employees that expressly instructs them that one race is morally and intellectually superior to another and 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 reports related to the same. *See* Part I(C).

Fourth, ABOR's Motion incorrectly assumes that absent an implied statutory right of action to enforce § 41-1494(A), (B), Plaintiffs have no cause of action. That is simply wrong.

Arizona courts have long recognized that a writ of injunction itself is a cause of action *to restrain* unlawful conduct such as that alleged here. *See* Part II(A)(1). There are no grounds to conclude that § 41-1494(C)'s reporting requirement precludes common law remedies (including those historically available in courts of equity) such as a prohibitory injunction under A.R.S. § 12-1801 *et seq.*, and therefore, Plaintiffs can proceed with that claim. *See, e.g.*, *Rodgers v. Huckelberry*, 247 Ariz. 426, 430 ¶¶15-17 (App. 2019). *See* Part II(A)(2), *infra*.

Fifth, if an implied statutory right of action or the writ of injunction is available, then the Declaratory Judgments Act provides Plaintiffs with standing to sue. This conclusion directly follows from *Arizona School Boards Association, Inc. v. State*, 252 Ariz. 219, 225 ¶20 (2022) ("*ASBA*"). ABOR disputes this in a footnote (Motion at 10 n.7), and the dicta it cites is inapposite because it speaks only to where there is no right of action. *See* Part II(B), *infra*.

Sixth, ABOR's private-right-of-action cases are all distinguishable because they involve claims for damages or the payment of money by a government entity, or they involve a claim against a private party. Neither of these categories is applicable to a claim for a prohibitory injunction against a government official or agency. *See* Part II(C), *infra*.

Seventh, ABOR's arguments regarding a "specific expenditure" for taxpayer standing do not support dismissal. In *Welch v. Cochise County Board of Supervisors*, a case ABOR cites, the Arizona Supreme Court adopted a broader test focusing on the "zone of interests." 251 Ariz. 519, 526 ¶¶23-24, 530-31 ¶41 (2021). For purposes of Count 2, both Plaintiffs have a "statutorily protected interest" under *Welch* in public monies not being "use[d]" for discriminatory trainings, orientations, or therapies. A.R.S. § 41-1494(B). The word "use" is *broader* than the words "payment" or "paid" in other statutes. *See* Part II(D), *infra*.

INTEREST OF AMICI CURIAE

Amici are Speaker of the Arizona House of Representatives Ben Toma 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 state government. The Speaker and President file this brief supporting Plaintiffs to ensure that the Legislature's intent, as expressed in § 41-1494, is given full force and effect.

ARGUMENT

I. The Statute At Issue Here—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 Motion to Dismiss (the "Motion") 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 brief (at page 8). 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 weighs heavily in favor of this Court having jurisdiction *to 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; or
- An individual should feel discomfort, guilt, anguish or any other form of psychological distress because of the individual's race, ethnicity 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]" or "us[ing] public monies" for this practice. *See Students for Fair Admissions*, 600 U.S. at 206 ("Eliminating racial discrimination means eliminating all of it."). And given this purpose, it is very likely that the Legislature intended for courts to be able to enjoin officials from engaging in the prohibited practices when an affected government employee or a resident taxpayer sues.

B. Civil Rights Laws Prohibit Discriminatory Notices or Advertisements Themselves as Unlawful Practices, Absent Any Additional Discrimination

ABOR's arguments similarly focus on whether Professor Anderson has suffered retaliatory action or discipline, thereby failing to acknowledge that, in the context of prohibited employment practices, publishing a discriminatory advertisement or notice is *itself* a completed violation of the civil rights laws. Section 41-1464(B) provides that "[i]t is an unlawful employment practice for an employer . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification or discrimination based on race [or] sex."[1]

This state-law provision mirrors Title VII in federal law, which includes a prohibition on a discriminatory "notice or advertisement relating to employment." 42 U.S.C. § 2000e-3(b). As an example, the EEOC brought an enforcement Action against McCormick & Schmick's Seafood Restaurants in part due to "racially discriminatory recruitment advertising in violation of Title VII." Consent Decree at 1, *EEOC v. McCormick and Schmick's Seafood Rests., Inc.*, No. 1:08-cv-00984-WMN (D. Md. Sept. 12, 2014), Dkt. 110.[2] The District Court found that entry of the consent decree "will further the objectives of Title VII." *Id.* at 2. As part of the consent decree the defendant agreed to "refrain from *printing or publishing* . . . notices and advertisements regarding career opportunities posted on any website by or for [the restaurant] that express a preference, limitation, specification or discrimination because of race." *Id.* at 6.

These statutes and EEOC enforcement action are directly relevant to ABOR's arguments regarding jurisdiction. For example, ABOR (at 3-4) takes issue with the sufficiency of the Complaint's allegations that Professor Anderson is "required" to take the Training and "viewed" the training. Later, ABOR argues that "Professor Anderson fails to allege that he has suffered any past or present injury connected to the Training." Motion at 12. But ABOR cannot dispute that it

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[1] There is an exception for sex, when it is "a bona fide occupational qualification for employment." That exception is not implicated here.

[2] This consent decree was entered by the District of Maryland and is attached as Exhibit 1; *see also* https://www.eeoc.gov/newsroom/mccormick-schmicks-pay-13-million-and-provide-significant-injunctive-relief-resolve-eeoc.

created this training, publicized it to its employees including Professor Anderson, and has stated the training is "required." *See, e.g.*, Compl. ¶¶14-22. These actions by ABOR are of the same nature as posting a notice or advertisement for purposes of. A.R.S. 41-1464(B) and 42 U.S.C. § 2000e-3(b). The Legislature can properly prohibit these types of employment-related practices, and courts can properly adjudicate claims that agencies are engaging in them.

C. 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 private-right-of-action arguments. ABOR argues that § 41-1494 "authorizes one—and only one—enforcement method . . . 'a report that includes state agencies in compliance with this section.'" Motion at 4 (quoting A.R.S. § 41-1494(C)). A state agency that required and used public money to create and carry out a training that expressly and repeatedly 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 enforce § 41-1494(A) or (B). ABOR also argues that no resident taxpayer could bring an injunction to stop the use of public monies for this unlawful purpose. In ABOR's world, the sole "remedy" would be being left off of a list in a report. This is plainly absurd.

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

The jurisdictional question here is straightforward. Multiple Arizona cases hold that the traditional writ of injunction itself provides a cause of action for the relief Plaintiffs seek—restraining a state official or agency from taking future actions that infringe on a person's civil rights or property rights. In fact, ABOR cites *no* Arizona case that declines to find a cause of action for such relief in this context. 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 requiring the expenditure of public monies, or 2) claims against private parties, not government defendants. Those categories of cases are inapposite.

A. A Writ of Injunction Is An 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 Plaintiffs 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 v. Ireland*, 174 Ariz. 490, 495 (App. 1992) (citing *Tucson Gas & Elec. Co. v. Schantz*, 5 Ariz. App. 511, 515 (1967)), *disapproved on other grounds in Carter v. Indus. Comm'n of Ariz.*, 182 Ariz. 128 (1995); *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.[3] In 1912, State Senator H.A. Davis[4] 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

[3] This type of injunction is known as a "prohibitory injunction," as distinguished from a "mandatory injunction." *See, e.g.*, *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017).
[4] *See* https://azmemory.azlibrary.gov/nodes/view/40682 (pdf page 7).

statehood, Arizona courts have recognized "the ordinary injunction in equity" for "matters involving property or civil rights." *Id.* This writ of injunction is contained 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. *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."); *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.").[5]

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, an employee and a taxpayer both can bring a cause of action to restrain ABOR from exercising its employment powers in a manner that exceeds its authority.

[5] *Crane* was overruled in part on other grounds by *Duhame v. State Tax Comm'n*, 65 Ariz. 268 (1947), and *Valencia Energy Co. v. ADOR*, 191 Ariz. 565 (1998).

2. The Presence of Express Causes of Action for Other Articles of ACRA Supports the Conclusion that Plaintiffs Can Bring Their 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* Motion at 8-9. That argument would be relevant if Plaintiffs were themselves bringing a claim for damages, but they are 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; *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.[6]

B. The Declaratory Judgments Act Provides Plaintiffs With Standing

Given the availability of an implied statutory cause of action under § 41-1494 and/or a writ of injunction, the Arizona Supreme Court's decision in *ASBA* resolves the question of standing. The Court held that the plaintiffs in that case "have standing under the DJA [Declaratory Judgments Act, A.R.S. § 12-1831 to -1846] to challenge" the constitutionality of a statute. *ASBA*, 252 Ariz. at 225 ¶20. In *ASBA*, the plaintiffs were groups that were directly "affected by" the Legislature enacting a law that exceeded the prohibition of the single subject rule. *Id.* Because of this the Arizona Supreme Court said that Plaintiffs had standing to challenge the constitutionality of that enactment.

Here, Plaintiff Anderson is directly "affected by" ABOR allegedly exceeding the prohibition on lawful training. Under the straightforward reasoning of *ASBA*, the Declaratory Judgments Act provides him with standing to sue to enjoin ABOR's actions. And the alleged violation here is "requir[ing]" or "us[ing] public monies for" discriminatory trainings, not firing

[6] This Amicus Brief takes no position on whether other articles in ACRA provide an exclusive remedy and foreclose common law actions. That is beyond the scope of the issue here.

or otherwise retaliating against an employee. A.R.S. § 41-1494(A), (B). Just as in § 41-1464(B) and 42 U.S.C. § 2000e-3(b), the printing or publishing of the illegal materials is itself a completed violation of the law. *See* Part I(B), *supra*. This is directly akin to *Mills v. Arizona Board of Technical Registration* ("ABTR"), where the Arizona Supreme Court rejected ABTR's argument that an actual enforcement action was required before a case or controversy arose. 253 Ariz. 415, 424 ¶26 (2022). Given what § 41-1494(A), (B) actually prohibit, no disciplinary action by ABOR is required for there to be a case or controversy.

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

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

ABOR's Motion cites four 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 the payment of public monies in some way. None involved a plaintiff simply seeking a prohibitory injunction to prevent a violation of law. These cases are thus all distinguishable from Plaintiffs' claims here.

The Motion (at 10) cites *McCarthy v. Scottsdale Unified School District No. 48*, 409 F. Supp. 3d 789, 820 (D. Ariz. 2019). The analysis of an implied right of action was related to a "claim for damages." *Id.*[7]

The Motion (at 5) 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. *Cf. T.W. v. N.Y. State Bd. of L. Exam'rs*, 110 F.4th 71, 79-80 (2d Cir. 2024) ("[W]hen the action is in essence one for the recovery of money

[7] Nonetheless, the District Court did find an implied right of action for parents for damages related to "reporting requirements that focus on parental notification and documentation." *Id.* at 821-22.

from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."); *Ashford v. Univ. of Mich.*, 89 F.4th 960, 969-70 (6th Cir. 2024). *Burns* says nothing about the availability of prohibitory injunctive relief.

The Motion (at 6, 7, and 10) 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. In fact, the court held open the possibility that "when an indigent is denied eligibility for such care, his or her only remedy is to recover payment for benefits wrongfully denied." *Id.*

The Motion (at 7 and 10) cites *Lancaster v. Arizona Board of Regents*, 143 Ariz. 451 (App. 1984). The plaintiffs in that case were seeking a right to "lost wages, overtime wages, retirement benefits and merit increases," as well as related claims for payment, breach of contract, and negligence. *Id.* at 453. As discussed above, these types of claims are not for prohibitory injunctions. In fact, shortly around the time of *Lancaster*, the Legislature enacted A.R.S. § 12-820.01, which provides absolute immunity for "[t]he exercise of an administrative function involving the determination of fundamental governmental policy," and defining that to include "[a] determination of whether to seek or whether to provide the resources necessary for . . . [t]he hiring of personnel" and "a determination of whether and how to spend existing resources, including those allocated for equipment, facilities and personnel." Again, this shows the fundamental difference between a claim seeking the recovery of money from the State versus a claim for a prohibitory injunction.

Finally, the Motion (at 6) cites *Allen v. Graham*, 8 Ariz. App. 336 (1968). That case involved a claim for the denial of old-age assistance and sought 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 6, 7, 8, 9, 10) *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.

D. ABOR's Argument that a "Specific Expenditure" Is Required For Standing Under § 41-1494(B) Is Misplaced Because That Statute Covers a Broader Zone of Interests Than Just Traceable Expenditures

ABOR's argument that Plaintiffs must identify a "specific expenditure tied to a tax they have paid" is misplaced because § 41-1494(B) prohibits a "use" of public monies, which is broader language than just specific expenditures. ABOR makes its "specific expenditure" argument repeatedly. Motion at 1, 14-17.

A case cited by ABOR – *Welch* – holds that standing is present for "public accountability laws" when the plaintiff is within the "zone of interests" protected by the statutes. 251 Ariz. at 526 ¶¶23-24, 530-31 ¶41. Therefore, a resident and taxpayer, even though he didn't attend the meeting in question had standing to bring an open meeting law claim. *Id.* at 527 ¶27. Moreover, the resident and taxpayer had standing to challenge a decision as a conflict of interest where "the Board's decision affected [plaintiff's] statutorily protected interest in preventing self-dealing." *Id.* at 528 ¶33. There was no requirement in *Welch* that the Cochise County Board of Supervisors expended funds in holding their meeting or that the meeting or vote itself caused pecuniary loss to the County.

For purposes of Count 2 of the instant complaint, both Plaintiffs have a "statutorily protected interest" under *Welch* in public monies not being "use[d]" for discriminatory trainings, orientations, or therapies. A.R.S. § 41-1494(B). It is worth noting that the word "use" is *broader* than the words used in other similar statutes. For example, A.R.S. § 35-212(A) contains the words

"*payment*" of public monies and "illegally *paid* public monies." But § 35-212 recognizes that there can also be an "illegal use of public monies" even if the person who used them illegally did not pay them in any way. *See* A.R.S. § 35-212(B)(5). This shows that the Legislature knows the difference between "payment" and "use." *See, e.g.*, *Carter Oil Co., Inc. v. ADOR*, 248 Ariz. 339, 345 ¶¶19 (App. 2020) (applying the tools of statutory construction embodying this principle). Section 41-1494(B)'s language tracks the broader formulation of illegal "use [of] public monies" and therefore the zone of interest protected is broader and does not require a "specific expenditure" as ABOR argues.

CONCLUSION

For the foregoing reasons, the Court should conclude that it has jurisdiction to hear Plaintiffs' claims and accordingly deny ABOR's motion to dismiss.

RESPECTFULLY SUBMITTED this 23rd day of August, 2024.

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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

MCCORMICK & SCHMICK'S SEAFOOD RESTAURANTS, INC. and MCCORMICK & SCHMICK RESTAURANT CORPORATION,

Defendants.

Case No. WMN-08-CV-984

CONSENT DECREE

INTRODUCTION AND FINDINGS

On April 16, 2008, the U.S. Equal Employment Opportunity Commission ("Commission" or "EEOC") filed this action against Defendants McCormick & Schmick's Seafood Restaurants, Inc. and McCormick & Schmick Restaurant Corporation alleging that Defendants have engaged in a pattern or practice of race discrimination against Black job applicants and employees at their two Baltimore restaurants (formerly identified as Units 41 and 66) in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). EEOC also alleged that Defendants engaged in racially discriminatory recruitment advertising in violation of Title VII. Defendants deny all allegations and assert that all relevant times they have maintained a diversified workforce.

The Parties acknowledge that Landry's, Inc.. purchased McCormick & Schmick's in 2012, three years after EEOC filed the present lawsuit and, therefore, Landry's, Inc. had no participation or role in any of the alleged events covered by the class claims period in this case, which ends in 2010.

EEOC and Defendants now desire to resolve this action and all claims asserted in EEOC's Complaint without the time and expenditure of contested litigation. McCormick & Schmick's believes that it has done nothing wrong and states that it fully supports equal opportunities for all employees, and in entering into the Consent Decree for its two Baltimore restaurants, acknowledges and agrees with the EEOC's mission to ensure legal compliance with hiring and recruitment practices. Accordingly, EEOC and Defendants have entered into this Consent Decree to resolve the EEOC's claims, to avoid the delay, costs and risks of further proceedings, and to promote and effectuate the purposes of Title VII.

The Court finds that it has jurisdiction over the subject matter of this action and the parties for purposes of the action, entry of the Consent Decree, and all proceedings related to the Consent Decree.

The Court, having examined the terms and provisions of the Consent Decree, further finds that it is reasonable and just in accordance with the Federal Rules of Civil Procedure and Title VII.

The Court further finds that entry of this Consent Decree will further the objectives of Title VII and will be in the best interests of the parties, those for whom the EEOC seeks relief, and the public. The Decree does not constitute an adjudication or finding on the merits, and the Parties agree that it cannot be used as evidence of liability, res judicata, or collateral estoppel in any other legal proceeding against Defendants.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

DEFINITIONS

A. "Defendants" means McCormick & Schmick's Seafood Restaurants, Inc., McCormick & Schmick Restaurant Corporation, and their predecessors, successors, assigns, and agents.

B. "Commission" or "EEOC" is the U.S. Equal Employment Opportunity Commission, an agency of the United States Government.

C. The term "hire" or "hiring" refers to the filling of a job opening with an individual who is new to the Company or is an employee of the company but new to the job title she or he has sought.

D. "Eligible Claimants" or "Eligible Claimant" refers to (a) Black persons who sought employment with Defendants as a server, cocktail server, busser, hostess/host and/or bartender at either or both of the Defendants' restaurants located in Baltimore, Maryland at any time during the period January 1, 1998 and January 1, 2010 and (b) Black persons who were employed by Defendants in the positions of server, cocktail server, busser, hostess/host and/or bartender at either or both of the Defendants' restaurants located in Baltimore, Maryland at any time during the period January 1, 1998 and January 1, 2010.

E. "Hiring authority" or "hiring authorities" refers to personnel of the Defendants or any third-party who participate in selection decisions related to screening, interviewing and/or hiring of job applicants, as well as any managerial personnel with a direct or successively higher supervisory role over such hiring authorities.

F. "Day" or "days" means calendar days.

G. "Best Efforts" means reasonable steps to comply with the specific objective identified.

H. "Effective Date" - The Effective Date of this Decree is the date on which the Court gives final approval to the Decree.

I. "Significant" when used in connection with statistical analyses or racial disparities refers to statistical significance as determined by a probability of .05 or lower that the disparity observed is a product of chance.

GENERAL PROVISIONS AND COURT ENFORCEMENT POWERS

1. This Decree constitutes full discharge and satisfaction of all claims which have been alleged in the Complaint filed in this Title VII action by the EEOC based on the Determination of the charge of discrimination filed by Cris Robinson.

2. EEOC and Defendants shall bear their own attorney's fees and costs incurred in connection with this action.

3. This Court shall retain jurisdiction to enforce the terms of this Decree and will have all available powers to enforce this Decree, including but not limited to monetary sanctions and injunctive relief.

3(a). Release of Claims - In consideration of receiving any monetary award pursuant to this Consent Decree, all Claimants who receive Monetary Relief shall execute a Release in the form attached as Exhibit A.

3(b) Complete Consent Decree - This Consent Decree constitutes the complete understanding among the Parties with respect to the matters herein.

3(c) Severability - If one or more provisions of this Consent Decree are rendered unlawful or unenforceable by act of Congress or by decision of the United States Supreme Court, the Parties shall attempt to agree upon what amendments to this Consent Decree, if any, are appropriate to effectuate the purposes of this Consent Decree. In any event, the unaffected provisions will remain enforceable.

3(d) No Admission of Liability - Neither this Consent Decree nor any order approving this Consent Decree is or shall be construed as an admission by Defendants of the truth of any allegation or the validity of any allegation asserted in this civil action or of Defendants' liability therefore, nor as a concession or an admission of any fault or omission of any act or failure to act by Defendants. This Consent Decree was entered into for settlement purposes only, and shall not

be construed by anyone for any purpose whatsoever as an admission or presumption of any wrongdoing on the part of Defendants, nor as an admission by any Party to this Consent Decree that the consideration to be given hereunder represents the relief which could have been recovered after trial.

3(e) No Third Party Rights - Nothing in this Consent Decree shall be deemed to create any rights on the part of Non-Parties to enforce this Consent Decree. The right to seek enforcement of this Consent Decree is vested exclusively in the Parties.

3(f). Failure To Obtain Approval Of Consent Decree – In the event this Consent Decree does not become final or effective in its current form (for whatever reason), this entire Consent Decree shall become null and void and of no force or effect.

3(g) Intent of Parties and Effect of Compliance with Consent Decree - It is the intent of the Parties that by virtue of the consideration agreed to herein by Defendants, this Consent Decree resolves the above-captioned civil action.

GEOGRAPHIC SCOPE AND DURATION OF DECREE

4. This Decree shall only apply to Defendants' restaurants that were formerly assigned Unit Nos. 41 and 66 and all business operations related to such restaurants. However, with regard to Paragraph Nos. 7, 26 & 33(g), below, this Decree shall apply to all of Defendants' facilities and business operations nationwide.

5. This Decree shall remain in effect for two (2) years subsequent to the Effective Date.

PROHIBITED DISCRIMINATION AND RETALIATION

6. During the operation of this Consent Decree, Defendants shall comply with Title VII and refrain from engaging in any employment practice that discriminates against their job applicants and employees on the basis of race in violation of Title VII, including, (a) subjecting Black job applicants to discrimination in recruiting or hiring because of their race; and (b) subjecting Black

employees to discriminatory or unequal table, section or other work assignments because of their race.

7. During the operation of this Consent Decree, Defendants shall comply with Title VII and refrain from printing or publishing, or causing to be printed or published, any notice or advertisement relating to employment that indicates a preference, limitation, specification and discrimination based on race in violation of Title VII, including notices and advertisements regarding career opportunities posted on any website by or for Defendants that express a preference, limitation, specification or discrimination because of race.

8. During the operation of this Consent Decree, Defendants shall comply with Title VII and refrain from engaging in any employment practice that discriminates against any of their employees or job applicants who oppose any practice made unlawful by Title VII. Defendants shall not retaliate against any job applicant, employee or other person because he or she made a charge, or participated, testified or assisted the Commission in any manner in this matter, or sought or received relief in this action, the administrative proceedings preceding this action, or in any other proceeding under Title VII.

MONETARY RELIEF

9. Within thirty (30) days of entry of this Decree, Defendants shall pay $1,300,000.00 in monetary relief into a Qualified Settlement Fund ("QSF") to be established and administered by the EEOC as discussed below. Of this amount, 50% shall constitute back pay with interest and the remaining 50% shall constitute statutory damages under 42 U.S.C. Section 1981a payable to Eligible Claimants who applied or were employed at any time during the period January 1, 1998 until January 1, 2010. Defendants shall notify EEOC after they have completed payment into the QSF.

10. Distribution of monetary relief to EEOC's Eligible Claimants shall be made by the Administrator in accordance with a claims process to be conducted by, and eligibility criteria to be determined by, the EEOC. All distributions of monetary relief to and among Eligible Claimants will be determined by the EEOC. Defendants shall not have any participation or role in determining the identities of Eligible Claimants or amounts payable to such persons.

11. EEOC shall use the following minimum criteria to identify persons to receive monetary awards regarding its hiring discrimination claim: persons who (a) are Black; (b) sought employment with Defendants at either or both their Baltimore restaurants at any time during the period January 1, 1998 until January 1, 2010; (c) sought employment as a server, cocktail server, host/hostess, busser and/or bartender, or circumstances demonstrate to EEOC that they were otherwise considered by Defendants as potential candidates for those positions; (d) were of legal age to work in the position(s) in question; and (e) were not selected for those positions by Defendants. In addition, in determining back pay award amounts EEOC will consider dates of application and subsequent employment history.

12. EEOC shall use the following minimum eligibility criteria to identify persons to receive monetary awards regarding its work assignments discrimination claim: persons who (a) are Black; (b) were employed by Defendants at either or both their Baltimore restaurants at any time during the period January 1, 1998 until January 1, 2010; and (c) held one or more positions as a server, cocktail server, bartender, and/or host/hostess.

13. Defendants shall be responsible for paying their share of all applicable payroll taxes (e.g., FICA).

13(a). The total amount of payments to Eligible Claimants shall not exceed the amount in the Qualified Settlement Fund.

14. EEOC shall have twenty-two (22) months after entry of this Decree within which payments may be made to Eligible Claimants from the QSF. EEOC shall be afforded an additional sixty (60) days after the expiration of the twenty-two month claimant payment period within which it may designate an organization to be the recipient of any residual amounts.

CLAIMS ADMINISTRATOR

15. The QSF, and payments made from the QSF, shall be administered by the settlement claims administrator ("Administrator"), which shall be Gilardi & Co. LLC, a qualified third-party settlement administrator that was selected by EEOC and Defendants prior to entry of this Decree. Upon entry of this Decree, the Administrator shall commence its duties in accordance with this Decree and instructions received from the Parties. If either Party determines that the Administrator cannot perform its duties in a proficient manner or at reasonable cost in light of the work required to be performed under this Decree, the rates quoted by the Administrator prior to entry of this Decree, and the availability of other potential Administrators that may be more cost-effective, that Party may file a motion with the Court for the appointment of a new Administrator. Prior to filing such motion, the moving Party shall confer with the non-moving Party in a good faith effort to identify a new Administrator satisfactory to both parties for presentation to the Court.

16. The Administrator shall be responsible for the following:

(a) establishing the QSF

(b) issuing payment to Eligible Claimants from the QSF in amounts determined by the EEOC;

(c) keeping records of such payments and reporting them;

(d) making necessary payroll tax withholdings; and

(e) issuing necessary tax documents.

17. The EEOC shall receive no monetary amount from the QSF Account. Payment of the Administrator will be made from interest earned on the Settlement Funds in the QSF Account. To the extent the interest is insufficient to cover these costs, Defendants shall pay all expenses of the Administrator (or any subsequently appointed Administrator) incurred in the course of carrying out its duties under the Decree upon to an amount that shall not exceed a total of $150,000 for the Administrator's work under this Decree as well as the administration of the settlement fund regarding the Conciliation Agreement resolving EEOC San Francisco District Office Charge No. 550-2006-02139. In the event that the cost of services required to administer the QSF in this litigation will exceed the aforementioned amount, the parties shall promptly confer in good faith concerning a joint proposal to the Court for completing the QSF administration.

18. The Administrator shall promptly inform Defendants of the amounts of back pay distributed to each Eligible Claimant from the QSF and all other information necessary for Defendants to satisfy their payroll tax liabilities no later than thirty (30) days before any distribution.

18(a). Defendants shall provide the EEOC with all information and documents necessary to carry out its functions, including information to enable the EEOC to make payroll tax withholdings. Prior to entry of this Decree, Defendants have provided EEOC with applicant and payroll records in its possession for dates up to and including January 1, 2010, to enable EEOC to conduct the claimant claims process. Defendants will cooperate with requests for further relevant information from EEOC that is reasonably accessible and within its possession in order to determine Eligible Claimants and award amounts.

18(b). Defendants shall be responsible for satisfying their own payroll tax obligations associated with payment of back pay. The process for Defendants to satisfy their payroll tax obligations is

as follows: Defendants shall remit to the QSF all monetary amounts equal to their payroll tax liability for back pay awards based on the back pay awards to be distributed by the Administrator to Eligible Claimants and reported to Defendants pursuant to Paragraph 18. Defendants shall remit such monetary amounts not later than thirty (30) days after receiving notification of back pay amounts from the Administrator pursuant to Paragraph 18. Such monetary amounts shall be used only for satisfying Defendants' payroll tax liability. Such payroll taxes shall then be timely paid by the Administrator under the Taxpayer Identification Number for the QSF.

INTERNAL DECREE COMPLIANCE MONITORING OFFICIAL

19. Defendants shall designate a Decree Compliance Monitor ("DCM"), who shall be an officer or high-level management official of the Defendants who shall possess the knowledge, capability, organizational authority, and resources to monitor and ensure Defendants' compliance with the terms of the Consent Decree. Prior to her/his selection, the DCM shall have a reasonable base of knowledge regarding equal employment opportunity law and human resource management. Defendants shall assign to the DCM the responsibility of monitoring and ensuring Decree compliance and shall further hold the DCM accountable for carrying out his or her responsibilities as DCM. Defendants shall ensure that the DCM receives all training and assistance necessary to carry out her/his duties in a proficient manner. To the extent the DCM requires technical assistance to enable her/him to proficiently perform a specific function (e.g., statistical analysis expertise) Defendants shall ensure that such assistance is provided by their own qualified personnel or, in the alternative, third-party consultants (e.g., labor economist, statistician, industrial/organizational psychologist, attorney). If Defendants have notice that the DCM is unable or unwilling to proficiently perform his/her assigned responsibility, or the DCM is no longer employed by Defendants, they shall identify and assign a new DCM within ten (10) days of such notice.

20. Defendants shall provide written notice to EEOC within ten (10) days of entry of this Decree of the full name, job title, work experience, and education/training history (including but not limited to all equal employment opportunity and human resource education/training) of the DCM required by this Decree, and within ten (10) days of the appointment of any new DCM required by this Decree. Written notice shall be provided to EEOC Supervisory Trial Attorney Ronald L. Phillips at the EEOC's Baltimore Field Office.

OFFERS OF EMPLOYMENT TO ELIGIBLE CLAIMANTS

21. In the event that one or more qualified Eligible Claimants chooses to complete an application for a vacant position with Defendants at either of the two Baltimore restaurants (formerly designated Unit #41 & #66) during the two-year operation of this Decree, Defendants shall offer the position to the applicant/Eligible Claimant if the applicant/Eligible Claimant possesses all lawful, objective qualifications for the position, including scheduling and availability requirements, unless another applicant is better qualified for the position. In the event Defendants do not offer a vacant position to an applicant/Eligible Claimant who applied for the position, they shall within sixty (60) days provide a written notice to EEOC identifying the reason(s) for not offering the position to that individual. Defendants shall not be required to make more than twenty (20) preferential offers of vacant positions under this Paragraph. Defendants' responsibilities under this Paragraph shall only arise if (i) an Eligible Claimant has applied for a vacant position covered by this Decree and (ii) Defendants are promptly notified by EEOC, in writing, that a particular Eligible Claimant has submitted an application for employment at either of the two restaurants and identifying the name, last known address, and last known telephone number of the Eligible Claimant; the restaurant to which they applied, and the vacant position sought. Such notice shall not be considered prompt unless submitted to

Defendants (via counsel) sufficiently in advance of the hiring decision regarding the vacant position to feasibly permit Defendants to consider the Eligible Claimant's application.

NUMERICAL HIRING GOALS
AND RECRUITING EFFORTS

22. Defendants shall, for a period of two (2) years, implement the following provisions related to hiring of persons for the job titles of server, cocktail server, host/hostess, busser and bartender at the two Baltimore facilities:

(a) Numerical Hiring Goals: Defendant shall make Best Efforts to ensure that the percentage of persons hired to fill vacancies in each of the aforementioned job titles who are Black is equal to or exceeds the percentage of Black persons applying for such job titles for each 12-month reporting period who possess all lawful, objective qualifications, including scheduling and availability requirements.

(b) Recruiting Efforts: In order to encourage a diverse pool of qualified applicants, Defendants shall advertise vacancies and employment opportunities available at the two Baltimore restaurants through submitting notices of employment opportunities and vacancies to three Baltimore City One-Stop Job Centers; at least one hospitality industry training program located in the City of Baltimore; Coppin State University, Morgan State University, Baltimore City Community College, The University of Baltimore, and Sojourner-Douglass College, to the extent that they accept job announcements from employers for student jobs; and at least one internet job posting site that advertises food service positions in the City of Baltimore (as well as other locations).

(c) Applicant Tracking System: Defendants shall adopt and maintain a tracking system which shall contain, for each person hired and for any other person

who submitted to Defendants an application, at least the following information: (i) full name; (ii) job title sought and/or for which considered; (iii) date of application/; (iv) particular restaurant of position sought and/or for which considered (if applicable);; (v) race; (vi) date of hire (if applicable); (vii) job title at time of hire (if applicable); (viii) work location/job site assigned (if applicable); (ix) reason for non-selection (if applicable); (x) whether position is full-time or part-time. Regarding race information, Defendants shall gather such information using means that are non-coercive and otherwise consistent with Title VII, such as voluntary applicant race surveys or, if warranted, visual identification of race.

(d) Goal Attainment Review: Defendants, acting through the DCM, shall conduct an annual review of their Numerical Hiring Goals attainment and Recruiting Efforts. At a minimum, such review shall be based on an analysis of data gathered pursuant to the Decree, any feedback regarding the Numerical Hiring Goals and Recruiting Efforts from its personnel, as well as any complaints, reports or allegations of discrimination or non-compliance with the Decree and investigations thereof. Subjects to be assessed during the review shall include at least the following: (i) Defendants' progress in achieving the Numerical Hiring Goals and Recruiting Efforts for Black candidates set forth in this Decree; and (ii) a determination of what steps could potentially remedy any failure to achieve Numerical Hiring Goals. Defendants shall prepare an annual report summarizing the results of such review.

(e) Critical Assessment of Goal Non-Attainment: When one or both of the two Baltimore facilities have failed to achieve the Numerical Hiring Goals for

Black candidates set forth in the Decree, Defendants shall conduct a review of those restaurants to determine the reasons for non-achievement of the goals. For each such restaurant, such review shall include, at a minimum, the following: (i) comparison of applicant flow data to hiring data to determine whether a statistical under-representation of Black hires exists for that restaurant; (ii) a determination of whether any statistical under-representation of Black hires in light of applicant flow data is statistically significant; (iii) a review of records to assess whether any allegations of possible race discrimination have been made regarding the restaurants or hiring authorities as well as the results of any investigations of possible race discrimination have been made regarding the restaurants or hiring authorities; (iv) interviews of the hiring authorities in question, as well as applicants and employees as reasonably warranted; (v) a review of recruiting techniques and procedures (including but not limited to advertising) that were used to solicit candidates for that restaurant; and (vi) where a determination has been made that any statistical under-representation of Black hires is statistically significant, audits of all hiring decisions made in the preceding year by the hiring authorities in question, including requiring the hiring authorities in question to articulate their reasons for non-selection of all Black candidates who were not hired and a review of the veracity of those reasons by comparison with non-Black selectees and/or by other means reasonably necessary under the circumstances to assess veracity.

(f) Reporting to the EEOC: Defendants shall report to EEOC the following information pertaining to each twelve-month period covered by the Decree: (i) a summary setting forth, separately for each restaurant, the total number of applicants

for each server, cocktail server, host/hostess, busser and bartender position who possess all lawful, objective qualifications and, within each job title, the total number of applicants of each race who possess all lawful, objective qualifications; (ii) a summary setting forth, separately for each restaurant, the total number of new hires for each job title and, within each job title, the total number of new hires of each race; (iii) a summary setting forth, separately for each restaurant, the number of employees of each race who were discharged and laid-off; (iv) a summary setting forth, separately for each restaurant, the total number of applicants for each server, cocktail server, host/hostess, busser and bartender position regardless of qualifications and, within each job title, the total number of applicants of each race regardless of qualifications; and (v) if Defendants have not achieved any Numerical Hiring Goals, a detailed narrative explanation of the steps taken to assess why the goal was not met, the reasons that Defendants believe they did not achieve the goal, the measures Defendants intend to undertake to achieve the Numerical Hiring Goals and the timetable for implementing those measures. Such reports shall be submitted within sixty (60) days of the end of each twelve-month period. Defendants shall take appropriate disciplinary action, up to and including discharge as warranted, against any hiring authority found to have engaged in purposeful race discrimination in violation of Title VII and this Decree or who willfully fails to assist Defendants in their lawful efforts to comply with this Consent Decree.

WORK ASSIGNMENT COMPLIANCE ASSESSMENT

23. Defendants shall implement the following provisions related to table, section, and other work assignments for employees holding the position of server:

Work Assignment Tracking System: Defendants shall adopt and maintain a work assignment tracking system which shall contain, for each server, at least the following information: (i) full name; (ii) dates of employment; (iii) restaurant; (iv) shift hours for each work day (clock in and clock out times and total hours worked); (v) table and section assignments in each shift worked; (vi) base pay per hour; and (vii) total sales per shift;

24. Defendants, acting through the DCM, shall conduct an annual review of work assignments for servers to determine if any statistically significant racial disparities exist concerning compensation. If a statistically significant racial disparity is found affecting compensation, Defendants will prepare a narrative explanation of the steps taken to assess the reasons for the disparity, any measures Defendants intend to undertake to remedy the disparity, and if no measures are contemplated, the reasons for that position. .

25. Reporting to EEOC: Each year during the operation of this Decree, Defendants shall provide EEOC with a copy of its annual review of work assignments. Such reports shall by submitted within sixty (60) days of the end of each twelve-month period.

ADVERTISING COMPLIANCE ASSESSMENT

26. Defendants, acting through the DCM, shall review all job advertisements and notices, including but not limited to website materials and visual depictions purporting to be employees or applicants, prior to their printing or publication to ensure that such advertisements and notices do not violate 42 U.S.C. § 2000e-3(b) with regard to race and color discrimination.

DISCRIMINATION PREVENTION MEASURES: COMPLAINT PROCESS

27. Throughout the duration of this Decree, and as it relates to facilities covered by this Decree, Defendants shall continue to implement and adhere to an internal complaint system (which may include the use of an internal hotline) that is substantially equivalent to that which was established in Section XV of the Consent Decree entered by the U.S. District Court for the

Northern District of California in the matter of *Wynne, et. al. v. McCormick & Schmick's Seafood Restaurants, Inc., et al.,* Case No. 4:06-cv-03153-CW (Document No. 113).

DISCRIMINATION PREVENTION MEASURES:
DECREE COMPLIANCE AND OTHER EEO TRAINING

28. Defendants will provide sufficient training from any necessary source to enable the DCM to proficiently perform his/her duties under this Decree, including initial training to the DCM concerning all contents of this Consent Decree; Defendants' Numerical Hiring Goals; their obligation to achieve those Goals; potential consequences of failure to achieve the Goals; the Applicant Tracking System and all record-retention requirements of this Decree; the role of Defendants, the DCM, EEOC, and the Court in monitoring Decree compliance; the requirements of Title VII, including but not limited to non-discrimination in hiring, work assignments, and advertising; basic statistical analysis concepts in employment cases; and EEO complaint investigations. In addition, to the extent the DCM is not reasonably familiar with Defendants' restaurant operations, Defendants shall provide such training as is required to enable the DCM to possess such familiarity. All DCM training (except regarding restaurant operations) shall be provided by Defendants' counsel of record in this case and any necessary adjuncts. Within thirty (30) days of the DCM's receipt of such training, his/her name and title and all written materials from the training shall be submitted to EEOC counsel of record for review.

29. Defendants will provide not less than one (1) hour of training to all current human resources personnel and all current hiring authorities with responsibility for the locations covered by this Decree concerning the content of this Consent Decree; Defendants' Numerical Hiring Goals; their obligation to achieve those Goals; potential consequences of failure to achieve the Goals; the Applicant Tracking System and record-retention requirements of this Decree; and the role of Defendants, the DCM, EEOC, and the Court in monitoring Decree compliance. All

training described in this Paragraph shall be provided by Defendants' counsel of record in this case and any necessary adjuncts. Within thirty (30) days of such training, a list of the names, job titles, and work locations of attendees and all written materials from the training shall be submitted to EEOC counsel of record for review.

30. Defendants shall ensure that the DCM and all personnel whose duties require them to conduct investigations of race discrimination/harassment complaints are reasonably qualified by experience, education, and training to perform those duties. Defendants shall require such persons to attend a reasonable quantum of professional development training annually concerning equal employment opportunity and EEO investigations.

REPORTS TO EEOC OF DISCRIMINATION ALLEGATIONS AND WITNESSED CONDUCT

31. Defendants shall submit an annual written report to the Commission regarding all written, or electronic complaints of potential race discrimination against Black job applicants or employees made to its internal complaint system, to any person with managerial and/or supervisory authority, or to any person designated by Defendants to receive such complaints, whether sufficient to state an actionable claim under Title VII or not, and any action taken in response to the complaints. Such reports shall by submitted within sixty (60) days of the end of each twelve month period.

32. Such reports shall contain the following:

(a) a narrative of the circumstances of the complaint or acquired knowledge;

(b) the dates of the alleged complained-of discriminatory conduct;

(c) the allegations of race discrimination and the facts known and/or alleged that are relevant to such complaint;

(d) the full name, job title, work address, last known home address, and last known home telephone number of any complainant;

(e) the full name, job title and last known work address of any persons who actually received the complaint; if other than the complainant, the full name, job title, work address, last known home address, and last known home telephone number of any person alleged by a complainant to have been a victim of discrimination and;

(f) the full name (if available), job title, and work address of any known or alleged witnesses to the incidents alleged by a complainant or reported by a person with managerial and/or supervisory authority.

RECORD-RETENTION REQUIREMENTS

33. For the duration of this Decree, Defendants shall retain the following documents relative to the two Baltimore restaurants previously known as Units 41 and 66:

(a) Any and all applications, resumes, cover letters, interview notes, recorded ratings, and any and all other documents related to recruitment, pre-screening and/or hiring that were otherwise received or generated by Defendants;

(b) Personnel, payroll, and point-of-sale data;

(c) Data related to table, section, shift or other work assignments;

(d) Data, reports or documents required to be created or compiled in accordance with this Decree;

(e) Personnel files;

(f) Any and all non-privileged documents created or compiled by the DCM or any persons assisting the DCM in performing his/her duties

(g) Copies of all newspaper, internet or other advertisements for employment;

(h) All written complaints or reports of potential race discrimination against Black job applicants or employees; and

(i) All training materials and listings of attendees required by this Decree.

34. Defendants will retain, and provide to EEOC as soon as practicable upon demand, any and all documents or data made or kept under the Decree

35. Defendants shall comply with all applicable record-keeping requirements of Title VII and the Commission's regulations, including but not limited to, 29 C.F.R. Parts 1602 and 1607.

SUBMISSION OF REPORTS AND NOTICES TO EEOC

36. All notifications and reports required under this Decree shall be made in writing and shall be sufficient if hand-delivered or sent by express or regular mail to Ronald L. Phillips, Supervisory Trial Attorney, U.S. Equal Employment Opportunity Commission, Baltimore Field Office, 10 South Howard Street, 3rd Floor, Baltimore, MD 21201. All reports shall be verified by oath or under penalty of perjury.

DISPUTE RESOLUTION AND COMPLIANCE

37. Upon motion of the Commission, this Court may schedule a hearing for the purpose of reviewing compliance with this Consent Decree. Prior to such motion, the Commission shall notify Defendants, in writing, of the alleged non-compliance. Upon receipt of written notice, Defendants shall have ninety (90) days to either correct the alleged violation, and so inform the Commission, or deny the alleged violation, in writing;

(a) If the parties remain in dispute they shall attempt in good faith to resolve their dispute;

(b) If the parties cannot resolve their dispute in good faith, the Commission may file a motion with the Court seeking remedies for the alleged noncompliance

and for Defendants to show cause why they should not be found in violation of the Decree;

(c) Each party shall bear its own costs, expenses and attorney's fees incurred in connection with such motion; and

(d) Jurisdiction to resolve any dispute arising under this Decree resides in the United States District Court for the District of Maryland.

38. EEOC shall be authorized to move for a compliance review hearing prior to expiration of the 90-day period set forth in Paragraph 37 above, if it demonstrates to the Court the presence of exigent circumstances warranting earlier intervention.

39. In the event that a remaining dispute exists as of the date this Decree expires, the duration of the Decree shall be automatically extended until final disposition of the existing dispute, or up to six (6) months, whichever is earliest. A dispute shall be deemed to exist on the date that the Decree expires if (a) it is an unresolved dispute set forth in a written notice of alleged Decree non-compliance that was served by the EEOC upon the Defendants (via counsel) on or before the expiration date of the Decree or (b) it is an unresolved dispute based on any final annual report required to be served by Defendants that is set forth in a written notice of Decree non-compliance served by the EEOC upon Defendants not later than sixty (60) days after EEOC's receipt of the relevant report(s).

40. If the Commission has a reasonable, good faith and articulable suspicion that Defendants have or are engaging in race discrimination at the restaurants covered by this Decree in violation of Title VII or have otherwise failed to comply with this Decree, the Commission may conduct on-site inspection of Defendants' Baltimore restaurants to ensure compliance with Title VII and any of the terms of this Decree. Such inspection may include requests for inspection of relevant

documents; ex parte interviews with non-managerial employees; interviews of managerial employees; and/or inspection of any area within the restaurants. In order to obtain such inspection, EEOC must first seek Defendants' voluntary cooperation by submitting a written request to Defendants (via counsel) at least 14 days in advance of the EEOC's requested inspection, which shall include the EEOC's reasonable, good faith and articulable suspicion. If Defendants deny or otherwise fail to respond to the EEOC's request for voluntary cooperation, EEOC may file a motion with the Court to require Defendants to comply with its inspection requests and any other compliance review measures as deemed appropriate by the Court to ensure compliance with any terms of this Decree, subject to Defendants objection based on EEOC's failure to provide reasonable, good-faith and articulable suspicion that Defendants have or are engaging in race discrimination at the restaurants covered by this Decree in violation of Title VII or have otherwise failed to comply with this Decree.

MISCELLANEOUS PROVISIONS

41(a). Joint Document Of The Parties - The terms of this Consent Decree are the product of joint negotiation and are not to be construed as having been authored by one party or another.

41(b). Limited Applicability to New Hires - All eligible employees hired by Defendants after the Effective Date of this Consent Decree, may avail themselves of the non-monetary relief portions of the Consent Decree but may not avail themselves of the monetary relief provisions in Paragraph 9 unless they had previously been employed by Defendants or applied for employment with Defendants at the locations set forth herein between January 1, 1998 and the January 1, 2010.

41(c). Amendment and Modification of Consent Decree - By mutual consent of the Parties, this Consent Decree may be amended in the interest of justice and fairness in order to execute the provisions involved. Should any Party determine that modification, additions, or deletions to this

Consent Decree are necessary, the counsel for the Parties shall meet in good faith and on reasonable notice to discuss any such changes. No modification, deletion, or addition to this Consent Decree shall be adopted unless it is agreed upon in writing, signed by the Parties, and so ordered by the Court.

41(d). Implementation - The Commission and Defendants agree to take all steps that may be necessary to fully effectuate the terms of this Consent Decree.

IT IS AGREED:

[remainder of page intentionally left blank]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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General Counsel

JAMES L. LEE
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FOR

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Dated:

Attorneys for Defendants

STEVEN SCHEINTHAL
Corporate representative for Defendants

Dated: 8-19-2014

IT IS SO ORDERED:

9/10/14
Dated

HONORABLE WILLIAM M. NICKERSON
Senior United States District Judge

Exhibit A

RELEASE AGREEMENT ("Release")

Release and Satisfaction of Claims. In consideration for the $___,000 paid to me by McCormick & Schmick's Seafood Restaurants, Inc. in connection with the resolution of the lawsuit styled *EEOC v. McCormick and Schmick's Seafood Restaurants, Inc. & McCormick and Schmick Restaurant Corporation,* Case No. WMN-08-CV-984 (District of Maryland), I waive, release and discharge, and covenant not to sue, McCormick & Schmick's Seafood Restaurants Inc. and McCormick and Schmick Restaurant Corporation, or any of its past, present, and future direct and indirect parents, affiliates, subsidiaries, divisions, predecessors, successors, partners, affiliated organizations, insurers, assigns, and each of its past, present, and future officers, directors, members, trustees, agents, employees, attorneys, contractors, representatives, and any other persons or entities acting on their behalf (the "Releasees") for any claims of race discrimination arising under Title VII of the Civil Rights Act of 1964, as amended that are the subject of the above-styled and numbered lawsuit and that I have or may have had against the Releasees and/or any of them on or before the date of this Release.

_____ X_____

Date Name

Mailing Address
Name:
Street Number:
City, State, Zip Code