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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, Plaintiff, vs. ARIZONA BOARD OF REGENTS; an Arizona corporate body, Defendant.	Case No. CV2024-005713 **PLAINTIFF'S RESPONSE TO MOTION TO STAY** (Assigned to the Honorable Melissa Iyer Julian)

On December 17, 2024, this Court granted in part and denied in part Defendant's Motion to Dismiss Plaintiffs' Amended Complaint, finding that Plaintiff Owen Anderson, a professor at ASU, has a cause of action to challenge the legality of training that the University requires him to take as a condition of employment. The Defendant Arizona Board of Regents ("ABOR") now seeks an interlocutory appeal of the Court's decision. The Court of Appeals lacks jurisdiction over the appeal, the appeal fails on the merits, and it will only serve to delay these proceedings further. The Motion to Stay should therefore be denied.

RELEVANT BACKGROUND

Arizona law prohibits government entities—including Defendant ABOR—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.

That 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).

Despite this statutory prohibition, ASU mandates that faculty and staff participate in a training called "Inclusive Communities" that includes discriminatory blame or judgment based on race, ethnicity, and sex in violation of Arizona law. Inclusive Communities is required for all ASU employees when hired, and it is reassigned every two years. ASU has publicly committed to continuing these trainings.

Plaintiff Owen Anderson is an ASU faculty member who believes the material presented in Inclusive Communities violates the statutory prohibition on discriminatory blame or judgment trainings. Anderson must complete the training as a condition of his employment.

Defendant filed a Motion to Dismiss alleging that Section 41-1494 does not create a private right of action. Defendant further argued that Plaintiff Anderson's claim was not ripe, and he therefore lacked standing. After briefing and oral argument, the Court held that Section 41-1494 implies a private right of action for aggrieved employees who are subject to mandatory training presenting forms of blame or judgment on the basis of race, ethnicity, or sex. *See* Under Advisement Ruling, dated December 17, 2024 ("Order") at 3-4. The Court further held that Anderson has standing, and his claims are ripe for judicial review. *Id.* at 5.[1]

Defendant has filed a Motion to Stay further proceedings in this Court, making precisely the same claims that were thoroughly briefed and rejected in its Motion to

[1] The Court held that Plaintiff D. Ladd Gustafson, as an Arizona taxpayer, lacked taxpayer standing.

Dismiss. The strength of those claims has not increased in ABOR's Special Action Petition, *Ariz. Bd. of Regents v. Anderson*, No. 1 CA-SA 25-0007 (Ariz. App. Jan. 16, 2025), which is a mechanism that is highly disfavored to challenge the denial of a motion to dismiss. A stay in this case would not promote the orderly course of justice, would result in undue delay, and would encourage other parties who disagree with rulings on Rule 12 motions to seek two bites at the apple before a final judgment is entered in the Superior Court. The Motion to Stay should be denied.

LEGAL STANDARD

A stay in this case is not appropriate because it would result in delay, increase costs, and encourage piecemeal litigation. This Court has discretion in determining whether to grant a stay. *State v. Ott*, 167 Ariz. 420, 428 (App. 1990). That discretion should be exercised to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Powers Reinforcing Fabricators, L.L.C. v. Contes in & for Maricopa Cnty.*¸ 249 Ariz. 585, 590 ¶ 17 (App. 2020) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).

The movant bears the burden of making a "clear case of hardship or inequity," but "if there is even a *fair* possibility that the stay for which he prays will work damage to someone else," the stay should not be granted. *Landis,* 299 U.S. at 255 (emphasis added). Among the factors relevant as to whether to grant a stay here is whether doing so would (1) "avoid[] increased costs" to parties, (2) "avoid[] extra cost and burden to judicial resources," and (3) "avoid[] piecemeal litigation." *Apache Produce Imports, LLC v. Malena Produce, Inc.*, 247 Ariz. 160, 164 ¶ 10 (App. 2019) (citation omitted). *See also Tonnemacher v. Touche Ross & Co.*, 186 Ariz. 125, 130 (App. 1996) (when considering whether to grant stay, court should consider interest in "avoiding piecemeal litigation"). All of the factors weigh in favor of denying the Motion to Stay.

I. Special action review of orders denying motions to dismiss are disfavored.

As a threshold matter, the Court of Appeals lacks jurisdiction to hear an appeal from a denial of a motion to dismiss. Consequently, a stay should not be granted because the appellate court lacks authority over the matter.

An appeal of a trial court's denial of a motion to dismiss is not authorized by law. A.R.S. § 12-2101. The order denying a motion to dismiss is therefore "an interlocutory, nonappealable order." *Quest Corp. v. Kelly*, 204 Ariz. 25, 27 ¶ 3 (App. 2002). Only in limited circumstances will an appellate court accept jurisdiction of a special action challenging the denial of a motion to dismiss. *Id.* The Arizona Rules of Procedure for Special Actions ("RPSA") were also recently amended, effective January 1, 2025, to clarify when an appellate court should accept special action jurisdiction. *See* RPSA 12. Importantly, among the factors listed that weigh in favor of declining jurisdiction, the RPSA expressly lists "**questions … resolved under Rules 12(b)(6).**" *Id.* (emphasis added). Here, Defendant is attempting to appeal the denial of a motion to dismiss under Rule 12(b)(6). Under the Rules, the Court of Appeals lacks jurisdiction to hear that appeal.

The appellate court also exercises discretion in determining whether it will accept jurisdiction and in doing so "is determining whether remedy by appeal is equally plain, speedy, and adequate." Rule 12(a). *See also United States v. Superior Ct. in & for Maricopa Cnty.*, 144 Ariz. 265, 269 (1985) ("relief by way of special action is not available where there is an adequate remedy by appeal. … [W]e follow a general policy of declining jurisdiction when relief by special action is sought to obtain review of orders denying motions to dismiss."). Defendant has an adequate remedy available—which is the right to appeal the trial court's order after a final judgment has been entered. It is unlikely that the Court of Appeals will accept jurisdiction to hear Defendant's Special Action Petition, and by seeking that appeal in the Court of Appeals, and a stay in this Court, Defendant is increasing costs to the parties, the judicial system, and attempting to engage

in piecemeal litigation when it has a plain and adequate remedy after a final judgment issues in this Court.

Other factors for accepting or declining jurisdiction of appellate special actions also weigh in favor of declining jurisdiction. While Defendant's Special Action Petition argues that there are several factors that support accepting jurisdiction, those factors are *not* intended to broaden the circumstances in which special action relief is appropriate. *See* Cmt. of Joel Nomkin on Petition to Amend the Rules of Procedure for Special Actions at 2, attached hereto as Exhibit 1. The factors in favor of accepting jurisdiction should be available only in the *absence* of an adequate appellate remedy, which exists here. *Id.*

The question raised in the Special Action Petition is one "presented by ordinary dispositive motion practice." Rule 12(b)(7). Moreover, the appellate court is likely to decline jurisdiction when the question is "equally appropriate to address by appeal." Rule 12(c)(4). Even if the appellate court is persuaded by Defendant's assertion that the question raised is one of first impression and statewide importance—which it is not—"those factors alone should not make a question special-action worthy when a regular appeal would be an adequate remedy." Exhibit 1 at 3 n.1. It is unlikely that the appellate court will accept jurisdiction over the Special Action Petition and therefore, as a matter of judicial economy and the appropriate administration of justice, the Motion to Stay should be denied.

II. Defendant's Petition will be denied for the same reasons the Motion to Dismiss was denied.

Even if the Court of Appeals accepts jurisdiction over Defendant's Special Action, Defendant is unlikely to succeed on the merits for the same reasons they did not succeed on their Motion to Dismiss in this Court. As this Court held, Section 41-1494 creates an implied private right of action for Plaintiff Anderson. The caselaw supporting that finding is clear. Arizona courts broadly construe statutes to imply a private right of action when such enforcement is consistent with the *Transamerica* factors. *Chavez v. Brewer*, 222 Ariz. 309, 317-18, ¶ 24 (App. 2009). *See also Transamerica Fin. Corp. v. Superior Ct.*,

158 Ariz. 115, 116 (1988). The language used, spirit and purpose of the law, and the effects and consequences of the law all indicate that Section 41-1494 implies a private cause of action. *Id.*

As the Court found, the purpose of Section 41-1494 is to protect employees from being compelled to attend training courses that the legislature deemed to be discriminatory, and Plaintiff Anderson was "not merely an 'incidental' beneficiary"—he falls well within the class of individuals the statute was designed to protect. Order at 4. The Court also distinguished the statute at issue in *Lancaster v. Ariz. Bd. of Regents*, 143 Ariz. 451 (App. 1984), because, unlike in that case, Section 41-1494's annual reporting requirement is not the sole and exclusive enforcement mechanism. Order at 4. In fact, that reporting requirement is not an enforcement mechanism *at all*, and doesn't even apply to local governments that violate the law.

In short, this Court's ruling on Defendant's Motion to Dismiss was correct as a matter of law, and it is exceedingly unlikely that the Court of Appeals will exercise jurisdiction and disturb that ruling.

Additionally, in order to grant relief, the Court of Appeals must find that this Court's decision on Defendant's Motion to Dismiss was "arbitrary and capricious or an abuse of discretion, which can include a legal error." Rule 4(c). "An abuse of discretion includes an error in interpreting or applying the law." *McGuire v. Lee*, 239 Ariz. 384, 386 ¶ 6 (App. 2016). Defendant's Special Action Petition alleges the Court committed legal error because the Court was not persuaded by Defendant's argument, despite it being "extensively analyzed … over ten pages of briefing." Petition for Special Action at 2. But this Court read the parties' extensive briefing, held oral arguments, and issued a well-reasoned decision supported by appropriate legal authorities.

Additionally, courts are required to "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts" when reviewing a motion to dismiss. *Coleman v. City of Mesa*, 230 Ariz. 352, 356 ¶¶ 8-9 (2012). Defendant's position that the Court should have accepted its briefing requires the Court to

flip its analysis to view it in a light most favorable to the party *seeking* dismissal. This is the opposite of the correct legal standard.

This Court accurately interpreted and applied the law to determine that Section 41-1494 creates an implied private right of action by following the *Transamerica* factors. Defendant will not prevail for the same reasons it lost in the trial court. The Motion for Stay should, therefore, be denied.

III. The factors courts consider in whether to grant a stay weigh in favor of denial.

The factors courts evaluate when determining whether to grant or deny a stay all weigh in favor of denial. As set out above, Defendant's Special Action Petition is unlikely to be granted and staying this case now would increase costs to the parties, the judicial system, and would result in precisely the type of piecemeal litigation that the Rules seek to avoid. *Apache Produce Imports*, 247 Ariz. at 164 ¶ 10.

Additionally, as the Supreme Court set out in *Landis*, the orderly course of justice is "measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254-55). The Defendant has an adequate remedy available once a final judgment is entered. Thus, the special action would not be simplifying any issues; it would only complicate issues, proof, and questions of law.

What's more, Defendant ABOR must make a clear showing that hardship would occur from the proceedings moving forward, and if there is even a fair possibility that the stay will damage another party, the stay should not be granted. *Id.* Defendant alleges that it will have to endure "substantial, unrecoverable, and wasteful discovery and pretrial motions practice." Motion to Stay at 4 (*citing Flores v. Bennett*, 675 F. Supp.3d 1052, 1062 (E.D. Cal. 2023)). But this is a Tier 2 case with minimal discovery permitted. In fact, in the Parties' January 14, 2025 meet and confer, Defendant agreed that this case will have minimal discovery and it is unlikely to require expert witnesses. Further, the Parties agree that they do not anticipate the need for presentation of evidence at trial, and that the issues in this case can be resolved by summary judgment motions. This is not "substantial,

unrecoverable, and wasteful discovery and pretrial motions." This is the ordinary defense of a lawsuit. Therefore it is not a case of hardship. *See Flores*, 675 F. Supp. 3d at 1062 ("Being required to defend a suit, without more, does not constitute a clear case of hardship." (citations omitted)).

On the other hand, Plaintiff Anderson will suffer harm from undue delay if a stay is granted.[2] *Landis*, 299 U.S. at 256. *See also Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (stays should be short and not indefinite in nature). The *Landis* Court primarily reversed the lower court's stay because it would result in undue delay. *Id.* As all parties seem to agree, the facts necessary for resolving this case are narrow and specific. And after limited discovery, this case is likely to be resolved on summary judgment.

Delay, however, would increase uncertainty for Plaintiff Anderson and his employment with ASU. Each day that passes is one in which he is subject to disciplinary action or other adverse employment consequences. Plaintiff Anderson is entitled to a speedy and efficient resolution of his claims so that he knows what his rights and responsibilities are. *See Landis*, 299 U.S. at 255 (Even a "*fair* possibility" of damage resulting from the stay favors denial of the stay) (emphasis added).

A stay will not advance the matter and will result in increased costs and delay that prejudice Plaintiff. In seeking special action review, Defendant is using a disfavored procedure to throw just another Hail Mary that was already incomplete. This Court should not reward that strategy and Plaintiff should not have to endure the costs and burden associated with further delay.

IV. Plaintiff Anderson is entitled to fees for the time spent responding to the Motion to Stay.

Attorneys are entitled to their reasonable fees and expenses when claims are brought without substantial justification, made for delay, or unreasonably expanding or

[2] Notably, Defendant did not attach a proposed order to the Motion to Stay and therefore, Plaintiff is unsure the length of a stay that is being requested by Defendant.

delaying proceedings. A.R.S. § 12-349(A). For the reasons articulated above, the Court of Appeals lacks jurisdiction to hear Defendant's Special Action Petition and even if that court exercises discretion to consider the merits, Defendant will be unsuccessful for the same reason Defendant was unsuccessful here. The Motion to Stay and Defendant's Special Action Petition have already increased the costs to the parties and the courts. Rather than proceed in the ordinary course of litigation with the opportunity to appeal the denial of the motion to dismiss upon a final judgment, Defendant is engaging in a delay tactic. The Motion to Stay and the Petition have therefore expanded and unreasonably delayed the proceeding by requiring additional unnecessary litigation. Under Section 12-349(A), Plaintiff Anderson is therefore entitled to its attorney fees and expenses for the necessary time spent responding to the Motion.

CONCLUSION

Defendant's Motion for Stay should be denied and Plaintiff Anderson should be awarded fees under Section 12-349(A) for the time spent responding to the Motion.

RESPECTFULLY SUBMITTED this 22nd day of January 2025.

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SUPREME COURT OF ARIZONA

PETITION TO AMEND THE RULES OF PROCEDURE FOR SPECIAL ACTIONS	)	Supreme Court No. R-23-0055
	)	**COMMENT OF JOEL NOMKIN ON PETITION TO AMEND THE RULES OF PROCEDURE FOR SPECIAL ACTIONS**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, and in my individual capacity as an Arizona appellate practitioner, I submit this comment on the Task Force's Petition to Amend the Rules of Procedure for Special Actions. The Petition brings much needed clarity and reform to the special action rules. I write to raise concern with only one aspect of the Petition—Proposed Rule 11.

Proposed Rule 11 would replace the current guidepost for the exercise of special action jurisdiction with thirteen non-dispositive factors—weighing for and against jurisdiction—"the court should consider." As drafted, that group of factors

may sanction and encourage appellate special actions that go beyond the intended scope and purpose of special action relief.

For over 50 years, Rule 1(a) has stated the standard for the exercise of special action jurisdiction. That Rule recognizes that special actions are meant only to replace, without broadening, traditional writ relief, and that as with the old writs, special actions should be available only in the absence of an adequate appellate remedy. To quote Rule 1(a):

> Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal; and nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus, and prohibition.

The same standard of "no equally plain, speedy, and adequate remedy by appeal" appears in current Rule 8(a), which specifically concerns appellate special actions.

The Petition acknowledges (at 10) that it deliberately "omitted the phrase 'no [equally] plain, speedy, and adequate remedy be appeal' from the Rule 11 factors." In doing so, the Petition does not question the substance of that standard, nor does it express an intent to broaden the circumstances in which special action relief is appropriate. Rather, the Petition says (*id.*) that "sometimes the phrase is merely a recital and is not tethered to specific circumstances," and that the proposed "factors in Rule 11 are more tangible for guiding the exercise of special action discretion."

The Task Force's desire to provide better guidance deserves applause. Yet, it's worth noting that the "no equally plain, speedy, and adequate remedy by appeal" language is entrenched in Arizona case law. According to a Westlaw search on March 7, 2024, that standard appears in 433 Arizona appellate decisions. Moreover, that standard mirrors the blackletter and universal principle that equitable relief is unavailable when an alternative remedy exists. But even accepting the Task Force's premise—that sometimes the phrase is merely a recital—the phrase's removal from the rules may have unintended substantive consequences. It may signal that special action jurisdiction *may be appropriate* even when there *is* an adequate remedy by appeal.

That signal is especially possible given the factors listed in Proposed Rule 11. Subsection (b) lists eight factors that support the exercise of special action jurisdiction. Several of these factors are consistent with the "no equally plain, speedy, and adequate remedy by appeal" standard. But practitioners could read at least some of the other listed factors as invitations for special actions even when there is an adequate appellate remedy—like factor 3 (a question "of first impression") or factor 4 (a question "of statewide importance").[1] This concern isn't cured by subsection (c), which lists five factors for declining jurisdictions. The

[1] The uniqueness and importance of an issue may well be plus-factors for the exercise of special action jurisdiction. But those factors alone should not make a question special-action worthy when a regular appeal would be an adequate remedy.

fourth listed factor asks whether the question presented is "equally appropriate to address by appeal." But that factor, like the others in subsection (c), only "support[s] but do[es] not require declining jurisdiction."

If the absence of an adequate appellate remedy is to become only one of thirteen non-dispositive factors for special action jurisdiction, then the rules may well "enlarge[e] the scope of the relief traditionally granted," Rule 1(a), under the old writs. That would not only be contrary to current Rules 1(a) and 8(a), but it would also be contrary to the Petition's Proposed Rule 2(c), which expressly reaffirms that the special action rules "do not enlarge the scope of relief [the traditional] writs formerly required." On a practical level, opening the spicket to more special actions would allow more cases to cut to the head of the appellate line, potentially delaying resolution of other cases in the queue.

The Task Force's desire to provide more tangible guidance can be accomplished without removing the standard that courts and practitioners have so long relied on. An easy alternative: rework Proposed Rule 11 to keep the "no equally plain, speedy, and adequate remedy by appeal" language, but follow that language with clarifying examples of when that standard may be met. Those examples can be drawn from at least some factors now listed in the Proposed Rule, such as whether a petition presents a question of privileges and immunities, a question that may become moot during appeal, or a question the speedy resolution of which is

necessary to avoid real harm. The use of such examples would provide the sort of additional guidance that the Petition seeks to offer without threatening an expansion of special action jurisdiction.[2]

Respectfully submitted this 18th day of March 2024.

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[2] One word of caution regarding the certification process contemplated by Proposed Rule 12. I assume that the Task Force does not intend that process to allow certification of issues where there is "an equally plain, speedy, and adequate remedy by appeal." Perhaps in a separate proceeding, Arizona should consider adopting a certification process (like 28 U.S.C. § 1292(b)) that does not require the absence of an adequate appellate remedy. But doing so in the context of the special action rules would allow those rules to go beyond the boundaries long established by current Rules 1(a) and 8(a), and still recognized by the Task Force in Proposed Rule 2(c).