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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

OWEN ANDERSON, a resident of Arizona, and D. LADD GUSTAFSON, a resident of Arizona,

Plaintiffs,

v.

ARIZONA BOARD OF REGENTS, an Arizona corporate body,

Defendant.

No. CV2024-005713

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Oral Argument Requested

(Assigned to the Hon. Melissa Julian)

Arizona State University's over 145,000 students come from every U.S. state, over 150 countries, and from all backgrounds and beliefs. To foster the success of this heterogenous student body, ASU trains its faculty and staff on how to welcome and engage with individuals from backgrounds other than their own. One such training ("Training") is at issue here. An ASU professor and an Arizona resident allege that this Training violates A.R.S. § 41-1494, which prohibits "the state from promulgating, imposing, endorsing, or requiring its employees to accept, agree with, or support, the doctrine of blame or judgment." First Amended Complaint ("FAC") ¶ 4. But blaming, judging, or mistreating people for who they are or what they believe is the *exact opposite* of the Training's message, which comports fully with the statute. In any event, this Court need not reach the substance of the Training at all, because the FAC has three other fatal flaws requiring its dismissal under Ariz. R. Civ. P. 12(b)(6) and (1).

First, Plaintiffs lack a private right of action to sue to enforce Section 41-1494, as the statute does not authorize any such action.

Second, as to Count 1, which challenges the training itself, neither plaintiff has standing. One is merely an Arizona resident; he does not allege that he must take the Training. And though the ASU professor alleges he must take the Training, he concedes that he has not done so for nearly two years, without any consequences. His speculative fear that he "could" face disciplinary action in the future, FAC ¶ 20, is not enough to establish his standing to bring this claim.

Third, as to Count 2, which challenges the purported expenditure of state taxpayer dollars on the Training, Plaintiffs fail to identify any specific expenditure tied to a tax that they have paid. Their only claimed injury is that (a) they pay taxes to the state, (b) some of which are allegedly used to fund ABOR, (c) which in turn allegedly uses some of those funds to pay for the challenged conduct. That's not enough for taxpayer standing.

Background

I. The Parties.

Plaintiff Owen Anderson is on ASU's faculty, while Plaintiff D. Ladd Gustafson does not allege that he is employed by, or otherwise associated with, ASU or ABOR. FAC ¶¶ 7-8. Defendant ABOR governs Arizona's public university system and, as such, has oversight authority over ASU. FAC ¶ 9.

II. ASU's Charter Commitment to Inclusiveness and the Training.

ASU's charter states that "ASU is a comprehensive public research university, **measured not by whom it excludes, but by whom it includes and how they succeed**[.]"[1] Consistent with that charter, ASU ensures that its faculty and staff are trained not just on the mandates of antidiscrimination laws, but also on how to establish and maintain an inclusive environment to support the success of all its students, who are drawn from all around the globe and all walks of life.[2] This includes three online training modules—two focused on legal requirements (covering the topics of preventing harassment and discrimination and reporting Title IX issues) and a third focused more broadly on how to build and maintain a university community that is welcoming and supportive for students and employees from all backgrounds, experiences, and beliefs.

It is the third of these modules—the "Inclusive Communities" training—that Plaintiffs challenge. Plaintiffs label that Training as "DEIB" training (standing for "diversity, equity, inclusion, and belonging"). Using selective quotations from mostly optional training materials, they contend that the Training violates Section 41-1494 by referring to certain words, ideas, or concepts. But as Plaintiffs concede, Section 41-1494 does not prohibit training that simply

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[1] *ASU Charter, mission and goals*, New Am. Univ., Ariz. State Univ., https://newamericanuniversity.asu.edu/about/asu-charter-mission-and-goals (last visited June 28, 2024) (emphasis added).

[2] *Facts and figures*, Ariz. State Univ., https://www.asu.edu/about/facts-and-figures (last visited June 28, 2024).

discusses those concepts or ideas; "Section 41-1494 permits the state and its entities, such as ASU, to *present* such ideas—that is, to teach *about* them." FAC ¶ 4 (emphasis in original).

Plaintiffs' description of the Training fails to grapple with its introductory text, which makes clear that employees are encouraged to discuss and question the concepts and ideas it discusses.[3] *See, e.g.*, FAC Ex. A at ASU000004 ("This training, however, is not intended to create discomfort or stress for anyone, especially as it relates to one's race, gender, sexuality or economic status. We do hope that this training will be enjoyable, illuminate previously unseen things, and create an opportunity for you to ask questions.") Further, while Section 41-1494 says that such trainings cannot convey "blame or judgment on the basis of race, ethnicity or sex," the Training's very purpose is for the university community to be *more* welcoming, not to make anyone feel unwelcome as a result of who they are or what they believe. *See, e.g.*, *id.* ("This training is not intended to imply or otherwise express that any individual is inherently racist, sexist, homophobic, or oppressive. We reject the notion that anyone should encounter or receive harmful treatment or be made to feel badly or guilty because of their identity, whether it is race, gender, sexuality, or other identity markers. In fact, this training is intended to extend this point.").

Nonetheless, Plaintiffs allege that the Training violates Section 41-1494 and is required for all ASU employees, who must complete the Training upon hire and then every two years afterward. FAC ¶¶ 16–17. Gustafson does not allege that he must take the Training. Professor Anderson, on the other hand, alleges that he is "required" to take the Training "as a condition of [his] employment at ASU." FAC ¶ 11; *see also* FAC ¶¶ 46–47. He alleges that he first received notice of this requirement in October 2022, and that he later received a reminder to complete the

[3] Notably, these portions of the Training were entirely omitted from the Verified Complaint, prior to its amendment.

training. FAC ¶¶ 18–19. Anderson contends that he "viewed" the Training, FAC ¶ 21, but he does not allege that he ever completed it.

Professor Anderson further alleges that he "believe[s]" that not taking the training "could" lead to adverse employment consequences. FAC ¶ 20. He does not allege that skipping the training "would" lead to adverse consequences or that he has faced—or been threatened with—any disciplinary action or other adverse consequence for not completing the Training over the nearly two-year period since he was asked to complete it. Nor do Plaintiffs allege that any other person has faced any consequences for not taking the Training.

III. The Statute in Question.

The Legislature in 2021 enacted A.R.S. § 41-1494. It includes three main subsections.

Subsection A prohibits certain public entities from requiring employees "to engage in training, orientation or therapy that presents any form of blame or judgment on the basis of race, ethnicity or sex." Subsection B prohibits public entities from using "public monies for training, orientation or therapy that presents any form of blame or judgment on the basis of race, ethnicity or sex." And subsection C authorizes one—and only one—enforcement method: "On or before December 1 of each year the department of administration shall submit a report that includes state agencies in compliance with this section to the governor, the president of the senate and the speaker of the house of representatives and submit a copy of this report to the secretary of state."

IV. The First Amended Complaint.

Plaintiffs' First Amended Complaint asserts two claims against ABOR. Count 1 claims that "ABOR has violated and is continuing to violate A.R.S. § 41-1494(A) by requiring its employees to take the [Training]." FAC ¶ 45. Count 2 claims that "ASU used taxpayer money to create, implement, conduct, and provide [the Training]," in violation of A.R.S. § 41-1494(B). FAC ¶ 52. Plaintiffs do not identify any particular expenditure, tax, or fund (nor any specific amount of

public funds) that they challenge. They allege only that state taxpayers "are liable to replenish" ASU's allegedly "unlawful expenditures of funds." FAC ¶¶ 33, 36. Under both counts, Plaintiffs seek declaratory and injunctive relief. FAC ¶¶ 34–36, 48, 57.

Legal Standards

On a motion to dismiss for failure to state a claim, a court presumes the veracity of only well-pled factual allegations; "mere conclusory statements are insufficient." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008). Nor does the court "accept as true allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 ¶ 4 (App. 2005).

Argument

Plaintiffs' two claims fail, for three reasons. *First*, both Counts 1 and 2 fail because Plaintiffs lack a private right of action under Section 41-1494. *Second*, Count 1 also fails because Plaintiffs lack standing to bring this claim. *And third*, Count 2 also fails because Plaintiffs lack taxpayer standing to challenge either preexisting, incidental payroll costs or unspecified taxes collected by the state and then distributed, at some point, to ABOR (or ASU).

I. Plaintiffs lack a private right of action to bring either Count 1 or Count 2.

Section 41-1494 does not authorize private rights of action, either expressly or impliedly.

A. Section 41-1494 does not grant an express private right of action.

To determine whether a private right of action exists, courts "begin with the statutory language, which is 'the best and most reliable index of its meaning.'" *Burns v. City of Tucson*, 245 Ariz. 594, 596 ¶ 6 (App. 2018) (citation omitted). This language may provide for a right of action either expressly or impliedly. *Id.* Here, nothing in A.R.S. § 41-1494 provides for a private right of

action expressly. Instead, and as discussed in more detail below, it expressly provides for a different enforcement mechanism: a report to the Governor and Legislature. A.R.S. § 41-1494(C).

B. Section 41-1494 does not grant an implied private right of action.

Nor did the Legislature create an *implied* private right of action in Section 41-1494. In deciding whether a statute implicitly creates a private right of action, the key issue is whether the *legislature intended* to allow the remedy. As the Court of Appeals explained in *Guibault v. Pima County*, 161 Ariz. 446 (App. 1989), "the question we must consider is . . . whether, in imposing this new obligation on [the government], [the Legislature] intended to provide any remedy to those who may be injured by the [government]'s violation of its obligation under the statutes, be it administrative review, private right of action, or otherwise." *Id.* at 448 (emphasis omitted). "[A]ppellate courts have implied the existence of a private right of action when doing so is consistent with 'the context of the statutes, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law.'" *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 194 ¶ 6 (App. 2014) (citation omitted). This test aims to determine the *Legislature's intent*; it is "not a license for the judicial branch to read into a statute something that might be perceived as better effectuating a statute's spirit and purpose." *Id.*

Here, Section 41-1494 does not create an implied private right of action, for several reasons.

***First,* by including another enforcement mechanism in the statute—but *not* a private right of action—the Legislature confirmed that it did not create a private right of action.** "Where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 196 ¶ 13 (citation omitted). That restraint is particularly important for actions against public entities (like ABOR) because, in creating rights "against itself, [the state] is not bound to provide a remedy in the courts . . . , however mistaken its exercise." *Guibault*, 161 Ariz. at 448 (quoting *Allen v. Graham*, 8 Ariz. App. 336, 339 (1968)).

Here, the Legislature specifically created a reporting mechanism that enables *the Legislature and Governor*—not the courts—to monitor and ensure compliance: "On or before December 1 of each year *the department of administration shall submit a report* that includes state agencies in compliance with this section *to the governor, the president of the senate and the speaker of the house of representatives and submit a copy of this report to the secretary of state*." A.R.S. § 41-1494(C) (emphasis added). The Legislature did not provide any other enforcement mechanism—it did not, for example, allow the Attorney General to enforce the statute, or (as relevant here) allow private litigants to bring causes of action for relief. Because the Legislature authorized only one enforcement mechanism, the court should not "read[] others into it." *McNamara*, 236 Ariz. at 196 ¶ 13; *see Guibault*, 161 Ariz. at 450.

A similar case also brought against ABOR supports this result. There, a statute "require[d] the preparation of a report for submission to the legislature" concerning ABOR's employment practices. *Lancaster v. Ariz. Bd. of Regents*, 143 Ariz. 451, 457 (App. 1984). "Because [the statute] creates only a right, vested in the legislature alone, to receive a report on a particular subject by a specified date," the court explained, "[t]he statute 'limits a thing to be done in a particular mode' and thus negates any other mode or remedy by private parties." *Id.* The court reiterated: "Plainly negated through the specification of a strictly legislative right is a private right of action by employees of the state colleges and universities in the courts of Arizona predicated upon the act." *Id.* So too here.

***Second*, the Legislature's intent to *not* authorize a right of action under Section 41-1494 is confirmed by a similar bill that was enacted at the same time—House Bill 2898—which *did* include a right of action.** Like the bill that added Section 41-1494, House Bill 2898 prohibited, in other contexts, the "use of public monies for instruction that presents any form of blame or judgment on the basis of race, ethnicity, or sex" or the "instruction in" or teaching of related

concepts. 2021 Ariz. Legis. Serv. ch. 404, § 21.[4] But unlike the bill that added Section 41-1494, House Bill 2898 *did* authorize a right of action: "[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." *Id.* (codified at A.R.S. § 15-717.02(E)). "The legislature obviously knows how to provide for [certain] rights of action [in statutes] when it chooses to do so." *McNamara*, 236 Ariz. at 195 ¶ 11. It did not do so in Section 41-1494, even though it did so for another bill, passed at the *same time*, by the *same Legislature*, about the *same subject*.[5] This negates any suggestion that the court should infer that the Legislature intended for a private right of action under Section 41-1494.

***Third*, had the Legislature meant to create a private right of action under Section 41-1494, it would have done so expressly—as it has repeatedly done throughout the same chapter that contains this statute.** Section 41-1494 falls within title 41 (titled "state government"), chapter 9 (titled "civil rights"). Much of this chapter imposes obligations on public entities, such as requirements for places of public accommodation. *See, e.g.*, A.R.S. §§ 41-1442–44. To enforce *these* obligations, the Legislature expressly created private rights of action, for example authorizing "[a]ny person" to "file a complaint with the superior court" to remedy "an alleged discriminatory act contrary to article 2 or 3 of this chapter." A.R.S. § 41-1471(A)–(B); *see also* A.R.S. § 41-1472 (authorizing remedies, including "damages," "[c]ourt costs," "injunction[s]," and "attorney fees").

In fact, nearly *all 11 articles within chapter 9* provide for at least some private right of action.

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[4] House Bill 2898 was held to be invalid on other grounds. *Ariz. Sch. Bds. Ass'n v. State*, 252 Ariz. 219, 229–30 ¶ 46 (2022).

[5] Further proof can be found in a DEIB training bill before the most recent Legislature that would have explicitly authorized a private right of action: "An employee of a public entity who is required to participate in a diversity, equity and inclusion program may bring an action against the public entity. If the employee demonstrates that the public entity violated this section, the employee is entitled to injunctive relief." S.B. 1005, 56th Leg., 2nd Reg. Sess. (Ariz. 2024), available at https://www.azleg.gov/legtext/56leg/2R/bills/SB1005S.pdf. That bill failed to pass.

See, e.g., A.R.S. §§ 41-1481(D) (private right of action for unlawful employment practices), -1482(A) (for recordkeeping violations), -1491.31(A) (for "alleged discriminatory housing practice[s]"), -1492.08(A) (for discrimination by public entities), -1493.01(D) (for laws burdening free exercise of religion), -1495.02(A) (for discrimination against religious organizations). The Legislature's failure to include such a private right of action in Section 41-1494 reflects its deliberate choice not to allow one. *See McNamara*, 236 Ariz. at 195–96 ¶ 11. "The Legislature obviously knows how to provide for private rights of action in [a specific] context when it chooses to do so. . . . [Courts] will not 'infer a statutory remedy into the [relevant] statutes that the legislature eschewed.'" *Id.* (quoting *Pacion v. Thomas*, 225 Ariz. 168, 170 ¶ 12 (2010)).

***Fourth*, other provisions of the bill that enacted Section 41-1494 confirm that the Legislature meant to create only one method of enforcement—a reporting requirement.** In the act that added Section 41-1494's reporting requirement, the Legislature added three other provisions as well—all of which included a similar reporting requirement. *See* 2021 Ariz. Legis. Serv. ch. 427 (H.B. 2906) §§ 1 (codified at A.R.S. § 9-481(H)), 2 (codified at A.R.S. § 11-661(D)), 3 (codified at A.R.S. § 15-1473(F)). No provision also authorized a private right of action. *See id.* These three other provisions likewise confirm that the Legislature meant to create only a reporting requirement, not a private right of action.

Given all this, Plaintiffs cannot establish that the Legislature intended to benefit them with a private right of action. As a non-employee of ASU, Gustafson is in no way a "member[] of 'the class for whose especial benefit' [Section 41-1494] [was] adopted." *Chavez v. Brewer*, 222 Ariz. 309, 318 ¶ 28 (App. 2009). He alleges only that "[he] is a resident of Arizona and a state taxpayer." FAC ¶ 8. That generalized interest is not enough. *See McNamara*, 236 Ariz. at 195 ¶¶ 8–9 (holding that a group of electors who sued to enforce campaign-finance laws were not "members of a class of electors for whose 'especial benefit' [the relevant statute] was enacted" in part because "campaign

finance laws are intended to benefit the voting public").

And the most that Professor Anderson can claim is that he is an "incidental beneficiar[y]" of the statute's reporting requirement. *McCarthy v. Scottsdale Unified Sch. Dist. No. 48*, 409 F. Supp. 3d 789, 820 (D. Ariz. 2019) (citing *Lancaster*, 143 Ariz. at 457; *Guibault*, 161 Ariz. at 448). In *Lancaster* for example (a case also brought by ASU employees against ABOR, where the only enforcement mechanism provided in the statute was also a report to the Legislature), the court of appeals held that "the employees of Arizona's colleges and universities" were only "incidental beneficiaries of the contemplated report." 143 Ariz. at 457. The same is true here. Like in *Lancaster*, "the enactment's specification that the report was to be made to the legislature for legislative implementation necessarily precludes private judicial enforcement by third persons who are incidental beneficiaries of the contemplated report," including "the employees of Arizona's colleges and universities"—just like Professor Anderson. *Id.* And while Professor Anderson may believe that providing him another enforcement mechanism might help give effect to the statute, "the judicial branch" does not have a "license . . . to read into a statute something that might be perceived as better effectuating a statute's spirit and purpose." *McNamara*, 236 Ariz. at 194 ¶ 6.[6]

In sum, the Legislature did not "intend[] to provide [a private right of action] to those who may be injured by [ABOR]'s violation of its obligation under [Section 41-1494]." *Guibault*, 161 Ariz. at 448. Plaintiffs therefore lack a private right of action for Counts 1 and 2.[7]

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[6] Because Arizona precedent clearly forecloses an implied private right of action here, this Court need not look to federal precedent as a guide on the issue. However, were this case for some reason to be considered by the appellate courts, ABOR hereby preserves its right to urge adoption of the federal test for implied rights of action, which is even stricter than Arizona's test. *See McCarthy*, 409 F. Supp. 3d at 820 (citing *Chavez*, 222 Ariz. at 317–18 ¶¶ 20–28).

[7] Without a private right of action, the Declaratory Judgment Act does not give Plaintiffs a right to sue either. *See Ansley v. Banner Health Network*, 248 Ariz. 143, 151 ¶ 31 (2020) ("The [plaintiffs] also argue that the Declaratory Judgment Act, A.R.S. § 12-1831, provides a cause of action . . . . [A]lthough the Act provides a procedural mechanism to mount a [particular] challenge, it cannot create a private right of action to do so.").

II. Count 1 must be dismissed also based on standing and ripeness.

Both Plaintiffs bring Count 1. *See* FAC ¶¶ 37–48. For this claim, "Plaintiffs [seek] a declaration that the Inclusive Communities Training violates A.R.S. § 41-1494 and an injunction that enjoins Defendant from requiring training that presents any form of blame or judgment under A.R.S. § 41-1494." FAC ¶ 48. But both standing and ripeness bar this claim.

A. Gustafson lacks standing to bring Count 1.

"[A] litigant seeking relief in the Arizona courts must first establish standing to sue." *Bennett v. Napolitano*, 206 Ariz. 520, 525 ¶ 19 (2003). This requirement is "rigorous." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140 ¶ 6 (2005). "A plaintiff has standing to bring an action if it alleges a 'distinct and palpable injury'; a generalized harm shared by all or by a large class of people is generally insufficient." *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 423 ¶ 24 (2022) (quoting *Sears v. Hull*, 192 Ariz. 65, 69 ¶ 16 (1998)).

Here, Gustafson lacks standing under Count 1. He does not allege that he must take the Training—or even that he is an ASU employee. He alleges only that "[he] is a resident of Arizona and a state taxpayer." FAC ¶ 8. In alleging only a generalized harm shared by all Arizona taxpayers, Gustafson lacks a "distinct and palpable injury." *Mills*, 253 Ariz. at 423 ¶ 24 (citation omitted).

B. Professor Anderson's claims are not justiciable.

Similarly, based on both standing and ripeness, this Court should dismiss Professor Anderson's claim because he does not allege a past, present, or non-speculative future injury. For standing, the injury can be present or future, "actual" or "threatened," but it cannot be "merely some speculative fear." *Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986). The related (but distinct) ripeness doctrine requires a plaintiff to show that there is "an actual controversy ripe for adjudication" and that the plaintiff has "a real interest in the questions to be resolved." *Mills*, 253 Ariz. at 423–24 ¶ 25. This doctrine "reflects the judiciary's reluctance to adjudicate hypothetical

or abstract questions." *Id.* at 423 ¶ 24. A case is not ripe when the plaintiff has not "incurred an injury" and there otherwise is no "actual controversy between the parties." *Id.*

Under these standards, there is simply no "actual controversy" here.

1. Professor Anderson alleges no actual injury sufficient for standing.

Professor Anderson fails to allege that he has suffered any *past or present* injury connected to the Training. He claims only that the Training is a condition of employment and "required for all ASU employees." FAC ¶¶ 11, 19–20 (emphasis added). He does not allege that he has completed the Training or been disciplined for not doing so. Anderson just dislikes the Training. But that is not enough for standing.

The Arizona Supreme Court addressed a similar lack of injury in *Mills v. Arizona Board of Technical Registration*, 253 Ariz. at 423–25 ¶¶ 23–32. The Court held that the plaintiff lacked standing to challenge a statute authorizing the Board to conduct administrative adjudications, because the Board never exercised that authority against the plaintiff. *Id.* at 425 ¶ 31. The plaintiff was "not affected" by the adjudication statute, so the Supreme Court ruled there was no "actual controversy" for it to resolve. *Id.* So too here. Professor Anderson lacks standing because he does not allege that he is *actually affected* by the Training requirement—in fact, while Anderson contends that he "viewed" the Training, FAC ¶ 21, he does not allege that he *ever even completed it*. *See Klein*, 149 Ariz. at 123–24 (plaintiff lacked standing to challenge the use of sobriety checkpoints because he had never been stopped at a checkpoint and thus "failed to show that he was affected" by them).

Unless and until Anderson alleges that he has been harmed somehow by the Training requirement, he cannot establish standing and his claim should be dismissed.

2. Professor Anderson's allegations of potential future injury are too speculative to support standing and are not ripe for review.

Professor Anderson also fails to allege any non-speculative future harm sufficient to

establish standing or ripeness for Count 1. He alleges only that his choice not to complete the Training "*could* lead to disciplinary action against him." FAC ¶ 20 (emphasis added). But this speculative allegation of "possible future injury" cannot establish standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).[8] Rather, a "threatened injury must be certainly impending" and not merely "speculative." *Id.*; *see also Ariz. Creditors Bar Ass'n, Inc. v. State*, No. 1 CA-CV 22-0765, 2024 WL 1876307, at *2 ¶ 14 (Ariz. Ct. App. Apr. 30, 2024) (no standing where future injury is "too far removed and too speculative").

Anderson fails to allege that any such disciplinary action (that "could" occur) is certainly impending. Nor could he plausibly do so. He alleges no discipline or threat of discipline, despite choosing not to take the "required" Training, for nearly two years. Nor does he allege that ABOR has expressed any intent to discipline him—or anyone else. Anderson therefore cannot establish that he is likely to encounter discipline connected to the Training. *See Klein*, 149 Ariz. at 124 (plaintiff lacked standing because he "failed to show that he was affected" by sobriety checkpoint policy that he challenged or "that he ever would be"); *see also Mills*, 253 Ariz. at 424–25 ¶¶ 25, 31 (no standing where allegations merely reflect an "intent to do certain things in the future all of which are dependent upon future events and contingencies within control of the plaintiff" (cleaned up)). His allegations of potential future injury are thus inadequate for standing.

Professor Anderson's allegations are similarly insufficient to establish an "actual controversy ripe for adjudication." *Mills*, 253 Ariz. at 423–24 ¶ 25. The ripeness doctrine is closely related to standing, but serves a distinct prudential purpose: avoiding "premature decision[s] on . . . issue[s] that may never arise." *Brush & Nib*, 247 Ariz. at 280 ¶ 36. Under that doctrine, a case is ripe when a "present existing controversy" exists between the parties that "permits the court

[8] Arizona courts look to federal caselaw on standing and ripeness as "instructive." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 280 ¶ 36 (2019).

to adjudicate any present rights" and that does not depend on uncertain "future events and contingencies." *Mills*, 253 Ariz. at 424 ¶ 25.

There is no present controversy here. To the extent that Anderson alleges he "could" be disciplined or fired for refusing to complete the Training, *see* FAC ¶¶ 11, 20, those allegations are far too imaginary and speculative to be ripe. Anderson says he was first required to take the Training almost two years ago and was on a 90-day deadline to complete it. FAC ¶¶ 18–19. And yet he does not allege that he completed the Training or that, because of his failure to do so, he has faced—or has even been threatened with—any employment or other consequence. He also does not allege any specific facts suggesting that such future consequences are substantially likely.

Thus, like in *Mills*, any true dispute here depends on the occurrence of hypothetical and uncertain facts that are nowhere in the complaint, including ABOR's exercise of discretion regarding the Training. *See* 253 Ariz. at 425 ¶ 31 ("[B]ecause the Board has not initiated formal proceedings, Mills is not affected by the Board's adjudicative processes, and an actual controversy does not exist regarding this claim. That claim is speculative and should be left to be developed by true adversaries."); *see also Brush & Nib*, 247 Ariz. at 280 ¶ 39 (claims are unripe if they "implicate[] a multitude of possible or factual scenarios" that are "imaginary" or "speculative").

To be sure, if ABOR decides to discipline Anderson in the future, his claims would be ripe at that time—but not before. Otherwise, his claims present nothing more than "hypothetical [and] abstract questions." *Mills*, 253 Ariz. at 423 ¶ 24. Such questions are not justiciable.

Count 1 therefore must be dismissed, based on both standing and ripeness grounds.

III. Count 2 must be dismissed also because Plaintiffs lack standing.

"As taxpaying residents of Arizona," Plaintiffs contend, they "have standing to enjoin the illegal expenditure of state funds." FAC ¶ 10. But taxpayer standing does not apply here.

A. Plaintiffs' allegations implicate only preexisting, incidental payroll costs—insufficient for taxpayer standing.

Arizona law allows "taxpayers generally [to] enjoin [an] illegal expenditure of taxpayer dollars." *Welch v. Cochise Cnty. Bd. of Supers.*, 251 Ariz. 519, 524 ¶ 18 (2021). This is called the taxpayer standing doctrine. But "[Arizona's courts] have never counted preexisting, incidental payroll costs as [public] expenditure[s]" sufficient to establish such standing. *Id.* at 525 ¶ 18 (citing *Henderson v. McCormick*, 70 Ariz. 19, 24–25 (1950)). And in such instances when "there has been no expenditure of funds raised by taxation and no pecuniary loss to the [public entity], the mere status [as a] resident taxpayer is insufficient to confer standing." *Tucson Cmty. Dev. & Design Ctr., Inc. v. City of Tucson*, 131 Ariz. 454, 456 (App. 1981); *accord Welch*, 251 Ariz. at 525 ¶ 20.

Here, Plaintiffs identify only preexisting, incidental payroll costs as the expenditure they wish to challenge. They allege in Count 2 that "ASU used taxpayer money to create, implement, conduct, and provide the Inclusive Communities training." FAC ¶ 33; *see also* FAC ¶¶ 52–53. But Plaintiffs fail to identify the specific expenditure that they challenge. The materials that Plaintiffs attach to their Amended Complaint, by comparison, show that those who worked on the Training were ASU employees (or students)—employees already earning a salary or other compensation for their work. *See, e.g.*, FAC Ex. A at ASU000008 (identifying the ASU "graduate students, staff and subject matter experts who will guide [faculty] through this training"); ASU000038 ("Listen to ASU faculty experts. . . ."); ASU000042 ("Listen to ASU faculty experts and graduate students. . . ."). Those employees' preexisting payroll costs are insufficient for taxpayer standing. *See Tucson Cmty. Dev. & Design Ctr.*, 131 Ariz. at 458 ("[Appellees] contend that even if no tax proceeds have been used directly, since regular city employees have performed services in furtherance of the project, this is sufficient for the court to find that the city has spent tax revenues. . . . Such evidence is insufficient to create standing."); *see also Welch*, 251 Ariz. at 524

¶ 17 ("[I]n *Dail*, the city employees tasked with negotiating the [challenged] contract surely drew public salaries. But those incidental costs were held not to suffice for standing." (discussing *Dail v. City of Phoenix*, 128 Ariz. 199, 202 (App. 1980))).

B. Plaintiffs fail to identify any specific expenditure and cannot rely on their non-specific allegation about paying taxes to the state that are then routed to ASU.

Apart from those existing payroll costs, Plaintiffs do not identify any specific expenditure to establish taxpayer standing. Generally, "to have [taxpayer] standing a taxpayer must be able to demonstrate a direct expenditure of funds that were generated through taxation, an increased levy of tax, or a pecuniary loss attributable to the challenged transaction of a municipality." *Dail*, 128 Ariz. at 202. And "to restrain an allegedly illegal expenditure of public funds, [the taxpayer] must be a contributor to the particular fund to be expended." *Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431, 433 (App. 1979).

Here, Plaintiffs fail to identify any such expenditure or tax. They do not identify a specific *tax* used to raise funds for the Training. They do not identify a specific *fund* used to pay for the Training. And they do not identify a specific *amount* spent on the Training. *Cf. Ethington v. Wright*, 66 Ariz. 382, 387 (1948) ("[P]laintiffs were financially affected by the legislation questioned in that . . . a levy had been made on their property to help raise the $50,000 appropriated . . . ."); *Dail*, 128 Ariz. at 202 ("Appellant has shown neither a direct expenditure of funds generated by taxation nor an increased levy of tax.").

Plaintiffs instead allege only that, generally, "ASU used taxpayer money" on the Training and that "taxpayers are liable to replenish" these "unlawful expenditures of funds." FAC ¶¶ 33, 36. That is not enough. Plaintiffs' allegation, in fact, mimics an allegation that the Court of Appeals has already held to be insufficient for taxpayer standing. In *Smith*, 123 Ariz. at 432–33, a plaintiff sought "to justify its standing only on the basis that it is a taxpayer" and "that since it pays

taxes to the state of Arizona, and the State of Arizona in turn contributes funds to the [defendant] community college district, [the plaintiff] has standing." *Id.* at 433. But "[the Court of Appeals] d[id] not agree." *Id.* "Because the theory allowing the taxpayer to maintain a suit is based upon his equitable ownership of the fund and his liability to replenish the public treasury for an insufficiency caused by misappropriation," the court explained, that "connection of the [plaintiff] with the community college district is too remote." *Id.* So too here, with ABOR.

Plaintiffs thus fail to establish that they have taxpayer standing to bring Count 2. This claim therefore should be dismissed.[9]

Conclusion

The Court should dismiss Counts 1 and 2. And because Plaintiffs cannot allege any facts that would overcome the above defects, the Court should dismiss Plaintiffs' claims with prejudice.

Dated: July 1, 2024

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By: */s/ Thomas D. Ryerson*

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[9] Nor does the Declaratory Judgment Act independently give Plaintiffs standing to sue. "Arizona law grants claimants a broad remedial right to seek declaratory relief regarding [a legal dispute] . . . only if . . . the claimant's rights, status or legal relations are affected by the [dispute]." *Welch*, 251 Ariz. at 526 ¶ 22 (cleaned up) (citation omitted).

Certificate of Good-Faith Consultation

Pursuant to Arizona Rule of Civil Procedure 7.1(h), 11, and 12(j), undersigned counsel hereby certifies that on June 26, 2024, counsel for Defendant Arizona Board of Regents participated in a videoconference with counsel for Plaintiffs Owen Anderson and D. Ladd Gustafson. During this videoconference, the parties discussed whether the issues identified in the foregoing Motion to Dismiss could be resolved by an amendment to the First Amended Complaint. The parties were unable to come to an agreement.

/s/ Thomas D. Ryerson

Original of the foregoing efiled with the Maricopa County Superior Court and served on the following parties at AZTurbocourt.gov this 1st day of July, 2024:

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