SUPREME COURT OF ARIZONA

ARIZONA BOARD OF REGENTS, Petitioner, v. OWEN ANDERSON, Respondent.	Arizona Supreme Court No. CV-26-0012-PR Court of Appeals Division One No. 1 CA-SA 25-0007 Maricopa County Superior Court No. CV2024-05713

AMICUS CURIAE BRIEF OF THE STATE OF ARIZONA IN SUPPORT OF NEITHER PARTY

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INTRODUCTION & INTERESTS OF AMICUS CURIAE

Whether the legislature has created a private right of action against the State and its subdivisions—and how courts go about answering that question—implicates important constitutional concerns and statutory interpretation issues of statewide importance beyond the scope of this case. Accordingly, the State files this as-of-right brief under ARCAP 16(b)(1)(B).

ARGUMENT

I. The notion of an implied private right of action implicates cross-cutting interpretive and constitutional principles.

The so-called "implied private right of action" is a bit of a statutory-interpretation platypus in that it implicates several cross-cutting presumptions and considerations, all of which bear on the issue presented.

To start, the question of whether to imply a private right of action from statutory text implicates the "omitted-case canon" and related precedent that "[w]hen the legislature has specifically included a term in some places within a statute and excluded it in other places, courts will not read that term into the sections from which it was excluded." *Est. of Dominguez v. Dominguez*, 567 P.3d 81, 86 ¶ 19 (Ariz. 2025) (citation omitted); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012). The legislature knows how to create an unambiguous private right of action. *E.g.*, A.R.S. § 36-668 (Under heading "Private right of action": "A protected person may bring an action in superior court for legal and equitable relief…."). And so, ordinary interpretive principles would counsel against judicial implication of that which the legislature does not express.

At the same time, the legislature also knows how to disclaim a private right of action and has repeatedly done so. *E.g.*, A.R.S. § 17-255.04(C) ("This article does not create any express or implied private right of action and may be enforced only by this state."); A.R.S. § 44-1376.01(B) ("No private right of action is authorized under this subsection."); *see also, e.g.*, A.R.S. §§ 13-1426(I), 15-1911(J), 20-461(D), 20-469.01(C), 41-1444(D), 42-5404(A)-(B), 44-2124, 44-7157(D). As this Court has long recognized, "fundamental is the presumption that what the Legislature means, it will say." *Padilla v. Indus. Comm'n*, 113 Ariz. 104, 106 (1976). But in this context, where the legislature has spoken in both directions, the meaning to attribute to legislative silence (if any) is not immediately obvious.

Also relevant is the "presum[ption] that the Legislature knows the existing law when it enacts or modifies a statute." *State v. Brown*, 577 P.3d 14, 25 ¶ 51 (Ariz. 2025) (citation omitted). For decades, this Court has indicated that when determining whether a private right of action exists, courts will "consider the context of the statute, the language used, the subject matter, the effects and consequences, and the spirit and purpose of the law." *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 575 (1974); *see Transamerica Fin. Corp. v. Super. Ct. in & for Maricopa Cnty.*, 158 Ariz. 115, 116-17 & n.1 (1988). That *Sellinger/Transamerica* line of cases appears to establish a multi-factor test that puts statutory language on equal footing with practical consequences and the law's purpose, without more specificity or guidance for lower courts about how to prioritize or balance those factors. Thus, unlike in other interpretive contexts, *see, e.g., City of Chandler v. Roosevelt Water Conservation Dist.*, 587 P.3d 1271, 1277 ¶¶ 22-23 (Ariz. 2026), the legislature has not been on longstanding notice of any specific language to use or standard to meet regarding private rights of action.

Meanwhile, the background law regarding statutory interpretation has been shifting to a more text-focused inquiry in the modern era. It would stand to reason, therefore, that the legislature's drafting approach has shifted in kind, perhaps making its silence as to any private action a weightier data point now than it was in prior interpretive eras. In fact, the most recent Legislative Drafting Manual acknowledges that courts "first look to a statute's plain language to determine its meaning" and will not go beyond that when "a statute is clear and unambiguous." Arizona Legislative Bill Drafting Manual at 46, § 4.18 (2025–2026) (citing 2023 and 2024 precedent).

Evaluating whether a statute impliedly creates a private right of action implicates other statutory and constitutional principles, as well.

As a general matter, "[s]tatutes shall be liberally construed to effect their objects and to promote justice." A.R.S. § 1-211(B). But that rule does not apply when "such construction would be inconsistent with the manifest intent of the legislature." *Id.* § 1-211(A). Indeed, the "limitations on [a law's] reach are as much a part of the statutory purpose as specifications of what is to be done." Scalia & Garner, *supra*, at 168. And so liberal construction provides no easy answers or analytical short cuts. *Cf. Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979) ("[T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf." (citation omitted)).

However, our Constitution's separation of powers does provide important limitations on statutory construction that are relevant here. *See* Ariz. Const. art. III; *see also Mecham v. Gordon*, 156 Ariz. 297, 300 (1988) ("Nowhere in the United States is [the separation of powers] more explicitly and firmly expressed than in Arizona."). Pursuant to that fundamental separation-of-powers principle, courts cannot rewrite statutes or "enlarge the meaning of [statutory language] … [to] conform to their own peculiar sociological and economic views." *Padilla*, 113 Ariz. at 106. It is the legislature's job to make policy about how statutes are best implemented, including whether a private action is appropriate.

Accordingly, courts must not get lost in a free-floating "search for what the legislature 'would have wanted,'" which is "philosophically indefensible as violating the separation of powers." Scalia & Garner, *supra*, at 95, 349-50. Rather, the primary focus should remain on what the legislature decided, as reflected in the text it enacted, and not "an assumption about the legal drafter's desires." *Id.* at 56.

This is particularly true when it comes to "suits [that] may be brought against the state" because the legislature has sole authority to "direct by law in what manner and in what courts" such actions can proceed. Ariz. Const. art. IV, pt. 2, § 18. Our Constitution "expressly assigns state liability matters … to the legislature," *Redgrave v. Ducey*, 493 P.3d 878, 883 ¶ 20 (Ariz. 2021), and thus "confers upon the legislature a power to control actions against the state that it does not possess with regard to actions against or between private parties," *Clouse ex rel. Clouse v. State*, 199 Ariz. 196, 203 ¶ 24 (2001).

That constitutional assignment heightens the separation of powers considerations when courts analyze whether to imply a private right of action against the government. Given that such private actions implicate numerous policy considerations—including as to the public fisc—the legislature presumably would speak clearly when that's what it intends to create. *See* A.R.S. § 1-254; *cf.* 2025–2026 Bill Drafting Manual at 56, § 4.31 ("In every instance it is important to consider whose direct and collateral rights and duties, including the state's rights, may be affected by the bill.").

Finally, this case raises questions about the Court's modern framework for statutory interpretation, including how to reconcile that framework with the *Sellinger/Transamerica* line; the meaning of legislative silence and when textual ambiguity exists in this context; and the analytical order of operations for an inquiry that historically has been focused less on text than what can be judicially implied based on non-textual factors.

In light of these observations, the State offers its perspective on how the Court might provide clarity moving forward.

II. This Court's two-step statutory interpretation framework applies, but with additional nuance unique to this context.

This Court's modern two-step approach to statutory interpretation applies to the interpretive question of whether a statute creates a private right of action. That analysis requires additional nuance, however, to account for the cross-cutting principles and considerations in this context.

A. Whether the legislature created a private right of action to enforce a statute is a statutory interpretation question.

To begin, the State addresses two threshold points about the proper analytical framework. First, arguing that the Court's two-step statutory interpretation test does not apply, Anderson asserts that the present "inquiry is about who can sue—not about what the statutory text means." Pet. at 9; *see also* Anderson Suppl. Br. at 7-9. That's mistaken.

The "who can sue" inquiry is a standing question about whether a litigant has a judicially redressable injury—which assumes there's an action to bring in the first place. Whether *any* private litigant can sue at all, however, is a statutory interpretation question. "Put another way, standing involves 'who' may assert a cause of action, while implied private right of action cases involve the entirely different question of whether the cause of action itself exists." Caroline Bermeo Newcombe, *Implied Private Rights of*

Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute, 49 Loy. U. Chi. L.J. 117, 121-22 (2017); *see In re Bernard L. Madoff Inv. Sec. LLC*, 721 F.3d 54, 68 (2d. Cir. 2013) ("[T]he question of who may assert a right of action is presented ordinarily only if a right of action has been found to exist.").

Whether the legislature created a private right of action is no less a statutory interpretation question than the meaning and application of a statute of limitations, *e.g.*, *City of Tucson v. Clean Channel Outdoor, Inc.*, 209 Ariz. 544, 547-48, 553-54 ¶¶ 8, 11-12, 38 (2005); the identification and meaning of elements of proof, *e.g.*, *State v. Lara*, 240 Ariz. 327, 328 ¶ 7 (App. 2016); or what statutory remedies are available to the plaintiff, *e.g.*, *State ex rel. Horne v. AutoZone, Inc.*, 229 Ariz. 358, 362 ¶¶ 18-19 (2012). Indeed, both *Sellinger*, 110 Ariz. at 575, and *Transamerica*, 158 Ariz. at 116, characterize the private-right-of-action inquiry as one of statutory interpretation.

Second, Anderson asserts that "[o]nly where the Legislature clearly intended to deny a private remedy will courts refuse to imply one." Pet. at 11. Anderson's proposed presumption does not exist and would be improper to adopt. For starters, that nearly per se rule to judicially imply private rights of action would render superfluous every instance where the legislature expressly created one. Relatedly, Anderson's proposed presumption fails to grapple with this Court's refusal to "add [words] to the statute that the legislature did not include," especially when the legislature "knows how to address [the issue] when it wishes to do so." *Wilks v. Manobianco*, 237 Ariz. 443, 447 ¶ 13 (2015); *see AutoZone, Inc.*, 229 Ariz. at 362 ¶¶ 18-19 ("It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); *see also* 2025–2026 Bill Drafting Manual at 46, § 4.18 ("The goal of statutory drafting is to be clear and unambiguous….").

Citing *Hayes v. Continental Ins.*, 178 Ariz. 264, 273-74 (1994) in support, Anderson seems to conflate whether the legislature created a statutory private right of action with whether the legislature abrogated a common law right of action. But those are distinct legislative actions and distinct judicial inquiries. *See* A.R.S. § 36-601.01(J) ("This law does not create any new private right of action nor does it extinguish any existing common law causes of action."); *cf. Columbus Life Ins. v. Wilmington Tr., N.A.*, 255 Ariz. 382, 387 ¶ 24 (2023) ("[O]nce the legislature displaces common law, we shed our policy role and confine ourselves to statutory interpretation.").

If anything, *Hayes* and other abrogation cases would seem to support the opposite presumption. As those cases explain, when the legislature wants to "change[], supplement[], or abrogate[] [the common law] by statute, it must be done expressly or by necessary implication." *Gallery v. K. Hovnanian*, CV-24-0252-PR, slip op. at 6 ¶ 15 (Ariz. July 29, 2026) (citation omitted); *see also Country Mut. v. Hartley*, 204 Ariz. 596, 598 ¶ 8 (App. 2003) ("[I]f the legislature intends to deny, abrogate, or preempt [a common law action], it must clearly say so." (quoting *Hayes*)). In other words, courts require a clear statement before interpreting a statute to legislatively change the common law status quo. *See also* A.R.S. § 1-201. But in this context, *judicial implication* of a new statutory private right of action is what would change the status quo, arguably supporting that a clear-statement rule should apply before courts do so.

Moreover, Anderson's asserted presumption does not account for the many reasons for legislative silence. Depending on the statute, the legislature might not have even considered the possibility of an individual trying to assert a private action. The legislature might have provided for other enforcement mechanisms and therefore found it redundant to expressly disclaim a private action. Or, for various reasons, a particular legislature might simply have followed the "general rule" to "not include an 'intent' [or] 'purpose' … section" disclaiming private enforcement. 2025–2026 Bill Drafting Manual at 46-47, § 4.18 (listing concerns with doing so). All of those circumstances would evidently fail Anderson's "clearly intended to deny" test (Pet. at 11), but none would affirmatively—much less textually—indicate that the legislature wanted to create a private action.

B. As in other contexts, here too, courts should look first to the statutory text and context.

The basic question in cases like this one is whether the legislature created a private right of action. In some cases, the plain text and statutory context may answer that question at step 1 of this Court's framework. In others, textual ambiguity may require analysis of secondary principles. But in all cases, legislative silence alone is not dispositive.

1. Many statutes unambiguously create or disclaim a private right of action; accordingly, legislative silence alone cannot be dispositive at step 1.

In many contexts, the legislature has proven it knows how to clearly create a private right of action. *See, e.g.*,

- A.R.S. § 16-1023(A) ("A candidate for public office or political party office who will appear on the ballot in this state or any citizen of this state may bring an action for digital impersonation….");

- A.R.S. § 46-455(B) ("A vulnerable adult whose life or health is being or has been endangered or injured by neglect, abuse or exploitation *may file an action in superior court against* any person or enterprise … for having caused or allowed such conduct.");

- A.R.S. § 49-407(A) ("[A] person having an interest which is or may be adversely affected *may commence a civil action in superior court on his own behalf* against the director….");

- A.R.S. § 23-805(A) ("When in the course of work in any of the employments or occupations enumerated in § 23-803, personal injury or death by an accident arising out of and in the course of such labor, service and employment, … *the employer is liable in damages to the employee injured*….") (all emphases added).

Likewise, the legislature knows how to unambiguously foreclose a private right of action. *E.g.*, A.R.S. §§ 17-255.04(C), 44-1376.01(B), 13-1426(I), 15-1911(J), 20-461(D), 20-469.01(C), 41-1444(D), 42-5404(A)-(B), 44-2124, 44-7157(D). In either situation, the statutory text is dispositive at step 1.

Outside of those clear-cut statutes, though, it is difficult to derive any obvious meaning from legislative silence precisely because the legislature has often spoken clearly in both directions. Nor is there any clearly established background principle specific to private rights of action that courts can presume the legislature is aware of when it declines to expressly create or disclaim a private right of action. *E.g.*, *City of Chandler*, 587 P.3d at

1275-76 ¶¶ 13-16 (requiring "express statement that overrides the *nullum tempus* doctrine" because of longstanding common law); *Redgrave*, 493 P.3d at 880 ¶¶ 8-9 (discussing "unequivocally expressed" standard that federal courts apply to determine whether state has waived Eleventh Amendment immunity (citation omitted)).

This Court could prospectively change that interpretive dilemma by announcing a clear-statement rule that would apply only to statutes enacted after its decision. Under current law, however, the State believes that "[a] statute's silence [alone] on whether a cause of action is conferred by the statute … is not dispositive" at step 1 of the interpretation analysis. *Napier v. Bertram*, 191 Ariz. 238, 240 ¶ 9 (1998).

2. Legislative silence coupled with text and context may be dispositive in certain cases; other times, it may establish ambiguity.

That said, legislative silence paired with other textual indicators and statutory context might be dispositive at step 1 or otherwise sufficient to establish textual ambiguity. Consider three illustrative hypotheticals.

Imagine a statute expressly authorizes enforcement by the attorney general, which is textual evidence that the legislature considered enforcement mechanisms more generally. Depending on the subject matter of the statute, and absent other relevant context to create ambiguity, that specific enforcement decision paired with legislative silence as to any private right of action might very well be dispositive at step 1. Indeed, the legislature knows how to provide for enforcement by the attorney general and then provide a conditional private right of action as an alternative. *See* A.R.S. § 35-213(A)-(B) ("action to recover illegally paid public monies").

By contrast, imagine a statute that refers to a statute of limitations but does not identify who can bring the action—whether a governmental officer, agency, or a private individual. Absent other relevant subject matter or statutory context to illuminate the proper plaintiff, that statute would seem to be ambiguous as to whether it creates a *private* right of action. And the legislative silence would not tip the scale in either direction, so a step 2 analysis would be necessary. In certain cases, though, the subject matter and other statutory context might unambiguously confirm that the only logical plaintiff is (or could not be) a private person. *E.g.*, *Sunland Dairy LLC v. Milky Way Dairy LLC*, 251 Ariz. 64, 67-68 ¶¶ 10-11 (App. 2021) (references to treble damages and "liability to an individual" confirmed that "the most natural reading of" statute was that it "provide[d] for a civil cause of action").

Finally, imagine an act that creates four causes of action. And in three of the four sections of the act, the legislature expressly disclaims a private cause of action, but it includes no such disclaimer in the fourth section. Looking at the fourth section of the act in isolation, that silence alone is not dispositive. But that silence paired with the immediate statutory context may give rise to an ambiguity about whether the fourth cause of action should be interpreted differently than the prior three.

More generally, under certain circumstances, courts might properly consider legislative silence in light of relevant statutory amendments and history. *E.g.*, *Guibault v. Pima County*, 161 Ariz. 446, 449 (App. 1989) (statute had "been amended numerous times since its adoption" and thus "indicate[d] a tacit approval of existing county administrative procedures … as the sole remedy available"). Additionally, whether the legislature has provided for other enforcement or implementation mechanisms can illuminate legislative silence and indicate that no private right of action was contemplated. *E.g.*, *Lancaster v. Ariz. Bd. of Regents*, 143 Ariz. 451, 458 (App. 1984); *Gersten v. Sun Pain Mgmt., PLLC*, 242 Ariz. 301, 305 ¶ 14 (App. 2017).

Importantly though, the absence of other enforcement or implementation mechanisms is not dispositive because "when the state creates rights in individuals against itself, it is not bound to provide a remedy in the courts and may withhold all remedy or it may provide an administrative remedy and make it exclusive." *Guibault*, 161 Ariz. at 448 (citation omitted). The mere fact that a statute creates a right or generally benefits members of the public is not enough to support finding a private right of action. *Cf. Cent. Mach. Co. v. State*, 152 Ariz. 134, 141 (1986) ("Most courts now agree that an entity does not obtain an enforceable right simply because it benefits from the statute's provisions.").

Other relevant textual and statutory context includes whether the legislature addressed the sorts of issues that it would be expected to address if it meant to create a private right of action, such as: the statute of limitations, *e.g.*, A.R.S. § 46-455(K); A.R.S. § 23-805(B); A.R.S. § 16-1023(A); accrual, *e.g.*, A.R.S. § 16-1023(A); the burden and standard of proof and elements of the action, *e.g.*, A.R.S. § 46-455(L); A.R.S. § 49-407(C); A.R.S. § 3-367(C)(2); A.R.S. § 16-1023(A)(1)-(2), (K); A.R.S. § 3-367(C)(2); A.R.S. § 49-264(C); and available remedies, including what fees and costs can be awarded, *e.g.*, A.R.S. § 46-455(H)(1)-(5), (O); A.R.S. § 49-407(D); A.R.S. § 3-367(D); A.R.S. § 16-1023(A), (F), (I); A.R.S. § 49-264(A), (D). If the statute includes some of these hallmarks of a private right of action (or not), combined with other primary considerations, it could be dispositive or else give rise to ambiguity. *Cf. Gallery*, slip op. at 16-17 ¶ 46 (Timmer, C.J., dissenting) ("If the Legislature had expressly established a new cause of action … it would have defined the particular right and its elements.").[1]

None of this is to say that generally applicable canons of construction are useless. But as discussed, the analysis in this context may need to be more subject-matter specific and localized to the statutory chapter at issue in order to avoid over-interpreting (or under-interpreting) the legislature's silence. *E.g.*, *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 195-96 ¶ 11 (App. 2014) ("The legislature obviously knows how to provide for private rights of action in the campaign finance context when it chooses to do so. [So] we will not 'infer a statutory remedy into the campaign finance statutes that the legislature eschewed.'" (citation omitted)); *see also Colberg v. Rellinger*, 160 Ariz. 42, 47-48 (App. 1988) (similar observation with "Arizona contractors law").

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[1] Because this case involves only declaratory and injunctive relief, the State has not specifically discussed asserted private actions for damages from the public fisc. Such cases would implicate other important considerations that the Court need not address here. But the Court might consider noting that fact in its opinion to prevent lower courts from erroneously implying damages claims against the State or its subdivisions.

In all events, in order to find ambiguity at step 1, there must be at least two reasonable interpretations of the statute. *See City of Chandler*, 587 P.3d at 1276 ¶ 17. That means some evidence, textual or contextual—but more than mere legislative silence—points in opposite directions about whether the legislature created a private right of action to enforce the law.

3. If a statute can reasonably be read both to create or foreclose a private action, then secondary principles can be considered.

As with other issues, when a statute is ambiguous regarding the creation of a private right of action, secondary principles are appropriate to consider under step 2. But courts must apply those factors carefully in light of the acute separation of powers considerations, always remembering that creating mechanisms for public liability is an exclusive legislative function that the legislature knows how to achieve clearly. *See Mendelsohn v. Super. Ct. in & for Maricopa Cnty.*, 76 Ariz. 163, 169 (1953) (presuming that the legislature will "express its meaning in as clear a manner as possible").

To guide lower courts and anchor the inquiry in the statutory text—and for consistency with the abrogation context—this Court might consider adopting a standard that asks whether the statute "necessarily implies" a private right of action. *See Gallery*, slip op. at 6 ¶ 15; *id.* at 20 ¶ 56 (Timmer, C.J., dissenting). That test might also include whether implying a private action "leads to too many unresolved 'implications'" for judges—rather than the legislature—to address. *Sellinger v. Freeway Mobile Home Sales, Inc.*, 20 Ariz. App. 238, 242 (App. 1973), *vacated by* 110 Ariz. 573 (1974).

Similarly, courts might ask whether the text would be illogical or effectively meaningless if it were not interpreted to create a private action. One such example would be if a textual reference to "voidness under [a statute] only inures to the benefit of an individual borrower," and could not mean anything but that "a private right of action [was] contemplated by the legislature for enforcement of [a specific statutory] individual right." *Transamerica*, 158 Ariz. at 117. Or, if the statute's "spirit and purpose is to allow punishment—both criminal … and civil"—for infringements on an individual's property, then references to damages and "liab[ility] to the owner" would be meaningless if "limited to establishing criminal liability for the prohibited conduct." *Sunland Dairy*, 251 Ariz. at 68 ¶ 12.

In closing, because the two-step framework for statutory interpretation applies, courts should not continue "broadly impl[ying]" private rights of action and collapsing the step 1 and step 2 inquiries as a single multi-factor test. *Chavez v. Brewer*, 222 Ariz. 309, 317-18 ¶ 24 (App. 2009). The inquiries are distinct.

As explained, the step 1 inquiry requires more than simply asking whether "express language" addresses the issue. *E.g.*, *Burns v. City of Tucson*, 245 Ariz. 594, 596 ¶¶ 6-7 (App. 2018). Rather, other text and context remain relevant, and silence alone is insufficient to find the statute is ambiguous.

And even when appropriate to consider secondary principles under step 2, any judicial finding that the legislature created a private right of action must be rooted in the text and not merely (or primarily) policy and practical reasons.

CONCLUSION

The State thanks the Court for considering its brief.[2]

[2] Although this brief is filed to address principles that are broadly applicable in a variety of contexts relevant to the State's interests more generally—and not for the purpose of taking any particular side in this dispute—the State observes that these principles do not favor finding an implied private cause of action here. This brief takes no position on the merits of Anderson's claim that the statute has been violated, or any other issues not discussed above.

RESPECTFULLY SUBMITTED this 7th day of August, 2026.

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