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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Linda Rae’Lee Klein, an individual,

Plaintiff,

v.

**Arizona State University and the Walter
Cronkite School of Journalism and Mass
Communication; and Kristin Grady
Gilger,**

Defendants.

CASE NO. _____

**APPLICATION FOR
INJUNCTIVE RELIEF**

**(Denial of Student’s
Right of Expression under the First
Amendment, Section 1983;
A.R.S. § 15-1864)**

(Expedited Hearing Requested)

Plaintiff Linda Rae’Lee Klein (“Rae’Lee Klein,” or “Plaintiff”) hereby asks the Court to enjoin Defendants Arizona State University and the Walter Cronkite School of Journalism and Mass Communication (“ASU”) and Kristin Grady Gilger (“Dean Gilger,” collectively the “Defendants”) from removing Plaintiff as station manager of The Blaze radio station at ASU. As detailed in the Verified Complaint, Defendants have taken a position that because Plaintiff Klein inoffensively shared and commented on a New York Post article (about Jacob Blake’s arrest warrant, described below) using her personal Twitter account, then “staying on as station manager is not an option” for her. Defendants’ threat to remove Plaintiff as station manager violates her right to free expression under the First Amendment, as well as an Arizona statute

1 protecting free speech by public university students, A.R.S. § 15-1864, and the Arizona
2 constitution.

3 Plaintiff's counsel has engaged in a number of lengthy communications with Defendants'
4 counsel on these matters and has reached an impasse. Copies of these filings are also being
5 delivered to Defendants' counsel.

6 **A short background on the Jacob Blake Controversy, and the Tweet in Question**

7 On August 23, national media reported that a man named Jacob Blake was shot and
8 wounded by police officers in Kenosha, Wisconsin.¹ Video circulated of the incident which
9 showed that Mr. Blake was black, and the shooting officer was white.² Subsequently, a number
10 of news reports and commentary implied or alleged that the shooting was racially-motivated. *See*
11 *e.g.* CNN's "Jacob Blake's shooting shows America has a long way to go in its journey toward a
12 racial reckoning"³ (quoting Columbia University lecturer who referred to the shooting as a
13 "lynching" and who stated that it was a "reminder of pervasive and entrenched racial violence in
14 America"); or The Atlantic's "The Shooting of Jacob Blake is a Wake-Up Call"⁴ (discussing the
15 shooting in the context of "[a]chieving racial justice"). It was also reported that the shooting was
16 being investigated by the Justice Department's division of criminal investigation, and that
17 protestors demanded an arrest of the shooting officer. *See e.g.* "Student-Led Protest Pushes For
18 Arrest Of Rusten Sheskey"⁵; or Washington Post's "What we know about Rusten Sheskey, the
19 officer involved in the Kenosha shooting."^{6 7}

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21 ¹ Verified Complaint, ¶ 8.

22 ² Verified Complaint, ¶ 9.

23 ³ <https://www.cnn.com/2020/08/30/us/jacob-blake-shooting-one-week-later/index.html>

24 ⁴ <https://www.theatlantic.com/ideas/archive/2020/08/the-shooting-of-jacob-blake-is-a-wake-up-call/615616/>

25 ⁵ <https://www.wortfm.org/student-led-protest-pushes-for-arrest-of-rusten-sheskey/>

26 ⁶ <https://www.washingtonpost.com/nation/2020/08/29/what-we-know-about-rusten-sheskey-officer-involved-kenosha-shooting/>

1 In August, Ms. Klein read an article in the New York Post which reported that Jacob
2 Blake had an active warrant out for his arrest “for violating a restraining order stemming from
3 alleged sexual assault.”⁸ The article linked to a copy of the warrant, which detailed that Mr.
4 Blake had allegedly committed sexual assault against a woman by digitally penetrating her in
5 front of her child, before stealing her car.⁹ Prior to the New York Post article being published,
6 those facts had not been widely reported by news media.¹⁰ From her personal Twitter account,
7 Ms. Klein tweeted out a link to the New York Post story with the comment, “Always more to the
8 story, folks. Please read this article to get the background of Jacob Blake’s warrant. You’ll be
9 quite disgusted.”¹¹ In doing so, she merely (1) shared an article by an established media outlet,
10 the New York Post; and (2) expressed a view that readers of the article would find the allegations
11 in Blake’s arrest warrant – which included raping a woman in front of her child – to be
12 repugnant; and (3) noted that there is “[a]lways more to the story.”

13 All students at the Cronkite school are required to have personal Twitter accounts.¹² The
14 students are encouraged to share news articles on their personal accounts, and to attract public
15 readers (“followers”) with commentary.¹³ The school even goes so far as to assign students a
16 grade for how often they use their personal Twitter account to share news articles and
17 commentary, and how large of an “audience” they attract.¹⁴ The school “recommends” that when
18 using Twitter, students follow certain “social media guidelines,” which are purportedly intended
19 “[t]o ensure the highest journalistic standards” and “reflect the Society of Professional
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21 ⁷ Verified Complaint, ¶¶ 10-12.

22 ⁸ Verified Complaint, ¶ 12.

23 ⁹ Verified Complaint, ¶ 14.

24 ¹⁰ Verified Complaint, ¶ 15.

25 ¹¹ Verified Complaint, ¶ 16.

26 ¹² Verified Complaint, ¶¶ 33, 34.

¹³ Verified Complaint, ¶ 35.

¹⁴ *Id.*

1 Journalists’ Code of Ethics core principles.”¹⁵ The student guidelines provide, in part:
2 “Personality is important: Don’t sound like a robot. Self-promotion is encouraged, but personal
3 accounts differ from organization accounts. Your audience wants to connect to a real person, so
4 sound like one! But keep in mind you’re a journalist. Journalists often use social media to raise
5 questions, make smart observations about other reporting and share content.”¹⁶ The guidelines
6 also recommend that students “avoid posting information...that could call into question your
7 ability to act independently as a journalist,” which “includes expressing political views, sports
8 fandom or opinions about newsmakers.”¹⁷ In spite of these vague and non-binding guidelines—
9 or perhaps in accordance with them, it is hard to tell—Cronkite school students, faculty and staff
10 regularly share, display or express their “political views, sports fandom or opinions about
11 newsmakers” on their personal Twitter/social media accounts.¹⁸ For example, the faculty member
12 who was assigned to the radio station at all relevant times, Ali Forbes, publicly displayed pro-
13 police messages and images on her Facebook account; and even though she had been a sports
14 journalist, she displayed images and messages indicating that she was a fan of the Toronto
15 Raptors.¹⁹ As recently as August 5th, the Dean of the Journalism School herself – Defendant
16 Gilger – retweeted an interview with a woman who wrote a book entitled “Why White
17 Evangelicals Worship at the Altar of Donald Trump,”²⁰ during which the author and interviewer
18 express a number of highly controversial “political views” and “opinions about newsmakers”
19 (including the view that President Trump is living in a “fantasy land” and engages in “magical
20 thinking” like “evangelical Christians”; that the author finds it “disturbing” that evangelical
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22 ¹⁵ Verified Complaint, ¶ 36.

23 ¹⁶ Verified Complaint, ¶ 37.

24 ¹⁷ Verified Complaint, ¶ 38.

25 ¹⁸ Verified Complaint, ¶ 40.

26 ¹⁹ Verified Complaint, ¶ 41.

²⁰ <https://twitter.com/RecoveringTruth/status/1291110582079242240>

1 Christians go to court and “press claims of violation of constitutional rights” based on COVID
2 restrictions; and that evangelical Christians should be “following the rules” instead of “listening
3 to President Trump”).²¹

4 The “Code of Ethics” for the Society of Professional Journalists – which the “social media
5 guidelines” refer to, and which they are purportedly intended to reflect – state that a journalist
6 must “[s]upport the open and civil exchange of views, even views they find repugnant.”²²
7 According to the Code, journalists must also “[e]ncourage a civil dialogue with the public about
8 journalistic practices, coverage and news content”; “[e]xpose unethical conduct in journalism”;
9 and give a “voice to the voiceless.” And a journalist must always “[g]ather, update and correct
10 information throughout the life of a news story.”

11 Ms. Klein’s tweet was consistent with journalistic ethics, which require that contrary
12 viewpoints or information be openly shared, even though some may find them repugnant. In fact,
13 her speech was more consistent with those principles than her fellow students’ actions following
14 her tweet, and the resulting conduct by the Walter Cronkite School of Journalism that causes this
15 matter to come before the Court today.

16 After Ms. Klein’s tweet, a number of students at the university demanded that the
17 university remove Ms. Klein from her position as station manager, claiming that her tweet was
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19 ²¹ *Inter alia*. During the interview that Defendant Gilger re-tweeted, the author also claimed
20 that evangelical Christians’ religious beliefs contribute to “coronavirus denial,” and that
21 President Trump “is going to claim that we have it [coronavirus] under control, even though
22 we don’t.” At the end of the interview, the interviewer—who identifies herself as an ASU
23 professor of religious studies—claims that “Trump has just pulled out the stops on his racist
24 rhetoric [over the last week], there’s no attempt to even hide it now”; and she asks, “is that
25 playing into this set of dynamics that you’ve identified that keep white evangelicals in thrall
26 to Trump, even through a pandemic”? To which the author answers, “yes.”

²¹ See <https://twitter.com/RecoveringTruth/status/1291110582079242240>.

²² See the Society of Professional Journalists “Code of Ethics,”
<https://www.spj.org/ethicscode.asp>.

1 somehow racist or otherwise offensive. A “board” of students who are involved with the station,
2 and who like Ms. Klein receive a salary for their work, removed her access to the station,
3 effectively removing her from her job. (As an internet radio station, the station is run through a
4 website – so the other students deleted her account.) Finally, the school’s Interim Dean Kristen
5 Gilger – instead of standing up for Ms. Klein’s right to free speech, and instead of disciplining
6 the other students for infringing on her right to free speech²³ – told Plaintiff that “staying on as
7 station manager is not an option” as the result of her tweet. The Dean has also refused to restore
8 Ms. Klein’s access to the website, despite requests made both directly and through counsel.

9 The Dean admits that Ms. Klein is not “unfit” to be station manager.²⁴ Rather, the Dean
10 claims that Ms. Klein cannot return to her position (1) because of the content of her personal
11 tweet, (2) because the student “board” was disturbed/offended by Ms. Klein’s tweet, and (3)
12 because Ms. Klein has since spoken up publicly about the university’s violation of her rights,
13 including to a number of politicians and media. All of these reasons amount to illegal
14 discrimination on the basis of free speech, in violation of Ms. Klein’s statutory and constitutional
15 rights.

16 **First Amendment Protections for Students/Student Employees**

17 The United States Supreme Court has, in its own words, “unmistakabl[y]” maintained for
18 over a century that the First Amendment protects the rights of students at state universities to
19 freedom of speech and expression. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503,
20 506 (1969). It is also well-settled that under the First Amendment, the state may not deprive a
21 person of “a valuable government benefit that that person previously enjoyed, conditioning
22 receipt of a government benefit on a promise to limit speech, or refusing to grant a benefit on the
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24 ²³ See A.R.S. §§ 15-1864(C) and -1866, discussed *infra*.

25 ²⁴ Verified Complaint, paragraph 31.

1 basis of speech. Those limitations apply even if the aggrieved party has no independent or
2 affirmative right to that government benefit.” *Arizona Students' Ass'n v. Arizona Bd. of Regents*,
3 824 F.3d 858, 869 (9th Cir. 2016). “[E]ven though a person has no ‘right’ to a valuable
4 governmental benefit and even though the government may deny him the benefit for any number
5 of reasons, there are some reasons upon which the government may not rely. It may not deny a
6 benefit to a person on a basis that infringes his constitutionally protected interests—especially,
7 his interest in freedom of speech....Such interference with constitutional rights is impermissible.”
8 *Id.*

9 Arizona state law supplements these protections even further, by specifically providing
10 that an Arizona university “shall not restrict a student’s right to speak, including verbal speech,
11 holding a sign or distributing fliers or other materials, in a public forum...” A.R.S. § 15-1864(A).
12 “Individual conduct that materially and substantially infringes on the rights of other persons to
13 engage in or listen to expressive activity is not allowed and is subject to sanction.”
14 A.R.S. § 15-1864(C). “An individual student or a faculty or staff member of a university or
15 community college may take a position on the public policy controversies of the day, but the
16 institution is encouraged to attempt to remain neutral, as an institution, on the public policy
17 controversies of the day unless the administrative decisions on such issues are essential to the
18 day-to-day functioning of the university or community college.” A.R.S. § 15-1864(G). “The
19 university or community college may not take action, as an institution, on the public policy
20 controversies of the day in a way that requires students or faculty members to publicly express or
21 endorse a particular view of a public policy controversy.” A.R.S. § 15-1864(H). “A person whose
22 expressive rights were violated by a violation of this article” “may bring an action in a court of
23 competent jurisdiction to enjoin any violation of this article by any university, community
24 college, faculty member or administrator or to recover reasonable court costs and reasonable
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1 attorney fees.” A.R.S. § 15-1864(I). “[I]f the court finds that a violation of this article occurred,
2 the court shall award the aggrieved person injunctive relief for the violation and shall award
3 reasonable court costs and reasonable attorney fees. The court shall also award damages of one
4 thousand dollars or actual damages, whichever is greater.” A.R.S. § 15-1864(J). “The primary
5 function of an institution of higher education is the discovery, improvement, transmission and
6 dissemination of knowledge by means of research, teaching, discussion and debate....[T]he
7 university or community college must strive to ensure the fullest degree of intellectual freedom
8 and free expression.” A.R.S. § 15-1866(A)(1). “It is not the proper role of an institution of higher
9 education to shield individuals from speech protected by the first amendment, including, without
10 limitation, ideas and opinions that may be unwelcome, disagreeable or deeply offensive.”
11 A.R.S. § 15-1866(A)(2). “Students and faculty members have the freedom to discuss any
12 problem that presents itself, as the first amendment allows and within the limits of reasonable
13 viewpoint and content-neutral restrictions on time, place and manner of expression that are
14 consistent with this article and that are necessary to achieve a compelling institutional interest if
15 these restrictions are clear, are published and provide ample alternative means of expression.”
16 A.R.S. § 15-1866(A)(3). Finally, the Arizona statutes provide for “a range of disciplinary
17 actions” against any students who engage in conduct that “materially and substantially infringes
18 on the rights of other persons to engage in or listen to expressive activity,” including
19 “punishment of suspension or expulsion from the university or community college.”
20 A.R.S. § 15-1866(A)(4),(B). The passage of these laws was motivated at least in part by student-
21 organized boycotts of controversial speakers during the last several years.²⁵

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24 ²⁵ See “‘Campus free-speech crisis’ is focus of new law – despite lack of Arizona incidents,”
25 <https://www.azcentral.com/story/news/politics/legislature/2018/04/27/campus-free-speech-crisis-focus-new-law-hb-2563-despite-lack-arizona-incidents/543283002/>.

1 By refusing to allow Ms. Klein to continue in her position, the university is illegally
2 depriving her of a “valuable benefit” that she previously enjoyed, on the basis of the content of
3 her speech. The university’s argument that it can point to other students’ apparent discomfort
4 with her speech as the basis for removing her is fundamentally flawed, as the Supreme Court
5 recognized in *Tinker*. In that case, a public school argued that it was entitled to ban black arm
6 bands (protesting the Vietnam War) because of the “disturbance” that wearing them caused to
7 other students, and because the school had an “urgent wish to avoid the controversy which might
8 result from the expression.” *Tinker*, 393 U.S. at 510. The Supreme Court held: “[a]ny word
9 spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another
10 person may start an argument or cause a disturbance. But our Constitution says we must take this
11 risk; and our history says that it is this sort of hazardous freedom—this kind of openness—that is
12 the basis of our national strength and of the independence and vigor of Americans who grow up
13 and live in this relatively permissive, often disputatious, society.” *Id.*, 393 U.S. at 508–09. The
14 Court held that unless the school could show that “engaging in the forbidden conduct would
15 materially and substantially interfere with the requirements of appropriate discipline in the
16 operation of the school, the prohibition cannot be sustained.” *Id.* “[Students] may not be confined
17 to the expression of those sentiments that are officially approved. In the absence of a specific
18 showing of constitutionally valid reasons to regulate their speech, students are entitled to
19 freedom of expression of their views....[S]chool officials cannot suppress expressions of feelings
20 with which they do not wish to contend....This Nation[] repudiate[es] the principle that a State
21 might so conduct its schools as to foster a homogeneous people....This principle has been
22 repeated by this Court of [sic] numerous occasions...The vigilant protection of constitutional
23 freedoms is nowhere more vital than in the community of American schools. The classroom is
24 peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through

1 wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of
2 tongues, (rather) than through any kind of authoritative selection.’” *Id.*, 393 U.S. 503, 511. “The
3 principle of these cases is not confined to the supervised and ordained discussion which takes
4 place in the classroom. The principal use to which the schools are dedicated is to accommodate
5 students during prescribed hours for the purpose of certain types of activities. Among those
6 activities is personal intercommunication among the students. This is not only an inevitable part
7 of the process of attending school; it is also an important part of the educational process. A
8 student’s rights, therefore, do not embrace merely the classroom hours. When he is in the
9 cafeteria, or on the playing field, or on the campus during the authorized hours, he may express
10 his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without
11 ‘materially and substantially interfer(ing) with the requirements of appropriate discipline in the
12 operation of the school’ and without colliding with the rights of others.” *Id.*, 393 U.S. at 512–13.

13 Ms. Klein’s tweet does not “substantially interfere with the requirements of appropriate
14 discipline in the operation of the school” or the “rights of others.” In contrast to a potentially
15 disruptive or violent protest, a tweet is a form of “pure speech” that does not disrupt the work and
16 discipline of a school, and it interferes with absolutely nobody’s rights at all. On the other hand,
17 the other students’ decision to lock Ms. Klein out of the station, and demand her termination, has
18 seriously interfered with her rights. It is exactly the kind of conduct that the Arizona free-speech
19 laws were intended to prohibit, and the Dean’s approval of it clearly runs afoul of the First
20 Amendment.

21 The university has (in certain pre-litigation correspondence) advanced the position that it
22 can remove Ms. Klein not for her tweet, but because of the way that she reacted to the
23 university’s decision to remove her over the tweet – namely, her decision to talk to politicians
24 and media about what she believes to be a violation of her free speech rights. However, (1) this
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1 position by the university again amounts to nothing more than First Amendment discrimination,
2 this time against her public expression that she believes that her rights have been violated. (2) In
3 taking this position, the university also runs afoul of A.R.S. §§ 23-1501 and 38-532, which are
4 “whistleblower” statutes that prohibit any public employer, including ASU, from terminating any
5 employee because the employee has disclosed what they believe to be a violation of the law.

6 The university has also tried to claim that it has a right to terminate Ms. Klein under cases
7 like *Garcetti v. Ceballos*, 547 U.S. 410 (2006), which hold that a public employee’s speech made
8 pursuant to their “official duties” may not be protected by the First Amendment. However, Ms.
9 Klein did not post the tweet as part of her “official duties” as station manager – she posted it on
10 her personal account. The radio station has a separate Twitter account, and she did not post the
11 tweet on its behalf. “It is well settled that the state may not abuse its position as employer to stifle
12 the First Amendment rights [its employees] would otherwise enjoy as citizens to comment on
13 matters of public interest.” *Dahlia v. Rodriguez*, 735 F.3d 1060, 1066 (9th Cir. 2013). While the
14 Court’s decision on this point should not be a “close” one, the Ninth Circuit has articulated a
15 5-part balancing test to aid in determining whether and when the State can permissibly fire a
16 public employee for speech on the grounds that it implicates their professional duties: “(1)
17 whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a
18 private citizen or public employee; (3) whether the plaintiff’s protected speech was a substantial
19 or motivating factor in the adverse employment action; (4) whether the state had an adequate
20 justification for treating the employee differently from other members of the general public; and
21 (5) whether the state would have taken the adverse employment action even absent the protected
22 speech.” *Id.*, 735 F.3d at 1067. Here, Ms. Klein’s personal tweet was on a matter of public
23 concern; she spoke as a private citizen (or at most, as a private student); her tweet was a
24 substantial or motivating factor in her removal; the state lacks an adequate justification for

1 treating her tweet any differently from its own faculty and staff’s; and as the Dean has
2 recognized, Ms. Klein is fit to be a station manager, so the university would not have taken the
3 action absent the protected speech.

4 Finally, the university has variously claimed that Ms. Klein’s tweet violates its
5 recommended “social media guidelines” for students’ use of social media, justifying her removal
6 from employment. But as a preliminary matter, those “guidelines” are for students, not for
7 employees—and so the notion that she violated some requirement of her employment by
8 violating recommended guidelines for “students” is already suspect. But even if the guidelines
9 were for employees, the *Dahlia* case speaks directly to this issue when it says that that public
10 employers cannot use “sweeping description[s] of...professional duties” to regulate free speech.
11 *Dahlia*, 735 F.3d at 1070. Otherwise, professions like “policemen,” “teachers and lawyers” – and
12 of course journalists – would effectively be “relegated to a watered-down version of
13 constitutional rights.” *Id.* The Arizona statutes also acknowledge this, by providing that
14 university restrictions on manner of expression must not only be “reasonable,” “content-neutral,”
15 “necessary to achieve a compelling institutional interest,” “published,” and “provide ample
16 alternative means of expression,” but also “clear.” A.R.S. § 15-1866(A)(3). In this case, the
17 “guidelines” are so broad and indeterminate, and therefore subject to arbitrary interpretation and
18 application, that the State could reach whatever result it wanted to reach, and it could restrict
19 essentially any kind of speech, simply by claiming to enforce the “guidelines.” For example, the
20 guidelines recommend: “don’t post content that can be easily misinterpreted or considered
21 insensitive or offensive.” Setting aside for the moment that the United States Supreme Court, the
22 Constitution, and the Society of Professional Journalists all say that “we must take this risk” of
23 offending others with new facts or ideas: at the end of Ms. Klein’s tweet, she wrote the only real
24 expression of any opinion whatsoever, which was “You’ll be quite disgusted”—clearly meaning,

1 “You’ll be quite disgusted [if you read this article to get the background of Jacob Blake’s
2 warrant].” If she had left that last sentence out, and simply retweeted the Post article containing
3 the background on Blake’s warrant (which graphically described a sexual assault), then other
4 students could have complained that her tweet was insensitive to victims of sexual assault,
5 because it failed to contain a “trigger warning,” and therefore violated the guideline not to be
6 “insensitive.” (From Merriam-Webster: a “trigger warning” is “a statement cautioning that
7 content (as in text, video or class) may be disturbing or upsetting.” According to the New York
8 Times, as quoted by Merriam-Webster: “Colleges across the country...have been wrestling with
9 student requests for what are known as ‘trigger warnings,’ explicit alerts that the material they
10 are about to read or see in a classroom might upset them or, as some students assert, cause
11 symptoms of post-traumatic stress disorder in victims of rape or in war veterans.”²⁶) It is the
12 irrationality of these kinds of restrictions on free speech, and of the modern-day “cancel culture”
13 in general, that is now forcing young, independent-thinking people like the Plaintiff – who did no
14 wrong, by any stretch of the imagination – to finally stand up for their rights, and to bring matters
15 like this to the attention of the Court.

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25 ²⁶ <https://www.merriam-webster.com/dictionary/trigger%20warning>

1 **CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully asks the Court to enjoin Defendants from
3 removing her from her position as station manager of The Blaze radio station at ASU.

4 **RESPECTFULLY SUBMITTED** this 12th day of October, 2020.

5 **WILENCHIK & BARTNESS, P.C.**

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13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on October 12, 2020, the foregoing document was electronically
15 transmitted to the Clerk’s Office using the CM/ECF System for filing, and a copy emailed to:

16 Jose Cardenas
17 General Counsel of Arizona State University
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18 David Bodney
BodneyD@ballardspahr.com

19 /s/ Christine M. Ferreira
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