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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

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 **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** (Assigned to the Honorable Melissa Iyer Julian)

Plaintiffs Owen Anderson and D. Ladd Gustafson hereby respond to Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint ("Motion"), and request that the Motion be denied. This Response is supported by the following memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In 2021, Arizona enacted a law prohibiting discriminatory practices by the state and specifically prohibiting government entities—including Defendant Arizona Board of Regents ("ABOR") and Arizona State University ("ASU")—from spending public money to develop or implement, or from requiring their employees to participate in, any training,

orientation, or therapy programs that present any form of "blame or judgment on the basis of race, ethnicity or sex." A.R.S. § 41-1494.

The statute defines the term "[b]lame or judgment on the basis of race, ethnicity or sex" by reference to seven concepts, including: that an individual is responsible for the actions committed by other members of that individual's race, ethnicity, or sex; that an individual should feel psychological distress because of his or her demographic characteristics; and/or that meritocracy is a racist or sexist tool. A.R.S. § 41-1494(D).[1] These concepts are commonly referred to as "critical race theory" or "diversity, equity, inclusion and belonging" ("DEIB"), but regardless of the name, they are discriminatory practices, and the state may not spend public resources to impose them on employees through required training programs.

The statute forbids the state from *requiring* state employees to take training that endorses these concepts. But despite that prohibition, ASU *mandates* faculty and staff training that includes Discriminatory Blame or Judgment, and uses public money to do so, in violation of Arizona law. The name it gives this Discriminatory Blame and Judgment Training is "Inclusive Communities."

However, the title "Inclusive Communities," is misleading. Inclusive Communities promulgates discriminatory practices—i.e., Discriminatory Blame or Judgment based on race, ethnicity, sex, and the other grounds specified in Section 41-1494. The Inclusive Communities training is required for all ASU employees when hired, and is reassigned every two years.[2] ASU has declared its commitment to DEIB and asserts that it may offer Inclusive Communities pursuant to its Charter. Motion at 2. ASU asserts that the training will continue.[3]

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[1] Blame or judgment on the basis of race, ethnicity of sex as that term is defined by Section 41-1494(D) is hereinafter referred to as "Discriminatory Blame or Judgment."

[2] *Workplace Inclusiveness Training,* ASU Human Resources (Mar. 18, 2024), https://cfo.asu.edu/OEI-training.

[3] *Inclusiveness at ASU,* ASU Human Resources (Mar. 18, 2024), https://cfo.asu.edu/inclusiveness-at-ASU [https://web.archive.org/web/20231219040140/https://cfo.asu.edu/inclusiveness-at-ASU].

Plaintiff Owen Anderson is a faculty member of ASU, and believes the material presented in Inclusive Communities violates the statutory prohibition on Discriminatory Blame or Judgment trainings. First Amended Verified Complaint for Declaratory and Injunctive Relief ("Compl.") ¶¶ 7, 46. Anderson has viewed the training and alleges—which must be accepted as true—that the training includes Discriminatory Blame or Judgment in violation of state law. Compl. ¶¶ 21, 46.

The Inclusive Communities training includes introductory text akin to a waiver of liability. Compl. Ex. A at ASU00004. This introductory text claims the training is "not intended to create discomfort or stress for anyone," and is "not intended to imply or otherwise express that any individual is inherently racist, sexist, homophobic, or oppressive"—but the Inclusive Communities training nevertheless *does* present these ideas. *Id.* Such boilerplate about "intention"—however carefully crafted to evade the scrutiny of Arizona law—does not cure the illegality of preparing, presenting, and mandating the Inclusive Communities training, which violates Section 41-1494.

What's more, Plaintiff Anderson *must* complete the training as a condition of his employment. Compl. ¶ 11. And public monies have been spent, are being spent, and will continue to be spent on the preparation, presentation, and mandating of the Inclusive Communities training as the training continues to develop. Compl. ¶¶ 5, 32–33, 52–53. Taxpayer Plaintiffs Anderson and D. Ladd Gustafson are liable for replenishing these unlawful government expenditures. Comp. ¶¶ 7–8.

LEGAL STANDARD

Dismissal of a complaint is only appropriate if "as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶ 8 (2012) (cleaned up, citation omitted). Motions to dismiss are disfavored and "should not be granted unless it appears certain that a party would not be entitled to relief on its asserted claim." *Ariz. Soc'y of Pathologists v. Ariz. Health Care Cost Containment Sys. Admin.*, 201 Ariz. 553, 557 ¶ 19 (App. 2002). To determine if a claim for relief can be granted, "courts must assume the truth of all well-

pleaded factual allegations and indulge all reasonable inferences from those facts," and rely on the complaint and any exhibits referenced in the complaint. *Coleman*, 230 Ariz. at 356 ¶ 9.

To plead a claim for declaratory judgment, "one need merely establish a protectible interest and a justiciable controversy over that interest between the parties." *Ariz. Soc'y of Pathologists*, 201 Ariz. at 557 ¶ 19.

ARGUMENT

I. Plaintiffs have a private right of action to bring Count 1 and Count 2.

A. Section 41-1494 grants an implied private right of action.

In Arizona, whether a private right of action exists is determined by weighing several factors: "the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law." *Transamerica Fin. Corp. v. Superior Ct.*, 158 Ariz. 115, 116 (1988). *See also Chavez v. Brewer*, 222 Ariz. 309, 317 ¶ 24 (App. 2009) (Arizona case law more broadly implies such a right than federal law). "Evaluation of these factors is a tool of statutory construction designed to discern legislative intent." *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 194 ¶ 6 (App. 2014). A statute's silence on whether there is a private right of action is not dispositive. *Napier v. Bertram*, 191 Ariz. 238, 240 ¶ 9 (1998). Unless the "statute's text or history shows an explicit legislative intent" to "deny, preempt, or abrogate" a private right of action, courts should not interpret any law to "reach so severe a result." *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273–74 (1994).

Each of the *Transamerica* factors weighs in favor of finding an implicit private right of action under Section 41-1494. Indeed, if these Plaintiffs, and others like them, do not have a cause of action to enforce A.R.S. § 41-1494, no one does. That cannot be the case.

B. Section 41-1494's context and subject matter supports the Legislature's intent for an implied private right of action.

The *Transamerica* test asks whether a private right of action would be consistent with the underlying context and subject matter of the legislation. The context and subject matter of the statute make clear that the answer is yes.

Section 41-1494 is a regulation of conditions of employment, as well as a restriction on public expenditures. As an employee, Anderson is therefore within the class of individuals the legislature specifically sought to protect. Just as in *Chavez*, 222 Ariz. at 318 ¶ 28, the voters were among the "individuals" the legislature intended to "benefit"—and this weighed in favor of a private right of action—so state employees such as Anderson are among those Section 41-1494(A) aims to benefit, which weighs in favor of a private right of action. The same is equally true of taxpayers—the intended beneficiaries of Section 41-1494(B). *See also Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 206 Ariz. 344, 347 ¶ 8 (App. 2003) (law governing teacher compensation was designed to benefit teachers, which weighed in favor of inferring a private cause of action).

Indeed, irrespective of a statutory cause of action, taxpayers of this state, including both Plaintiffs, may sue to enjoin the unlawful expenditure of taxpayer funds, as set forth more fully below. *Ethington v. Wright*, 66 Ariz. 382, 386–87 (1948) ("It is now the almost universal rule that taxpayers of a municipality may enjoin the illegal expenditure of municipal funds … [and] the same principles which permit a taxpayer to enjoin the waste or illegal expenditure of municipal funds permit the same kind of proceedings by state taxpayers concerning state funds.").

Defendant compares Section 41-1494 to Section 15-717.02,[4] which uses similar Discriminatory Blame or Judgment language, but which contains other enforcement mechanisms. Motion at 7-8.[5] It makes sense, however, that the Legislature chose to permit

[4] Which was declared unconstitutional in *Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219 (2022), for violating the Single-Subject Rule.

[5] Defendant also compared Section 41-1494 to another bill raising DEIB concerns that contained a private right of action. Motion at 8 n.5. This bill is not analogous. S.B. 1005

private enforcement in this context but not in that one. Section 15-717.02 concerned a different context and subject matter: students from preschool to twelfth grade, and teacher disciplinary action for those who promulgate Discriminatory Blame or Judgment in pre-college public-school classrooms, where concerns about "academic freedom" are at their lowest. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007) ("constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

In other words, the contrast between Sections 15-717.02 and 41-1494 actually reinforce *Plaintiffs'* position: the legislature reasonably believed a private cause of action by employees and taxpayers is an appropriate enforcement mechanism in the case of universities, but not in the public-school context.

Defendant also argues that because House Bill 2906 (which together with Senate Bill 1840 became Section 41-1494) amended three other sections that include some form of reporting requirement, the reporting requirement of Section 41-1494(C) is therefore the exclusive enforcement method. Motion at 9. This, again, is not so. The reporting requirements of Sections 9-481, 11-661, and 15-1473, all focus on finance, budgets, and audits. Each describes in detail what must be included in the reports or audits, and how to determine compliance. Section 41-1494(C)'s reporting requirement of state agencies in compliance with the statute is therefore entirely different from the other laws amended in H.B. 2906. The context and subject matter of Section 41-1494 relate to *employee* rights, *civil rights*, and *the rights of taxpayers*. This demonstrates that the Legislature intended to create a private right of action.

C. Section 41-1494's language supports the Legislature's intent for an implied private right of action.

The next *Transamerica* factor is whether the statute's language is consistent with, or suggestive of, a private right of action or whether it blocks a private right of action.

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does not include the Blame or Judgment language at issue here and concerned investment of state funds.

Here, the language of Section 41-1494 does not give exclusive enforcement authority to the Attorney General or other public officials—and in that respect, it stands in instructive contrast with Section 15-717.02, which imposed a nearly identical prohibition on Discriminatory Blame or Judgment in Arizona's K-12 schools. *That* statute *did* say it was only enforceable by the Attorney General, and that the penalty for violation was a civil fine. That indicates that when the Legislature intended to exclude a private right of action for enforcing statutes of this sort, it knew how to do so—and did so in Section 15-717.02. It also indicates that the *omission* of such language from Section 41-1494 was equally intentional. In other words, the Legislature *did* intend a private right of action in the latter case.

Defendant argues that the Legislature chose not to create a private right of action in Section 41-1494, because it provided "another enforcement mechanism": the report to the Governor, Legislature, and Secretary of State required by Subsection C of the statute. *See* Motion at 6–7. This is incorrect. Section 41-1494 has four separate subsections, each using different language concerning their various purposes. Subsection A provides that a "state, a state agency or a city, town, county or political subdivision of this state" may not require employee training presenting forms of Discriminatory Blame or Judgment. Subsection B provides that a "state, a state agency or a city, town, county or political subdivision of this state" may not use public money for training presenting forms of Discriminatory Blame or Judgment. Only Subsection C requires "the department of administration [to] submit a report that includes state agencies in compliance with this section" to the Governor, Legislature, and Secretary of State. (Subsection D is definitional.) And the reporting requirement of Subsection C is limited: it only requires an account of state agencies in compliance—omitting the state, city, town, county, or political subdivisions of the state. It doesn't specify what information is needed to show compliance, or what happens to agencies out of compliance.

Subsection C is therefore not an enforcement mechanism *at all*, let alone the exclusive mechanism for enforcement of Section 41-1494. In this, Section 41-1494 is the

opposite of *Lancaster v. Arizona Board of Regents*, where the legislature created a right "vested in the legislature alone."143 Ariz. 451, 457 (App. 1984). The statute in that case required ABOR to prepare a specific report to the legislature on the "development of a system of wage and salary equivalency." *Id.* at 454. Employees of the University of Arizona sought a declaratory judgment regarding their right to lost wages, but the court found that the statute did not create a right to incidental beneficiaries of the legislature's report. *Id.* at 453-57.[6] The University employees therefore did not have a private right of action.

Subsection C provides *no* mechanism for enforcement of Section 41-1494. Section 41-1494 thus is more like the statute at issue in *Douglas*, which required the governing boards of school districts "to submit evidence" that each district followed teacher-evaluation processes, as a condition for the receipt of funds for teacher compensation. The statute was silent on how funds were to be used as teacher compensation and offered no remedy for misappropriated funds. 206 Ariz. at 347–48 ¶¶ 10–11. Proof of compliance was not a means of enforcement. *Id.* The court therefore held that the only way to enforce the statute was through an implied private cause of action. *Id.*

An implied right of action must therefore be the only means to enforce the statute.

D. Section 41-1494's effects and consequences support the Legislature's intent for an implied private right of action.

The prohibition of mandatory training affects employees of the state by not requiring employees to experience, complete, engage, or affirm understanding of Discriminatory Blame or Judgment training. Should the state violate this prohibition, employees will be forced to engage in training that presents divisive DEIB concepts as a condition of employment.

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[6] This is also unlike *Guibault v. Pima County*, 161 Ariz. 446 (App. 1989), where the statute established a procedure for administrative review. Section 41-1494 offers no review of the agency that is not complying with Arizona law. There is no means of enforcement, administrative or otherwise.

The prohibition of using public monies for training presenting forms of Discriminatory Blame or Judgment protects taxpayers from funding discriminatory trainings. Without such a protection, Arizona taxpayers are liable to replenish the unlawful government expenditures. The effects of Section 41-1494 and the consequence for violations of the statute clearly protect state employees and taxpayers, therefore, supporting the Legislature's intent for a private right of action.

E. Section 41-1494's spirit and purpose demonstrate that the Legislature intended a private right of action.

Section 41-1494 was proposed out of an increased concern about the harmful social consequences of DEIB training in the United States.[7] Section 41-1494's language was adapted in large part from an Executive Order combatting race- and sex-based stereotyping or scapegoating in the Federal workforce.[8] The purpose of that Executive Order was to train employees to create inclusive workplaces with fair and equal treatment of all individuals and stop trainings perpetuating racial stereotypes and division, and coercive pressure to ensure conformity of a viewpoint. *Id.*

Section 41-1494 was signed into law by Governor Ducey on July 9, 2021.[9] While little discussion about House Bill 2906 or Senate Bill 1840 occurred in the Legislature, the same language used in the bills—the Discriminatory Blame or Judgment language—was proposed as a floor amendment to Senate Bill 1074 by Senator Hoffman ("Hoffman Amendment").[10] During discussion of that Amendment, Senator Hoffman argued that the

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[7] *See* Rashawn Ray and Alexandra Gibbson, *Why Are States Banning Critical Race Theory?*, Brookings (Nov. 2021), https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/ (describing legislature and administrative actions taken regarding critical race theory in 2021).

[8] *See* Executive Order No. 13950 (Sept. 22, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/.

[9] H.B. 2906, 55th Leg., 1st Reg. Sess. (Ariz. 2021), https://apps.azleg.gov/BillStatus/BillOverview/76158; S.B. 1840, 55th Leg., 1st Reg. Sess. (Ariz. 2021), https://apps.azleg.gov/BillStatus/BillOverview/76176.

[10] House Floor Amendment Explanation Bill Number S.B. 1074 (July 31, 2024), https://apps.azleg.gov/BillStatus/GetCalendarBillAmendmentPdf/?calendarBillId=726746

amendment's purpose was transparency, accountability, and misuse of public monies.[11] Opponents of the Hoffman Amendment argued that it expanded the purpose of S.B. 1074, which focused on auditing. *Id.* The Discriminatory Blame or Judgment language was therefore proposed again as a separate bill, and eventually signed into law as Section 41-1494. Thus, the Senators' discussions of the Discriminatory Blame or Judgment language used in Section 41-1494 reveals that the Legislature intended for this language to provide protections for Arizona taxpayers as well as employees.

This makes Section 41-1494 different than the statute at issue in, for example, *Lancaster*, where the court looked at the "sole and exclusive purpose" of the legislature's intent—which was for ABOR to prepare and submit a report to the legislature. 143 Ariz. at 457. Because there was no indication that the legislature intended anything more than that, the court concluded that the statute in question did not create a remedy for private parties. *Id.* Section 41-1494, by contrast: (1) prohibits employee training that incorporates Discriminatory Blame or Judgment—thereby protecting employees themselves, A.R.S. § 1494(A); (2) prohibits the spending of public money on trainings that incorporate Discriminatory Blame or Judgment—thereby protecting taxpayers from unlawful expenditures, A.R.S. § 41-1494(B); and (3) requires the Department of Administration to submit an annual report regarding compliance by state agencies—ensuring that these agencies are following the law, A.R.S. § 41-1494(C). These are three distinctly different goals.

A private right of action is consistent with the underlying purposes of Section 41-1494. Looking at the Legislative record discussing Discriminatory Blame or Judgment, the legislative intent was to provide a private right of action.

&itemId=0. The Hoffman Amendment passed but S.B. 1074 was vetoed by the Governor. *See* S.B. 1074, 55th Leg., 1st Reg. Sess. (Ariz. 2021), https://apps.azleg.gov/BillStatus/BillOverview/76176.

[11] House Floor Session (July 31, 2024), https://www.azleg.gov/videoplayer/?eventID=2021051006&startStreamAt=9779.

II. Plaintiffs have standing to bring Counts 1 and 2 and the issues are ripe.

Defendant argues that the Plaintiffs have not yet been injured—Anderson because he has not been disciplined for refusing to take the unlawful training, and Gustafson because he is a taxpayer and isn't required to take the training. This reflects a misunderstanding of standing and ripeness.

In Arizona, standing is "not a constitutional mandate" but a "prudential or judicial restraint." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6 (1985). Courts "apply the doctrines of standing and ripeness as a matter of judicial restraint to ensure courts 'refrain from issuing advisory opinions, that cases be ripe for decision and not moot, and that issues be fully developed between true adversaries.'" *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 423 ¶ 23 (2022) (citation omitted). While obviously a "generalized harm" is insufficient to establish standing, a plaintiff does have standing where he "alleges a 'distinct and palpable injury.'" *Id.* ¶ 24 (citation omitted).[12]

Plaintiffs have experienced and will experience distinct and palpable sufficient injuries to bring Count 1. Plaintiff Anderson *must* take the Inclusive Communities training as a condition of employment. Compl. ¶¶ 18–19. This training is reassigned every two years. *Id.* ¶¶ 18, 22. ASU has repeatedly communicated that this is a requirement. *Id.* ¶¶ 18–19. In short, Anderson is *compelled as a condition of employment at ASU* to take the training which he contends is illegal, and he will be required to re-take it repeatedly into the indefinite future.

Defendant doesn't deny that the training is required—it just says nobody has been punished for refusing to comply. Motion at 4. Defendant seems to presume that Anderson is only injured if he's disciplined for refusing to follow ASU's employment requirements.

[12] Of course, even in the absence of an actual injury, the courts may find standing. *Id.* at 424 ¶ 29 ("The key inquiry in the absence of actual injury is whether an actual controversy exists between the parties."). *See also Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005) (courts will consider a case without an injury "in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur." (citation omitted)).

But while disciplinary action could *also* be an injury, the injury here is the mandate to take the training in the first place. Section 41-1494 prohibits "*requir[ing]*" a training that includes Discriminatory Blame or Judgment. A.R.S. § 41-1494(A) (emphasis added). Because Anderson is *required* to take the unlawful training, his injury is therefore distinct and palpable already.

The law virtually never requires a person to experience a harm—let alone to submit to an unlawful procedure—before seeking legal relief. *Cf. Beram v. City of Sedona*, 587 F. Supp.3d 948, 955 (D. Ariz. 2022) ("A plaintiff need not … await the consummation of threatened injury to obtain prospective relief." (cleaned up)); *cf. Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012) ("Plaintiffs who challenge a permitting system are not required to show that they have applied for, or have been denied, a permit."). Certainly nothing in the *statute* says an employee must complete the training before seeking redress or must be disciplined for refusing to abide by the employment contract before seeking redress.

In nearly every other context, a person may ask a court for preventative relief whenever an injury is imminent, palpable, and certain to occur. *Mills* made that quite clear. There, the Supreme Court said the plaintiff was "*not* required to suffer an actual injury before his claims became justiciable." 253 Ariz. at 424 ¶ 29 (emphasis added). Instead, he could sue because if he did not apply for an engineering license, he was subject to prosecution—but he believed he should not have to get such a license. The court ruled in his favor, saying that Mills was "*not* required to await prosecution before bringing [his] declaratory judgment complaints … . [His] controversy with the Board is an actual one based on presently existing facts, *despite the Board's failure to proceed with formal proceedings*." *Id*. at 425 ¶ 30 (emphasis added).

In other words, "Mills has a real and present need to know whether the pertinent statutes are constitutional and can therefore prevent him from continuing to work as an engineer without registering with the Board," and that was sufficient for standing purposes. *Id.* The same plainly applies here: ASU requires the training for all employees;

Anderson is an employee; he contends the training is unlawful—just as Mills was not required to await prosecution before suing, Anderson is not required to await disciplinary action.

In *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280 ¶ 39 (2019), the Court made the point even clearer when it said the plaintiff had standing even though there was *no* actual threatened prosecution.[13] The fact that the ordinance itself made the plaintiff liable to potential punishment, and that the government "never stated it would not enforce the statute," was *alone* sufficient for standing purposes. *Id.* at ¶ 40. In the same way, the fact that Anderson is subject to discipline for refusal to comply is enough to seek preventative relief.

Obviously there's also an actual and substantial controversy: Defendant contends that the Inclusive Communities training's introductory language removes any illegality. Motion at 3. It does not.[14] Plaintiffs therefore contend that Inclusive Communities violates Section 41-1494, and Defendant's disagreement constitutes an actual and substantial controversy. That is sufficient to withstand the Motion to Dismiss.

As for Plaintiff Gustafson, Arizona courts have held that taxpayers have standing to sue to enjoin illegal expenditures whether actually made *or threatened in the future* by a public agency. *See*, *e.g.*, *Rodgers v. Huckelberry*, 247 Ariz. 426, 429 ¶ 11 (App. 2019); *Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432 (App. 1979); *Ethington*, 66 Ariz. at 386. The right to maintain such an action is based on "the taxpayer's equitable

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[13] Not only had the appellants in that case "not yet refused services to a same-sex couple," but they had "not yet [even] received a request to provide services for a same-sex wedding"—yet they still had standing. *Brush & Nib Studio,* 244 Ariz. at 68 & n.7.

[14] Examples of Discriminatory Blame or Judgment include, but are not limited to: discussions of the "socio-historical legacy of racism, sexism, homophobia and other forms of structural inequality," Compl. Ex. A at ASU000055; "heterosexuality, the dominate sexual identity in American culture, is privileged by going largely unquestioned," *id.* at ASU000100; "it scares people … to be called a white supremacist," Compl. Ex. B at ASU000167–168; "we … have to open the space to critique whiteness," *id.* at ASU000168; "[A Land Acknowledgement Statement] is a way of holding organizations, and their people, accountable." Compl. Ex. C at 7; "[Transformative Justice] calls for an overall shift in structural conditions in ways that redress harm and trauma." *Id.* at 11.

ownership of such funds" and his liability to replenish any illegally spent funds. *Smith*, 123 Ariz. at 432–33 (finding a plaintiff taxpayer in the district had standing but the plaintiff association did not pay taxes into the district and thus had too remote a connection for standing).

In just the same way that a taxpayer is injured by an illegal expenditure of public money in violation of procurement statutes, Gustafson is distinctly injured by the expenditure of public resources to prepare and implement the Inclusive Communities training (Count 2). If not enjoined by the Court, Defendant will continue to implement the Discriminatory Blame or Judgment training (whether under the name Inclusive Communities or another name). This will continue to impose unlawful employment conditions and will mean continued unlawful expenditures of public monies which taxpayers like Gustafson are liable to replenish. *Rodgers*, 247 Ariz. at 429 ¶ 11.

The Inclusive Communities training has already been created and disseminated, and taxpayer monies have already been unlawfully spent (and will be again, on a regular schedule). The injury is therefore not only any possible disciplinary action against Plaintiff Anderson—which he *does* face, for refusing to complete the training[15]—but also the development and implementation of the unlawful training at taxpayer expense.

Indeed, the taxpayer monies that have been unlawfully spent on the Inclusive Communities training exceed "preexisting, incidental payroll costs." Motion at 15 (quoting *Welch v. Cochise Cnty. Bd. of Supers.*, 251 Ariz. 519, 524 ¶ 18 (2021)). Defendant glosses over the costs incurred, saying that "graduate students, staff and subject matter experts" would already be paid their salaries anyway, *id.*, yet this dismisses the labor, time, and resources used to create the training—necessarily a departure from the tasks they would otherwise be performing. This would include research, writing, web design, video production, as well as the paid hours for every ASU employee who prepares, gathers material for, and films the Inclusive Communities training.

[15] *See Brush & Nib Studio*, 247 Ariz. at 280 ¶¶ 36–39 (designers faced a real threat of prosecution for refusing to create invitations for a same-sex wedding).

Costs have been, and will continue to be, incurred for employee time, labor, and resources to assign the unlawful training, to monitor those who have not completed it, to send reminders to complete it, and to reassign it every two years. That's not counting the expense of paid work time for every employee (approximately 18,500 employees[16]) to take time from their regularly assigned duties to be available for the training. And all these costs will continue to recur as ASU updates its training. None of this is the kind of "incidental" expenditure found insufficient for standing purposes in *Welch,* 251 Ariz. at 524 ¶ 17. Instead, they are the type of "illegal expenditure of taxpayer dollars" that by "'almost universal rule' … taxpayers generally may enjoin." *Id.* ¶ 18 (citation omitted).

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be *denied*.

RESPECTFULLY SUBMITTED this 7th day of August 2024.

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[16] *See Working at ASU*, Human Resources (July 31, 2024), https://cfo.asu.edu/working-at-asu. The Court may take judicial notice of facts that are "generally known within the trial court's territorial jurisdiction." Ariz. R. Evid. 201. *See also Pedersen v. Bennett*, 230 Ariz. 556, 559 ¶ 15 (2012) (taking judicial notice of materials on government website).

CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 7th day of August 2024, with a copy delivered via the ECF system to:

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