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

RESPONDENT'S SUPPLEMENTAL BRIEF

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Pursuant to this Court's Order for Supplemental Briefing, Respondent Owen Anderson submits the following response to address the questions presented.

ARGUMENT

I. Section 41-1402(B)(1) does not grant the Civil Rights Division authority to initiate judicial actions to enforce A.R.S. § 41-1494.

The Attorney General ("AG") has only that authority specifically granted by the legislature. *Arizona State Land Dep't v. McFate*, 87 Ariz. 139, 144 (1960). This has been the law in Arizona for over sixty years and this principle was recently reaffirmed by the Supreme Court in *State ex. rel. Brnovich v. Arizona Bd. of Regents*, 250 Ariz. 127, 133 ¶ 21 (2020) ("the Attorney General possesses only such powers as the legislature grants him."). The grant of authority for the AG to sue, especially a state agency, must be "specific." *Id.* And legislative silence does not equate to a grant of authority. *Id.*[1] Thus, the Supreme Court has repeatedly declined to accept a broad interpretation of the AG's enforcement authority. *McFate*, 87 Ariz. at 148 (the AG may initiate proceedings only if granted specific statutory power); *Gershon v. Broomfield*, 131 Ariz. 507, 508 (1982) (the AG has no common-law powers); *State v. Arizona Bd. of Regents*, 253 Ariz. 6, 9 ¶ 7 (2022) (the AG's authority to bring claims is delineated by statute). Of course, no specific grant of enforcement authority exists in A.R.S. § 41-1494.

Section 41-1402(B)(2) also does not grant the AG specific authority to enforce A.R.S. § 41-1494. Instead, that provision provides that the Civil Rights Division "shall administer" the chapter. To "administer" does not mean the same thing as to "enforce." "Administer" means "[t]o provide or arrange (something) officially as part of one's job." ADMINISTER, Black's Law Dictionary (12th ed.

[1] This is unlike the analysis used when determining whether a statute provides an implied private right of action. *Napier v. Bertram*, 191 Ariz. 238, 240 ¶ 9 (1998) ("the legislature's silence begins, rather than ends, our inquiry.").

2024). Whereas "enforce" would "give force or effect to (a law, etc.); to compel obedience to." ENFORCE, *id.* That is why other statutes that *do* confer enforcement authority on state agencies use the word "enforce." *See, e.g.*, A.R.S. § 36-136 (the Department Director has authority to "[a]dminister *and enforce* the laws relating to health and sanitation and the rules of the department.") (emphasis added); A.R.S. § 42-1004 (the Department of Revenue "shall administer *and enforce*" the title on taxation) (emphasis added). Use of the word "administer" rather than "enforce" in A.R.S. § 41-1402(B)(2) is dispositive as a textual matter. And in the absence of specific authority granted to the AG to bring suit, the AG is powerless to do so. *See McFate*, 87 Ariz. at 144; *Brnovich*, 250 Ariz. at 133 ¶ 21. Indeed, Petitioner ABOR itself argued that the AG does not have broad authority to enforce. *Id.* at 133 ¶ 20. And, in *Arizona Bd. of Regents*, ABOR made a similar argument that the AG's mandate to "prosecute … all actions necessary to enforce" did *not* provide the AG open-ended enforcement authority. 253 Ariz. at 10 ¶ 9.

Use of the word "administer" in A.R.S. § 41-1402(B)(2) instead refers to provisions of the chapter—not at issue here—which require administrative exhaustion, specifically Articles 5 (voting rights or public accommodations discrimination) and 6 (employment discrimination). Those two Articles impose preliminary jurisdictional exhaustion requirements on plaintiffs, requiring them to file charges with the Division and await the Division's action before suing. *See* A.R.S. §§ 41-1471 and 41-1481. Section 41-1494, however, contains no such exhaustion requirement. Consider that the word "administer" is also far less specific than the phrase "shall … prosecute and defend any proceeding," which in *Brnovich* the Supreme Court held did not give the AG power to initiate legal challenges any time he concluded there was a violation of law. 250 Ariz. at 130, 132 ¶¶ 9, 16, 19. But if a grant of authority as specific and broad as the one at issue in *Brnovich* was inadequate, then surely the grant of authority to "administer" in

A.R.S. § 41-1402(B)(2) cannot be read as a grant of enforcement power, let alone a grant of *exclusive* enforcement power.

Section 41-1494, of course, contains no exhaustion requirement at all. It stands in striking contrast to Articles 5 and 6, both of which lay out specific procedures for bringing complaints for violations of voting rights and public accommodations, which the AG "administers." There is no statutory provision establishing enforcement procedures for violations of Article 10's "Training and Instruction" prohibition. The legislature knew how to establish an exhaustion requirement or an enforcement authority, and did so in Articles 5 and 6, but it did not do so with respect to Article 10. "Under the statutory interpretive principle of *expressio unius est exclusio alterius*, when the legislature makes a requirement in one provision of the statute but does not include it in another, we assume the absence of the requirement was intentional." *Sharpe v. AHCCCS*, 220 Ariz. 488, 496 (App. 2009).[2]

Section 41-1494 stands as a separate legal protection that can be privately enforced by those harmed by government entities that violate the law. The "Training and Instruction" it forbids differs from employment discrimination (Article 6) or public-accommodation discrimination (Article 5) in that discriminatory blame or judgment training is not a form of discrimination that might deny a person a promotion or exclude someone from a restaurant or hotel on the basis of race. Instead, blame or judgment training involves publicly funded, offensive, and discriminatory government *speech*. That difference gives the legislature good reason to provide different methods of redress for such harms.

[2] Indeed, courts presume against the existence of jurisdictional exhaustion requirements and will not infer that an administrative exhaustion requirement is jurisdictional unless the legislature clearly says so. *See, e.g.*, *Holmes v. PHI Serv. Co.*, 437 F. Supp.2d 110, 120–22 (D.D.C. 2006); *United States v. Wilson*,77 F.4th 837, 841 (D.C. Cir. 2023), *cert. denied*, 144 S. Ct. 1111 (2024).

Because A.R.S. § 41-1494 is a law regulating *conditions of employment*, the legislature had no need to establish an elaborate administrative investigation-and-enforcement scheme or to give the AG enforcement authority—because injured employees, and taxpayers, already have a cause of action to sue for such violations under longstanding Arizona law. *See* *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist.*, 206 Ariz. 344, 347-48 ¶¶ 11-12 (App. 2003); *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 524-525 ¶ 18 (2021).

The limited authority given to the Civil Rights Division to "administer" is not express authority to enforce or initiate judicial actions—and certainly is not an *exclusive* grant of authority to do so. As the Supreme Court said, "statutes will be construed as not forbidding or preempting judicial jurisdiction or common-law actions," unless there is clear language to that effect. *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 274 (1994). Thus "[i]f the legislature intends to deny, abrogate, or preempt, it must clearly say so." *Id.* (citations omitted). Nothing in A.R.S. § 41-1494 or any other statute says that only the AG may bring enforcement actions for violations of discriminatory blame or judgment training.

II. The absence of AG enforcement authority in Section 41-1494 shows there is an implied private right of action.

Even if the AG has *some* authority to "administer" A.R.S. § 41-1494, it does not follow that Respondent Professor Anderson lacks a private right of action. Courts have routinely held that even where an AG is granted statutory enforcement authority, private parties are not barred from bringing suit unless that authority is plainly *exclusive*. *See, e.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186, 230–34 (1996) (Congress giving AG enforcement power did not preclude private right of action); *Schwier v. Cox*, 340 F.3d 1284, 1295 (11th Cir. 2003) ("the possibility

of enforcement by the Attorney General [does] not preclude enforcement by private citizens.").

Moreover, as explained in Respondent's Response to Petition for Special Action, *Transamerica Fin. Corp. v. Superior Ct.* and other cases make clear that the existence of *other* enforcement mechanisms does not preclude enforcement by individuals whose rights are violated. 158 Ariz. 115, 116 (1988).[3] Section 41-1494 creates substantive rights just like the statute in *Douglas*, 206 Ariz. at 347-48 ¶¶ 11-12.

What's more, private rights of action exist under other sections of Chapter 9, further demonstrating that the AG does not have exclusive enforcement authority over the entire title. *See, e.g.*, A.R.S. §§ 41-1481(B), (D); 41-1471(B).

Given this context, there is no reason to believe that, even if the AG could enforce A.R.S. § 41-1494—which she cannot under the holdings of *McFate* and *Brnovich*—such power would not preclude these Respondents from suing.

CONCLUSION

The Court should decline jurisdiction or, alternatively, deny the relief requested by Petitioner and hold that Professor Anderson has an implied cause of action under A.R.S. § 41-1494(A).

[3] In fact, other provisions of A.R.S. § 41-1402 specifically contemplate actions brought by *other litigants* in addition to the AG, specifying circumstances in which the AG may intervene in ongoing actions brought by other parties. A.R.S. § 41-1402(A)(4). And other portions of the Civil Rights chapter contemplate private enforcement, even if the AG *also* has enforcement authority. *See, e.g.*, A.R.S. § 41-1491.31(A), (C).

Respectfully submitted April 21, 2025 by:

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CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 14(g) of the Ariz. R. P. for Special Actions and this Court's Order for Supplemental Briefing, I certify that the body of the attached Respondent's Supplemental Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and is no more than 5 pages.

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 21, 2025, she caused the attached Respondent's Supplemental Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

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