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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Arizona law forbids state entities from requiring any employee to take a trainsing session that includes race-based "blame or judgment." A.R.S. § 41-1494. Petitioner Owen Anderson is an ASU Professor. ASU requires him, as a condition of his employment, to engage in a training program that presents race-based blame or judgment. Plaintiff D. Ladd Gustafson is a taxpayer who's required to pay for it.

Plaintiffs sued the Arizona Board of Regents ("ABOR"), which governs ASU, to enforce Section 41-1494. In defense, ABOR argued that Section 41-1494 gives Anderson no private cause of action and that Gustafson lacks taxpayer standing.

Arizona courts determine whether someone has an implied cause of action by using this Court's test from *Transamerica Financial Corp. v. Superior Court*, 158 Ariz. 115 (1988). Yet the court below, without even citing *Transamerica*, held that Anderson has no cause of action.[1]

Pursuant to ARCAP 23, Plaintiffs/Petitioners seek this Court's review. Review is warranted because the Court of Appeals committed reversible legal error on a matter of statewide importance involving critical civil-rights safeguards under a statute expressly enacted to protect public employees and taxpayers. If allowed

[1] The Superior Court also said Gustafson lacks taxpayer standing because he can't prove that the illegal training affects public expenditures.

to stand, the decision—which disregards this Court's binding precedent and directly conflicts with decades of Court of Appeals decisions—would broadly eliminate private causes of action whenever a statute does not expressly create one.

BACKGROUND

The Legislature enacted Section 41-1494 in 2021 to prohibit government entities from requiring public employees to participate in any training, orientation, or therapy programs that assign "blame or judgment" on the basis of race, ethnicity, or sex. The statute also prohibits the use of taxpayer funds for such programs. It defines "blame or judgment" to include concepts such as: that an individual is responsible for the actions committed by other members of that individual's race, ethnicity, or sex; or should feel psychological distress because of his or her demographic characteristics; or that meritocracy is inherently racist or sexist.

Despite these clear prohibitions, ASU requires its employees to take a course titled "Inclusive Communities," that presents the very concepts Section 41-1494(D) forbids. *See* Appendix ("App.") at 19 ¶ 5. ASU mandates this training as a condition of employment—upon hire and again every two years—for all ASU faculty and staff. *Id.* ASU funds this training with taxpayer dollars. *Id.* ¶ 6.

Petitioner Anderson is a tenured ASU faculty member. App. at 20 ¶ 11. Plaintiff Gustafson is a state taxpayer, whose tax dollars are used to pay for the

training. *Id.* ¶ 8 Because the "Inclusive Communities" training includes unlawful "blame or judgment" material, Plaintiffs brought this action seeking declaratory and injunctive relief.

ABOR moved to dismiss, claiming that Section 41-1494 gives Anderson no private right of action. The trial court denied ABOR's motion, finding that the statute does create an implied cause of action for Professor Anderson in his capacity as an employee. (It also dismissed Gustafson for lack of standing, as discussed below, Section II.)

ABOR then filed a special action in the Court of Appeals challenging the denial of its motion to dismiss. Without oral argument, that court accepted special action jurisdiction and reversed, holding that because Section 41-1494 does not expressly provide a private right of action, it cannot be enforced through an implied cause of action.

That erroneous decision—rendered without even citing the governing case, *Transamerica*—not only contravenes this Court's binding precedent and decades of consistent decisions of the Court of Appeals, but also effectively eliminates any implied cause of action whenever a statute lacks express enforcement language. If allowed to stand, the decision will leave Arizonans without meaningful redress when their statutory rights are violated, and let government agencies disregard Section 41-1494 with impunity, free from any realistic prospect of enforcement.

This Court should grant review and reverse.

ISSUE PRESENTED FOR REVIEW

1. Did the Court of Appeals err by failing to apply the factors this Court set out in *Transamerica* when it concluded that Section 41-1494, which expressly protects public employees and taxpayers, provides no implied private right of action?

ISSUE PRESENTED TO BUT NOT DECIDED BY THE COURT OF APPEALS

1. Does Plaintiff Gustafson, who is a state taxpayer with an equitable ownership of taxpayer resources, have standing and an implied cause of action under Section 41-1494, which prohibits the use of taxpayer funds for "blame and judgment" trainings?

REASONS FOR GRANTING THIS PETITION

I. The Court of Appeals erred by failing to apply the *Transamerica* factors and illogically holding that, absent *express* statutory language, Section 41-1494 cannot give rise to an *implied* private right of action.

For at least half a century, this Court and lower courts have recognized implied private rights of action where statutes don't expressly create them. In *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576 (1974), for instance, this Court said consumers could sue for fraud under the Consumer Fraud Act, even though the Act didn't expressly create a cause of action, because the language the Legislature used made it clear that that was the Act's intent, and because without a private right of action, "the widespread economic losses that

result from deceptive trade practices" would "remain uncompensable." *Id.* Since then, courts have inferred causes of action in many other statutes. In fact, Arizona law "more broadly implies" private causes of action than does federal case law. *Chavez v. Brewer*, 222 Ariz. 309, 317-18 ¶ 24 (App. 2009).

This Court articulated the test for determining whether a statute implies a private right of action in *Transamerica*, directing lower courts to recognize such a right when the statute's context, language, subject matter, effects, consequences, and overall spirit and purpose support it. 158 Ariz. at 116. That multi-factor framework has never been overruled, remains controlling law, and has been applied in many cases since.

But here, the Court of Appeals ignored it entirely. Instead, that court limited its inquiry to the absence of *express* statutory language. And it relied on *State ex rel. Ariz. Dep't of Revenue v. Tunkey*, 254 Ariz. 432 (2023)—a case having nothing at all to do with implied rights of action—to deny or effectively abrogate that right. That was reversible legal error.

The Court of Appeals said "[t]he absence of a private right of action in the statute" proved there was no implied right of action. Op. at 5-6 ¶ 13. But as this Court said in *Napier v. Bertram*, 191 Ariz. 238, 240 ¶ 9 (1998), "the legislature's silence begins, rather than ends, our inquiry" regarding whether an implied cause of action exists. *Id.* Obviously "[a] statute's silence on whether a cause of action

is conferred … is not dispositive," since that's just what "implied" means. *Id.* Rather, the central question is always whether there is reason to conclude that such right exists even though the statute is silent, or whether, on the other hand, "legislative silence precludes recognition" of such a right. *Id.*

The whole point of an *implied* cause of action is that it is *implicit*. Yet the Court of Appeals simply held that because the statute contains no *explicit* right of action, no such right exists. That reasoning is both fallacious and contrary to this Court's instructions. Most obviously, it's contrary to *Napier* and *Transamerica*, which says courts are "require[d]" to consider many factors—context, subject matter, consequences, and purpose, and other things—to decide that question.

Yet despite this clear instruction, and despite the fact that *Transamerica* was fully briefed by both parties, the Court of Appeals entirely ignored it, and used its own test. It reasoned that, absent linguistic ambiguity in a statute, or absurd results flowing from a statute's express language, a court's inquiry "begins and ends with the plain meaning of the legislature's chosen words." Op. at 4 ¶ 9 (quoting *Pima Cnty. v. State*, 258 Ariz. 11, 15-16 ¶ 23 (2024)). That, of course, means that if a statute does not *expressly and unambiguously* create a cause of action, it creates none. In other words, the court below did just what this Court forbade in *Napier*: it "[began] and end[ed]" its analysis, *id.*, by treating legislative silence as dispositive.

But by that reasoning, there could never be *any* implied cause of action.

The court below erred in applying the test for *ambiguity* instead of the test for *implication*. Those, however, are two entirely different legal concepts.[2]

Tunkey, the case on which the lower court rested its decision, doesn't address implied private rights of action at all, or purport to supply the framework for such an inquiry. Instead, it construed Section 42-5028, which imposes liability on businesspeople who fail to remit taxes collected from customers to cover transaction privilege taxes. *Tunkey*, 254 Ariz. at 433 ¶ 1. The words "private" and "right of action" don't even occur in *Tunkey*. Instead, the question was about who is the "responsible person" for remitting taxes. *Id.* at 434 ¶ 9. That was a question of *ambiguity*. It had nothing to do with *implication*.

Nor does the *Tunkey* concurrence support what the court below did here. That concurrence cautioned against elevating legislative intent above statutory text through an interpretive approach that "stitch[es] together disparate statutes and interpretations of different provisions from other jurisdictions." *Id.* at 439-40 ¶ 35 (Bolick, J., concurring.). It said courts shouldn't treat legislative intent as the "primary goal" of statutory construction, *id.* at 437 ¶ 23, and that when parties seek

[2] *Ambiguity* means "open to multiple reasonable interpretations." *Glazer v. State*, 244 Ariz. 612, 614 ¶ 12 (2018). *Implied* or *implicit*, by contrast, means something is created or communicated in an indirect way. Something can be implied without being ambiguous (putting a flag at half-staff *implies* that someone died, but isn't ambiguous) and something can be ambiguous without implication.

a statute's meaning, courts should choose "plain meaning over legislative intent when the two diverge." *Id.* at 438-39 ¶ 32.

But the issue here is not choosing between competing meanings of statutory text (*i.e.*, ambiguity). It's whether the statute's text, context, and purpose support the conclusion (*i.e.,* implication) that a law governing conditions of employment by the state can be enforced by a state employee.

Answering that question requires applying the *Transamerica* test, which says courts consider the statutory text, but also the context, subject matter, effects, consequences, and spirit and purpose to determine whether a person affected by a statutory violation can sue to enforce the statute, or not.

Arizona courts have applied that test for decades by asking what the statute implies about enforceability.

For instance, in *Douglas v. Governing Bd. of Window Rock Consolidated School District No. 8*, 206 Ariz. 344 (App. 2003), the state gave public schools money to establish a performance-based teacher pay system. *See id.* at 346 ¶ 2. The school district failed to pay the teachers with this money, and they sued. *Id.* ¶ 3. The question was whether the statute, by providing funding and mandating that it be spent for teacher compensation, implicitly entitled them to sue the district for noncompliance. *Id.* at 346–48 ¶¶ 4-13. The court said yes, because the statute set terms of employment, thus creating legally enforceable rights for employees, and

"without a private cause of action … there is no way of holding the school districts accountable for the misappropriation of these funds." *Id.* at 347 ¶ 9. There was no *ambiguity* in the statute—there was just silence. *Id.* at 346 ¶ 5. But that silence was filled in by the *Transamerica* factors.

Here, the Court of Appeals' substitution of *Tunkey*'s ambiguity test for *Transamerica*'s implication test effectively restricts implied causes of action in an unprecedented way. Such a substitution would mean that an implied cause of action could only exist where legislative silence itself somehow creates statutory ambiguity. In practice, that would mean implied causes of action could never exist at all. But there was no *ambiguity* in *Douglas*, or in *Chavez*, 222 Ariz. at 318 ¶ 25, or in *Sellinger*, 110 Ariz. at 576—just silence. That's why this Court said in *Napier* that "the legislature's silence begins, rather than ends, our inquiry." 191 Ariz. at 240 ¶ 9. That inquiry is about *who can sue*—not about what the statutory text means.

Those two things might overlap sometimes, and *Tunkey* rightly says that a statute's plain meaning prevails over legislative intent when the two conflict. 254 Ariz. At 437-40 ¶¶ 23-36. But there's no such conflict here. Rather, the statute's text is *silent* on whether an affected individual can sue under the statute. That's a question for the *Transamerica* test—not the *Tunkey* rule.

This point is critical because it is quite common for statutes that set conditions of employment or protect consumers to be enforceable by affected employees or consumers. *See, e.g., Douglas, supra*; *Sunland Dairy LLC v. Milky Way Dairy LLC*, 251 Ariz. 64, 68 ¶¶ 11–12 (App. 2021); *Carder v. Cont'l Airlines, Inc.,* 636 F.3d 172, 178 (5th Cir. 2011); *Wingert v. Yellow Freight Sys., Inc.*, 50 P.3d 256, 261 (Wash. 2002). But if the court of appeals' interpretation is allowed to stand, it would effectively eliminate implied private rights of action *entirely*, implicitly overruling decades of precedent recognizing such rights, and making legislative silence the equivalent of a *prohibition* on private rights of action—which, of course, would mean that there could be no *implied* private rights of action at all.

The court below therefore erred by disregarding the *Transamerica* test and by confining its analysis to the absence of *express* statutory language. For this reason, the Court should grant review and reverse.

II. Section 41-1494 does create an implied private right of action.

The Legislature enacted Section 41-1494 to prohibit government entities from requiring public employees to participate in inappropriate and racially divisive training and orientation programs, and to prohibit the use of public funds for such programs. The statute thus expressly protects both public employees and

taxpayers.[3] Those are precisely the parties who brought this case. App. at 20 ¶¶ 7–8.

Although Section 41-1494 doesn't expressly create a private right of action, Arizona law does not require it to do so. When a statute is silent, courts must consider whether the Legislature intended to imply a private right of action by applying the factors set out in *Transamerica*: the statute's context, language, subject matter, effects and consequences, and overall spirit and purpose. 158 Ariz. at 116. Only where the Legislature clearly intended to *deny* a private remedy will courts refuse to imply one. *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 273-74 (1994).

Each factor supports recognizing an implied private right of action.

A. Section 41-1494's plain language shows that it creates an implied cause of action.

The statute's language confers *substantive* protections on *identifiable* classes. Subsection (A) provides that the State "may not require an employee" to engage in prohibited training—a protection that runs directly to individual

[3] The Superior Court held that Gustafson lacked standing because he could not show that a judgment in his favor would affect public expenditures. That is not the proper test. The relevant inquiry is whether Gustafson would be liable to replenish the government's coffers for illegal expenditures. *Rodgers v. Huckelberry*, 247 Ariz. 426, 429–30 ¶¶ 11–14 (App. 2019). Because ASU imposes the unlawful training requirement every two years, Gustafson is plainly injured and therefore has standing. This issue was not addressed below because this Petition follows Defendants' special action petition to the Court of Appeals. It is, however, squarely presented here, and the Court should resolve Gustafson's standing.

employees—and Subsection (B) prohibits the use of "public monies" for such training, protecting taxpayers as a class. Nothing in the statute prohibits private enforcement or vests exclusive enforcement authority in any public official.

Where, as here, a statute is enacted for the benefit of a specific class, courts routinely recognize an implied private right of action for that class's members. *See Chavez*, 222 Ariz. at 318 ¶ 28; *Douglas*, 206 Ariz. at 347 ¶ 6. Section 41-1494 confers direct, enforceable protections on state employees and taxpayers. But absent a private right of action, those protections will be rendered illusory. *Cf. Douglas*, 206 Ariz. at 347 ¶ 9.

B. Section 41-1494's context and subject matter support an implied cause of action.

Section 41-1494 appears in Title 41, Chapter 9—Arizona's civil rights statutes—and functions as an employee- and taxpayer-protection law. It regulates the conditions of employment and the expenditure of public funds, forbidding discriminatory practices. This mirrors statutes in which courts have recognized implied private rights of action for those the law was designed to protect. In *Chavez*, for example, the statute protected groups of voters—and thus they had the right to sue to enforce that protection. And in *Douglas*, the statute protected public school teachers—so they, too, had the right to sue.

In the court below, ABOR cited another statute, Section 15-717.02,[4] which it said showed that no private right of action exists here. That statute, which applies to K-12 schools, does indeed use language strikingly similar to Section 41-1494. But it *expressly* authorizes enforcement exclusively by the Attorney General or county attorney. *See* A.R.S. § 15-717.02(E). And no similar subsection exists in Section 41-1494. The inference is obvious: the Legislature intentionally omitted it from Section 41-1494 precisely because while Section 15-717.02 doesn't create a private right off action, the latter *does*.

C. The effects and consequences of the statute support finding an implied cause of action.

Without an implied private right of action, Section 41-1494 is effectively unenforceable. Public employees would be forced to comply with unlawful training as a condition of employment, and taxpayers would have no mechanism to prevent illegal expenditures of public funds.

Contrary to the Court of Appeals' claim, Subsection (C) does not supply an enforcement mechanism. It merely requires the Department of Administration to submit an annual compliance report regarding state agencies. But reporting isn't enforcement, and courts have repeatedly rejected the notion that provisions requiring reporting or administrative oversight somehow foreclose private

[4] This section was declared unconstitutional for unrelated reasons in *Arizona School Boards Ass'n v. State*, 252 Ariz. 219 (2022).

enforcement. *See Transamerica*, 158 Ariz. at 117; *Douglas*, 206 Ariz. at 347 ¶ 9; *McCarthy v. Scottsdale Unified Sch. Dist. No. 48*, 409 F. Supp.3d 789, 822 (D. Ariz. 2019). Again, the court below failed to mention that fact—because it failed to even mention *Transamerica*.

Here, as in *Douglas*, failing to recognize an implied private right of action would leave public employees and taxpayers with no recourse when a public employer mandates the very "blame or judgment" training Section 41-1494 prohibits. Construing the statute to foreclose enforcement would nullify its protections and produce absurd results—an outcome Arizona law forbids. *State ex rel. Flournoy v. Mangum*, 113 Ariz. 151, 152 (1976).

D. The spirit and purpose of Section 41-1494 supports an implied cause of action.

The Legislature enacted Section 41-1494 to address the coercive and divisive effects of "blame or judgment" training programs that assign moral culpability based on immutable characteristics. Legislative debate confirms that it was intended to protect both public employees from compelled ideological conformity and taxpayers from funding it.

The statute's structure reflects that intent: Subsection (A) protects employees; Subsection (B) protects taxpayers; Subsection (C) provides limited oversight. This multi-part design demonstrates a remedial purpose far broader than mere administrative reporting.

III. Mandamus relief is insufficient.

Finally, the Court of Appeals' suggestion that mandamus relief might suffice misses the mark. Mandamus lies only to compel performance of purely ministerial duties, and offers no meaningful remedy where, as here, compliance is discretionary and violations are ongoing. Mandamus is therefore neither adequate nor available to vindicate the rights Section 41-1494 was enacted to protect.

A private right of action, by contrast, is consistent with—and necessary to effectuate—the statute's purpose. It lets the very parties the Legislature sought to protect seek prompt declaratory and injunctive relief and ensures that Section 41-1494 is enforceable in practice, not merely words on paper.

RULE 21(a) NOTICE

Petitioner requests an award of attorney fees and costs on appeal pursuant to A.R.S. § 12-341; ARPSA 17; ARCAP 21 and 23(d)(4).

CONCLUSION

The Court should grant the petition and reverse the decision of the Court of Appeals.

Respectfully submitted January 29, 2026 by:

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APPENDIX INDEX

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

OWEN ANDERSON, a resident of Arizona; and D. LADD GUSTAFSON, a resident of Arizona, Plaintiffs, vs. ARIZONA BOARD OF REGENTS; an Arizona corporate body, Defendant.	Case No. CV2024-005713 **FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This lawsuit seeks declaratory and injunctive relief against the Arizona Board of Regents ("ABOR") which has used and is now using public money to prepare and disseminate mandatory faculty and staff training for its employees that presents forms of blame or judgment on the basis of race, ethnicity or sex, in violation of state law.

2. Arizona law prohibits discriminatory practices by the state, state agencies, and specifically prohibits government entities—including Arizona State University ("ASU"), from requiring its employees to participate in mandatory training programs that present any form of "blame or judgment on the basis of race, ethnicity or sex." A.R.S. § 41-1494. The statute defines "blame or judgment" by seven concepts that can be summarized as: one person or group of people being treated differently from another

based solely on demographic or immutable characteristics such as race or national origin. *Id.*

3. Blame or judgment also includes such concepts as: that an individual is responsible for the actions committed by other members of the individual's race, ethnicity, or sex; that an individual should feel psychological distress because of his or her demographic characteristics; and that meritocracy is a racist or sexist tool. These doctrines are sometimes termed "critical race theory" or "diversity, equity, inclusion and belonging" ("DEIB").

4. Section 41-1494 permits the state and its entities, such as ASU, to *present* such ideas—that is, to teach *about* them—but it forbids the state from promulgating, imposing, endorsing, or requiring its employees to accept, agree with, or support, the doctrine of blame or judgment.

5. Yet despite this unambiguous instruction, ASU has proudly declared its commitment to promulgating DEIB in many aspects of its operations.[1] ASU publicly declares that it provides comprehensive DEIB or "inclusive communities" training for employees, requires such training for all ASU employees, and that such training will continue.[2] ASU requires this training to be taken by faculty and staff when first hired, and again every two years.[3]

6. The Inclusive Communities training promulgates many forms of blame or judgment as that phrase is defined in A.R.S. § 41-1494. Requiring employees to take a training that presents any form of blame or judgment, and/or spending taxpayer money on training that presents any form of blame or judgment violates state law.

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[1] *Inclusiveness at ASU*, ASU Human Resources (Mar. 18, 2024), https://cfo.asu.edu/inclusiveness-at-ASU.

[2] *Id.*

[3] *Workplace Inclusiveness Training*, ASU Human Resources (Mar. 18, 2024), https://cfo.asu.edu/OEI-training.

PARTIES

7. Plaintiff Owen Anderson is a faculty member of ASU and is consequently required to take the Inclusive Communities training. Anderson is also a resident of Arizona and a state taxpayer, and therefore is liable for replenishing the public coffers for unlawful government expenditures.

8. Plaintiff D. Ladd Gustafson is a resident of Arizona and a state taxpayer. As such, Gustafson is liable for replenishing the public coffers for unlawful government expenditures, including those used to finance ASU.

9. Defendant Arizona Board of Regents ("ABOR") is a state actor that is the governing body for Arizona State University ("ASU") and has administrative authority over ASU. ABOR is ultimately responsible for all personnel policies—including imposing and maintaining conditions on hiring and/or continued employment—and for decisions by ASU regarding the expenditure of public funds. ABOR is a corporate body that may be sued and has a physical address in Maricopa County, Arizona.

STANDING, JURISDICTION AND VENUE

10. As taxpaying residents of Arizona, Plaintiffs have standing to enjoin the illegal expenditure of state funds. *Ethington v. Wright*, 66 Ariz. 382, 386 (1948).

11. Plaintiff Anderson is a public employee who is required as a condition of employment at ASU to take the Inclusive Communities training upon hire and every subsequent two years.

12. This Court has jurisdiction over actions seeking declaratory and injunctive relief pursuant to the Arizona Constitution art. VI, § 14, and A.R.S. §§ 12-123, 12-1801, and 12-1831.

13. Venue is proper pursuant to A.R.S. § 12-401.

FACTS COMMON TO ALL CLAIMS

14. ASU promotes Diversity, Equity, Inclusion and Belonging ("DEIB") through required training for its faculty and staff.

15. This DEIB training consists of online training for all faculty, staff, and student workers, including (1) Inclusive Communities, (2) preventing harassment and discrimination, and (3) Title IX duty to report. *Workplace Inclusiveness Training*, ASU Human Resources (Mar. 18, 2024), https://cfo.asu.edu/OEI-training.

16. The required training must be completed within a specified number of days from the date of hire. *Id.*

17. The Inclusive Communities training is required for all ASU employees, and it must be completed at least every two years. *Id.*

18. On or about October 22, 2022, Plaintiff Anderson was notified via email that ASU was requiring a training on DEIB within 90 days of assignment and reassigned every two years.

19. On or about November 27, 2022, Anderson received an email stating that the ASU Inclusive Communities training was due in 45 days, that the training was required for all ASU employees, and that he must successfully pass the module quiz.

20. Anderson believed that if he failed to complete the Inclusive Communities training, it could lead to disciplinary action against him.

21. Anderson viewed the online Inclusive Communities training.

22. Anderson is required to take the Inclusive Communities training every two years.

23. A copy of the Inclusive Communities training for Faculty is attached hereto as Exhibit A at ASU000001-ASU000120.

24. Module 0 includes an implied disclaimer of responsibility and liability for the training.

25. The Inclusive Communities training includes, but is not limited to, materials that contain the following statements or concepts:

- "[A]cknowledging the history of white supremacy and the social conditions for it to exist as a structural phenomenon." Exhibit A, at ASU000042;
- "How is white supremacy normalized in society." *Id.*at ASU000043;

- "[G]iven the socio-historical legacy of racism, sexism, homophobia and other forms of structural inequality, perceptions of authority and control are not always granted to minoritized [sic] faculty." *Id.* at ASU000055;
- "White Fragility." *Id.* at ASU000077;
- "What is White Privilege, Really." *Id.*;
- "Explaining White privilege to a broke white person… ." *Id.*;
- "7 Ways White People Can Combat Their Privilege." *Id.*;
- "Racism … can take the form of … and include seemingly innocuous questions or comments, such as asking people of color where they are from … ." *Id.* at ASU000084;
- "Sexual identities are linked to power, and heterosexuality, the dominant sexual identity in American culture, is privileged by going largely unquestioned." *Id.* at ASU000100.

26. Copies of the Inclusive Communities video transcripts are attached hereto as Exhibit B, at ASU000121-ASU000240.

27. The Inclusive Communities video transcript includes, but is not limited to, the following statements:

- "[I]t scares people to talk about white supremacy or to be called a white supremacist. But if we start thinking about it in terms of whiteness as something that is culturally neutral and we're moving it from that neutral space into a critical space." *See* Exhibit B, at ASU000167-ASU000168;
- "[W]e also have to open the space to critique whiteness." *Id.* at ASU000168;
- "[W]hite supremacy … referring to here is the period between the 1500's and the 1800's that encompasses both Spanish colonization and Euro American colonization. And what colonization did, was it really created this system of binary thinking. There were folks that were inherently good and folks that were inherently bad, and that led to the systems of superiority that were then written into the foundational documents of our Nation." *Id.* at ASU000164-ASU000165.
- "[Misogyny] … it's a very benign, no it's seemingly benign and benevolent, but it still has very lethal consequences of where your space should be, right? But then there's also the institutional policies, practices, and norms that are embedded into everyday, or to our society and the structures." *Id.* at ASU000224
- "So historically we could think about women not gaining the right to vote until the 19th Amendment in the early 20th Century. But then we can also think about that our organizations that we work in, right? Do we have diversity of leadership or is it primarily heterosexual, cisgender, white males who run organizations, right, and set the norms for the culture, how one should dress, how one should speak." *Id.* at ASU000224-ASU000225.

- "And on the other hand it's also about political mobilization – social political mobilization in terms of community formation. That where people who are gender and sexually minoritized come together to resist to support to create a new or different kind of reality where there are safe spaces for people who do not 'fit in' – and I use scare quotes – fit into normative identity categories of gender and sexuality." *Id.* at ASU000231-ASU000232.

- "So homophobia and anti-gay bias can look all different kinds of ways. So they can be something really what seems like maybe innocuous. So maybe on a form the gender or sex options are male and female. And so that's a kind of subtle implicit kind of bias that there are only two options." *Id.* at ASU000235.

28. An examination previously followed the Inclusive Communities training testing comprehension of the material taught.

29. A copy of the prior Inclusive Communities exam materials are attached hereto as Exhibit C.

30. The prior exam materials include the "correct" answers (reproduced in boldface below) based on concepts taught in the Inclusive Communities training:

- "Actions or policies taken by a group or organization without awareness of the widespread consequences to many people reflect which form of bias? **a. Systemic unconscious**." *Id.* at 3 (bold in original);

- "**a. True. Feedback:** Intersectionality … is … how multiple forms of inequality or disadvantage compound themselves and create obstacles that are not often understood within conventional ways of thinking. The convergence of perceptions and stereotypes of different groups impact how we engage others and the larger set of interactions between individuals and institutions." *Id.* at 4;

- "Which phrase best describes the individual feeling of intellectual fraudulence that often cancels out external evidence of success, which is systemically rooted in the lack of access to power and privilege for marginalized social groups? **a. Imposter syndrome**." *Id.* at 5 (bold in original);

- "This type of document is often designed with a specific goal in mind. … [I]t is a way of holding organizations, and their people, accountable to those with whom they share space. **a. Land Acknowledgement Statement**." *Id.* at 7 (bold in original);

- "This term recognizes the history of inequality that promotes by-laws, policies, and social practices that may have advantaged some groups while simultaneously preventing members of other groups from accessing similar resources. … **a. Equity**." *Id.* (bold in original);

- "Bias is informed by fact and not ideologies. … **b. False**." *Id.* at 9 (bold in original);
- "Which of the following areas of the university should address DEIB? … **d. DEIB should be part of every facet of the university**." *Id.* (bold in original);
- "To decolonize the university means: a. To examine structures and policies that have been oppressive to or have inflicted harm on any community, group or culture. b. To create platforms for historically marginalized voices to be heard and to contribute to policy change. c. To create a climate inclusive to all peoples, cultures and communities. **d. All of the above**." *Id.* at 10 (bold in original);
- "A leadership challenge related to DEIB is: a. Creating an inclusive environment b. Unconscious manifestations of power and privilege c. Feeling unempowered as a staff member d. Failure to decolonize university spaces that are oppressive to historically minoritized communities **e. All of the above**." *Id.* (bold in original);
- "What are some ways that power and privilege can affect staff? … b. Asserting decision-making along the line of established hierarchies c. Lack of inclusiveness … **e. All of the above**." *Id.* (bold in original);
- "This term has been described as 'small paper cuts that represent all of the times that someone says or does something that further marginalizes you because of your identity.' **a. Microaggressions**." *Id.* (bold in original);
- "ASU believes an important way to promote its Charter, Design Aspirations, and DEIB on campus is through ongoing learning, empathy, and dialogue about topics related to bias and inclusion. **a. True**." *Id.* at 11 (bold in original);
- "[**a. Transformative Justice**] calls for an overall shift in structural conditions in ways that redress harm and trauma and creates safe, just environments where everyone can thrive." *Id.* (bold in original);
- "Dominant identities are often interrogated in society and by individuals. … **b. False**." *Id.* (bold in original).

31. Upon information and belief, ASU no longer continues to require faculty and staff to take an examination following the mandatory Inclusive Communities training.

32. ASU continues to require that all ASU employees take the Inclusive Communities training.

33. ASU used taxpayer money to create, implement, conduct, and provide the Inclusive Communities training.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

34. Plaintiffs re-allege and incorporate the preceding paragraphs.

35. An actual and substantial controversy exists between Plaintiffs and Defendant as to their respective legal rights and duties. Plaintiffs contend that the imposition of the DEIB training requirement violates Arizona law. Plaintiffs are informed and believe, and on that basis allege, that Defendant contends otherwise. Accordingly, declaratory relief is appropriate.

36. If not enjoined by the Court, Defendant and its agents, representatives, and employees, will continue to implement the DEIB training requirements described herein, which will result in irreparable injuries to the Plaintiffs and all Arizona taxpayers in the form of unlawful conditions on employment and unlawful expenditures of funds which taxpayers are liable to replenish. Plaintiffs have no plain, speedy, or adequate remedy at law for such injuries. Accordingly, injunctive relief is appropriate.

COUNT 1
ASU Requires Employees to Take a Training that Presents a Form of Blame or Judgment (A.R.S. § 41-1494(A)).

37. Plaintiffs re-allege and incorporate the preceding paragraphs.

38. Arizona law prohibits the state from "requir[ing] 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." A.R.S. §41-1494(A) (emphasis added).

39. Arizona defines "[b]lame or judgment on the basis of race, ethnicity or sex" through the following seven concepts:

1. One race, ethnic group or sex is inherently morally or intellectually superior to another race, ethnic group or sex.

2. An individual, by virtue of the individual's race, ethnicity or sex, is inherently racist, sexist or oppressive, whether consciously or unconsciously.

3. An individual should be invidiously discriminated against or receive adverse treatment solely or partly because of the individual's race, ethnicity or sex.

4. An individual's moral character is determined by the individual's race, ethnicity or sex.

5. An individual, by virtue of the individual's race, ethnicity or sex, bears responsibility for actions committed by other members of the same race, ethnic group or sex.

6. An individual should feel discomfort, guilt, anguish or any other form of psychological distress because of the individual's race, ethnicity or sex.

7. Meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race, ethnic group or sex to oppress members of another race, ethnic group or sex.

A.R.S. § 41-1494(D).

40. The Inclusive Communities training provides discriminatory concepts including, but not limited to: white people are inherently racist and oppressive, whether consciously or unconsciously; heterosexuals are inherently sexist and oppressive, whether consciously or unconsciously; white people should receive adverse treatment solely or partly because of their race or ethnicity; white people bear responsibility for actions committed by other white people; land acknowledgement statements are a way of holding one race or ethnicity responsible for the actions committed by other members of the same race or ethnicity; transformative justice calls for an individual to bear responsibility for actions committed by other members of the same race, ethnic group or sex; and dominant identities (whites or heterosexuals) are treated morally or intellectually superior to other races, ethnic groups or sexes.

41. The Inclusive Communities training promulgates several forms of blame or judgment on the basis of race, ethnicity or sex.

42. A violation of state law occurs where **any form** of blame or judgment on the basis of race, ethnicity or sex occur. A.R.S. § 41-1494(A) (emphasis added).

43. The statements or concepts in the Inclusive Communities training were "carefully curated" by ASU. ASU000004.

44. ASU knew that the Inclusive Communities training presented forms of blame or judgment on the basis of race, ethnicity or sex. *See* ASU000004.

45. ABOR has violated and is continuing to violate A.R.S. § 41-1494(A) by requiring its employees to take the Inclusive Communities training.

46. As an employee of ASU, Plaintiff Anderson was required to take the Inclusive Communities training. Anderson was therefore required to receive training that presented many forms of blame or judgment on the basis of race, ethnicity or sex.

47. Plaintiff Anderson is required to take the Inclusive Communities training every two years. Anderson intends to remain employed at ASU into the indefinite future.

48. Accordingly, Plaintiffs are entitled to 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.

COUNT 2
ASU's Expenditure of Public Funds for Training that Presents a Form of Blame or Judgment is Illegal (A.R.S. § 41-1494(B)).

49. Plaintiffs re-allege and incorporate the preceding paragraphs.

50. Arizona law prohibits the "state" from "us[ing] public monies for training, orientation or therapy that presents **any form** of blame or judgment on the basis of race, ethnicity or sex." A.R.S. § 41-1494(B) (emphasis added).

51. Arizona defines "blame or judgment on the basis of race, ethnicity or sex" through the seven concepts described in paragraph 42 above.

52. ASU used taxpayer money to create, implement, conduct, and provide the employee training known as Inclusive Communities.

53. ASU used taxpayer money to "carefully curate" the Inclusive Communities training. ASU000004.

54. The state is prohibited from using public monies for training that presents any form of blame or judgment on the basis of race, ethnicity or sex.

55. The Inclusive Communities training teaches concepts of blame or judgment on the basis of race, ethnicity or sex.

56. Spending public money to develop, administer, and/or require the Inclusive Communities training is an unlawful expenditure that violates A.R.S. § 41-1494(B).

57. Accordingly, Plaintiffs are entitled to a declaration and injunction that enjoins Defendant from spending public money on training that presents any form of blame or judgment under A.R.S. § 41-1494.

REQUEST FOR RELIEF

Plaintiffs respectfully request that this Court take the following actions:

A. Declare that the Inclusive Communities training presents forms of blame or judgment on the basis of race, ethnicity or sex in violation of A.R.S. § 41-1494;

B. Declare that requiring employees, faculty, staff, and/or student workers to take the Inclusive Communities training violates A.R.S. § 41-1494;

C. Declare that ABOR unlawfully used public funds to develop, require, administer, implement, and grade the Inclusive Communities training;

D. Permanently enjoin Defendant from requiring either prospective or current employees, faculty, staff, or student workers, to participate in the Inclusive Communities training that presents any form of blame or judgment pursuant to A.R.S. § 41-1494;

E. Permanently enjoin Defendants from spending public money to impose, implement, administer, require, or grade the Inclusive Communities training that presents any form of blame or judgment pursuant to A.R.S. § 41-1494;

F. Award Plaintiffs their costs and attorney fees pursuant to A.R.S. § 12-341, A.R.S. § 12-348, and the private attorney general doctrine; and

G. Award such other and further relief as may be just and proper.

RESPECTFULLY SUBMITTED this 17th day of May 2024.

GOLDWATER INSTITUTE

/s/ *Stacy Skankey*

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Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2024-005713 12/16/2024

HONORABLE MELISSA IYER JULIAN

CLERK OF THE COURT
A. Villela
Deputy

OWEN ANDERSON, et al. STACY C SKANKEY

v.

ARIZONA BOARD OF REGENTS THOMAS D RYERSON

JONATHAN RICHES
JUDGE JULIAN

UNDER ADVISEMENT RULING

Re: Defendant's Motion to Dismiss Plaintiff's First Amended Complaint

Pending before this Court is *Defendant's Motion to Dismiss Plaintiff's First Amended Complaint*, filed July 1, 2024. The motion is fully briefed and this Court also considered the Brief of the Amici Curiae President Petersen and Speaker Toma in Support of Plaintiff's Response to Motion to Dismiss, filed August 30, 2024.

This Court held oral argument on the pending motion on October 18, 2024 at which time the Court took the motion under advisement.

For purposes of this motion, the Court must assume the truth of all well-pled allegations and must view those facts in the light most favorable to the non-moving plaintiff. *Acker v. CSO Chavira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997) (citing *Lakin Cattle Co. v. Engel haler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (1966)*; Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 69, ¶2, 326 P.3d 335, 336 (App. 2014). Dismissal is permitted only when a "plaintiff[] would not be entitled to relief under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State Depot of Ins.*, 191 Ariz. 222, 224, ¶4, 954 P.2d 580, 582 (1998) (emphasis added).

Applying this standard, the Court evaluates the allegations and arguments regarding dismissal as raised in the pending motion.

Factual Description

This case presents a legal challenge to Arizona State University's ("ASU") required training for faculty and staff relating to the subject of "Inclusive Communities." Plaintiffs are Owen Anderson ("Anderson") and D. Ladd Gustafson ("Gustafson"). Anderson is a faculty member at ASU and is required to take the Inclusive Communities training every two years as a condition of his employment. (First Amended Complaint ("FAC") at ¶¶ 7, 11, & 32.) Gustafson "is a resident of Arizona and a state taxpayer." (FAC at ¶ 8.) Anderson and Gustafson filed suit seeking declaratory and injunctive relief to enjoin the continuation of Inclusive Communities training at ASU as a violation of A.R.S. § 41-1494.

Defendant Arizona Board of Regents (the "Board") has administrative authority regarding the personnel policies implemented at ASU, including the requirement for employee training on Inclusive Communities. (FAC at ¶ 9.) The Board moved to dismiss the FAC, arguing that neither Anderson nor Gustafson have standing to allege violations of section 41-1494. The Board also urges that section 41-1494 contains no express or implied authorization for private enforcement.

Section 1494 prohibits the "state, a state agency or a city, town, county or political subdivision of this state" from "requir[ing] 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." A.R.S. § 41-1494(A). The statute also prohibits the "use public monies for training, orientation or therapy that presents any form of blame or judgment on the basis of race, ethnicity or sex." A.R.S. § 41-1494(B). The statute defines the phrase "Blame or judgment on the basis of race, ethnicity, or sex" as including the "following concepts":

1. One race, ethnic group or sex is inherently morally or intellectually superior to another race, ethnic group, or sex.
2. An individual, by virtue of the individual's race, ethnicity, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
3. An individual should be invidiously discriminated against or receive adverse treatment solely or partly because of the individual's race, ethnicity, or sex.
4. An individual's moral character is determined by the individual's race, ethnicity, or sex.

5. An individual, by virtue of the individual's race, ethnicity or sex, bears responsibility for actions committed by other members of the same race, ethnic group, or sex.
6. An individual should feel discomfort, guilt, anguish, or any other form of psychological distress because of the individual's race, ethnicity, or sex.
7. Meritocracy or traits such as a hard work ethic are racist or sexist or were created by members of a particular race, ethnic group, or sex to oppress members of another race, ethnic group, or sex.

A.R.S. § 41-1494(D). The statute's only express mechanism to ensure compliance is a requirement that "[o]n 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).

Legal Analysis

A. Section 41-1494 implies a private right of action.

The Board argues that section 41-1494 does not create an express or implied private right of action such that citizens like Anderson or Gustafson can seek to enforce its provisions through means of a civil suit. The parties agree that the statute contains no provision expressly authorizing its enforcement by private citizens. Accordingly, the only remaining question is whether the statute impliedly authorizes private enforcement.

Even in the absence of express authorization, Arizona courts "more broadly" construe statutes to imply a private right of action when private enforcement 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.'" *Chavez v. Brewer*, 222 Ariz. 309, 318, ¶ 24 (App. 2009) (quoting *Transamerica Fin. Corp. v. Superior Court*, 158 Ariz. 115, 116 (1988)). "Evaluation of these factors is a tool of statutory construction designed to discern legislative intent, 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." *McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 194, ¶ 6 (App. 2014).

Section 41-1494 falls within several other anti-discrimination provisions set forth in Title 41, Chapter 9. It was signed into law by Governor Ducey on July 9, 2021, after being passed by the legislature as a floor amendment to Senate Bill 1074 introduced by Senator Hoffman. In describing the purpose of the bill, Senator Hoffman stated that its intent was to ensure state agencies would not use public funds to promote an ideology sometimes referred to as "critical

race theory," which he described as "an ideology [that] teaches that an individual, by the virtue of the individual's race, ethnicity, or sex, is inherently racist, sexist, or oppressive."[1]

This Court finds that section 41-1494 was intended to protect employees from being compelled to attend training courses that the legislature deemed to be discriminatory. In this regard, Anderson falls within the class of individuals the statute was designed to protect and he is not merely an "incidental" beneficiary. *See Chavez*, 222 Ariz. at 318, ¶ 28. Further, while the statute does include a reporting requirement, that reporting is not truly a mechanism of enforcing the statute. Accordingly, in the absence of an implied, private right of enforcement, public employees who are subject to training in violation of this provision have no means of seeking redress. *See Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 206 Ariz. 344, 348, ¶ 12 (App. 2003) (private cause of action implied where "statute offers no means to enforce the requirement" intended to benefit teachers).

In this regard, section 41-1494 is distinguishable from the statue at issue in *Lancaster v. Arizona Bd. of Regents*, 143 Ariz. 451, 457 (App. 1984). In *Lancaster*, the "sole and exclusive purpose" of the statute was to require the preparation of a report to establish a system of equivalent wages and salaries for university employees, which was then used by the legislature to appropriate funds for the implementation of the plan included in the report. As recognized in *Lancaster*, the statute contained no provision giving any individual employee the "right to an increase in pay." *Id.* Rather, the statute "define[d] a process for which the legislative assembly, rather than individuals who might benefit incidentally, constituted 'the class for whose *especial* benefit the statute was enacted.'" *Id.* (quoting *City of Tucson v. Superior Court of Pima County*, 127 Ariz. 205, 208 (App. 1980)).

Unlike the statute at issue in *Lancaster*, section 41-1494 includes an annual reporting requirement, but that is not its "sole and exclusive" purpose. Rather, its primary purpose is to ensure that public employees are not required to undergo training "that presents any form of blame or judgment on the basis of race, ethnicity or sex" as a condition of their employment. Without the implied right to enforce that provision through means of injunctive or declaratory relief, there would be no means for remedying or preventing violations of its terms.

For these reasons, the Court finds that § 41-1494 implies a private right of action for aggrieved employees who are subject to mandatory training that "presents any form of blame or judgment on the basis of race, ethnicity or sex."

[1] House Floor Session (July 31, 2024), https://www.azleg.gov/videoplayer/?eventID=2021051006&startStreamAt=9779.

B. Anderson has Standing to Challenge ASU's Inclusive Communities Training Program

In Arizona, standing is "not a constitutional mandate" but a "prudential or judicial restraint." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 6 (1985). Courts "apply the doctrines of standing and ripeness as a matter of judicial restraint to ensure courts 'refrain from issuing advisory opinions, that cases be ripe for decision and not moot, and that issues be fully developed between true adversaries.'" *Mills v. Ariz. Bd. of Tech. Registration*, 253 Ariz. 415, 423 ¶ 23 (2022) (citation omitted). While "generalized harm" is insufficient to establish standing, a plaintiff does have standing where he "alleges a 'distinct and palpable injury.'" *Id.* ¶ 24 (citation omitted).

In this case, this Court assumes the truth of Anderson's allegations that he is required to complete the Inclusive Communities training as a condition of his employment at ASU. Defendant nevertheless argues that Anderson's claim is not "ripe" because he has not yet suffered any adverse consequence of his refusal to complete the training thus far. But, as the U.S. Supreme Court has long recognized, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Commonwealth of Pennsylvania v. State of W. Virginia*, 262 U.S. 553, 593 (1923).

In this case, Anderson is seeking preventative relief and has established a justiciable controversy regarding whether he can be compelled as a condition of his employment to complete the Inclusive Communities Training. As a public employee, Anderson has standing and his claims are ripe for judicial review.

C. Gustafson does not have Taxpayer Standing

Arizona courts have "long observed the 'almost universal rule' that taxpayers generally may enjoin the illegal expenditure of taxpayer dollars." *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 524 (2021). More recently, however, the Arizona Supreme Court emphasized that the expenditure of "preexisting, incidental payroll costs" is not an expenditure that confers taxpayer standing. *Id.*

Gustafson's only claim to standing is based upon his taxpayer status and the argument that ASU's mandated training is paid for with "public funds" presumably derived from tax dollars. Under *Welch*, the use of funds for a preexisting employee training program is not an expenditure that confers taxpayer standing. As in *Welch*, there is no indication that the elimination of the preexisting training program would impact the allocation of public funds. Further, an order restoring funds used for the training would not redress the claimed injury, *i.e.*, requiring employees to undergo Inclusive Communities Training in violation of section 41-1494(A). *Id.* at 525, ¶ 20. Accordingly, as in *Welch*, the Complaint does not allege facts

sufficient to confer taxpayer standing to Gustafson. His dismissal as a party Plaintiff is therefore appropriate.

IT IS THEREFORE ORDERED granting in part, and denying in part, *Defendant's Motion to Dismiss Plaintiff's First Amended Complaint*, July 1, 2024.

IT IS FURTHER ORDERED dismissing Plaintiff Gustafson as a party Plaintiff for lack of standing.

IT IS FURTHER ORDERED that the Board shall file an answer to the FAC within 10 business days of the filing date of this minute entry as required by Ariz. R. Civ. P. 12(a)(2(A). The remaining parties shall thereafter meet and confer and submit their joint report and proposed scheduling order as required by Rule 16(c).