IN THE SUPREME COURT
STATE OF ARIZONA

OWEN ANDERSON, Petitioner, v. ARIZONA BOARD OF REGENTS, Respondent.	Supreme Court No. CV-26-0012-PR Court of Appeals, Div. 1 No. 1 CA-SA 25-0007 Maricopa County Superior Court No. CV2024-005713

PETITIONER'S RESPONSE TO AMICUS BRIEF OF STATE OF ARIZONA

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INTRODUCTION

The State's Amicus Brief ("State's Br.") reflects several misconceptions and fallacies concerning what this case is about.

For example, it says this case is about "the Court's modern framework for statutory interpretation." *Id.* at 6. It is not.[1] It's about applying the longstanding test of *Transamerica Fin. Corp. v. Superior Ct.*, 158 Ariz. 115 (1988), which the court below failed to do.

The State says this case is about "search[ing] for what the legislature 'would have wanted.'" State's Br. at 5 (citation omitted). It is not. It's about what the Legislature *actually did*.

The State says this case is about "rewrit[ing] statutes or 'enlarg[ing] the meaning of [statutory language].'" *Id.* at 5 (citation omitted). It is not. It's about faithfully applying the statute in order to "give effect to legislative intent," which is the Court's proper role. *Wyatt v. Wehmueller*, 167 Ariz. 281, 284 (1991).

The State says this case is about "plain language" versus "liberal construction." State's Br. at 4 (quoting *Arizona Legislative Bill Drafting Manual*

[1] Obviously whether a statute creates a private right of action will involve "a statutory interpretation question" to *some* extent, State's Br. at 8, because every single lawsuit involving a statute will involve statutory interpretation to *some* extent. The point is that this case is about whether the statute creates a private right of action, *not*—as the court below held—about whether the statute is ambiguous, or creates an absurdity, or any of the other questions typically referred to by the term "statutory interpretation."

46 (2025-2026)). It is not. This is a case about whether a law that governs conditions of employment is enforceable by an employee—again, a question to be resolved (as the State concedes) by applying the *Transamerica* test, not by recourse to the plain language/liberal construction dichotomy. Applying that test, instead of being bogged down in abstruse theoretical questions, shows that Section 41-1494 is indeed enforceable by a private plaintiff who is harmed by the violation of that statute. That's enough to resolve this case, and the Court should not let the amicus inject other issues into it.

ARGUMENT

I. Abstruse questions of legal theory are out of place here.

The State suggests that this case involves complicated questions about "textual ambiguity" and "secondary principles" of statutory construction. State's Br. at 11. It doesn't. Interesting as such questions are, this case is about whether an employee of Arizona State University may sue when ABOR violates Section 41-1494(A), which says "[t]his state … may not require an employee to engage in training, orientation or therapy that presents any form of blame or judgment on the basis of race, ethnicity or sex." That's a question about private rights of action, and such questions are answered (as the State acknowledges, State's Br. at 4), by applying the *Transamerica* test. That test "requires consideration of the context of

the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law." 158 Ariz. at 116.

That is not the same thing as statutory *ambiguity*, which occurs when a statute is reasonably susceptible of two equally plausible interpretations. *See* *Coburn v. Sievert*, 35 Cal. Rptr.3d 596, 603 (App. 2005). True, courts resolving ambiguity do consider some of the same factors as they do in ambiguity cases, including context, *see* *Arizona Pres. Found. v. Pima Cmty. Coll. Dist. Bd.*, 569 P.3d 402, 406 ¶ 16 (App. 2025), but in determining whether a plaintiff can sue under a statute that doesn't explicitly say so, courts consider other factors, also, which are not used in ambiguity cases. These include whether the plaintiff is a "member[] of 'the class for whose especial benefit' the statute[] [was] adopted," *Chavez v. Brewer*, 222 Ariz. 309, 318 ¶ 28 (App. 2009), and whether the statute can be enforced in the absence of an implied cause of action. *Cf.* *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 206 Ariz. 344, 347-48 ¶¶ 10-11 (App. 2003). So, the two issues—the existence of a private right of action, and statutory ambiguity—are not the same.

What's more, courts determining whether a private plaintiff can sue to enforce his or her rights under a statute start from the position that, "in the absence of express language, Arizona law more broadly implies a private right of action 'when consistent with "the context of the statutes, the language used, … [etc.]."'"

Burns v. City of Tucson, 245 Ariz. 594, 596 ¶ 6 (App. 2018) (citations omitted). In other words, courts ask whether the statute "precludes recognition" of a private right of action. *Napier v. Bertram*, 191 Ariz. 238, 240 ¶ 9 (1998).

Here, the Court of Appeals failed even to consider these factors—and failed to apply the *Transamerica* test—because it confused this case with a case about statutory ambiguity. And the reason for that mistake was that it overlooked the first step in an implied-right-of-action case: namely, that "the legislature's silence begins, rather than ends, our inquiry." *Napier*, 191 Ariz. at 240 ¶ 9.

This case is not about ambiguity because—contrary to the State's assertion, State's Br. at 18—this statute is not ambiguous. It's silent. Those are different things. As Justice Breyer observed, "silence is not ambiguity; silence means that ordinary background law applies." *New Jersey v. New York*, 523 U.S. 767, 813 (1998) (Breyer, J., concurring). The ordinary background law here is, of course, the *Transamerica* test. But the Court of Appeals thought the statute's silence created an *ambiguity*, so it used tools of statutory interpretation for resolving ambiguities, instead of applying *Transamerica* as it should have. That alone suffices for reversal.[2]

[2] The State argues that there may be "many reasons for legislative silence" with regard to a private cause of action. State's Br. at 10. Obviously—but the question is what to do when the Legislature *is* silent, and the answer to that is: apply the *Transamerica* test. The State also says that "the legislature has often spoken clearly in both directions." *Id.* at 12. Maybe—but it did not do so in this case.

Due to this error, the Court of Appeals asked whether the statute would be rendered "absurd" in the absence of a private right of action. But that is simply not the question in an implied-right-of-action case. Instead, the right question is: given "the context of the statute[], the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law," *Transamerica*, 158 Ariz. at 116, is there good reason to deny the plaintiff the right to sue? *See also Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273-74 (1994) ("It is, after all, easy enough for the legislature to state that a certain statute does or does not create, preempt, or abrogate a private right of action. The appropriate language is known to the legislature.").

As Petitioner explains in his merit briefs, no such good reason exists here.

On the contrary, there's good reason to conclude that there *is* a private right of action here. For one thing, the statute includes no remedy provision, meaning that eliminating the right of state employees to enforce Section 41-1494, which specifies conditions of employment, would leave those employees powerless to vindicate their rights. Courts will find a private right of action in such circumstances. *See, e.g., Douglas*, 206 Ariz. at 347-48 ¶ 11 ("there is no remedy … other than the maintenance of a private cause of action."); *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576 (1974) ("Without effective private remedies the widespread economic losses that result from deceptive trade practices

remain uncompensable and a private remedy is highly desirable in order to control fraud in the marketplace.").

But even if this Court were to resort to the traditional tools of statutory construction, those tools also show that Petitioner has a right to sue here. Consider the traditional statutory construction tool of *expressio unis*, which says that where there's reason to believe the lawmaker purposely left something off of a list, a court should not interpret the list as including that thing. Scalia & Garner, *Reading Law* 107 (2012).

Applying that rule, contrast Section 41-1494 and Section 15-717.02. The latter statute, which applies to K-12 schools instead of universities, contained[3] similar language to Section 41-1494. It prohibited instruction involving race-based blame or judgment. But it also included a subsection (E), which said "[t]he attorney general or the county attorney for the county in which an alleged violation of this section occurs may initiate a suit in the superior court … for the purpose of complying with this section."

That provision is less likely to confer a private cause of action under *Transamerica* [4] because "'where a statute expressly provides a particular remedy or

[3] The statute was declared unconstitutional by this Court for unrelated reasons in *Arizona Sch. Bds. Ass'n v. State*, 252 Ariz. 219 (2022).

[4] Not necessarily, however. Even where the Legislature gives the Attorney General enforcement authority, Arizona courts still sometimes infer a private right of action—as, indeed, *Transamerica* itself.

remedies, a court must be chary of reading others into it.'" *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 345 (App. 1983) (Howard, C.J., dissenting) (quoting *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)). Section 41-1494, however, noticeably lacks anything like that Subsection (E). Since the Legislature certainly knows how to deny private citizens a right of action under a statute, *see Hayes*, 178 Ariz. at 273-74—and in fact did so in Section 15-717.02(E), which is the fraternal twin of the statute at issue here—the *expressio unis* conclusion is palpable: the Legislature did not intend to deny public employees like Professor Anderson the right to vindicate their rights under this statute.

There's another statutory-interpretation principle the State gets wrong. It argues that legislators are instructed in the *Legislative Drafting Manual* that courts interpret laws by looking first at their plain meaning. This, the State suggests, means that today's legislators are less likely to leave a private right of action to inference than in years past. State's Br. at 3-4. That argument, however, ignores a basic rule of statutory interpretation: namely, that "[w]e presume the Legislature is aware of Supreme Court decisions and existing case law interpreting the language of a statute." *State v. Marner*, 583 P.3d 53, 61 ¶ 34 (Ariz. 2026); *cf.* Scalia & Garner, *supra* at 318-19. That presumption means lawmakers are presumed to legislate with existing case law regarding private rights of action in mind—and

indeed, that they are presumed to have *relied upon* that case law when drafting statutes.[5]

So, the proper conclusion is the *opposite* of what the State says. Whatever the *Drafting Manual* may say, this Court presumes that legislators rely on existing case law—including the *Transamerica* test—when writing statutes. Legislators therefore are entitled, indeed expected, to rely on the settled principles of Arizona law governing when courts will infer a private right of action. Thus, when enacting statutes like Section 41-1494, legislators may reasonably assume that courts will apply those existing principles to determine whether the statute creates a private right of action.

The State's brief therefore reverses the ordinary presumption, and radically so. It suggests that the alleged "shift[] … in the modern era," State's Br. at 3, should overcome the longstanding principle—reaffirmed by this Court as recently as January, *Marner,* 583 P.3d at 61 ¶ 34—that legislators act in light of *existing* jurisprudence, as well as the longstanding principle that if the Legislature wants to

[5] That presumption has often proven central to cases involving private rights of action. *Transamerica* itself turned on it. There, the Legislature adopted a statute giving the Attorney General the power of enforcement. But because the case law at the time that statute was adopted held that there was a private right of action, and the Legislature had not explicitly disclaimed that, the private right of action was retained. *See* 158 Ariz. at 117. The lower court had concluded that the grant of power to the Attorney General was definitive, but this Court reversed, saying that there was "nothing in the [statute] … or in the stated legislative intent … which prohibits a private cause of action." *Id.*

change the rules about inferring rights of action, it must do so explicitly. The State is wrong. This Court should presume that lawmakers were aware of the *Transamerica* test when they adopted Section 41-1494, and (absent any statement to the contrary) that they intended that test to apply.

Since the Legislature was silent on a private cause of action here, the Court of Appeals should have employed the *Transamerica* test, as the Legislature presumably anticipated. And application of that test results in the conclusion that a private right of action is available under Section 41-1494.

II. Private Rights of Action are typically precluded where there's an adequate enforcement remedy—and none exists here.

The whole issue of the existence of private rights of action historically resulted from the advent of administrative mechanisms of enforcement, beginning largely with the worker's compensation reform movement of the early twentieth century. Before that period, courts typically found a private right of action based on the fundamental Anglo-American maxim that every right implies a remedy. As William Blackstone put it, "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." William Backstone, Commentaries on the Laws of England, Book III 23 (1768); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

But in the modern era, as regulation of industry "became more complex and as administrative agencies began to play a larger role," courts began to ask whether the administrative remedies provided by a statute were reconcilable with, or substituted for, a private right of action—i.e., an inquiry into "demonstrable legislative purposes and intentions." Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 Corn. L. Rev. 501, 548 (1986)[6]

As turn-of-the-century reformers sought to substitute certain new, uniform, statutory remedies for the cumbersome and sometimes unjust common law—for example, a worker's compensation system that substituted for private lawsuits by injured workers—the question often arose whether an employee still retained an individual right to sue, or whether that had been displaced by the administrative remedy.

Consequently, one important question in determining whether a private right of action exists is whether there is an administrative remedy, or an adequate

[6] Professor Foy offered the following criticism of those who—like the State here—insist "that private rights of action must be founded upon *affirmative* legislative intentions." *Id.* at 572 (emphasis added). Such an approach, he wrote, "collides with two beneficial principles. First, it collides with the traditional assumption that legislative action can have adjudicatory consequences not described in the legislative text or demonstrably intended by the legislature. Second, it collides with the Anglo-American belief that courts are in business to provide remedies for legal wrongs." *Id.*

enforcement mechanism, included in the statute. *See, e.g.,* *Melancon v. USAA Cas. Ins. Co.*, 174 Ariz. 344, 347 (App. 1992); *Hayes*, 178 Ariz. at 270-72. This is not a *dispositive* consideration—even where an administrative remedy exists, individuals also often still have the right to sue, as in *Transamerica*, for example, and *Chavez*, 222 Ariz. at 318 ¶ 28. But it is an important consideration, because, as *Lancaster v. Arizona Board of Regents* said, when a statute "limits a thing to be done in a particular mode, it includes the negative of any other mode." 143 Ariz. 451, 457 (App. 1984) (cleaned up). *See also* *Valley Drive-In Theatre Corp. v. Superior Ct.*, 79 Ariz. 396, 400 (1955) ("when a statute creates a right and also provides a complete and valid remedy for the right created, the remedy thereby given is exclusive.").

That consideration explains many of the cases the State cites. In *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 196 ¶ 12 (App. 2014), for example, there was a detailed enforcement mechanism specified by statute, and a private right of action would have been inconsistent with that. And in *Colberg v. Rellinger*, 160 Ariz. 42, 47 (App. 1988), the court said there was no private right of action under a statute (A.R.S. § 32–1127) that set out conditions of contractor licensing—which, of course, is enforceable by the agencies responsible for such licensing. The State is wrong to imply that these cases turned on statutory construction issues of "ambiguity." State's Br. at 18. Instead, they turned on the

more specific question of whether, given the existence of enforcement remedies and other considerations, a private right of action was the natural implication of the statute.

Here, the answer is simple: there is no enforcement remedy *at all*. The statute simply says that the state shall not treat its employees in a certain way, and Professor Anderson, as an employee, is suing on the grounds that the statute has been violated, thereby injuring him. In the absence of an administrative remedy or other enforcement mechanism, it is far simpler to conclude that the statute can be enforced by the class of persons the statute was intended to protect, such as Professor Anderson.

This case is therefore much closer to *Douglas, supra*, where the statute ensured compensation for teachers. When individual teachers sued, the court had to decide if they had a private cause of action. The defendants pointed out that the statute required certain types of paperwork to be done—specifically it required schools to "submit evidence that the school district continues to meet the requirements of [the statute]"—and (like the Court of Appeals in this case) claimed that this reporting requirement was the exclusive administrative remedy. *See* 206 Ariz. at 347-48 ¶¶ 10-11. But the court found that inadequate to disprove the existence of a private right of action, because that paperwork requirement "[did] not address the [plaintiffs'] allegations." *Id.* ¶ 11. Consequently, there was "no

remedy in [the statute] for a misappropriation of funds earmarked for teacher compensation other than the maintenance of a private cause of action." *Id.*

Exactly the same is true here. The statute does require certain paperwork—an annual report to the Legislature about compliance, just like in *Douglas*—but that provides no remedy for the violation of the statute which harms Professor Anderson, again like in *Douglas*. And, as in *Douglas*, absent a private right of action, "there is no way of holding [Defendants] accountable." *Id.* ¶ 9. Therefore, as in *Douglas*, a private right of action exists here.

III. The other novel issues the State introduces are out of place.

This Court will typically not consider questions raised only by an amicus. *Protect Our Arizona v. Fontes*, 254 Ariz. 288, 294 ¶ 13 n.4 (2023). That rule is particularly weighty here, given that the State "amicus" isn't distinct from the Arizona Board of Regents, which is the Defendant. A *true* amicus has *different* interests than those of the parties, but here the State's interests are nearly identical to the Defendant's. The reason amici curiae are helpful is "because they are *nonparties* who often have a *different perspective* from the principal litigants." *Connerly v. State Personnel Board*, 37 Cal.4th 1169, 1177 (2006) (emphasis added). Here, that isn't true. As one Texas court has remarked, "litigants … who don the drab habits of amicus curiae are subject to having their acts laid to their true owner." *Jackson v. Birk*, 84 S.W.2d 332, 332 (Tex. Civ. App. 1935). Here, the

State and ABOR may be distinct enough to satisfy ARCAP 16, but the practical reality is that both are state entities, asserting the same interests.

Consequently, the State's effort to inject new issues into the case—such as its suggestion that the Court create a new and unprecedented "clear statement rule," State's Br. at 13—should be treated with skepticism. And given that none of the parties to the case have briefed the issue, the Court should decline the State's request to resolve it here. *See also State ex rel. Donaldson v. Hines*, 182 P.2d 865, 880 (Kan. 1947) ("it would be highly improper for the court to pass upon questions [raised by an amicus] which were not within the issues and consequently not briefed by counsel for all parties.").

Nor would such a rule be appropriate in any event. The State premises that suggestion on the idea that this is a case about statutory ambiguity, and that this ambiguity creates an "interpretive dilemma" which a clear-statement rule would resolve. State's Br. at 13. But this isn't a case about statutory ambiguity, because the statute isn't ambiguous—it's just silent. And the statute is *always* silent in a case about implied private rights of action. That silence "'begins, rather than ends [the court's] inquiry.'" *Douglas*, 206 Ariz. at 346 ¶ 5 (quoting *Napier*, 191 Ariz. at 240 ¶ 9). The next step is to apply the *Transamerica* test—a test that has been Arizona law for four decades, and which the Legislature presumably was aware of when it adopted Section 41-1494.

In fact, a clear statement rule might have radical consequences. It would mean, in effect, that every statute intending to protect people would be either unenforceable, or only enforceable by the state, unless the Legislature *explicitly* declared otherwise. At a minimum, that would impose a tremendous strain on the State's enforcement capacities, making the State responsible for enforcement of every law regulating conditions of employment, consumer protection, fraud, privacy, personal injury, and countless other matters that are currently open to common law remedies. Since the State would probably lack the resources to enforce all these laws fully, such a rule would likely result in a vast increase in the number of unredressed injuries—and in the number of statutes that make strong pronouncements but, in reality, go unenforced (never a good idea[7]).

In any event, limiting the enforcement of legal rights except in those rare cases where the Legislature explicitly says otherwise would undermine constitutional values, including those reflected in Article II Section 11 of the Constitution, which promises that justice "shall be administered openly," and Article XVIII Section 6, which prohibits abrogating the right to recover for injuries. Stripping Arizonans of the right to seek justice in courts, and making the enforcement of remedial legislation the nearly exclusive purview of administrative

[7] The proliferation of laws that go unenforced tends to degrade respect for law in general and "forms a precedent for other breaches." *The Federalist* No. 25 at 163 (J. Cooke ed. 1961) (Alexander Hamilton).

agencies is not "openness." And to bar Arizonans from seeking redress for the violation of statutes unless the Legislature chooses to explicitly authorize that reverses the presumption embodied in the Anti-Abrogation Clause that people are free to come to court for redress unless there's good reason to the contrary.

CONCLUSION

This case is about whether there's an implied private right of action in the statute. That's resolved by applying the *Transamerica* test. The court below failed to apply that test. That was reversible error. That's enough to resolve this case.

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Pursuant to Rule 23(g)(2) of the Ariz. R. Civ. App. and this Court's June 11, 2026 Order, I certify that the body of the attached Petitioner's Response to Amicus Brief of State of Arizona appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and does not exceed 20 pages, excluding table of contents and table of authorities.

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