COURT OF APPEALS DIVISION 1
STATE OF ARIZONA
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ARIZONA COURT OF APPEALS
DIVISION ONE

CONGRESS ELEMENTARY SCHOOL DISTRICT NO. 17 OF YAVAPAI COUNTY, Plaintiff-Appellant, vs. JEAN WARREN, JENNIFER RENEE HOGE, CYNDI REGIS, AND BARBARA REJON, Defendants-Appellees.	No. 1 CA-CV 10-0361 Yavapai Superior Court No. P1300 CV 201000162

APPELLEES' RESPONSE BRIEF

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Statement of Facts and of the Case

As the appeal involves a Motion to Dismiss, in which material facts alleged are deemed to be true, the facts set forth here are taken from the Complaint and other documents filed by Appellant, or from public documents of which the Court may take judicial notice.

Appellees are four women the Complaint alleges are taxpayers and residents of Appellant Congress Elementary School District No. 17 of Yavapai County ("the District") (Index of Record ("I.R.") 18, ¶¶ 4-7). The District alleges that during the nine years from 2002 to 2010, Appellees have filed 74 public records requests and 16 complaints with the Arizona Ombudsman and other agencies (Op. Br. at 6).

Although Appellant characterizes Appellees as having "engaged in a coordinated campaign to harass and impede the functioning of [the District's] day-to-day business through multiple complaints filed with various governmental agencies, and the abuse of the public record request system" (I.R. 2 at 3), the Complaint on its face tells a different story. Never does it describe any action taken together by all four women. Never does it allege that any single request was outside of the boundary of the public records law, nor that any complaint was frivolous. The gravamen of the Complaint is based purely on aggregate numbers, the alleged whole of which turns out to be far greater than the sum of the actual

parts.

Far from evidencing a concerted campaign of harassment, the Complaint paints a picture of three women (the fourth, Jennifer Renee Hoge, is barely involved at all apart from being Appellee Jean Warren's daughter) who have two distinct and separate sets of concerns: as taxpayers concerned about district management and governance, and as mothers of particular students. Accordingly, the Complaint lumps together not only apples and oranges but pears, tangerines, and cumquats.

Among the 74 alleged public records requests, 18 seek District meeting minutes and agendas (I.R. 18, ¶¶ 10, 13, 15, 20, 21, 25, 28, 34, 46, 67, 70, 71, 72, 85, 87, 88). Separate and apart from public records disclosure requirements, the District is required to create, maintain, and make publicly available meeting minutes (A.R.S. §§ 38-431.01(B) and (D)) and agendas (A.R.S. § 38-431.02). The District does not allege that it did indeed make such minutes and agendas publicly available in a manner (such as a website) that would make it unnecessary for Appellees to go through the trouble of filing a public records request.

Twenty-four of the alleged public records requests involve requests of student records by a parent (I.R. 18, ¶¶ 62, 68, 69, 73, 74, 75, 76, 89, 90, 91, 92, 93, 96, 99, 100, 101, 103, 104, 105, 106, 107, 108, 111, 112). Those requests are

not public records requests at all. They are private records, accessible only by certain specified persons such as parents, and governed not by Arizona public records law but by other state laws and federal law. See 20 U.S.C. §§ 1232g(b)(1) and 1417(c).

Others among the alleged public records requests do not involve public records at all, but requests for the Board to hold meetings or form committees (I.R. 18, ¶ 8, 18, 44), for permission to speak at meetings (¶¶ 11, 113) and to place items on the agenda (¶¶ 102, 110), for disability accommodation (¶ 17), for the Board to attend Public Records Law training (¶ 31) and to review education laws (¶ 60),[1] and that existing records be corrected (¶¶ 14, 112, 114). At least three

[1] Appellees' concerns about the District's misunderstanding of its legal obligations are demonstrably well-founded. On at least three occasions during the relevant period, the District has been found by state agencies to be non-compliant with open meetings and public records requirements. In 2002, the Attorney General found that the District "does not understand the requirements for a proper agenda" and "failed to keep appropriate minutes," and recommended that the Board "obtain training from a lawyer experienced with the Open Meeting Laws" (I.R. 12 Exh.) (App. 2). In 2007, the Attorney General again found the District violated the open meeting law; and given its previous violations, the Attorney General recommended, as "an alternative to initiating a civil enforcement action against the Board in Superior Court," a consent agreement including, *inter alia*, that "Board members shall participate in Open Meeting Law training" (I.R. 12 Exh.) (App. 3, p. 5). In June 2009, in response to 12 specific allegations of violations of public records law, the Arizona Ombudsman found that the District "has provided access to the records," but that there were "inconsistencies and delays in the District's responses. As a result, we are concerned that District staff does not fully understand its responsibilities and obligations under Arizona's Public Records

(¶¶ 9, 30, 61) ask that the District respond to prior requests.

The District nonetheless considers the totality of the disparate requests to "constitute harassment, vexatious conduct and an abuse of the rights afforded by law for the inspection and copying" of public records (I.R. 18, ¶ 139). However, over the entire course of the nine years at issue, the District availed itself of the opportunity to contest specific public records requests in court exactly zero times. Nor does it allege that any of the enumerated requests falls outside of the scope of public records requirements, or that any of the administrative complaints was frivolous. Instead, on January 27, 2010, it filed this lawsuit, declaring categorically (¶ 142) that "Defendants are not entitled to any additional disclosure of public records from Plaintiff."

The Complaint included counts for declaratory judgment, harassment, and nuisance. As relief, Appellant sought, *inter alia*, as follows:

> 2. For an Injunction permanently restraining and enjoining the Defendants . . . from making any additional public records requests of Plaintiff . . . without first obtaining leave of this Court.
>
> . . .
>
> 4. For an Injunction permanently restraining and enjoining the Defendants . . . from filing any additional claims, charges or lawsuits in or before any court, administrative agency or other forum

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Law." Accordingly, the Ombudsman recommended that "District staff attend public records law training" (I.R. 12 Exh.) (App. 4, p. 2).

whatsoever against Plaintiff . . . without first obtaining leave of this Court.

(I.R. 18 at 37-38).

Appellant filed a Motion for Preliminary Injunction. After securing representation from the Goldwater Institute, Appellees filed a Motion to Dismiss on several grounds, including Arizona's statute prohibiting strategic lawsuits against public participation (SLAPP), A.R.S. § 12-752 (App. 1). Following briefing and oral argument, Yavapai Superior Court David L. Mackey on April 15, 2010, dismissed all of the claims except paragraphs 1-7, 58, and 135 of the Verified Amended Complaint pertaining to a pending public records request. Because the Court found that (1) the public records statute does not "allow for the establishment of a judicial screening process for multiple or even unreasonable public records requests"; (2) the requisite standards for harassment were not met; and (3) the requisite standards for public nuisance were not met, the Court did not rule on Appellees' SLAPP argument (I.R. 22 at 1-3). The Court awarded sanctions to defendant Jennifer Renee Hoge on the basis that she made only three requests and was alleged to be part of a "coordinated campaign to harass and impede the functioning" of the District only on the basis of her family relationship with Appellee Jean Warren (*id.* at 4-5). "Not only is that offensive to this Court's

sense of justice, but it is groundless, constitutes harassment and is not made in good faith" (*id.* at 5).

Appellant thereafter brought this interlocutory appeal, asserting the Court's jurisdiction pursuant to A.R.S. § 12-2101(F)(2) on the basis that in granting most of Appellees' Motion to Dismiss, the Court "effectively denied Congress' request for preliminary and permanent injunctive relief" (Op. Br. at 3).

Statement of the Issues[2]

1. Did the Superior Court properly dismiss an action seeking to suppress future public records requests and legal actions by Appellees on the grounds that it did not state a cause of action under the Arizona public records statute, for harassment, or for nuisance?

2. As an alternative basis, see Ariz. R. App. P. 13(b)(3), is it proper to dismiss the action under Arizona's SLAPP statute, A.R.S. § 12-752 (App. 1)?

3. As an alternative basis, see Ariz. R. App. P. 13(b)(3), is it proper to dismiss the action because the requested relief constitutes a prior restraint on speech?

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[2] Additionally, appellees request costs and reasonable attorney fees for the trial and appeal court proceedings pursuant to A.R.S. §§ 12-341, 12-348, 39-121.02(B) 12-752, 12-1840, the private attorney general doctrine, Ariz. R. Civ. App. P. 21(a), and Ariz. R. P. for Spec. Actions 4(g).

Standard of Review

As noted, Appellant asserts jurisdiction over this interlocutory appeal based on the implicit denial of a Motion for Injunction. "We review a trial court's order granting or denying an injunction for a clear abuse of discretion." *Kromko v. City of Tucson*, 202 Ariz. 499, 501, 47 P.3d 1137, 1139 (App. 2002). The context of the appeal, however, is the trial court's order granting most of Appellees' Motion to Dismiss. "We review an order granting a motion to dismiss for abuse of discretion, . . . and review issues of law, including issues of statutory interpretation, de novo." *Dressler v. Morrison*, 212 Ariz. 279, 281, 130 P.3d 978, 980 (2006) (citations omitted). Although courts "assume the truth of the well-pled factual allegations, . . . mere conclusory statements are insufficient to state a claim upon which relief can be granted." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008) (citation omitted). "We may affirm for reasons other than those relied upon by the trial court." *Linder v. Brown & Herrick*, 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997) (citations omitted).

Argument

> A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both.
>
> —James Madison[3]

This lawsuit is an assault upon some of the most basic, precious, and important rights of citizens of the United States and Arizona: freedom of speech, the right to petition for redress of grievances, and under our state law, the right of access to public records. For so long as it persists, this lawsuit chills not only the rights of the four women against whom it is prosecuted, but all Arizonans who now fear that if they sufficiently pester the powers that be, even though they act well within their rights, they may be subjected to costly litigation demanding that they be silenced or forever subjected to prior restraint.

The specter of this type of lawsuit by a government against its citizens so concerned the Arizona Legislature that it enacted a statute forbidding strategic lawsuits against public participation (SLAPP), A.R.S. § 12-752 (App. 1). If that statute is unfamiliar to members of this Court (as it was to Appellees' counsel prior to this lawsuit), that may be because the statute apparently never has been the subject of reported appellate court litigation in Arizona, until now. The District

[3] Letter to W. T. Barry, Aug. 4, 1822.

has earned the notorious distinction of being the first to trigger it.

It would be difficult to find Arizona statutes that more strongly reflect unequivocal public policy than the requirement of government transparency embodied in the public records statutes and the prohibition against government intimidation of its citizens through litigation in the SLAPP statute. We urge this Court to act firmly and quickly to affirm Appellees' rights by sustaining the dismissal of this action.

I. THE FACTS ALLEGED DO NOT STATE A CAUSE OF ACTION UNDER ARIZONA PUBLIC RECORDS LAW.

The trial court correctly concluded that the Complaint does not state a cause of action under Arizona's public records statute:

> Specifically, the Court finds that Plaintiff's request would require that the Court re-write Arizona's Public Records law as set forth in A.R.S. §39-121 *et seq*. The Court cannot find within the language of those statutes anything that could be interpreted to allow for the establishment of a judicial screening process for multiple or even unreasonable public records requests. The statutes and Arizona case law provides a method by which a party who has their request for public records denied may seek Court review and a method by which a public entity who opposes a public records request may seek Court review before complying with the request. Arizona statutes and case law do not provide for any type of relief from the Court as to future public records requests. Whether to establish a screening process for multiple and unreasonable public records requests is a legislative function not within the jurisdiction of the Court.

(Op. at 1-2.)

The public records statute and case law yield a number of consistently applied principles: (1) a strong presumption in favor of public records access by members of the public, (2) exceptions (including the "best interests of the state") are narrowly construed, and (3) disputes over disclosure are handled on a case-by-case basis (all of the Arizona cases cited by Appellant occur in that context). Appellant's demand flies in the face of each of those principles.

The language of A.R.S. § 39-121.01(D)(1) (App. 1) is categorical: "Any person may request to examine . . . any public record," and the agency "shall promptly furnish" such documents. The courts, including and especially this Court, have consistently enforced that right.

The "core purpose of the public records law" is to "'allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees'." *Phoenix New Times, LLC v. Arpaio*, 217 Ariz. 533, 541, 177 P.3d 275, 283 (App. 2008) (citation omitted). Our Supreme Court has held that the public records law "evince[s] a clear policy favoring disclosure," and establishes that "the public ha[s] a right of access" to public records that are "privileged as a matter of law." *Carlson v. Pima County*, 141 Ariz. 487, 489-90, 687 P.2d 1242, 1244-45 (1984).

The Supreme Court has established that whether a particular public records

request is unduly burdensome should be decided on a case-by-case basis. In *Lake v. City of Phoenix*, 222 Ariz. 547, 551, 218 P.3d 1004, 1008 (2009), the city sought to exclude a whole class of records (metadata) on the grounds that its disclosure would represent an "administrative nightmare." The Court held that "requests that are unduly burdensome or harassing can be addressed under existing law, which recognizes that disclosure may be refused based on concerns of privacy, confidentiality, or the best interests of the state"—but that the determination must be based on a balancing of the interests with respect to a particular case. *Id.* Accord, *Bolm v. Custodian of Records*, 193 Ariz. 35, 40, 969 P.2d 200, 205 (App. 1998).

Likewise here, as the trial court held, any legitimate concerns can be addressed within the statute, and must be addressed within the context of a particular public records request rather than through the type of blanket exemption from disclosure that the District here seeks. Indeed, no Arizona court has ever provided such a blanket exemption for any category of public records, much less for all public records, *see Bolm*, 193 Ariz. at 40, 969 P.2d at 205 (rejecting blanket exemptions for public records); *accord*, *Cox Ariz. Publications, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993); nor an injunction prohibiting individuals from seeking such records. To prevent disclosure, the government

"must point to specific risks with respect to a specific disclosure; it is insufficient to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases." *Star Publishing Co. v. Parks*, 178 Ariz. 604, 605, 875 P.2d 837, 838 (App. 1993).

So, for instance, in *Mitchell v. Superior Court*, 142 Ariz. 332, 690 P.2d 51 (1984), the Supreme Court reviewed a local court practice that sealed all pre-sentence reports unless they were opened by judicial order. The Supreme Court overturned the rule, which "ma[de] non-disclosure the general rule and access the exception," which is the "obverse" of public records policy. *Id.*, 142 Ariz. at 334, 690 P.2d at 53. The Court noted that Arizona public records statutes embody a "policy favoring disclosure, unless strong countervailing considerations exist," and that exceptions must be based on individualized assessments of particular cases. *Id.*; accord, *Griffis v. Pinal County*, 215 Ariz. 1, 5, 156 P.3d 418, 422 (2007) ("If a document falls within the scope of the public records statute, then the presumption favoring disclosure applies and, when necessary, the court can . . . determine whether privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure"). The order sought by the District here likewise would eliminate the presumption of disclosure, which is directly contrary to the policy expressed through the public records statute.

The District cites *West Valley View, Inc. v. Maricopa County Sheriff's Office*, 216 Ariz. 225, 165 P.3d 203 (App. 2007) for the proposition that a court may provide prospective relief under the public records law. Indeed it can, but only *against a recalcitrant government agency that fails to comply with its public records obligations*. Ironically, the District here seeks to invoke prospective relief to allow it to *evade* its legal obligations. Where a governmental duty is created by statute, a court always has the inherent authority to enforce it by mandatory injunction or special action. But the public records statute contains no constraint on individual action, therefore injunctive relief exceeds the bounds of the statute. See A.R.S. § 12-1802(4) (courts cannot issue an injunction that prevents enforcement of a statute for the public benefit) (App. 1).

The District also cites *Arpaio v. Davis*, 221 Ariz. 116, 118, 210 P.3d 1287, 1289 (App. 2009), which is not on point because "the requests were incorrectly submitted pursuant to the Arizona Public Records Law . . . [and] should have been submitted pursuant to Rule 123."[4] Recognizing that the rule considers factors that are "unique to the [judicial] branch," *id.*, 221 Ariz. at 121 n.5, 210 P.3d at

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[4] Likewise, another case the District relies upon, *U.S. v. Kaun*, 827 F.2d 1144, 1150-52 (7th Cir. 1987), upheld an injunction against future Freedom of Information Act requests based on Internal Revenue Code provisions that placed certain types of unlawful actions outside of the realm of protected speech.

1292 n.5, including an exemption for requests that are "duplicative or harassing or [that] substantially interfere with court operations," *id.*, 221 Ariz. at 120, 210 P.3d at 1291, the Court held that disclosure was not required for "thousands of random, unidentified electronic messages (e-mails) and documents, without regard to subject matter," which would entail "an untargeted review [that] would seriously impede the court's performance of its core functions with no discernable public benefit." *Id.*, 221 Ariz. at 117-18, 210 P.3d at 1288-89. Even while denying disclosure under an exception unique to the judicial system, the Court based its determination on the particulars of a specific request; whereas here, relief is sought based on *past* public records requests, none of which are alleged to be outside the scope of the public records law, so as to bar *future* disclosure of public records.

Under the public records law, the main recourse for a governmental entity confronted with a voluminous public records request is not to deny it on that basis, nor certainly to seek an injunction prohibiting future disclosures, but to take the reasonable time necessary to respond to the request as justified by the circumstances. In *Phoenix New Times*, the newspaper made 16 requests for public records in four months, sometimes making multiple requests on the same day. 217 Ariz. at 539-46, 177 P.3d at 281-88. The requests entailed voluminous

documents stored in different places. *Id.* One specific request required compilation and disclosure of "many boxes of records."[5] *Id.*, 217 Ariz. at 543, 177 P.3d at 285. As here, the city attempted to convince the court to examine the alleged pattern or practice of aggregate public records requests, which the Court rejected, holding that the "circumstances surrounding each request must be considered." *Id.*, 217 Ariz. at 539, 177 P.3d at 281. Despite the administrative burden and the fact that the agency ultimately fulfilled all of the requests, the Court found that the agency had failed to provide the documents promptly, and remanded for attorney fees. *Id.*, 217 Ariz. at 548, 177 P.3d at 290.

Phoenix New Times stands for the proposition that even repeated and voluminous public records requests require prompt disclosure. Plainly it is not within the "best interests of the state" exception to exempt all future disclosures based on past administrative burden or expense. If the District wishes to expand the universe of "best interest" exceptions, it should address its plea to the Legislature, which determines "the best interests of the State in carrying out its legitimate activities." *Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 81, 927

[5] The District here asserts (Op. Br. at 6) that over an eight-year period, it had to sift through 8,831 pages of documentation. In *Phoenix New Times*, the volume of records ("many boxes"), compiled in response to a single request among 16 requests over a four-month period, likely dwarfed the entirety of the records reviewed by the District.

P.2d 340, 347 (App. 1996) (noting, *id.*, 187 Ariz. at 79, 927 P.2d at 345, that the Legislature had responded to the prospect of "overly burdensome and possibly capricious requests" for documents through the adoption of per-page costs for copying certain documents in A.R.S. § 16-168(E)).

The District analogizes the conduct here to vexatious and frivolous abuses of the legal process, which can be enjoined. But such actions are predicated upon a finding of frivolous litigation, not (as here) merely upon volume.[6] And the public records context differs sharply because here government is statutorily obligated to comply with public records laws. Moreover, the courts have noted that remedies for abusive or excessive public records requests are provided within the public records statute itself. See, e.g. *Lake*, 222 Ariz. at 551, 218 P.3d at 1008.

The requested relief, based upon Appellees' allegedly nefarious purposes

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[6] For instance, the District cites *Stone v. Maricopa County*, 2008 U.S. Dist. LEXIS 84030 (Ariz. Sept. 29, 2008), in which the court found, *id.* at 13-14, that because the claimants "have been repeatedly informed that such repetitive suits are barred by res judicata, there can be no conclusion except that Plaintiffs filed this case for an improper purpose, such as to harass," and had been warned that another attempt to re-litigate would result in a "blanket vexatious litigant" order. *Id.* at 15. Such an order is predicated, among other things, on "claims that were previously and conclusively decided by other courts." *Id.* at 27. Here, of course, appellant never availed itself of the opportunity to litigate any specific public records requests, so there are no findings (or even allegations) that prior public records requests were invalid.

for requesting information that is well within the scope of the public records law, is further precluded by the rule that the motivation behind a public records request, even the "good faith" of those requesting the documents, is "entirely irrelevant." *Phoenix New Times*, 217 Ariz. at 544, 177 P.3d at 286. As the trial court held, it would require a judicial re-writing of the public records law to permit the District to evade its obligations or to prevent Appellees from exercising their rights.

That is not to say that the District is without recourse for excessive or burdensome public records requests. Among the options available to it are the following:

1. Pursuant to A.R.S. § 39-121.01(D)(1) (App. 1), it may require those making public records requests to pay for copying certain types of documents.
2. Pursuant to the same subsection, it need not provide copies of records if they are available on the District's website. As noted in the Statement of Facts, 18 of the public records requests at issue requested meeting agendas and minutes. Were such routine documents or others published on a website, no public records requests would be necessary.
3. If there are multiple requests and numerous documents, a longer response time can be appropriate. See *Lake*, *supra* (sustaining a 30-58 day response time under the circumstances presented); *Phoenix New Times*, 217 Ariz. at

542, 177 P.3d at 284.

4. The District can deny a request it deems outside the scope of the law, and require the persons seeking the documents to file an enforcement action.
5. The District can file an action seeking to establish that certain specific records need not be produced.[7] The court below, for instance, reserved judgment on the one pending records request raised in the Complaint.
6. Finally, as Judge (now Justice) Pelander remarked in *Bolm*, 193 Ariz. at 40, 969 P.2d at 205, "If the [governmental entity] believes that certain records should not be open to public inspection, a remedy must be sought with the Legislature" (citations omitted). Obviously the District chafes under the obligations of the public records law. Its proper recourse is not retaliation and suppression of future records requests, but to seek a change in the law. By contrast, the sweeping judicial intervention the District seeks here runs

[7] We note that in allowing such action, Arizona is more generous than California, where it was held that "authorizing the agency to commence such an action would chill the rights of individuals to obtain disclosure of public records, require such individuals to incur fees and costs in defending civil actions . . ., and clearly thwart the Act's purpose of ensuring speedy public access to vital information regarding the government's conduct of its business." *Filarksy v. Superior Ct.*, 49 P.3d 194, 202 (Cal. 2002). If an action determining whether documents are subject to disclosure does violence to the policy objectives of the public records law, then surely an action seeking categorically to prevent individuals from requesting public records, or to obtain judicial consent for each request, does so in spades.

counter to the "whole tenor of the public records statutes to make access freely available so that public criticism of governmental activity may be fostered." *Star Publishing*, 178 Ariz. at 605, 875 P.2d at 838. Far from fostering criticism of government activity, this lawsuit seeks to squelch it, thereby sending a signal to other concerned citizens not to ask too many questions of their government. This lawsuit is fundamentally at odds with the public records statute and was properly dismissed.

II. THIS ACTION CONSTITUTES AN UNLAWFUL STRATEGIC LAWSUIT AGAINST PUBLIC PARTICIPATION.

Arizona's SLAPP statute provides an additional and independent basis for dismissing this action.

The SLAPP statute, A.R.S. § 12-752 (App. 1), was enacted by the Legislature and signed into law by Gov. Janet Napolitano in 2006. The legislative findings, which inform this entire appeal, are set forth below in relevant part:

A. It is the policy of this state that the rights of citizens and organizations under the constitutions of the United States and this state to be involved and participate freely in the process of government shall be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments and other expressions that are provided by citizens and organizations are vital to effective law enforcement, the operation of government, the making of public policy and decisions and the continuation of representative democracy. The laws, courts and other agencies of this state and its political subdivisions shall provide the

> utmost protection for the free exercise of these petition, speech and association rights.
>
> B. The legislature finds that civil actions have been filed against citizens and organizations of this state as the result of the valid exercise of their constitutional rights of petition, speech and association. The threat of strategic lawsuits against public participation, personal liability and burdensome litigation costs significantly chill and diminish citizen participation in government, voluntary public service and the exercise of these important constitutional rights. . . . This abuse of the judicial process can and has been used as a means of intimidating, harassing or punishing citizens and organizations for involving themselves in public affairs.

(2006 Ariz. Legisl. Serv. Ch. 234 (HB 2440)) (App. 5 at 3).

Accordingly, A.R.S. § 12-752(A) (App. 1) provides, "In any legal action that involves a party's exercise of the right of petition, the defending party may file a motion to dismiss the action under this section." Section 12-752(B) provides that the court "shall grant the motion unless the party against whom the motion is made shows that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual compensable injury to the responding party." Further sections provide for sanctions, attorney fees, and costs.

A.R.S. § 12-751(1) (App. 1) defines the exercise of the right to petition as "any written or oral statement that falls within the constitutional protection of free speech" and is made as part of an initiative, referendum, or recall effort *or* is (1)

"made before or submitted to a legislative or executive body or any other governmental proceeding," (2) "made in connection with an issue that is under consideration or review" by such a body, and (3) "made for the purpose of influencing a governmental action, decision or result."

Two categories of activities that are the subject of this action are implicated by the SLAPP statute. First are requests made to the District to take various types of action, including requests for the Board to hold meetings or form committees, for permission to speak at meetings, to place items on the agenda, and for the Board to attend Public Records Law training and to review education laws, and encompassing issues ranging from the budget to purchases and school uniforms (see, e.g., I.R. 18, ¶¶ 8, 11, 18, 30, 31, 44, 60, 102, 110, 113, 115). Helpfully, the District itself, in its Response to Defendants' Motion to Dismiss (I.R. 19 at 11), provides a chart depicting "Defendants' Letters Requesting Action by Plaintiff," listing ten such requests. Those requests comprise classic petitions for the redress of grievances and fall squarely within the SLAPP statute. The District simply cannot take legal action against Appellees to prevent them from exercising those rights.

The second category is administrative complaints to the Ombudsman and Attorney General, filed by Appellees against the District, which comprise an entire

section of the Complaint (I.R. 18, ¶¶ 117-35). The U.S. Supreme Court has established that legal proceedings, including administrative complaints such as worker compensation claims, are encompassed within the First Amendment right to petition for redress of grievances. *United Mineworkers v. Ill. St. Bar Ass'n*, 389 U.S. 217, 222 (1967); see also *Smith v. Silvey*, 149 Cal. App. 3d 400 (1983) (administrative complaints).

Unquestionably this action "involves a party's exercise of right of petition" so that the "court shall grant the motion" to dismiss unless the grievances "did not contain any reasonable factual support or any arguable basis in law." A.R.S. § 12-752(A)-(B) (App. 1).[8] The Complaint does not even allege that any of the requests made to the District or the administrative complaints—much less all of them—had no reasonable factual support or arguable basis in law. It would be

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[8] While Arizona courts have not interpreted the SLAPP statute, California courts have interpreted its version. Given its purposes, the statute should be construed to have "broad application." *Averill v. Superior Ct.*, 42 Cal. App. 4th 1170, 1176 (1996). The only showing the defendant need make "to invoke the protection of the SLAPP statute is that the challenged lawsuit arose from an act on the part of the defendant in furtherance of her right of petition or free speech," *Fox Searchlight Pictures v. Paladino*, 89 Cal. App. 4th 294, 307 (2001)—a fact that here is established on the face of the Complaint. To establish a defense, the plaintiff must show that the protected action was taken "solely to harass and hinder" and that it "must have been objectively baseless." *Ludwig v. Superior Ct.*, 37 Cal. App. 4th 8, 22 (1995). While appellant urges that the complaints were made for purposes of harassment, it does not even allege that they were baseless.

difficult for the District to do so given that, as we pointed out in the Statement of Facts (*supra* at 3 n. 1), the District has been at least thrice-admonished by state authorities to obtain remedial training in open meetings and public records laws.

Of course, a finding that the lawsuit should be dismissed under the SLAPP statute is determinative of all other issues. SLAPP is on the books to prevent precisely this type of predatory legal action taken by the District against its citizens. It is amazing and profoundly troubling that the District would initiate legal action against citizens on the basis that they were audacious enough to request to speak, to place items on an agenda, and to suggest policy actions—by the District's reckoning, ten times over a period of nine years. As the Legislature found in enacting the SLAPP statute, "the rights of citizens . . . to be involved and participate freely in the process of government shall be encouraged and safeguarded with great diligence." That is exactly what Appellees ask this Court to do.

III. THE REQUESTED RELIEF WOULD INFLICT AN UNCONSTITUTIONAL PRIOR RESTRAINT ON SPEECH.

An additional, fully dispositive reason for dismissing the lawsuit is that the relief sought by Appellant—an injunction requiring prior court approval for any "additional public records requests of Plaintiff" and for "any additional claims,

charges or lawsuits in or before any court, administrative agency or other forum whatsoever against Plaintiff"—would impose an unconditional prior restraint on speech.

Both federal and Arizona courts hold that any prior restraint on citizens' speech or petition rights is presumptively unconstitutional. See, e.g., *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976); *State v. Tolleson*, 160 Ariz. 385, 396, 773 P.2d 490, 501 (App. 1989). Requiring leave of court before citizens may avail themselves of a right constitutes prior restraint. *Kaun*, 827 F.2d at 1150 (holding in that case that there was no prior restraint because the activity was not protected speech). Forcing individuals to garner permission from the government to engage in public discourse offends the right to free speech "[e]ven if the issuance of [such permission] by the [government] is a ministerial task that is performed promptly and at no cost to the applicant." *Watchtower Bible and Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002). Here, of course, the permission would not entail a mere ministerial task but a judicial proceeding.

The government bears a heavy burden in justifying presumptively unconstitutional prior restraints. *Stuart*, 427 U.S. at 558. In fact, the *only* justifications for prior restraints of protected speech are when a nation is at war,

when charges of obscenity are involved, and when the security of a community is threatened by "incitements to acts of violence and the overthrow by force of orderly government." *Near v. State of Minn.*, 283 U.S. 697, 716 (1931). Appellant here has accused Appellees of many things, but so far, at least, not the violent overthrow of the Congress School District.

Because prior restraints are "the most serious and the least tolerable infringement on First Amendment rights," *Stuart*, 427 U.S. at 559, even where they are justified, the courts must examine whether there are measures short of restraint that would ensure the same outcome. *Id.* at 563. That is because the "essence of prior restraint is that it places specific communications under the personal censorship of the judge." *Kaun*, 827 F.2d at 1150 (quoting *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 468 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981)).

In this case, as outlined in Part I, *supra,* there are numerous alternatives short of prior restraint that can achieve whatever legitimate objectives the District might seek. In particular, the District can reject public records requests and await enforcement action, or it may preemptively secure a judicial determination that a specific public records request is meritless. A prior restraint therefore cannot be justified.

Equally on point, past activity never justifies restraining future speech.

Tolleson, 160 Ariz. at 396, 773 P.2d at 501. In *Tolleson*, the trial court found that the defendant had engaged in fraudulent (i.e., unprotected) activities, and issued an injunction prohibiting him from selling not only the product in question but any other motivational course. The Court rejected the injunction against selling other courses because when it banned "future, unproven communication by Tolleson, it committed a classic prior restraint on speech." *Id.* Here, the District does not even allege that past requests were unjustified, yet seeks a forever prior restraint against future public records requests, administrative actions, and even legal actions.

To borrow the phrase from *Tolleson*, the requested relief would constitute a classic prior restraint. Nor can the Court construe the requested relief in a narrower fashion: the whole point of this action is to require future court consent for all future actions by Appellees, based entirely on past actions, none of which were unlawful. The District demands what is possibly the most sweeping and invasive civil remedy in the judicial arsenal: a future restraint on constitutionally protected activities. No such judicial action is remotely called for even under the most generous reading of the facts alleged in the Complaint, and even with the most sinister of motivations attributed to the women against whom the relief is sought. The lawsuit therefore must be dismissed.

IV. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR HARASSMENT.

Appellant appears to have abandoned on appeal its second cause of action for statutory harassment under A.R.S. § 12-1809 (App. 1), and does not even cite that statute in its brief. Rather, the District appears to rely purely upon a theory of harassment under the public records statute (its first cause of action). That claim is addressed by Part I, *supra*. To the extent that a statutory harassment claim remains, it is foreclosed both by the SLAPP statute and because the requested relief constitutes a prior restraint. Additionally, the statutory standards are not met on the face of the Complaint.

A.R.S. § 12-1809 (App. 1) provides for an injunction for harassment, which is defined in subsection (R) as "a series of acts over any period of time that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed . . . and serves no legitimate purpose." The Complaint does not allege that the series of acts are directed at a specific person nor that any of the acts, much less all of them, serve no legitimate purpose.

As this Court admonished in *LaFaro v. Cahill*, 203 Ariz. 482, 488, 56 P.3d 56, 62 (App. 2002), "We construe § 12-809's definition of harassment—conduct that 'serves no legitimate purpose'—to exclude pure political speech. We are

confident that the legislature did not intend § 12-809 to be used for issuance of injunctions restricting political speech."

Two cases from other jurisdictions are especially on point. In *Zink v. City of Mesa*, 166 P.3d 738 (Wash. App. 2007), the court of appeals overturned a finding of harassment based on 172 public records requests over a three-year period. Acknowledging that the requests placed a substantial administrative burden on the city, the court noted that the Legislature is responsible for weighing the impact of compliance against the public purpose of the public records law, *id.* at 742, and that the law (as here) "does not place a limit on the number of record requests an individual can make." *Id.* at 744. The Court also held that as a matter of law, the facts did not state a cause of action for harassment because, even though the requests were sometimes accompanied by threats of legal action, they were not directed at the clerk responding to the requests "personally, but instead served the legitimate purpose of achieving lawful disclosure of public documents." *Id.* at 745. Likewise, here, that is the plain objective of the public records requests as evidenced on the face of the Complaint.

Similarly, in *Smith v. Silvey*, *supra*, the California Court of Appeal overturned a trial court injunction based on numerous administrative complaints filed against a mobile home operator, holding that the harassment statute cannot be

used to proscribe constitutionally protected activities, including the right to petition for redress of grievances. "As exasperating as Silvey's conduct must have been to Smith, Silvey was constitutionally protected in exercising his right of petition to administrative agencies, or the executive branch of government, irrespective of the considerations that prompted his actions," the court declared. "Such activity cannot be classified as a harassing 'course of conduct'." *Id.*, 149 Cal. App.3d at 406. As a matter of law, Appellant's second cause of action fails to state a cognizable claim.

V. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR PUBLIC NUISANCE.

The basis for Appellant's third cause of action, public nuisance, was not apparent from the Complaint, its opposition to the Motion to Dismiss, or oral argument. But the District here pieces together an argument that, despite its fatal flaws, does not lack for creativity.

Appellant seizes upon a passage from *Armory Park Neighborhood Ass'n v. Episcopal Comm. Svcs.*, 148 Ariz. 1, 4, 712 P.2d 914, 917 (1985) to the effect that a public nuisance "is not limited to an interference with the use and enjoyment of the plaintiff's land. It encompasses any unreasonable interference with a right common to the general public." From there, the District observes that Arizona

schoolchildren have a constitutional right to public education, and that anything that diverts funding from the accomplishment of the District's obligation to provide public education constitutes a public nuisance.

Though *Armory Park* states the proposition that a public nuisance goes beyond actions that harm property, it appears that Arizona statutory and case law (including *Armory Park*[9]) have not applied the doctrine except where the harm either was inflicted upon property or emanated from the use of property. A.R.S. § 13-2917(A) (App. 1) defines nuisance as actions that are "injurious to health, indecent, offensive to the senses or an obstruction to the free use of property that interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons." In *City of Phoenix v. Johnson*, 51 Ariz. 115, 123, 75 P.2d 30, 34 (1938) (emphasis added), the Arizona Supreme Court defined nuisance as "a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person *of his own property*, working an obstruction or injury to the right of another, or to the public, and producing such material annoyance, inconvenience, and discomfort that the

[9] *Armory Park* involved a challenge by local residents to a center providing free meals to indigent persons because patrons "trespassed onto residents' yards, sometimes urinating, defecating, drinking and littering on the residents' property." *Id.*, 148 Ariz. at 3, 712 P.2d at 916.

law will presume a resulting damage."

Likewise, Arizona courts have inquired whether conduct would have constituted a public nuisance at common law. See, e.g., *Mutschler v. City of Phoenix*, 212 Ariz. 160, 129 P.3d 71 (App. 2006) (citation omitted) (noting, *id.* 212 Ariz. at 166, 129 P.3d at 77, that "[a]t common law, public nuisances included 'interference with the public health, as in the case of keeping diseased animals or the maintenance of a pond breeding malarial mosquitoes' and 'with the public morals, as in the case of houses of prostitution or indecent exhibitions'"); *Yauch v. State*, 109 Ariz. 576, 514 P.2d 709 (1973) (upholding ordinance prohibiting nude dancing as comparable to a public nuisance at common law), *disapproved of on First Amendment grounds*, *State v. Western*, 168 Ariz. 169, 173 n.3, 812 P.2d 987, 991 n.3 (1991). Neither asking for too many public records, nor filing too many administrative complaints, nor seeking to participate in public meetings, was recognized as a public nuisance at common law.

If the Court was inclined to apply the public nuisance doctrine to a novel set of circumstances, this would seem a decidedly bad case in which to do so, given the strong public policy embodied in the public records laws. Though one might suspect that the District's nuisance theory was entirely novel, in fact the same theory was advanced in a Texas public records case, *Lake Travis Indep. Sch. Dist.*

v. Lovelace, 243 S.W.3d 244 (Tex. App. 2007). There, the school district brought a public nuisance action against two residents (the use of italics seems especially appropriate here given the quantum difference between the facts there as opposed to here) who allegedly made *2,274 requests for information, requiring the district to copy over 120,000 pages and to seek over 551 open records determinations from the Attorney General, at a cost of $700,000 over the course of 13 months*. *Id.* at 248. As here, the district argued that the money used to respond to the requests "otherwise would have gone toward educating its students." *Id.*

The court acknowledged the constitutional obligation to provide public education, recognizing that "school districts, given their already limited funds, have a legitimate interest in determining how best to devote tax dollars towards educating our schoolchildren." *Id.* at 250. "At the same time, however, we have a clear legislative mandate on the subject of open government and must be guided by the policy" behind the public records law. *Id.*

The court found that the legislature intended to prohibit governmental bodies from filing suit against requestors of public information, *id.* at 250, noting that there were a number of ways, including copying charges, that the district could reduce compliance burdens. *Id.* at 251 n.4. The Court held that rather than filing a lawsuit, "the District should have availed itself of provisions contained in

the statute that were designed to mitigate the effects of burdensome requests." *Id.* at 252. Beyond those, "we defer to the legislature to respond to the concern of governmental bodies who would seek further recourse against [the] vexatious misuse" of public records law. *Id.* at 251.

Unlike Texas and California, under which actions by governmental entities to determine whether particular public records requests are prohibited, Arizona allows such actions, giving the District an additional way to mitigate the effects of burdensome requests. Like those jurisdictions, a nuisance or harassment claim contradicts the public policy reflected by public records laws.

Hence, even if public nuisance goes beyond instances where the use property is affected or causes injury, the District's attempt to cobble together a nuisance theory fails for multiple reasons. As with all of its claims, the nuisance action is precluded by the SLAPP statute, and the relief sought would constitute an unconstitutional prior restraint. But as well, the theory is at war with the public records statute and its strong presumption of disclosure. By Appellant's theory, *any* compliance by a school district with the public records law entails a diversion of funds from educational purposes. The Legislature has determined that the importance of open government justifies impositions on the budgets of governmental entities. It has provided means to reduce those burdens, but not to

evade them altogether. As we have seen in the *Phoenix New Times* decision, involving a much more extensive public records request that undoubtedly diverted law-enforcement resources, the policy in favor of prompt and full disclosure is strong and cannot be overcome by claims of administrative inconvenience or cost.

Compliance with the public records law cannot be both an enforceable obligation, as Arizona courts repeatedly and consistently have held, and a public nuisance. To credit Appellant's cause of action would require holding the public records law unconstitutional as applied to the Congress School District. No such extreme action is warranted here. The District may consider the women a nuisance, but the law emphatically does not.

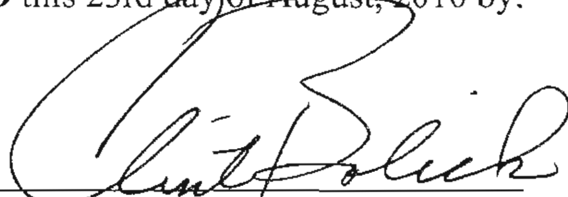
Conclusion

Surely from the moment that democracy dawned, and perhaps even before, government officials have been mightily annoyed by individuals who object to the job they are doing. No doubt many governments, even those that call themselves democracies, have at times suppressed such dissent. Our republic, by contrast, is distinguished by the fact that it not only tolerates dissent, it encourages and protects it. And our State is distinguished both by the fact that it has embraced the principle of open government not just as an objective but as an enforceable reality, and that it has established through statute that it will not tolerate

infringement of the rights upon which a robust democracy is built and endures.

From the instant it was filed, this lawsuit has been an affront to those policies, rights, and principles. There are few lawsuits that provide courts an opportunity to establish a clear and forceful exposition of rights that, with luck, will prevent future abuses altogether. This case is one of them. We urge this Court to seize that opportunity, to affirm the trial court's able decision, and to go beyond it so as to protect the rights not only of the four women here, but of all Arizonans.

RESPECTFULLY SUBMITTED this 23rd day of August, 2010 by:



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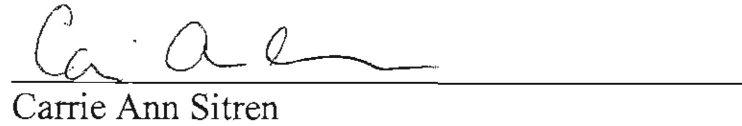
Certificate of Compliance

Pursuant to Ariz. R. Civ. App. P. 14, I certify that the attached brief uses proportionately spaced type of 14 points, is double-spaced using Times New Roman font, and contains approximately 7,368 words.

August 23, 2010



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