IN THE SUPREME COURT
STATE OF ARIZONA

BARRY GOLDWATER INSTITUTE FOR PUBLIC POLICY RESEARCH, Plaintiff / Appellant, v. CITY OF PHOENIX; JEFF BARTON; DENISE ARCHIBALD, and SHEREE RUCKER, Defendants / Appellees.	Supreme Court No. CV-25-0033-PR Court of Appeals, Division One No. 1 CA-CV 24-0176 Maricopa County Superior Court No. CV 2023-003250

PLAINTIFF/APPELLANT'S PETITION FOR REVIEW

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INTRODUCTION

The question in this case is whether public records exchanged during public-sector labor negotiations with the City of Phoenix—records related to labor relations, public employment, and the expenditure of hundreds of millions of taxpayer dollars—should be withheld from the public under the "best interests of the state" exception to the state's public records laws. This Court should grant review to resolve ongoing confusion regarding application of this exemption, and hold that the requested records are not exempt from public disclosure.

Lower courts, including in this case, struggle to consistently apply the "best interests" exception, which the court below correctly described as the "least litigated," "least developed," and most "amorphous" exception recognized by this Court, with "little case law" interpreting its meaning, scope, and application. COA Op. ¶¶ 15, 33.

That lack of clarity has led to repeated misapplication of the balancing test established in *Carlson v. Pima County*, 141 Ariz. 487, 490-91 (1984). Confusion surrounding this exception also allows public bodies statewide to provide increasingly questionable and speculative justifications for withholding records, often without supporting their claims with evidence sufficient to demonstrate a "probability that specific, material harm will result from disclosure." *Mitchell v. Superior Ct.*, 142 Ariz. 332, 335 (1984).

If left unaddressed, the decision below threatens to eviscerate the "strong presumption in favor of disclosure" inherent in the Public Records Law, *Griffis v. Pinal Cnty.*, 215 Ariz. 1, 5 ¶ 12 (2007), and to effectively destroy the *de novo* review that is supposed to apply to public records cases. *See, e.g., Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14 (1993). Only this Court can resolve these problems, and it should grant review to prevent further errors by lower courts and additional harm to the public's right to "open government activity to public scrutiny." *Griffis*, 215 Ariz. at 4 ¶ 11.

ISSUES PRESENTED

1. Did the Court of Appeals err by not requiring the City, after it invoked the "best interests of the state" exception, to establish a probability that specific, material harm will result from disclosure, as *Mitchell* requires?

2. Did the Court of Appeals err by not applying the *Carlson* balancing test *de novo* to independently determine whether the City's purported interests in nondisclosure outweigh the presumption in favor of disclosure?

FACTS

The City of Phoenix ("City"), like many other public bodies in this state, periodically negotiates with public-sector labor unions to set terms and conditions of city employment. Such negotiations result in the allocation of hundreds of millions of taxpayer dollars for one of the most important services the City

provides—public safety. Also, the wages of both City and union[1] negotiators are taxpayer-funded. APP.005 ¶¶ 12-13.[2] The negotiations and related public records therefore implicate strong taxpayer interests.

Under the City's codified "meet and confer" procedures, unions are to submit proposed draft memoranda of understanding ("MOUs") for public comment before closed-door negotiations begin. APP.004 ¶ 6; APP.005-6 ¶¶ 14-16. Negotiators then exchange additional records containing proposed terms and conditions of employment. *Id*. ¶ 10. The City admits that these documents are public records within the meaning of A.R.S. § 39-121.01. APP.005 ¶ 11.

But in the 2022-2023 bargaining cycle, this process wasn't followed. APP.006 ¶ 22-24. The Phoenix Law Enforcement Association ("PLEA")[3] and other government unions refused to submit draft MOUs, *id*., depriving the public of meaningful opportunity to comment on PLEA's proposals, or the City's responses, before closed-door negotiations began, APP.006-7 ¶¶ 17, 24-28; APP.037-38 at 21:18-22:14. Yet despite the City's acknowledgment that PLEA failed to comply

[1] Union negotiators are (or at least were) release-time City employees, meaning they are hired and paid by the City, but "released" to work for the union. APP.005 ¶ 13, APP.174-75 at 158:21-159:19, APP.187-88 at 171:19-172:15.
[2] All "APP." citations reference the Appendix to Plaintiff/Appellant's Opening Brief filed with the Court of Appeals, while "SC-APP." citations reference the appendix to this petition. *See infra* at 4.
[3] PLEA is the authorized meet-and-confer representative for Phoenix police officers below the rank of sergeant. APP.005 ¶ 7.

with the disclosure requirement, it began negotiations anyway. APP.006-7 ¶¶ 21, 26-29.

After the unions refused to submit proposed drafts for public comment, the Goldwater Institute ("Goldwater") submitted a public records request for: (1) "[a]ll draft [MOUs]" between the City and PLEA contemplated for the fiscal year(s) beginning July 1, 2023; (2) "[a]ll proposals for MOUs currently being negotiated—or set to be negotiated per City Code Section 2-218" between those parties for the same time period, and (3) "[a]ny communications to or from City officials regarding PLEA's failure to submit a draft MOU for the fiscal year(s) beginning July 1, 2023." APP.007 ¶ 30; APP.008 ¶ 36.

The City admitted that it has approximately 54 written proposals responsive to Goldwater's request, APP.010 ¶¶ 42, 45, but refused to provide those records, contending that the "best interests of the state" exception applied. APP.008-10 ¶¶ 37, 41, 43. Goldwater therefore initiated this statutory special action on March 1, 2023.[4] APP.010 ¶ 46; Pl./Appellant's App. in Supp. of Pet. For Rev. (SC-APP.) at SC-APP.003-18. The City made no effort to produce redacted versions of the

[4] Negotiations had not yet concluded. After final agreement was reached, the City Council ratified the 2023-2024 MOU on or about May 3, 2023. APP.010 ¶¶ 48-49.

documents or to provide them for *in camera* inspection, despite Goldwater repeatedly raising those practical issues.[5]

The principal disputed fact at trial concerned the impact of disclosure. After an evidentiary hearing with testimony from lay witnesses called by both parties and an expert called by Goldwater, the trial court accepted the City's claims that disclosure of negotiation documents "*may* result in politicizing labor negotiations, collusive activities among bargaining units, public posturing by negotiators, and hindering the free exchange of ideas or proposals without undue influence of constituents." APP.012 (emphasis added). It therefore denied Goldwater's petition.

But the City failed to identify a single example where disclosure of similar records caused the harms it claimed.[6] (Goldwater, by contrast, provided evidence from another jurisdiction[7] where analogous disclosure did *not* result in the City's stated harms.[8]) Other evidence demonstrated that labor negotiations are already

[5] SC-APP.014 ¶¶70-76; SC-APP.028; SC-APP.053 & n.11; APP.216 at 200:12-17; APP.217 at 201:6-10; APP.239-40 at 223:8-224:13.
[6] APP.126-27 at 110:8-111:15, APP.142-43 at 126:5-127:22, APP.145-46 at 129:7-130:21, APP.149 at 133:4-15, APP.179 at 163:2-11, APP.184-85 at 168:18-169:3, APP.198-200 at 182:21-184:12, *see also* APP.240-41 at 224:12-225:5.
[7] Goldwater's expert witness also pointed to Florida, Texas, and Washington as jurisdictions with transparent labor negotiations that have not experienced the harms the City alleged. APP.273; APP.104 at 88:13-20, APP.121-22 at 105:20-106:9, APP.126 at 110:8-24.
[8] APP.252-55; APP.075-78 at 59:5-62:6.

politicized,[9] that collusive activities among bargaining units already occur,[10] that public posturing can occur regardless of whether records are disclosed,[11] and that nondisclosure impairs constituents' ability meaningfully participate in the process.[12]

In short, the record reveals no *probability* that disclosure of the withheld records would cause "specific, material harm." *Mitchell*, 142 Ariz. at 335. Nor did the trial court find one. Instead, it found mere *possibility*. *See* APP.012 ("*may* result in" (emphasis added)). Of course, mere possibility is not probability. *Cf. Lamb v. Indus. Comm'n*, 13 Ariz. App. 408, 411 (1970) (citing cases).

The trial court ultimately entered judgment for the City, finding that "the best interests of the state weigh against the disclosure of the records." SC-APP.057-58. Goldwater timely appealed. SC-APP.059-60.

Without the benefit of oral argument, the Court of Appeals found that "Goldwater has shown no error in the Superior Court's recitation and application of the law," COA Op. at 8 ¶ 17 (cleaned up), at least pertaining to the trial judge's

[9] APP.244-51; APP.267, APP.270-71; APP.109-11 at 93:2-95:3, APP.127-31 at 111:7-9, 111:16-112:17, 113:5-9, 114:18-115:17, APP.163-67 at 147:4-151:10; APP.27.
[10] APP.268-69; APP.099 at 83:4-11, APP.162-63 at 146:7-147:3, APP.169-70 at 153:22-154:15, *see also* APP.226 at 210:20-21 ("THE COURT: It sounds like they're already [colluding].").
[11] APP.116 at 100:1-3, APP.129-30 at 113:10-114:5.
[12] APP.244-47, APP.036-53 at 20:2-37:1, APP.131-32 at 115:18-116:10.

treatment of the *Carlson* balancing test and the *Mitchell* standard. *Id.* at 8-11 ¶¶ 17-24. The court then remanded the case to the trial court to allow the City to propose redactions, and for that court to conduct an *in camera* inspection of the records to determine whether certain disclosures are appropriate. *Id.* at 11-14 ¶¶ 25-36.

This Petition followed.

REASONS FOR GRANTING THE PETITION

I. This Court should clarify that *Mitchell* requires the government to show a probability of specific, material harm when claiming the "best interests of the state" exception to public records disclosure.

This Court should grant review to clarify the proper application of the "best interests of the state" exception. It should hold that the *Mitchell* standard applies, and that public bodies such as the City (or other parties seeking nondisclosure of public records) bear the "burden of showing the probability that *specific, material harm* will result from disclosure." 142 Ariz. at 335 (emphasis added).

Carlson said that "interests of confidentiality, privacy or the best interests of the state" can justify denying access to public records if these interests "outweigh" the Public Records Law's "strong policy" favoring access and disclosure. 141 Ariz. at 491. Since then, there has been no guidance from this Court interpreting the "best interests" exception, and only a handful of published Court of Appeals opinions discuss it. *See Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344 (App.

2001); *Hodai v. City of Tucson*, 239 Ariz. 34 (App. 2016); *ACLU v. Arizona Dep't of Child Safety*, 240 Ariz. 142, 152-53 ¶¶ 32-36 (App. 2016).

Consequently, the court below said that the "best interests" exception is "the least litigated and least developed" exception to the Public Records Law, and with "comparatively little case law" explaining it, it remains "broader" and more "amorphous" than other recognized exceptions. COA Op. ¶¶ 15, 33.

One thing is clear, however: *specificity* is crucial. If the government can deny access to public records by offering speculative assertions of possible harm to amorphous and ill-defined public interests, and then shift the burden of proof to requesters attempt to rebut such vague assertions, the Public Records Law will be neutered. That's because the government could easily claim some *possible* and *general* harm from public disclosure of almost any document. The phrase "best interests of the state" is already so expansive[13] that without a requirement of specific, material, and probable harm, this *exception* will swallow the *rule* of disclosure.

[13] As Sir Edward Coke observed, when political leaders asserted that they were exempt from legal limitations for "reasons of state," "a Reason of State is often used as a trick to put a man out of the right way, for when a man can give no reason for a thing, then he flieth to a higher strain, and saith it is a Reason of State." 1 *Debates and Proceedings of the House of Commons in 1620 and 1621* at 308 (Oxford: Clarendon Press, 1766).

In other words, the "best interests" exception cannot mean mere speculation that something bad may happen due to disclosure. The government must instead establish the *probability* of *specific, material* harm that *will likely* occur *due to* disclosure. *Smith v. Town of Marana*, for example, rejected a government effort to block disclosure based on "generalized potential harms that might [result]." 254 Ariz. 393, 399 ¶ 19 (App. 2022). This, it said, fell short of *Mitchell*'s requirement that the government show "'specific, material harm … will result from disclosure.'" *Id.* In short, the public should not be forced to rebut mere speculation[14] before accessing public records.

Since *Mathews v. Pyle*, 75 Ariz. 76, 80 (1952), this Court has made clear that public officials are not the final arbiters as to what information regarding the affairs of their offices should be made public. But failing to enforce *Mitchell*'s requirements here would give them that power, enabling them to shield records from disclosure by broad assertions of "public interest" that by virtue of their vagueness would be largely impossible to refute—contrary to the state's public policy. *Carlson*, 141 Ariz. at 491.

[14] Rebutting mere speculation is a needle-in-the-haystack type of task, wrongly forcing upon a plaintiff the obligation to refute every straw, no matter how ill-defined (and therefore difficult to refute). It is for that reason that courts typically do not require it.

The Court of Appeals essentially concluded, quite illogically, that specificity is *not* required, precisely *because* the "best interests" exception is "amorphous." COA Op. ¶ 33. In other words, the very fact of this exception's vagueness was, to the court below, reason to *excuse* the government from the rigorous demands of the *Carlson* balancing test. *Id.* That gets things backwards.

The lower court said that "Goldwater cites no case law or other applicable public records authority showing a finding of potential material harm rather than probable material harm constitutes reversible error." COA Op. ¶ 23. But that's not true. In addition to *Mitchell* itself, Goldwater cited *Cox*, in which this Court held that public bodies must "*specifically demonstrate* how production of the documents … would be 'detrimental to the best interests of the state.'" 175 Ariz. at 14 (emphasis added). Goldwater also cited *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 265 (1991), which reiterated the rule that public bodies must make an evidentiary showing of "specific harm" to prevent disclosure.

The court went on to say that *Mitchell* may not provide "a definitive, universal standard" for public records cases. COA Op. ¶ 23. That, too, was wrong. *Mitchell*'s requirement that government demonstrate that specific, material harm would result from disclosure ensures that the government can withhold documents where legitimate reason exists—but cannot disregard its transparency obligation by mere *ipse dixit,* or the recitation of magic words ("Close Sesame"). Here, the City

offered nothing but speculation about harms that "may" occur after disclosure—speculation backed by no objective evidence, and indeed contradicted by the actual record. If the decision below is allowed to stand, any public body can invoke potential, general harms to prevent public disclosure. That would nullify the presumption in favor of disclosure.

The trial court recited the *Mitchell* standard, but did not apply it. Rather than finding *probable* harm, that court found only "*potential* harm," APP.015 (emphasis added), and concluded that disclosure "may" cause harm, APP.012—without finding any *specific* harm was *likely* to follow. The Court of Appeals nevertheless affirmed because it "presume[ed] that the superior court knew the applicable law and applied it." COA Op. ¶ 22. That was plain error because neither court actually held the City to the legally mandatory standard of *Mitchell*. The result was to reverse the legal presumption favoring disclosure, and to unfairly relieve the City of its burden to prove entitlement to an exception from the Public Records Law.

The *Mitchell* standard gives effect to the presumption of disclosure and allows for real scrutiny when the state's best interests and other exceptions to disclosure are invoked—while still giving government room to shield records when necessary. This Court should clarify that *Mitchell*'s requirements apply when a party seeks to prevent disclosure of public information.

II. The Court of Appeals erred by not conducting the *Carlson* balancing test *de novo.*

"If a document falls within the scope of the public records statute, then the presumption favoring disclosure applies and, when necessary, the court can perform a balancing test to determine whether … the best interests of the state outweigh the policy in favor of disclosure." *Griffis*, 215 Ariz. at 5 ¶ 13. That analysis—and the balancing test *Carlson* mandates—must be performed *de novo* at each level of judicial review. *Cox*, 175 Ariz. at 14 ("Whether the denial of access to public records is wrongful is an issue of law which we review de novo.")

Yet the Court of Appeals did not even attempt to balance the interests the City claimed warranted non-disclosure against the public's right to know. Instead, it said it would not "reweigh on appeal the evidence considered and weighed by the superior court." COA Op. ¶ 24. To support this, it cited inapplicable family and probate caselaw, *see id.*, not cases involving the Public Records Law, where *de novo* review applies.

Goldwater was not asking the Court of Appeals to make *de novo* factual determinations. Instead, Goldwater asserted that the Court of Appeals was required to conduct the *Carlson* balancing test for itself and weigh the interests[15] at stake *de novo*.

[15] The Court of Appeals misunderstood Goldwater's position regarding the interests of taxpayers in the requested records as merely reasons why they were

Not only does Public Records Law precedent make clear that *de novo* review applies, *Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 302 ¶ 20 (1998), but the balancing of interests is the kind of purely legal—i.e., non-factual—matter to which *de novo* review applies generally. *See, e.g., In re Est. of Shumway*, 198 Ariz. 323, 326 ¶ 9 (2000) (appellate courts "review the legal issues de novo, applying the appropriate legal standard to the facts found by the trier.").

This case is not the only recent public records case in which the Court of Appeals failed to apply *de novo* review. In *Abraham v. Arizona Board of Regents*, 563 P.3d 632 (App. 2025), Division Two fashioned a novel "abuse-of-discretion" step of review in evaluating withholding and redaction decisions for specific documents. *Id.* at 643 ¶ 46. That is, rather than conduct its own balancing test to evaluate whether the state's interest in nondisclosure outweighs the public's right to public information, Division Two instead now *defers* to a government entity's decision to withhold public records.

Such deference plainly conflicts with the decades-old "policy favoring disclosure" underlying the Public Records Law. *Carlson*, 141 Ariz. at 490. If the

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public records. COA Op. ¶ 24. Not so. As this Court wrote in *Griffis*, among the "purposes underlying the public records law" are to "shed … light on how the government is conducting its business or spending taxpayer money," Both of which apply here. 215 Ariz. at 5 ¶ 12. These are interests both courts below should have weighed under *Carlson*.

government can withhold documents based on broad, *non-specific* assertions of merely *possible* future harms, and then receive judicial deference on appeal, that policy will be honored only in the breach.

III. The Court of Appeals' remand decision does not cure the problem.

The court below remanded to the trial court for an *in camera* determination of the propriety of potential production and/or redaction. But that decision does not fix the Court of Appeals' erroneous *legal* determinations. Because it affirmed the trial court's conclusion that the City could withhold documents based on non-specific, "may"-type speculation of possible future harms—instead of requiring a showing of specific, material, and *probable* harms—any proceedings on remand will be conducted pursuant to the wrong legal standard.

The decision also assumes the City should receive a second chance to meet its burden when it has never offered the documents for *in camera* inspection or produced redacted versions. COA Op. ¶ 31. It's unclear whether remand is even appropriate in such circumstances. *Compare id.* ¶¶ 31-32 & n.4 (relying on *Griffis*), *with Cox*, 175 Ariz. at 15 (finding a public official "acted in an arbitrary and capricious manner" when "[h]e neither [timely] produced the records for an *in camera* review, nor offered a redacted version to the court or [the requester]").

Moreover, the remand covers only the redacted documents responsive to Category 2 of Goldwater's request. COA Op. at ¶ 25. The remand order does not

cover the other categories of documents Goldwater has sought. *See, e.g.,* COA Op. ¶¶ 6-8; APP.007-8 ¶ 32, APP.009-10 ¶¶ 41, 44; SC-APP.011-12 ¶¶ 50-52; SC-APP.016 ¶ 87; COA Op. Br. at 5-6 n.4.

Thus the remand order does not resolve the legal problems caused by the Court of Appeals' ruling.

CONCLUSION

The court of appeals didn't hold the City to its burden under *Mitchell* of demonstrating the *probability*—as opposed to mere speculations of possibility—of *specific and material harm* to the public resulting from disclosure. It also refused to independently apply *Carlson*'s balancing test as a matter of *de novo* review. These were not merely errors in the application of law—they resulted from confusion and uncertainty surrounding the "best interests" exception to public records disclosure, a judicially-created exception this Court has never explained and which the court below rightly called "the least litigated and least developed of the three common law exceptions." COA Op. ¶ 15. Lack of guidance on this question has led to confusion in both this case and in Division Two (*see Abraham, supra*).

The Court should grant review and hold that public bodies must prove a probability of specific, material harm to justify withholding public records, and that reviewing courts must assess such withholding *de novo*.

Petitioner also requests an award of attorney fees and costs on appeal pursuant to A.R.S. §§ 12-341, 12-348, 12-2030, and 39-121.02; ARCAP 21 and 23(d)(4); and the private attorney general doctrine.

Respectfully submitted May 2, 2025 by:

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IN THE SUPREME COURT
STATE OF ARIZONA

BARRY GOLDWATER INSTITUTE FOR PUBLIC POLICY RESEARCH, Plaintiff / Appellant, v. CITY OF PHOENIX; JEFF BARTON; DENISE ARCHIBALD, and SHEREE RUCKER, Defendants / Appellees.	Supreme Court No. CV-25-0033-PR Court of Appeals, Division One No. 1 CA-CV 24-0176 Maricopa County Superior Court No. CV 2023-003250 **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 23(g)(2) of the Ariz. R. Civ. App. P., I certify that the body of the attached Plaintiff/Appellant's Petition for Review appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 3,495 words, excluding table of contents and table of authorities.

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The undersigned certifies that on May 2, 2025, she caused the attached Plaintiff/Appellant's Petition for Review and supporting Appendix to be filed via the Court's Electronic Filing System and electronically served a copy to:

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IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

BARRY GOLDWATER INSTITUTE FOR PUBLIC POLICY RESEARCH CENTER,
Plaintiff/Appellant,

v.

CITY OF PHOENIX, et al., *Defendants/Appellee*s.

No. 1 CA-CV 24-0176

FILED 01-31-2025

Appeal from the Superior Court in Maricopa County
No. CV2023-003250
The Honorable Danielle J. Viola, Judge

REMANDED

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OPINION

Judge Samuel A. Thumma delivered the opinion of the Court, in which Presiding Judge Maria Elena Cruz and Judge Andrew M. Jacobs joined.

T H U M M A, Judge:

¶1 Appellant Barry Goldwater Institute for Public Policy Research (Goldwater) challenges an order denying its statutory special action complaint seeking to compel the City of Phoenix and certain City officials (collectively, the City) to disclose public records related to then-pending labor negotiations. For the reasons set forth below, this matter is remanded to allow the City to provide to the superior court both unredacted and redacted versions of responsive documents for an in camera review to determine what portions of those documents, if any, may be withheld under the best interests of the state exception to the requirement that public records be disclosed.

FACTS AND PROCEDURAL HISTORY

¶2 In a series of lengthy, complicated arrangements, each called a Memorandum of Understanding (MOU), the City and groups of City employees called Units agree to terms of employment. These MOUs are the product of a complicated, multi-step meet and confer bargaining process undertaken from time to time. The Phoenix City Code, including a meet and confer Ordinance, guides that bargaining process. Among other things, the Ordinance includes a prohibition period, where bargaining groups cannot discuss matters being negotiated with City Council members. A proposed MOU resulting from this meet and confer process is made available for public comment before being considered for approval by the City Council. MOUs apparently build on prior approved MOUs, with many identical terms but also new or different terms.

¶3 The City negotiates separately and simultaneously with these Units in this meet and confer process. The specific Unit at issue here is "Police officers—Below the rank of Sergeant," represented by the Phoenix Law Enforcement Association (PLEA).

¶4 The substantive provisions of these City-PLEA MOUs have resulted in significant litigation. *See Gilmore v. Gallego*, ___ Ariz. ___, ___, 552 P.3d 1084 (2024); *Cheatham v. DiCiccio*, 240 Ariz. 315 (2016); *see also PLEA v. City of Phx.*, No. 1 CA-CV 23-0454 (Ariz. App. Aug. 27, 2024) (mem. decision). Those substantive provisions are not at issue here. Instead, this dispute is whether the City had to disclose to Goldwater draft MOU proposals exchanged between the City and PLEA during the meet and confer process leading up to the City-PLEA MOU effective July 1, 2023 through June 2024 (the 2024 MOU).

¶5 On December 1, 2022, PLEA gave the City written notice it wanted to negotiate wage and benefit issues leading up to what became the 2024 MOU. Although the City Code required PLEA to provide a proposed MOU along with that notice, City Code § 2-218(B), PLEA failed to do so. On January 3, 2023, the City wrote PLEA that its December 1, 2022 notice did not comply with the City Code but that the City looked forward to working with PLEA in negotiating the 2024 MOU.

¶6 Apparently having learned of PLEA's December 1 notice, on December 19, 2022, Goldwater sent a public records request to the City seeking three categories of documents: (1) all drafts of a proposed 2024 MOU with PLEA; (2) all MOU proposals being negotiated or to be negotiated with PLEA under City Code § 2-218 and (3) "[a]ny communications to or from City officials regarding PLEA's failure to submit a draft MOU." On January 5, 2023, the City responded by providing Goldwater the January 3, 2023 letter it sent to PLEA, stating it had no other responsive documents. The City added that, for categories "1 and 2, any working drafts of MOUs and any proposals submitted during negotiations are not disclosable until filed with the City Clerk's office."

¶7 After further exchanges, on January 20, 2023, Goldwater submitted a renewed request for the same three categories of documents. On February 23, 2023, the City responded to the renewed request, stating it had no documents responsive to the category 1 request, adding that "[o]nce a draft MOU between the City of Phoenix and PLEA is finalized, it will be released to the public for review and comment pursuant to the requirements of the City Code." For the category 2 request, although noting it had no responsive documents, the City added that it would be

"withholding all such responsive documents during negotiations" of the 2024 MOU. The City stated those documents need not be provided because "[r]eleasing [those proposals] could create a chilling effect[,] . . . would hinder the negotiations process," and "would harm the best interest of the City." The City provided one other document responsive to the category 3 request.

¶8 Dissatisfied with that response, on March 1, 2023, Goldwater filed this statutory special action against the City in superior court. Goldwater's complaint sought an order compelling production of the requested documents as well as declaratory and injunctive relief. The complaint alleged that Arizona Public Records Law and the City Code required production of the requested documents. Goldwater then filed an application seeking an order requiring the City to show cause why Goldwater should not be granted the relief it was seeking. That application did not request an evidentiary hearing.

¶9 After full briefing and oral argument, in May 2023, the court denied Goldwater's request for special action and injunctive relief. Noting the City did not dispute the documents requested were public records presumptively "open to inspection by any person," Ariz. Rev. Stat. (A.R.S.) § 39-121 (2025),[1] the court found the City had shown the documents were protected from disclosure under the "best interests of the state" exception recognized in *Carlson v. Pima County,* 141 Ariz. 487, 491 (1984). Although the City had supported its position with declarations, "Goldwater did not submit any controverting declarations." Noting Goldwater's interest in disclosure, the court observed "the general concerns about transparency, advocacy, and accountability identified by Goldwater are different . . . from the particularized interest in preserving the ability to negotiate labor agreements free of political pressure, collusion, and unnecessary delay due to impasse" the City had shown. The court found the City's "declarations establish potential material harm (i.e., potential for undue pressure, impasse, and collusion) that outweighs the presumption in favor of disclosure."

¶10 Although finding the City properly withheld those documents, the court concluded the documents could not be withheld indefinitely. Balancing the parties' interests, the court ruled the documents could be withheld from disclosure only "until the next MOU is finalized."

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[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

See generally Church of Scientology v. City of Phx. Police Dep't, 122 Ariz. 338 (1979) (prohibiting permanent non-disclosure).

¶11 As these events were unfolding in court, on April 13, 2023, the proposed 2024 MOU was made available for public comment. Public comment was received on that proposal at an April 19, 2023 City Council meeting. Then, on May 3, 2023, the City Council approved the 2024 MOU. The 2024 MOU, a publicly available document, was operative from July 1, 2023 until it expired in June 2024.

¶12 At an August 2023 court hearing, Goldwater requested an evidentiary hearing. At a day-long evidentiary hearing in December 2023, the court received exhibits and stipulated facts and heard testimony from seven witnesses and arguments from the parties. The court's 14-page minute entry entered in January 2024 recited the stipulated facts, summarized the applicable law and applied it to the disputed facts. In addressing the conflicting evidence, the court found the testimony of the City's witnesses more persuasive and probative than Goldwater's, in part given their experience with City-affiliated MOUs. Again, noting Goldwater's interest in disclosure, the court observed that:

> the general concerns about transparency, advocacy, and accountability identified by the [Goldwater] are different, however, from the particularized interest in preserving the ability to negotiate labor agreements free of political pressure, collusion, and unnecessary delay due to impasse. The City provided testimony from individuals directly involved in the collective bargaining process and with experience in labor negotiations with and for the City of Phoenix. [Goldwater] asserts that the City's witnesses merely speculate about potential harm. Even if true, speculative concerns may be sufficient to support the public interests exception. *See Ariz. Bd. of Regents v. Phx. Newspapers, Inc.*, 167 Ariz. 254 (1991); *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297 (1988). Here, the Court finds the testimony presented by the City establishes potential material harm (i.e., potential for undue pressure, impasse, and collusion) that

> outweighs the presumption in favor of disclosure.

Although declining the primary relief Goldwater requested, this January 2024 ruling stated the requested documents could be withheld from disclosure only "until the next MOU is finalized."[2]

¶13 After entry of a final judgment, Goldwater timely appealed. This court has appellate jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21 and -2101(A)(1).[3]

DISCUSSION

I. Arizona's Public Records Law.

¶14 The parties do not dispute the documents Goldwater requested are "public records." *See Griffis v. Pinal Cnty.*, 215 Ariz. 1, 4 ¶ 9 (2007) (providing "three alternative definitions of public records," a term not defined by statute). By statute, absent an applicable exception, "[p]ublic records and other matters . . . shall be open to inspection by any person." A.R.S. § 39-121. Arizona's public records statute "evince[s] a clear policy favoring disclosure." *Carlson*, 141 Ariz. at 490. Although there are "many statutory exceptions to this public right of inspection," *Scottsdale Unified Sch. Dist.*, 191 Ariz. at 300 ¶ 9 (citing authority), there is no argument that any statutory exception applies here. Case law, however, has recognized three additional exceptions to the statutory public record disclosure requirement, using "a balancing test to determine whether [1] privacy, [2] confidentiality, or [3] the best interests of the state outweigh the policy in

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[2] This "next MOU" reference appears to be to an MOU that should have been finalized and in place effective July 2024 (the 2025 MOU). The record does not address a 2025 MOU, recognizing the complaint's focus is documents created leading up to the 2024 MOU. In addition, the record does not show whether the City made available on or after July 1, 2024, the documents leading up to the 2024 MOU, as the superior court's order appears to require.

[3] The court acknowledges and appreciates the amicus brief filed by Poder in Action and the American Civil Liberties Union Foundation of Arizona. To the extent the amici ask the court to address issues and arguments the parties did not raise, the court declines that request. *See Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 84 (1981) (amicus curiae may not create, extend or enlarge issues) (citing cases).

favor of disclosure." *Griffis*, 215 Ariz. at 5 ¶ 13 (citing *Carlson*, 141 Ariz. at 490). The question here is whether, in applying this *Carlson* balancing test, the "best interests of the state" exception justifies the City's refusal to provide the public records Goldwater requested.

¶15 The "best interests of the state" exception is the least litigated and least developed of the three common law exceptions to the requirement that public records be disclosed. *See, e.g.*, *Scottsdale Unified Sch. Dist.*, 191 Ariz. at 299 ¶ 1 (addressing "privacy" exception); *Ariz. Bd. of Regents*, 167 Ariz. at 258 (addressing "confidentiality" exception). As a result, there is comparatively little case law applying the "best interests of the state" exception to disclosure. The City, as the party seeking to prevent disclosure of public records, had the burden to prove that this exception overcomes "the legal presumption favoring disclosure." *Scottsdale Unified Sch. Dist.*, 191 Ariz. at 300 ¶ 9 (citation omitted).

II. Applicable Standard of Review.

¶16 Goldwater argues a de novo standard of review applies, viewing the facts and resulting inferences in a light most favorable to Goldwater. The City argues findings of fact should be reviewed for an abuse of discretion, while the "legal conclusions drawn from those facts are reviewed de novo." Recognizing Goldwater challenges the January 2024 ruling entered after an evidentiary hearing, as directed by the Arizona Supreme Court, this court applies the following standard of review:

> The trial court appropriately conducted the balancing test pursuant to *Carlson*. In reviewing the trial court's findings of fact, we apply two different standards of review. We will uphold its findings of fact unless clearly erroneous. We are, however, free to draw our own conclusions of law from these facts. Thus, whether plaintiffs wrongfully denied defendants access to public records 'is an issue of law which we review de novo.'

Id. at 302 ¶ 20 (citations omitted).

III. Goldwater's Arguments on Appeal.

¶17 Goldwater argues the superior court erred by (1) failing to require the City to show a probability of specific material harm (rather than potential material harm) will result if disclosure was required and (2) not acknowledging that the requested documents "are produced in a process funded by taxpayers and reveal critical information about the allocation of hundreds of millions of dollars in taxpayer money on significant policy questions affecting public safety." The court addresses these arguments in turn.

A. Goldwater Has Shown No Error in the Superior Court's Recitation and Application of the Law.

¶18 The *Carlson* balancing test provides that:

> [t]o justify withholding public documents, the . . . interest in non-disclosure must 'outweigh the general policy of open access.'" It is the public official's burden to "demonstrate specifically how production of the records would violate rights of privacy or confidentiality or would be detrimental to the best interests of the state." A party seeking to block disclosure must, under *Carlson*, demonstrate "the probability that specific, material harm will result from disclosure."

Smith v. Town of Marana, 254 Ariz. 393, 397 ¶ 12 (App. 2022) (citations omitted); *accord Mitchell v. Superior Ct.*, 142 Ariz. 332, 335 (1984). By definition, the *Carlson* balancing test is applied in a case-by-case manner, *Bolm v. Custodian of Recs.*, 193 Ariz. 35, 40 ¶13 (App. 1998) (citing cases), with substantial deference owed to the superior court's factual findings, *see Scottsdale Unified Sch. Dist.*, 191 Ariz. at 302 ¶ 20. As noted by the superior court, given its very nature, even concerns about events that have not yet occurred may be sufficient to support the "best interests of the state" exception to disclosure. *See Ariz. Bd. of Regents*, 167 Ariz. at 258 (reversing decision requiring disclosure of names of all prospects for university president position, noting such disclosure "could chill the attraction of the best possible candidates for the position.").

¶19 Goldwater asserts reversible error based on the proposition that the superior court "based its decision on the mere 'potential,' for generalized, abstract harms – as opposed to the 'probability [of] specific, material harm' required" for the best interests exception to apply. On the record presented, Goldwater has shown no error.

¶20 In context, the text Goldwater relies on comes from *Mitchell*, which arose out of a request for a criminal defendant's presentence report, is highlighted in a longer passage from that case:

> [W]hen a newspaper seeks information as a member of the public, and a convicted offender wishes to bar disclosure on the ground of infringement of his privacy, the rights involved are not coequal, and any decision about which claim is to prevail must ordinarily favor the public's right of access. *The burden of showing the probability that specific, material harm will result from disclosure,* thus justifying an exception to the usual rule of full disclosure, is on the party that seeks non-disclosure rather than on the party that seeks access.
>
> By sealing all presentence reports, the 1973 Pima County rule places the burden on the wrong party, producing a result that is directly contrary to our rules.

142 Ariz. at 335 (emphasis added). In setting forth the applicable legal standard, correctly quoting *Mitchell*, the superior court here stated "[t]he probability of 'specific, material harm' must be shown." In describing what the City's witnesses established, after weighing conflicting evidence and assessing credibility, the superior court concluded that politicization of the negotiating process "has the potential to effect the City's interests, including the taxpayers' interests." Goldwater has not shown how that recitation of the legal standard or characterization of the evidence was reversible error or how that summary was clearly erroneous, given the evidence considered by the court. *See Scottsdale Unified Sch. Dist.*, 191 Ariz. at 302 ¶ 20 (citing cases).

¶21 In analyzing the evidence received, the superior court also found the testimony of the City's witnesses "supports a conclusion that the City has a strong interest in maintaining the confidentiality of the records

at issue;" the public comment process for an MOU recommended for approval "allows an opportunity for transparency, advocacy, and accountability" and Goldwater provided generalized concerns that were different "from the particularized interest in preserving the ability to negotiate labor agreements free of political pressure, collusion, and unnecessary delay due to impasse." Again, Goldwater has not shown how these characterizations were reversible error or were clearly erroneous based on the evidence presented. *See id.* (citing cases).

¶22 At the December 2023 evidentiary hearing, reciting *Mitchell*, the superior court referenced "potential harm or probability, I guess, of harm, if the documents were to be released." In its January 2024 ruling, after stating "[t]he probability of 'specific, material harm' must be shown," the superior court concluded that "the testimony presented by the City establishes potential material harm (i.e., potential for undue pressure, impasse, and collusion) that outweighs the presumption in favor of disclosure." Goldwater argues this use of "potential," rather than "probability," is reversible error. But in addressing material harm, the superior court referenced both a "probability," which Goldwater argues was required, and "potential," which Goldwater argues was error. Even though using both words to describe the standard, the record supports the presumption that the superior court knew the applicable law and applied it here. *See State v. Lee*, 189 Ariz. 608, 616 (1997) ("Trial judges 'are presumed to know the law and to apply it in making their decisions.'") (citation omitted).

¶23 Finally, Goldwater cites no case law or other applicable public records authority showing a finding of potential material harm rather than probable material harm constitutes reversible error. Nor does Goldwater cite any case finding the *Mitchell* statement on which it relies was a definitive, universal standard applicable to all facts in what the Arizona Supreme Court has described as a case-by-case inquiry. *See Bolm*, 193 Ariz. at 40 ¶13 (declining an invitation "to fashion a blanket rule protecting" disclosure of certain types of documents "because the [*Carlson*] balancing test must be applied on a case-by-case basis 'to determine whether a particular record should be released.'") (citation omitted). Moreover, appellate case law reflects a standard that, at least textually, differs from what Goldwater argues *Mitchell* mandates. *See ACLU v. Ariz. Dep't of Child Safety*, 240 Ariz. 142, 151 ¶ 29 (App. 2016) (describing the standard as requiring a governmental entity opposing disclosure to "demonstrate specific material harm or risks to privacy, confidentiality, or the best interests of the state") (citing cases). On this record, Goldwater has shown no error in the superior court's recitation and application of the law.

B. Goldwater's Argument that the Documents Are the Product of a Process Funded by Taxpayers and Contain Information About Allocating Significant Tax Dollars Involving Policy Questions Does Not Show Error.

¶24 Arguing the superior erred in failing to order disclosure of the documents it requested, Goldwater asserts the documents "are produced in a process funded by taxpayers and reveal critical information about the allocation of hundreds of millions of dollars in taxpayer money on significant policy questions affecting public safety." But public records typically would be produced in a process funded by taxpayers and may reveal information about funding originating from tax revenues and implicating public policy. *See Griffis*, 215 Ariz. at 4 ¶ 9 (describing alternative definitions for public records). That Goldwater requested public records is a predicate for the *Carlson* balancing test to apply, not a basis to conclude the superior court erred in applying it. *See id.* at 5 ¶ 13 (noting *Carlson* balancing test applies only after the court determines "whether a document is a public record"). Moreover, to the extent Goldwater seeks to reweigh on appeal the evidence considered and weighed by the superior court, this court declines that invitation. *See, e.g.*, *Hurd v. Hurd*, 223 Ariz. 48, 52 ¶ 16 (App. 2009); *In re Estate of Pouser*, 193 Ariz. 574, 579 ¶ 13 (1999). Goldwater's argument that the documents it seeks stem from a taxpayer-funded process allocating significant tax dollars based on policy determinations does not show error by the superior court.

C. Remand Is Required for an In Camera Review of Redacted Documents Responsive to Category 2 of the Request.

¶25 The record presented provides two primary reasons for why further proceedings are required for the order preventing the disclosure of documents responsive to category 2 of the request.

¶26 ***First,*** the record suggests much of each MOU is boilerplate that does not change in the meet and confer process. Goldwater filed the draft and final MOU for the period ending June 30, 2023 (the 2023 MOU). Apparently building off a 2019-2021 MOU, the 62-page draft 2023 MOU shows changes of any sort on about 20 pages, with half of those pages the result of removing one section. That comparison shows the vast majority of the MOU remained unchanged for years.

¶27 For the 2024 MOU, the changes apparently were far more modest. In closing arguments at the December 2023 evidentiary hearing, the City asserted the 2024 MOU was 45-pages long and "there's maybe ten lines of text that are changed throughout . . . . They're very minimal

changes." Although offering that argument for a different purpose, it is a concession that the changes reflected in the 2024 MOU, compared to the prior MOU, are "minimal" and small in number.

¶28 Unchanged provisions of MOUs, in draft or final form, based on prior MOUs that are publicly available public records, would not appear to be protected from disclosure. Indeed, the City does not appear to suggest disclosure of boilerplate portions of the MOU that remain unchanged, either during negotiations or in a proposed final MOU, "would be detrimental to the best interests of the state." *Smith*, 54 Ariz. at 397 ¶ 12 (citation omitted).

¶29 ***Second,*** the record provided does not include the documents responsive to Goldwater's category 2 request. Indeed, it appears those documents were never provided to or reviewed by the superior court.

¶30 For nearly 75 years, the Arizona Supreme Court has highlighted the need for in camera court review in undertaking the *Carlson* balancing test, particularly in cases where the best interests of the state is claimed as an exception to public disclosure. In *Mathews v. Pyle*, for example, in addressing whether documents in the Governor's Office were protected from disclosure, the Arizona Supreme Court reversed a dismissal and directed the documents "be produced in court for the private examination of the trial judge in order that the court may determine whether . . . [the] documents are confidential and privileged or whether their disclosure would be detrimental to the best interests of the state." 75 Ariz. 76, 81 (1952). To avoid any doubt about the need for such court review, *Mathews* added "***In no other way can such questions be determined***." *Id.* (emphasis added). In *Carlson*, the Arizona Supreme Court repeated that in camera review and partial redaction are "practical alternative[s] to the complete denial of access." 141 Ariz. at 490–91 (citing cases); *accord Mitchell*, 142 Ariz. at 334 ("where the court's discretion has been properly invoked, [we] have asked trial courts to make in camera inspections of the relevant documents and balance the rights of the parties.").

¶31 Goldwater correctly notes the City did not seek in camera review and did not provide the court unredacted and redacted copies of the documents it claims are shielded from disclosure. As a result, Goldwater argues, "the City has waived both alternatives to full disclosure." Recognizing waiver typically is discretionary, the importance of in camera review has prompted the Arizona Supreme Court to require such review even over the objection of the party claiming asserted public records should not be disclosed.

¶32 In *Griffis*, the party arguing that records should not be disclosed given an expectation of privacy "declined" the superior court's offer to conduct an in camera inspection of those documents. 215 Ariz. at 3 ¶ 4. Even then, the Arizona Supreme Court did not find waiver. Instead, noting no court had reviewed the disputed documents, *Griffis* declared "[a]bsent such a review, we have no record on which we can determine the nature and content of the requested documents." *Id.* at 6 ¶ 17. And even though the party opposing production had declined the in camera review offer, *Griffis* remanded "to permit the superior court to review the content of the disputed [documents] in camera." *Id.*;[4] *accord Schoeneweis v. Hamner*, 223 Ariz. 169, 175 ¶ 22 (App. 2009) ("Although no Arizona decision imposes a per se rule requiring an in camera inspection of public records (and we do not announce one here), the necessity of such a review becomes nearly inescapable when the court contemplates the release of documents that inherently raise significant privacy concerns.").

¶33 In reaching this conclusion, the court writes narrowly. Most cases involving common law exceptions to producing public records do not turn on whether that production would be against the best interests of the state. The best interests of the state exception to the public records law and the applicable legal standards differ, qualitatively, from the common law privacy and confidentiality exceptions. Among other things, the best interests of the state exception is more amorphous and implicates broader interests than privacy and confidentiality concerns, which typically are personal. *See Phx. Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348-49 ¶ 18 (App. 2001) ("Th[e] 'best interests of the state' standard is not confined to the narrow interest of either the official who holds the records or the agency he or she serves. It includes the overall interests of the government and the people."). As a result, the legal standards for these three common law exceptions to disclosure of public records address different interests and involve different kinds of balancing in applying the *Carlson* balancing test.

[4] Although the *Griffis* remand was "to determine whether [the documents] are subject to the public records law," *id.* at 6 ¶ 17, the same concept applies to a claim that public records are not subject to disclosure.

¶34 The result on remand in this case may yield an outcome that significantly varies from the order challenged in this appeal, given review of the documents by the superior court, the passage of time or other factors. For now, however, as directed by Arizona Supreme Court cases, remand is necessary for the City to provide to the superior court, for in camera review, both the unredacted public records and versions of those documents with redactions reflecting what the City claims should not be disclosed based on the best interests of the state exception.

ATTORNEYS' FEES ON APPEAL

¶35 Goldwater requests an award of attorneys' fees on appeal pursuant to A.R.S. §§ 12-341, 12-348, 12-2030, and 39-121.02; the Arizona Rules of Procedure for Special Actions and the private attorney general doctrine. Given the remand, Goldwater's request is denied without prejudice so that, on remand, the superior court may consider whether Goldwater is eligible for an award of fees on any of these grounds and, if so, what reasonable fees should be awarded.

CONCLUSION

¶36 The order prohibiting disclosure is remanded for further proceedings consistent with this opinion.

AMY M. WOOD • Clerk of the Court
FILED: JR