**IN THE COURT OF APPEALS**
**DIVISION ONE**
**STATE OF ARIZONA**

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| ARIZONA BOARD OF REGENTS,<br><br>Petitioner,<br><br>v.<br><br>OWEN ANDERSON,<br><br>Respondent. | Court of Appeals, Div. 1<br>No. 1 CA-SA 25-0007<br><br>Maricopa County Superior Court<br>No. CV2024-005713 |

# RESPONSE TO PETITION FOR SPECIAL ACTION

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## INTRODUCTION

Petitioner Arizona Board of Regents ("ABOR") brought this interlocutory appeal in the form of a special action petition in hopes of "jumping the line" after the court below properly denied its Rule 12(b) motion to dismiss. But such an unusual step is inappropriate here. The trial court's decision was based on settled Arizona law and was entered after extensive briefing and oral argument. Special actions are not favored vehicles to review the denial of a motion to dismiss, and this Court should decline jurisdiction, or alternatively, deny the relief requested by Petitioner.

This case concerns Arizona State University ("ASU")'s mandatory employee training, which—in violation of A.R.S. § 41-1494—presents forms of "blame or judgment on the basis of race, ethnicity or sex."[1] Respondent Owen Anderson ("Anderson") is a professor who has worked for ASU for over two decades. Although Section 41-1494 prohibits mandatory "blame or judgment" training, Petitioner requires Professor Anderson to take ASU's "Inclusive Communities" training every two years as a condition of his continued employment. The material presented in Inclusive Communities violates Section 41-1494(D). Thus, under state law, Petitioner cannot require employees, like Professor Anderson, to take the training, nor can Petitioner fund that training with taxpayer resources.

Because Professor Anderson is an employee, and Section 41-1494 is a law relating to conditions of employment, Anderson falls within the class of individuals that statute was intended to protect. He then has a cause of action to sue ASU for violating it. *Douglas v. Governing Bd. of Window Rock Sch. Dist.*, 206 Ariz. 344,

[1] Given the interlocutory nature of the proceedings at this point, the facts stated herein are those alleged in the complaint. This Court is required to assume those allegations to be true and construe them in the light most favorable to Anderson. *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 50 ¶ 7 (App. 2001).

347-48 ¶¶ 11-12 (App. 2003). The Superior Court therefore rightly held that this lawsuit could proceed to discovery. Taxpayers, too, are expressly protected by the statute, and they also have a cause of action to enforce the statute. *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 524-255 ¶ 18 (2021).

Nevertheless, Petitioner has sought this unusual route to appeal the trial court's denial of its dismissal motion. Normally, such an appeal would be interlocutory and hence improper. Using a special action as a way around that rule is permitted but only in those extremely rare cases in which the trial court's ruling "cannot be justified under any rule of law, and when granting of special action relief will effectively terminate the litigation." *Polacke v. Superior Ct.*, 170 Ariz. 217, 218–19 (App. 1991) (internal citation omitted). Neither is the case here. Petitioner's effort to evade the rule against interlocutory appeals should therefore be denied.

If the Court does consider the merits of the appeal, it should affirm the trial court's holding that the plain language of Section 41-1494 provides Professor Anderson with a cause of action to enforce his legal protections as a public employee under Subsection (A). And, if the Court accepts jurisdiction, it should further hold that both taxpayer plaintiffs (Anderson in his capacity as a taxpayer, and Plaintiff D. Ladd Gustafson ("Gustafson") [2]) have an implied cause of action under Subsection (B).

## JURISDICTIONAL STATEMENT

Special action appellate jurisdiction is discretionary. Arizona Rules of Procedure for Special Actions ("RPSA") 12(a). When determining whether to

[2] In the same order that is the subject of this Petition, the trial court concluded that Plaintiff Gustafson does not have an implied right of action as a taxpayer. Minute Entry filed Jan. 27, 2025 regarding Motion to Stay, Joint Report Held, Designation of Special Action Review ("Stay Order").

accept jurisdiction, this Court evaluates, among other things, whether a "remedy by appeal is equally plain, speedy, and adequate." *Id.* *See also* *United States v. Superior Ct.*, 144 Ariz. 265, 269 (1985) (appeal after judgment is an adequate remedy to correct errors, if any, from denying a motion to dismiss).

It is on that basis that Arizona courts rarely allow parties to exploit the special action procedure as a way of bringing interlocutory appeals. If parties could argue that they lack an adequate remedy due to the rule against interlocutory appeals, then the exception would swamp the rule, and interlocutory appeals would become the norm. Thus, Arizona courts allow special actions to challenge the denial of a motion to dismiss only in those rare circumstances "where justice cannot be satisfactorily obtained by other means." *Nataros v. Super. Ct.*, 113 Ariz. 498, 499 (1976).

None of that is true here. Petitioner has an adequate remedy available: it can appeal the denial of the motion to dismiss after final judgment is entered. Also, the denial of that motion is entirely consistent with—indeed, required by—Arizona law. The additional factors the Court considers in determining whether to accept special action jurisdiction weigh in favor of declining jurisdiction.

This Court should do so.

## STATEMENT OF THE ISSUES

1. Whether the Court should accept special action jurisdiction from an appeal of a denial of a motion to dismiss where the Petitioner has an adequate remedy and the denial can be justified under Arizona law?
2. Whether the trial court correctly held that A.R.S. § 41-1494(A)—a statute that provides express protection for public employees—creates an implied private right of action for Professor Anderson, a public employee at ASU?

3. Whether the trial court erred in finding that A.R.S. § 41-1494(B)—which prohibits public funding of discriminatory training by state and local governments—does not create a private cause of action for state taxpayers?

## STATEMENT OF MATERIAL FACTS

Arizona law prohibits government entities from requiring public 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). These doctrines are sometimes termed "diversity, equity, inclusion and belonging" ("DEIB"). Appx4 ¶ 3.

Petitioner ABOR has administrative authority over ASU, and is ultimately responsible for all personnel policies, including imposing and maintaining conditions on hiring and continued employment. Appx5 ¶ 9.

ASU mandates as a condition of employment that faculty and staff participate in a training called "Inclusive Communities." That training contains discriminatory blame or judgment concepts as defined in Section 41-1494(D). Appx4 ¶ 5. Inclusive Communities is required for all ASU employees when hired and reassigned every two years. *Id.* ASU proudly declares its commitment to DEIB and that it will continue the Inclusive Communities training. *Id.*[3]

[3] Petitioner asserts its commitment to diversity aligns with ASU's Charter. Petition at 11-12 ("ASU is … measured not by whom it excludes, but by whom it includes and how they succeed …"). However, this is irrelevant and does not justify

As a faculty member of ASU, Professor Anderson must complete the Inclusive Communities training as a condition of his employment. Appx5 ¶ 11. Anderson is also an Arizona resident and state taxpayer and, thus, liable for replenishing the public coffers for unlawful government expenditures. *Id.* ¶ 7. Mr. Gustafson is a resident of Arizona and a state taxpayer who is also liable for replenishing the public coffers for unlawful government expenditures. *Id.* ¶ 8.

Petitioner moved to dismiss, alleging that Section 41-1494 does not create a private right of action for either Professor Anderson or Mr. Gustafson. Appx15-26. ABOR further argued that Plaintiffs' claims were not ripe, and that Plaintiffs lacked standing. *Id.* After briefing and oral argument, the trial court held that Section 41-1494 creates an implied private right of action for Professor Anderson, who, as an ASU employee, is subject to mandatory training that he alleges violates Section 41-1494. Appx48-49. The court further held that Anderson has standing, and his claims are ripe. Appx50. It declined to find a private cause of action for Plaintiff Gustafson as a state taxpayer, however, and he was dismissed as a party. Appx50-51.

On January 15, 2025, ABOR filed this Petition.

The trial court later designated the following issue for special action review: Does A.R.S. § 41-1494 imply a private right of action for alleged violations of Subsection (A)? Stay Order.

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discriminatory blame or judgment in violation of state law. The reason state law forbids mandatory "blame or judgment" trainings is precisely because such trainings "exclude" in the sense of the Charter. In any event, ASU's Charter is not a license for discrimination.

## ARGUMENT

### I. The Court of Appeals should decline jurisdiction.

#### A. ABOR has an equally plain, speedy, and adequate remedy.

An appeal of a 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." *Qwest Corp. v. Kelly*, 204 Ariz. 25, 27 ¶ 3 (App. 2002). Thus, this Court may only accept special action appellate review as a discretionary matter. That discretion, however, is cabined by both the general policy of Arizona courts and the Rules for Special Actions.

The general policy of Arizona courts is to decline jurisdiction when a party appeals a denial of a motion to dismiss. *United States*, 144 Ariz. at 269. *See also Vo v. Superior Ct.*, 172 Ariz. 195, 198 (App. 1992) ("As a general rule, special action is not an appropriate vehicle for review of a denial of a motion to dismiss."). Consequently, the grant of special action relief to review the denial of a motion to dismiss is disfavored. *City of Mesa v. Driggs*, No. 1 CA-SA 24-0239, 2024 WL 5205547, at *1 ¶ 6 (Ariz. App. Dec. 24, 2024) (citing *Henke v. Superior Ct.*, 161 Ariz. 96, 98 (App. 1989) (the grant of accepting special action jurisdiction is unusual)).

"Special actions may not be used as a substitute for an appeal." *Jordan v. Rea*, 221 Ariz. 581, 586 ¶ 8 (App. 2009). And rightfully so. If parties could obtain special action review of every denial of a motion to dismiss, trial courts would be deprived of the ability to manage cases, litigation would linger for years, parties would be deprived on timely adjudication and finality. Judicial resources would be squandered, and the petitioning party would get two bites of the apple for every argument raised in a 12(b) motion, among many other undesirable consequences. Those are the reasons appeals of denials of motion to dismiss are already not allowed.

Those are also the reasons why the Special Action Rules state that appellate special action jurisdiction should not be exercised when "remedy by appeal is equally plain, speedy, and adequate." RPSA 12(a). As the Supreme Court said in *United States*, "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." 144 Ariz. at 269.

There are rare cases where special action relief from a denial of a dismissal motion is appropriate, but this is only "where justice cannot be satisfactorily obtained by other means." *Nataros*, 113 Ariz. at 499. For example, where there is a "lack of any other appellate vehicle," *Nalbandian v. Superior Ct.*, 163 Ariz. 126, 129–30 (App. 1989), or where the trial court's ruling "cannot be justified under any rule of law." *Polacke*, 170 Ariz. at 218–19. In other words, the procedure is allowed only in extremely rare circumstances far outside the norm of litigation. To allow such a procedure in an ordinary case like this one would cause the special action rule to swamp the rule against interlocutory appeals: every defendant who loses a motion to dismiss would come knocking.

Here, Petitioner obviously has the right to appeal the trial court's order after a final judgment has been entered. That is the preferred method for appellate review from a motion to dismiss. *See, e.g.*, *Citizen Publ'g Co. v. Miller*, 210 Ariz. 513, 516 ¶ 7 (2005); *Qwest Corp.*, 204 Ariz. 27 ¶ 3 (special action jurisdiction challenging the denial of a motion to dismiss should only be accepted in limited circumstances); *Taylor v. Jarrett*, 191 Ariz. 550, 551 ¶ 5 (App. 1998) (courts rarely accept special action jurisdiction when a petitioner seeks relief from the denial of a motion to dismiss). That remedy is both "plain" and "adequate" because it will afford Petitioner complete appellate review after a final judgment is entered, when all appellate issues can be presented together to this Court. Appellate review is also

"speedy" in this case because both parties acknowledge that this case is unlikely to be fact-intensive and will require little discovery.

Petitioner argues that a standard appeal is not an "adequate" remedy because it would have to defend itself in the trial court which, it claims, lacks jurisdiction. Petition at 4. This is both illogical and misrepresents what "jurisdiction" means.

First, it is illogical because the ordinary appellate process is not "inadequate" merely because a party will have to wait before obtaining it. *Neary v. Frantz*, 141 Ariz. 171, 177 (App. 1984). "The cost or delay of having to go through trial and the appellate process does not make the remedy at law inadequate." *Hooks v. Fourth Ct. of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991); *accord, Mattson v. Kline*, 288 P.2d 483, 485–86 (Wash. 1955). *See also Armstrong v. City Ct. of City of Scottsdale*, 118 Ariz. 593, 594 (App. 1978) (the potential expense and delay of trial and appeal do not justify granting special action relief). If it did, then defendants could use special actions *every* time a motion to dismiss is denied, on the theory that the rule against interlocutory appeals means they have no "adequate" remedy. Needless to say, such reasoning is barred by the "strong Arizona policy against using extraordinary writs as substitutes for appeals." *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76 (1990).

Second, Petitioner's effort to portray the trial court's finding that Anderson has a cause of action as the equivalent of the trial court operating in absence of jurisdiction, is misleading. Petition at 3-4. These are not the same things. In Arizona the rule is clear: "Whether a complaint does or does not state a cause of action, is, so far as concerns the question of jurisdiction, of no importance; for, if the complaint states a case belonging to a general class over which the authority of the court extends, there is jurisdiction, and the court has power to decide whether the pleading is good or bad. … Have the plaintiffs shown a right to the relief which they seek? and has the court authority to determine whether or not they have

shown such a right? A wrong determination of the question first stated is error, but can be reexamined only on appeal." *City of Phoenix v. Rodgers*, 44 Ariz. 40, 48–49 (1934) (cleaned up; emphasis added).

In other words, the fact that the Superior Court found that Anderson has a cause of action is *not* the kind of jurisdictional determination that makes special action the proper procedure here. On the contrary, that finding can be reexamined through the ordinary course of an appeal. *Id.* Because Petitioner has a plain, speedy, and adequate remedy available, in the form of an appeal after judgement, this Court should decline jurisdiction.

### B. The Rules of Procedure for Special Actions support declining jurisdiction.

The recently amended Arizona Rules of Procedure for Special Actions expressly state that an appellate court should *decline* jurisdiction when parties seek special action review of motions to dismiss. Among the factors the Rules identify for declining jurisdiction are "**questions … resolved under Rules 12(b)(6)**." RPSA 12(c). Here, Petitioner seeks special action review of the denial of a motion to dismiss under Rule 12(b)(6), and for that reason and others stated below, the Court should decline jurisdiction.

#### 1. The RPSA factors weigh in favor of declining jurisdiction.

The specific factors courts assess when determining whether to decline jurisdiction are identified in the RPSA: Those include:

> [W]hether the petition asks the court to resolve questions:
> (1) of fact;
> (2) resolved under Rules 12(b)(6)) … ;
> (3) clearly resolved by settled law;
> (4) equally appropriate to address by appeal; or
> (5) the resolution of which will not materially advance the efficient management of the case.

RPSA 12(c). Four of these five factors weigh in favor of declining jurisdiction.[4]

*First*, the question of whether Section 41-1494 creates an implied cause of action was resolved under Rule 12(b)(6). Arizona law does not allow appeals of denials of motions to dismiss, specifically classifying them as non-appealable orders. *Qwest Corp.*, 204 Ariz. at 27 ¶ 3. *See also* A.R.S. § 12-2101. Special action relief for a denial of a motion to dismiss, particularly when premised upon 12(b)(6), is both rare and disfavored. *United States*, 144 Ariz. at 269; *Henke*, 161 Ariz. at 98.

Petitioner makes the baffling argument that this Petition does not involve a Rule 12(b)(6) denial. Petition at 9. But the record shows the truth: ABOR's Motion to Dismiss was filed pursuant to Ariz. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and 12(b)(1) for lack of subject-matter jurisdiction. Appx16. The Motion argued that Section 41-1494 does not contain an express or implied private right of action, and that Professor Anderson therefore failed to state a claim for relief. *See* Appx15-26.

After briefing and oral argument, the trial court held that Anderson has a private right of action and stated a claim entitling him to relief. Appx48-49. After that determination, the court turned to the jurisdictional question to analyze standing. Appx 50. The Petition, however, seeks review of whether Section 41-1494 creates an implied private right of action. *That* claim was adjudicated under Rule 12(b)(6).[5] And the Petition is silent on the jurisdictional question of standing.

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[4] Respondents agree that this case does not raise significant areas of factual dispute. However, limited discovery may be necessary and appropriate to full adjudicate Plaintiffs' claims and to resolve the legal issues.

[5] *See also* Fed. R. Civ. P. 12 Advisory Committee Notes at Subdivision (b) ("Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action.").

The Petition blurs the distinction between Rules 12(b)(6) and 12(b)(1). A 12(b)(1) motion to dismiss concerns the trial court's subject-matter jurisdiction and "refers to a court's statutory or constitutional power to hear and determine a particular type of case." *State v. Maldonado*, 223 Ariz. 309, 311 ¶ 14 (2010). *See also Church of Isaiah 58 Project of Ariz., Inc. v. La Paz Cnty.*, 233 Ariz. 460, 462 ¶ 9 (App. 2013). Here, Petitioner does not appear to argue that the trial court lacked the power to hear this case, only that Plaintiffs did not have an implied cause of action.[6]

A 12(b)(1) motion may also assert that a plaintiff lacks standing. *See Magellan Health, Inc. v. Duncan*, 252 Ariz. 400, 404 ¶ 14 (App. 2021). But lack of standing is not the basis of the Petition.

Instead, the Petition focuses on whether Plaintiffs have a *cause of action*, which is a defense that is appropriately raised under Rule 12(b)(6) for "*failure to state a claim*." The leading Arizona cases that examine whether a party has an implied cause of action have all been reviewed under 12(b)(6), not 12(b)(1). *See, e.g.*, *Chavez v. Brewer*, 222 Ariz. 309, 319 ¶ 31 (App. 2009) (party sought review of denial of 12(b)(6) motion); *Douglas, supra* (same)[7]; *Lancaster v. Arizona Bd. of Regents*, 143 Ariz. 451, 453 (App. 1984) ("The appellees responded to the complaint by filing a motion to dismiss, pursuant to Rule 12(b)(6) … .").

Petitioner contends that its motion to dismiss "*implicate[d]* the trial court's subject matter jurisdiction." Petition at 3 (emphasis added). But the Petition is utterly void of any case law to support this proposition. Petitioner cites *Grosvenor*

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[6] That, again, is why Petitioner has an adequate remedy via appeal. *Rodgers*, 44 Ariz. at 48–49.

[7] The Opening Brief is available at *Douglas v. Governing Board of Window Rock Consolidated School District No. 8*, No. 1 CA-CV 08-0481, 2008 WL 4971937, at *1 (App. Oct. 2, 2008) ("the District filed an Ariz. R. Civ. P. 12(b)(6) Motion to Dismiss … .")

*Holdings, L.C. v. Figueroa*, 222 Ariz. 588, 593 ¶ 8 (App. 2009), but that was a special action appealing the denial of *a motion for summary judgment*—not a motion to dismiss. It cites *Alpine 4 Holdings Inc. v. Finn Management GP LLC*, No. CV-21-01494-PHX-SPL, 2022 WL 1188073, at *2 (D. Ariz. April 21, 2022), but that unreported district court case involved an issue of federal question jurisdiction. It cites *Scott v. Kemp*, 248 Ariz. 380 (App. 2020), but that was an appeal from a motion to dismiss based on personal jurisdiction, a traditional 12(b)(1) motion to dismiss, not a 12(b)(6) motion to dismiss. *See id.* at 392 ¶ 41 ("[W]e are not asked to address the merits of [Petitioner's] claims under Rules 12(b)(6) … ."). In other words, Petitioner provides *no* legal support for the proposition that their 12(b)(6) motion to dismiss should be treated as a 12(b)(1) motion to dismiss—because there is none.

Instead, Petitioner's maneuver to transform its 12(b)(6) motion, asserting that Plaintiffs do not have a claim for relief, into a 12(b)(1) motion regarding the trial court's subject matter jurisdiction, should not be indulged. This Petition is a special action of the denial of Petitioner's 12(b)(6) motion, and the RPSA makes evident that petitions involving such questions expressly weigh in favor of *declining* jurisdiction.

Presenting the Petition as a denial from a motion to dismiss pursuant to Rule 12(b)(1)—without properly briefing the issue—cannot make it so. Appeals from motions to dismiss based on Rule 12(b)(6) occur only in the rarest of circumstances; this is not such a circumstance.

*Second*, the criteria for determining whether a statute creates an implied cause of action is already resolved by settled law. RPSA 12(c)(3); *see, e.g.*, *Transamerica Fin. Corp. v. Superior Ct.*, 158 Ariz. 115, 116 (1988).

To determine whether there is an implied right of action, courts follow the cardinal rule of statutory construction to "determine and give effect to the

legislative intent behind the statute." *Phoenix Newspapers, Inc. v. Superior Ct.*, 180 Ariz. 159, 161 (App. 1993); *Transamerica*, 158 Ariz. at 116. That includes a specific set of factors that have been settled Arizona law for decades, including "the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law." *Chavez*, 222 Ariz. at 317-18 ¶ 24 (quoting *Transamerica*, 158 Ariz. at 116); *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 194 ¶ 6 (App. 2014); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 575 (1974); *State v. Stockton*, 85 Ariz. 153, 155 (1958); *Coggins v. Ely*, 23 Ariz. 155, 161-62 (1921).

In the proceedings below, both parties relied on the *Transamerica* factors as the settled law to apply when deciding whether state law creates an implied private right of action. *See* Appx21, Appx 28, Petition at 1.

True, this Court has not decided whether Section 41-1494 creates an implied cause of action. But that determination only involves the *application* of settled law, not the creation of new law, or the examination of unsettled legal principles. Here, the trial court correctly applied the *Transamerica* factors to Section 41-1494. Appx 48-49. There is no need to disrupt longstanding case law in this area by exercising jurisdiction in this special action.

*Third*, the RPSA asks whether the matter is "equally appropriate to address by appeal"—and here, the answer is yes: an appeal of a denial of a motion to dismiss is ordinarily addressed by appeal—not the extraordinary remedy of a special action. RPSA 12(c)(4). In fact, appeal-after-judgment is not only "equally appropriate," but is the standard for reviewing a denial of a motion to dismiss is by ordinary appeal after a final judgment. *See Citizen Publ'g*, 210 Ariz. at 516 ¶ 7; *Qwest Corp.*, 204 Ariz. 25 ¶ 3; *Taylor*, 191 Ariz. at 551 ¶ 5. Awaiting final judgment would not cause Petitioner to waive any right or argument. This Court

would also then have the benefit of a complete record with *all* appellate issues preserved and presented in one appeal.

The reason for the "strong Arizona policy against using extraordinary writs as substitutes for appeals," *Rodriguez*, 165 Ariz. at 76, is that courts seek to "avoid[] piecemeal litigation." *Apache Produce Imports, LLC v. Malena Produce, Inc.*, 247 Ariz. 160, 164 ¶ 10 (App. 2019). Exercising special action jurisdiction here would result in precisely the sort of piecemeal litigation courts should discourage, and for no good reason since there is an equally appropriate—indeed, preferable—method of appellate review.

*Fourth*, a special action will not materially promote the efficient management of the case. RPSA 12(c)(5). In fact, exercising jurisdiction on this Petition does the opposite by creating inefficiencies and disorganization. For example, other issues may be raised on appeal after a complete record has been developed. To continue in the trial court—with a case the parties agree involves minimal discovery and could be concluded in short duration—materially advances the efficient management of the case. On the other hand, a prolonged appellate process on one issue, while others are likely to be appealed later, results in delay and adds to the uncertainty of Anderson's employment status with ASU.[8]

The RPSA factors strongly support this Court declining jurisdiction.

[8] Because the illegal training is required for all ASU employees, and Anderson has made his refusal to comply clear, ASU could at any moment take disciplinary action against Anderson. Speedy resolution of this case is therefore necessary to prevent such a result. The delay in resolving this matter caused by Petitioner filing this improper special action petition is in itself an ongoing harm to Anderson.

### 2. Petitioner's arguments for accepting special action jurisdiction are unavailing.

The RPSA identifies specific factors to assess when determining whether to accept jurisdiction. RPSA 12(b). Petitioner argues that several of these support the exercise of jurisdiction here, but they do not.

One point to remember is that the factors courts consider regarding whether to accept or decline jurisdiction in RPSA12(b) and RPSA12(c) are cabined by RPSA 2(b) ("appellate special actions … may be accepted only if the remedy by appeal is not equally plain, speedy, and adequate."). These RPSA 12 factors are not intended to expand the circumstances in which special action relief is proper. *See* RPSA 12, 2025 Cmt. (special action rules codify the historical availability of special actions). *See also* Cmt. of Joel Nomkin on Petition to Amend the Rules of Procedure for Special Actions, Appendix 1 at 30 (the amended RPSA does not "express an intent to broaden the circumstances in which special action relief is appropriate"). *See also* *Rodriguez*, 165 Ariz. at 78 (special action rules do not intend for the Court of Appeals to use special action procedures to expand its jurisdiction).

Under RPSA 2(b), appellate special action jurisdiction "may be accepted ***only if*** the remedy by appeal is not equally plain, speedy, and adequate" (emphasis added); *see also* Appendix 1 at 31 n.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.").

As set out above, there *is* currently an equally plain, speedy, and adequate remedy: appeal after judgment. Therefore, it is not necessary to address the RPSA factors for accepting jurisdiction.

However, an assessment of those factors also weighs in favor of declining jurisdiction.

*First*, this Petition does not raise a question of first impression. RPSA 12(b)(3). As described above, the question of whether a statute creates an implied cause of action is settled, and Arizona courts have been applying the test for decades. *See Transamerica*, 158 Ariz. at 116; *Chavez*, 222 Ariz. at 317 ¶ 24; *McNamara*, 236 Ariz. at 194 ¶ 6. While appellate courts have not decided whether this specific statute creates a private cause of action, that is a simple matter of applying the *Transamerica* factors, which the trial court did. It is not a novel issue or matter of first impression.

*Second*, the Petition presents an issue presented by ordinary dispositive motion practice. RSPA 12(b)(7). Again, special action jurisdiction is proper only when a litigant has no plain, speedy, and adequate remedy, RPSA 2; RPSA 12. *See also Qwest Corp.*, 204 Ariz. at 27 ¶ 3. But Petitioner has a plain, speedy, and adequate remedy available: post-judgment appeal. Whether a statute implies a private right of action is the exact type of issue presented by ordinary dispositive motion practice and trial courts are equipped to resolve these issues, as the trial court did here.

*Third*, this action does not materially advance the efficient management of this case. RSPA 12(b)(7). Because an adequate remedy is available, it is *the Petition* that disrupts the efficient management of this action. All parties agree that this case involves minimal discovery and that the matter will likely be resolved on summary judgment. This Petition therefore delays the ordinary course of proceedings—and, in the meantime, adds to Anderson's uncertainty about his employment.

Contrary to Petitioner's contention, accepting jurisdiction *increases* cost and delay. Petition at 4. This case raises legal questions, including questions that are likely to be appealed after final judgment. Those questions should be considered together, not in this piecemeal fashion. Petitioner cites *Summerfield v. Superior*

*Court*, 144 Ariz. 467 (1985), to support its argument pertaining to efficiency, but that case is not analogous. There the Supreme Court was aware of several simultaneously pending cases presenting the same issue. *See id.* at 469.[9] But no such circumstance exists here. Instead, this case should be permitted to proceed to judgment, to obtain a full record, so that all legal issues can be presented through the ordinary appellate course.

*Finally*, although the trial court *sua sponte* designated the question of whether Section 41-1494 creates an implied cause of action for special action review, this does not weigh in favor of accepting jurisdiction. The trial court's designation relied on similar arguments raised here, which, as set out above weigh in favor of declining jurisdiction.

The Court should decline jurisdiction in this attempted circuitous "appeal" of the denial of an ordinary motion to dismiss.

## II. Section 41-1494 creates an implied cause of action for public employees and taxpayers.

Should this Court exercise special action jurisdiction, it should affirm the trial court's finding that Section 41-1494(A) creates an implied cause of action for Professor Anderson, and it should reverse the trial court's finding that Section 41-1494(B) does not create an implied cause of action for taxpayer Mr. Gustafson.

Of course, irrespective of an implied cause of action, Arizona law still authorizes suits in equity to enjoin unlawful government action. *See Bd. of Regents of Univ. & 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."); *Arizona Pub.*

[9] Additionally, another way in which *Summerfield* is not analogous is its question of obvious statewide significance: whether the word "person" includes a stillborn, viable fetus. *Id.* There is not such an obvious question of statewide importance here.

*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.").

But here, the Legislature created Section 41-1494 expressly to protect public employees and taxpayers. Those are the exact parties who brought this case, Appx5 ¶¶ 7-8, and who are harmed by Petitioner's unlawful training. Yet Petitioner makes the remarkable argument that those who are protected by Section 41-1494's plain language—and whom the Legislature intended to protect when it enacted that statute—are powerless to enforce it. This Court should reject that argument.

It is firmly established that the absence of an express private right of action "begins, rather than ends" the court's inquiry into whether a statute creates an implied cause of action. *Napier v. Bertram*, 191 Ariz. 238, 240 ¶ 9 (1998). When the Legislature is silent on whether a law creates a private cause of action, courts employ a list of statutory interpretation factors to determine whether there is an implied cause of action. *McNamara*, 236 Ariz. at 194 ¶ 6. These factors include: "[1] the context of the statutes, [2] the language used, [3] the subject matter, [4] the effects and consequences, and [5] the spirit and purpose of the law." *Transamerica*, 158 Ariz. at 116.

Additionally, Arizona law *more broadly* implies a private right of action than federal law. *Chavez*, 222 Ariz. at 317 ¶ 24. Therefore, 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).

In this case, each of the *Transamerica* factors weigh in favor of finding an implied right of action under Section 41-1494. If Professor Anderson and Mr. Gustafson, and others like them, lack the ability to enforce Section 41-1494, then the law is an unenforceable nullity. That is simply implausible.

### A. The plain language in Section 41-1494 and the purpose of that law implies a private right of action for public employees and taxpayers.

Section 41-1494 expressly protected—and was designed to protect—two classes of people: (1) public employees; and (2) state taxpayers.

Under Subsection (A), the state, government agencies, local governments, or any other political subdivision of the state, "may ***not*** require an ***employee*** to engage in training, orientation or therapy" which presents forms of discriminatory blame or judgment. A.R.S. § 41-1494(A) (emphasis added). These protections and rights run to *individual* public employees. They are not intended to protect the Governor, the Senate President, or the Speaker of the House, as Petitioner contends.

Similarly, Subsection (B) bars state and local governments from "us[ing] ***public monies*** for training, orientation or therapy" based on discriminatory blame or judgment. A.R.S. § 41-1494(B) (emphasis added). This is a taxpayer protection measure, safeguarding state taxpayers as a class. For decades, the Supreme Court has been clear that taxpayers have the *right* to have their tax dollars lawfully spent and may sue to "enjoin the illegal expenditure" of public funds. *Ethington v. Wright*, 66 Ariz. 382, 386 (1948). When the Legislature enacted Section 41-1494(B), it did so precisely to protect state taxpayers such as Mr. Gustafson.

When a statute is enacted to benefit a specific class of individuals, members of that class have an implied private right of action to enforce that statute. In *Chavez*, 222 Ariz. at 318 ¶ 28, this Court found an implied cause of action under a state law that required the state to provide voting systems to the blind or visually impaired. The Court held that the Legislature enacted the statute "clearly [to] benefit individuals with disabilities," and because the plaintiffs were disabled, they were the members of the class of individuals the statute was enacted to benefit and therefore had an implied right of action. *Id.*

Similarly, in *Douglas*, 206 Ariz. at 347 ¶ 6, this Court found that individual teachers had an implied cause of action under a statute that required additional education funding to schools be allocated to teacher compensation. This Court found that because "the provision of additional teacher compensation was the primary intent of the legislature" individual teachers had an implied cause of action to seek relief under the statute. *Id.*

The same rule applies here. Section 41-1494 is a law regulating conditions of employment to protect individual employees (government agencies "may not require ***an employee*** to engage in training …" (emphasis added)), and a law restricting the use of taxpayer funds, to protect taxpayers (government agencies "may not use ***public monies*** for training …" (emphasis added)). Professor Anderson, as an employee, is plainly among the class of individuals Section 41-1494(A) benefits. The same is true of Anderson, in his capacity as a taxpayer, and Gustafson as a taxpayer, who are both "liab[le] to replenish the public treasury for the deficiency which would be caused by the misappropriation," *Welch*, 251 Ariz. at 525 ¶ 18 (citation omitted), and who are thus the intended beneficiaries of Section 41-1494(B).

Courts have declined to find a private cause of action only when plaintiffs are "incidental" beneficiaries, as in *Lancaster*, 143 Ariz. at 457. There, university employees sought additional compensation under a statute that did not protect them as a class, and which, unlike the statute in *Douglas*, was not intended to allocate additional compensation. On the contrary, the statute in *Lancaster* merely required ABOR to prepare a report on the development of a system of wage and salary equivalency of university employees. 143 Ariz. at 457. Indeed, the title of the statute at issue was "that [the] Board of Regents shall make certain report to the Legislature." *Id.* at 454 (citation omitted). Only after that report was presented could it be used for future legislative enactment that might or might not have

adjusted employee compensation. *Id.* at 457. Consequently, the court said that the employees were mere "incidental" beneficiaries of that statute and had no private right of action regarding lost wages. *Id.* at 453-57.

This case is nothing like that. Here, the right to be free from discriminatory training as a public employee runs to individual employees, and the statute was created to protect that class of individuals. Likewise, Section 41-1494(B) prohibits the use of "public monies" to fund any such training. Again, this protection for taxpayers was to ensure that their tax dollars are lawfully spent. The title of Section 41-1494 includes a "prohibition" on government agencies. In short, Section 41-1494 specifically names public "employee[s]" as a class of individuals the statute protects. It further protects taxpayers from the unlawful expenditure of their funds. Accordingly, "similar to the statutes at issue in *Transamerica,* the focus of these statutes is protecting the rights of individuals." *Chavez*, 222 Ariz. at 318 ¶ 28. Those individuals are public employees, like Professor Anderson, and state taxpayers, like him and Mr. Gustafson. All plaintiffs have an implied cause of action to protect their rights under that law.

### B. The context and subject matter of Section 41-1494 support an implied private right of action.

The context and subject matter of Section 41-1494 indicate that the statute was intended to create a cause of action for public employees. It is, in effect, an employment and civil rights statute, intended to protect the rights of public employees. It is placed in Title 41, Chapter 9: Civil Rights. And it is surrounded by articles that clearly define a protective class, the prohibited harms, and potential harms from violations. Like other state civil rights statutes, Section 41-1494 forbids discrimination, specifically in training and orientation programs.

Petitioner argues that *other* statutes that expressly create private causes of action suggest the Legislature did not intend to create an implied cause of action

here. *See* Petition at 25-26. But the argument is unavailing. First, "the legislature's silence begins, rather than ends, our inquiry" regarding whether a statute creates an *implied* cause of action. *Napier*, 191 Ariz. at 240 ¶ 9. Second, the statutes cited by Petitioner differ in important ways. Section 15-717.02, for example, covered similar matters, but it was a limit on what public school teachers could teach; it did not provide public employees any specific statutory protections, which Section 41-1494 does provide.[10] Moreover, that law gave the Attorney General or County Attorney express enforcement authority to ensure compliance with the law. The fact that the Legislature chose *not* to include that language here is a strong indication that the Legislature *expected* Section 41-1494 to be enforceable by the public employees and taxpayers whom it protects. The fact that the Legislature limited the enforceability of Section 15-717.02 to the Attorney General and County Attorneys shows that it could have also limited Section 41-1494 in the same way—and it chose not to do so. To ignore that choice, as the Petitioner asks this Court to do, would be contrary to the rules of statutory construction.

Just as in other areas of the law, the Legislature may choose to permit private enforcement in one context and not another for many reasons.[11] Here, unlike in Section 15-717.02, the Legislature believed a private cause of action by employees and taxpayers to be the best enforcement mechanism. The context and subject matter of Section 41-1494 relate to *employee* rights, *civil rights*, and *the rights of*

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[10] Section 15-717.02 was declared unconstitutional for violating the Single-Subject Rule. *Arizona Sch. Bds. Ass'n v. State*, 252 Ariz. 219 (2022).

[11] The other statutes cited by Petitioner are also not analogous. For example, House Bill 2906 (passed along with Senate Bill 1840 to become Section 41-1494) amended three other sections that include a reporting requirement of finance, budgets, and audits. These financial reporting requirements specify the details to be included in these reports and how to determine compliance. These are in stark contrast to the non-financial minimal reporting requirement found in Section 41-1494(C).

*taxpayers*. This demonstrates that the Legislature intended to create a private right of action.

### C. The spirit and purpose of Section 41-1494 imply a private right of action.

Section 41-1494 was passed out of an increased concern about the harmful social consequences of DEIB training that perpetuate racial stereotypes and division along with coercive pressure to ensure ideological conformity.[12] Indeed its proponent, Senator Hoffman, stated this would ensure that state agencies would not use public funds to promote DEIB ideology which "teaches that an individual, by the virtue of the individual's race, ethnicity, or sex, is inherently racist, sexist, or oppressive." House Floor Session (July 31, 2024) .The Senators' discussions of the discriminatory blame or judgment language in Section 41-1494 reveal that the Legislature intended for this language to provide protection for taxpayers as well as employees.

Section 41-1494 does three things. Subsection (A) prohibits employee training that incorporates discriminatory blame or judgment, thereby protecting employees. Subsection (B) prohibits the spending of public money on trainings that include discriminatory blame or judgment—protecting taxpayers. Subsection (C) requires the Department of Administration to submit an annual report for the Governor and Legislature of those state agencies in compliance with the statute—ensuring oversight. These are three distinctly different purposes, reflecting the

[12] House Floor Session (July 31, 2024). While there was little discussion about House Bill 2906 or Senate Bill 1840 in the Legislature, the same language used in the bills—discriminatory blame or judgment—was proposed as a floor amendment to Senate Bill 1074 by Senator Hoffman. 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 proposed again as a separate bill and eventually signed into law by Governor Doug Ducey as Section 41-1494.

overall spirit of the law to protect employees and state taxpayers against improper publicly financed training.

### D. The effects and consequences of Section 41-1494 support a private right of action.

Arizona courts "will not interpret a law to deny, preempt, or abrogate" a private cause of action "unless the statute's text or history shows an explicit legislative intent to reach so severe a result." *Hayes*, 178 Ariz. at 273. That is because the Legislature can "eas[ily] enough" declare that a statute does not create a private right of action if that is its intent—and it did not do so here. *Id.*

On the contrary, this case is on all fours with *Douglas*. There, the Court found an implied cause of action for individual teachers because without one, "there [was] no way of holding school districts accountable for the misappropriation of [the] funds," 206 Ariz. 344, at 347 ¶ 9, and absent an implied cause of action there would be "no remedy … for a misappropriation of funds earmarked for teacher compensation." *Id.* ¶ 11. In other words, the only way to enforce the statute was through an implied private cause of action. *Id.*

Similarly, in *McCarthy v. Scottsdale Unified Sch. Dist. No. 48*, 409 F. Supp.3d 789 (D. Ariz. 2019), the court found a private cause of action under an Arizona statute that required parental notification when restraints or seclusion were used on a student. Because the law was intended to benefit parents, absent a private right of action, there would be "no remedy for the enforcement of the parental notification provisions." *Id.* at 822.

Here, the prohibition on mandatory, discriminatory training protects Arizona's public employees. Absent an implied cause of action, those employees would be powerless to enforce their protection. Nor would taxpayers be able to enjoin the expenditure of their money in violation of the act. That would be an absurd outcome and would defeat the Legislature's purpose, and that would be

contrary to rules of statutory construction. *State ex rel. Flournoy v. Mangum*, 113 Ariz. 151, 152 (1976) (courts should use sensible construction to avoid absurd results). Again, if the Legislature had intended to bar employees and taxpayers from enforcing the statute, it could have provided the Attorney General and County Attorneys with enforcement authority, as it did in the notably similar Section 15-717.02—yet it chose not to. That is because it expected employees and taxpayers to sue if and when necessary.

Petitioner contends that Section 41-1494(C) provides the sole enforcement mechanism. That is plainly wrong. That subsection requires that a report be made to the Governor, Senate President, and Speaker of the House, from the Department of Administration—*not from ABOR* or any other public body—regarding compliance with the law. Far from being the sole enforcement mechanism, Subsection (C) is not an enforcement mechanism at all; it is a reporting requirement. And it has nothing to do with the protections provided by Subsections (A) and (B).

For one thing, Subsection (C) only applies to "state agencies." Unlike Subsections (A) and (B), it does not apply to cities, towns, counties, and other political subdivisions. This shows that Subsection (C) simply does not cover the other sections of the statute. Because Subsection (A) provides protections for public employees of cities, towns, counties, and local governments, the *only* way Subsection (A) can be enforced is through an implied cause of action. Similarly, because Subsection (B) prohibits not only the state, but also cities, towns, counties, and local governments from using public monies to fund discriminatory training—and, again, Subsection (C)'s reporting requirement doesn't apply to these. So, the *only* way Subsection (B) can be enforced is through an implied cause of action.

Also, Petitioner's argument that a reporting requirement is an enforcement mechanism was squarely rejected in *Transamerica*, *Douglas*, and *McCarthy*. In

*Transamerica*, the Supreme Court found a private right of action for individual borrowers who were intended beneficiaries of the law, even though other aspects of the law provided for administrative enforcement mechanisms. 158 Ariz. at 117. In *Douglas*, this Court held that even though the law required a report from school district governing boards to the legislature—almost identical to the reporting requirement here—it also gave a private right of action to individual teachers, because otherwise "there is no way of holding school districts accountable for the misappropriation of [the] funds." 206 Ariz. at 347 ¶ 9. In *McCarthy*, the court found a private cause of action for parents regarding restraints on students even though there was also an administrative remedy because "if there is no private right of action …, there is no remedy for the enforcement of the parental notification provisions." 409 F.Supp.3d at 822.

In short, the report from the Department of Administration is a woefully insufficient "enforcement mechanism," because it is not an enforcement mechanism at all. It does not apply to local governments. And it does not provide any remedy for the specific parties Section 41-1494 was created to protect—public employees and taxpayers. Those parties—the two Plaintiffs here—have a cause of action to challenge Petitioner's unlawful training requirements.

## CONCLUSION

This Court should decline jurisdiction, or in the alternative, deny the requested relief, and hold that Professor Anderson has an implied cause of action under A.R.S. § 41-1494(A), and that both he and Mr. Gustafson have an implied cause of action under A.R.S. § 41-1494(B).

**Respectfully submitted February 14, 2025 by**:

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# APPENDIX 1

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SUPREME COURT OF ARIZONA

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

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).

**IN THE COURT OF APPEALS**
**DIVISION ONE**
**STATE OF ARIZONA**

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|---|---|
| ARIZONA BOARD OF REGENTS,<br><br>Petitioner,<br><br>v.<br><br>OWEN ANDERSON,<br><br>Respondent. | Court of Appeals, Div. 1<br>No. 1 CA-SA 25-0007<br><br>Maricopa County Superior Court<br>No. CV2024-005713 |

# CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 14(g) of the Ariz. R. P. for Special Actions, I certify that the body of the attached Response to Petition for Special Action appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 8,178 words, excluding table of contents and table of authorities.

**Respectfully submitted February 14, 2025 by**:

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**IN THE COURT OF APPEALS**
**DIVISION ONE**
**STATE OF ARIZONA**

ARIZONA BOARD OF REGENTS,

Petitioner,

v.

OWEN ANDERSON,

Respondent.

Court of Appeals, Div. 1
No. 1 CA-SA 25-0007

Maricopa County Superior Court
No. CV2024-005713

**CERTIFICATE OF SERVICE**

The undersigned certifies that on February 14, 2025, she caused the attached Response to Petition for Special Action to be filed via the Court's Electronic Filing System and electronically served a copy to:

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