ARIZONA COURT OF APPEALS

DIVISION ONE

Barry Goldwater Institute for Public Policy Research, Plaintiff / Appellant, v. City of Phoenix; Jeff Barton; Denise Archibald, and Sheree Rucker, Defendants /Appellees.	1 CA-CV 24-0176 Maricopa County Superior Court No. CV 2023-003250 `

BRIEF OF AMICI CURIAE PODER IN ACTION AND AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

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INTRODUCTION

"Democracies die behind closed doors,"[1] yet the court below slammed the door shut when it refused to order public disclosure of the draft Memoranda of Understanding ("MOU") and negotiation documents between the Police Law Enforcement Association ("PLEA") and the City of Phoenix ("City"). Arizona has a rich history of open access to government records, favoring a well-informed citizenry.[2] The vital importance of open government to public scrutiny is enshrined in Arizona's Public Records Law, A.R.S. § 39-121 *et seq*."[3] Public records are meant to hold government accountable by allowing the public to "monitor the performance of government officials and their employees."[4] Yet the people of Phoenix, including amici Poder in Action, the ACLU of Arizona, and other interested parties were deprived of the opportunity to conduct such monitoring. Here, the lower court prevented participation in open government when it misapplied one of the three narrow exceptions to Arizona's robust public records law, relying on the "best interests of the State" exception to deny disclosure of the MOU between PLEA and

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[1] *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

[2] *Ariz. Newspaper Ass'n, Inc. v. Superior Court* 143 Ariz. 560, 564 (1985). "Historically, [Arizona] has always favored open government and an informed citizenry."

[3] *Griffis v. Pinal Cty.*, 215 Ariz. 1, 4, ¶ 11 (2007).

[4] *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 352 (App. 2001).

the City of Phoenix.

Amici here will first explain how the lower court misapplied the balancing test between the narrow "best interests of the state" exception and the broad presumption in favor of disclosure. Next, Amici provide a review of the power of police unions to block police reform throughout the United States and in Phoenix specifically. Finally, Amici will explain why the withheld public records here have profound public importance, as they alone illustrate which police accountability and transparency measures the City was willing to bargain away at the expense of communities who demand to be free from police violence and patterns of unconstitutional behavior at the hands of the Phoenix Police. In weighing the interests at hand, the Court cannot ignore the recent report by the Department of Justice that found patterns and practices of constitutional violations, including the routine use of excessive force, and need for greater accountability of the very police department whose MOU the City sought to shield from public view.

Interests of Amici Curae

Poder in Action is a civic engagement organization located in Phoenix, Arizona. Poder builds the power of people of color and working-class people to disrupt and dismantle harmful systems and determine a liberated future in Arizona through developing leaders, community education, and civic advocacy. Poder organizes with community members impacted by unjust systems to increase police

accountability, bring an end to police violence, and increase life-affirming resources in historically divested neighborhoods.

The American Civil Liberties Union of Arizona is a statewide nonpartisan, nonprofit organization with over 20,000 members throughout Arizona dedicated to protecting the constitutional rights of all. Freedom of speech and expression under the First Amendment of the United States Constitution has been a foundational mission of the ACLU of Arizona since its founding. The ACLU of Arizona frequently files amicus curiae briefs in Arizona and federal courts on a wide range of civil liberties and civil rights issues, including on access to public records.

ARGUMENT

I. The lower court erred when it wrongly defined the "best interests of the state" to include only the interests of the City of Phoenix and not all Arizona residents.

The "best interests of the state" exception, relied on by the City and the lower court to justify withholding the requested records, overrides the presumption of access to public records only when the government can "prove specifically how the public interest outweighs the right of disclosure."[5] Close scrutiny of any claim raised by the government to justify the withholding of public records under this exception is necessary because public officers can creatively claim this exception to shield

[5] *Phoenix Newspapers*, 201 Ariz. at 349.

documents that, when disclosed, harm not the best interests of the state and its people, but the best interests of their agency. For example, public officers often have an incentive to withhold documents that would make those public officials' jobs more difficult, harm their prospects of re-election, or alienate a constituency they hope to court. For this reason, no court has held that a showing of harm to the government entity seeking to avoid disclosure is sufficient to override the presumption of public access. In fact, courts have repeatedly stressed that the "state" referred to in the "best interests of the state" is the *general public of the state of Arizona,* not the entity, here the City, seeking to avoid disclosure.[6] By failing to consider whether the best interests of the state and *all* its residents would be harmed by disclosure — relying instead on a showing of harm to the City and its taxpayers — the lower court made a clear error of law that extended a narrow exception to the public records law far beyond its scope.

When identifying the actual interests on the government's side, the lower court failed to adhere to the rule that the "'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."[7] In contrast, the lower court only required the City to show an effect on its

[6] *Hodai v. City of Tucson*, 239 Ariz. 34, 38 (App. 2016) (quoting *Phoenix Newspapers*, 201 Ariz. at 349).

[7] *Hodai*, 239 Ariz. at 38 (quoting *Phoenix Newspapers*, 201 Ariz. at 348-49).

specific interests as a governmental body, and then only examined the City's specific, narrow interest in efficient labor negotiations.

The lower court explained that "[t]he 'best interests' exception is not limited to the interest of the City but instead includes the overall interests of the government and residents of the City."[8] Yet the lower court's application of the law is divorced from Arizona precedent applying the "best interests of the state" exception. Moreover, the lower court's flawed reasoning permeates the lower court's opinion, allowing it to incorrectly uphold a denial based on "the best interests of the City."[9] Specifically, the lower court supported its conclusion by reasoning that the balance of interests favors the City due to "the particularized interest in preserving the ability to negotiate labor agreements free of political pressure, collusion, and unnecessary delay due to impasse,"[10] which could impair the City's "ability to get the best value for the available tax dollars."[11]

At no point did the lower court (or the City officials denying this request) describe statewide interests or cast the public as interested in anything other than the City's finances. In fact, the lower court dismissed Isabel Garcia's testimony because it "reflect[ed] her desire to obtain better outcomes for her constituency group as

[8] Superior Court's Under Advisement Ruling, at 10 (emphasis added).

[9] Defendant/Appellees' Answering Brief, at 9.

[10] Superior Court's Under Advisement Ruling, at 13.

[11] *Id.* at 10.

opposed to protecting the labor negotiation process itself,"[12] strongly implying that constituents' interests in anything besides efficient labor contract negotiations do not matter, and therefore should not be weighed, in deciding this case. This approach allowed the City to redefine the "best interests of the state" as "the best interests of the City"[13]while ignoring the myriad interests the public has in disclosure of these important records.

Arizona courts, on the other hand, have always defined the "best interests of the state" to include the interests of the state as both a governmental entity and as an agent of its people.[14] The City's interests as a political subdivision of the state are not coextensive with "the best interests of the state." Casting the "best interests of the state" exception in the terms suggested by the City and adopted by the lower court would allow a government agency to deny any records request that would arguably impede the operations of the agency, no matter to what extent the agency's interests depart from the best interests of the public. This is precisely what occurred

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[12] *Id.* at 11. Isabel Garcia is the Community Safety Strategist for Poder in Action, a Phoenix, Arizona grassroots organization, previously known as Center for Leadership Management, that focuses on leadership development, community building, and advocacy. Poder in Action, *Who We Are* (June 25, 2018) Who We Are — Poder in Action.

[13] Defendant/Appellees' Answering Brief, at 9.

[14] *Hodai*, 239 Ariz at 38. *See also Arizona Bd. Of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 258 (1991) (describing the best interests of the state as "as "[t]he public's interest in ensuring the state's ability to secure the most qualified candidates").

here: the City avoided disclosure of valuable draft proposals based on a three-sentence assertion of how the City prefers to do business.[15] The lower court made a clear error of law by allowing the City to so narrowly define the public interests that would be harmed by disclosure. Thus, the decision below must be reversed.

II. The lower court wrongly defined the public's interest in disclosure to include only their "general concerns about transparency, advocacy, and accountability,"[16] not their particular interest in disclosure of union negotiation documents.

In considering whether the "best interests of the state" exception applies to override the presumption of disclosure, courts are bound by the holding that "the State's interest in non-disclosure must 'outweigh the general policy of open access[.]'"[17] No court has ever held that this test allows, on one side of the scale, a purely abstract consideration of the public's general interests in disclosure without an accompanying analysis of the public's specific interests in disclosure of the records sought. On the contrary, courts have treated it as a given that proper application of this balancing test requires consideration of "[t]he specific public interest in disclosure[.]"[18] The lower court erred by limiting—not to mention minimizing—the interests supporting disclosure to "general concerns about

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[15] Defendant/Appellees' Answering Brief, at 9.

[16] Superior Court's Under Advisement Ruling, at 13.

[17] *Phoenix Newspapers*, 201 Ariz. at 349 (quoting *Carlson v. Pima Cnty.*, 141 Ariz. 487, 491 (1984)).

[18] *See e.g. Id.*

transparency, advocacy, and accountability." In this way, the lower court failed to consider whether the public's specific interest in disclosure of union negotiation documents outweighed the state's interest in avoiding disclosure. This is a clear error of law that, again, extended a narrow exception to the public records law far beyond its scope and therefore must be reversed.

Examples of the proper application of this exception, however, abound. In *Phoenix Newspapers v. Keegan,* the court recognized a profound public interest in the disclosure of questions appearing on a state test *in addition to* the public's interest in a general right of access. There, the court reasoned that the state test's potential to deny Arizona students a high school diploma, particularly when 92% of students failed a basic component, made public knowledge especially important.[19] Similarly, in *Arizona Board of Regents*, the court balanced the State's interest in protecting its process for recruiting a university president against "[t]he public's legitimate interest in knowing which candidates are being considered for the job."[20] There the court reached a nuanced conclusion, holding that the public had a strong enough interest in the seventeen "finalist" candidates, but not records of all 256 "prospects."[21]

Here, the lower court failed to implement this long-established balancing test

[19] *Id.*

[20] *Arizona Bd. Of Regents*, 167 Ariz at 352.

[21] *Id.*

by merely recognizing and, again, minimizing "general concerns about transparency, advocacy, and accountability."[22] These "general concerns" do not resemble the particularized impacts described in previous cases nor comport with the evidence produced below. Plaintiffs here introduced testimony describing the public's particular interests in access to draft proposals for labor negotiations. For example, in her declaration, Ms. Garcia discussed the amount of taxes spent on policing,[23] the amount of influence a police union could exert,[24] and the critical role early knowledge of such information plays in public advocacy.[25] Mr. Shoplock also emphasized the potential benefits for citizens and negotiators stemming from open negotiations.[26] These claims describe *specific* public interests in disclosure of police union draft MOUs and other draft proposals, not merely a general "public interest in a transparent government, including negotiations implicating policy and economic considerations[,]"[27] as was recognized only in passing by the lower court.

Rather than consider the proper weight to afford these potential interests as it was required to do, the lower court failed to place them on the scale at all, concluding

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[22] Superior Court's Under Advisement Ruling, at 13.

[23] Declaration of Isabel Garcia, at 2.

[24] *Id.* at 4.

[25] *Id.*

[26] Declaration of Joseph Robert Shoplock, Jr., at p. 4-25.

[27] Superior Court's Under Advisement Ruling, at 10-11.

that the "general concerns… are different, however, from the particularized interest in preserving the ability to negotiate labor agreements."[28] Significantly, the lower court adopted the City's rationale from its original denial, in which it explained that "[a] balancing act of countervailing interests is appropriate in weighing the possible adverse impact of disclosure against the public's right to inspection."[29] Worse, the lower court then acknowledged no countervailing arguments in favor of disclosure. Both the City and the lower court treated the public interest in disclosure as a generic threshold for the government to overcome instead of placing it, in all its detail, on one end of a true balancing test.

When properly applied, Arizona law requires particularized analysis of both the state's interest in shielding records and the public interest in accessing them.[30] This longstanding approach recognizes that some documents have little public value in disclosure, while others provide an essential means to "monitor the performance of government officials and their employees."[31] The lower court erred in applying the "best interests of the state" exception without recognizing the public's particularized interest in accessing the draft proposals at issue here. This approach

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[28] Superior Court's Under Advisement Ruling, at 13.

[29] Defendants/Appellees' Answering Brief, at 9.

[30] *Phoenix Newspapers*, 201 Ariz. at 349.

[31] *Fann v. Kemp in and for Cnty. Of Maricopa*, 253 Ariz. 537 n.1 (2022) (quoting *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 352 (App. 2001)).

functionally broadens the exception to cover any records which the government has an interest in protecting, regardless of countervailing arguments for disclosure. At the same time, this approach will encourage government agencies to deny records requests without considering the importance of public access, as happened here.

Preventing the "best interests of the state" exception from expanding beyond its intended scope is particularly important in light of the rights protected by the public records law. It is "clear that the courts of this country recognize a general right to inspect and copy public records and documents."[32] Common-law rights of access led Arizona to create a statutory presumption in favor of disclosure.[33] At their core, these common-law rights and statutory presumption stem from a fundamental First Amendment interest in public debate about proper self-government. As the U.S. Supreme Court explained, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[34] Arizona courts have protected this fundamental interest by broadly construing A.R.S. § 39-121 *et seq.*, and narrowly interpreting its common-law exceptions.[35] The "best interests of the state" exception, when properly applied,

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[32] *Nixon v. Warner Commun., Inc.,* 435 U.S. 589, 597 (1978).

[33] *Carlson*, 141 Ariz. at 491.

[34] *Mills v. State of Ala.*, 384 U.S. 214, 218 (1966).

[35] *See Phoenix Newspapers*, 201 Ariz. at 348.

ensures that only a strong public need to shield a record can outweigh the public interest in disclosure. It also acknowledges that the public interest in democratic debate can make access to particular records especially important. In contrast, the lower court's approach fails to protect the fundamental interests underlying the public records law and should be rejected by this Court.

III. Even if it did consider the public's interest in disclosure, the lower court erred in finding that the harm to the state outweighed the public's interest in disclosure of police union collective bargaining agreement proposals, given the immense impact these agreements have on police accountability.

The public has a strong interest in accessing these particular records, because collective bargaining agreements in police departments implicate the public's civil and constitutional rights, as well as safety from bodily harm and death at the hands of law enforcement. Community groups like Poder in Action are interested in the disciplinary processes for police misconduct, and whether these processes can shield officers who commit abuse on the job. Indeed, historians trace the rise of police unions, in part, to a 1950s and 1960s reaction to the civil rights movement and opposition to civilian review and oversight of police agencies.[36] While historically, many police chiefs recognized the importance of transparency in maintaining good community relationships, [37] police unions today negatively impact police-

[36] Robert M. Fogelson, *Big-City Police: An Urban Institute Study* 284-86 (1977).

[37] Walker at 102.

community relationships when they: (1) defend police misconduct, (2) oppose citizen oversight, (3) prevent the public release of discipline records, and (4) disapprove of policies promoting police-community relationships.[38] At the very least, these actions instill the perception that the police are untrustworthy.

Political scientist Wesley Skogan has identified police unions as one of the major reasons police reforms may fail, although respective union attitudes vary from location to location.[39] Skogan details several ways a police union can impede progress:

(1) refuse to agree to any community-policing style reforms;

(2) include rules in a union contract that inhibit the ability of supervisors to make personnel decisions or implement organizational change; and

(3) function as a "formidable force" in local politics.[40]

As criminal justice professor Samuel Walker explains, "many, if not most, police experts believe [police unions] are major obstacles to all police reforms and accountability-related reforms in particular."[41]

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[38] *Id.* at 105-06.

[39] Wesley Skogan, *Why Reforms Fail*, 18 POLICING & SOCIETY 23 (2008).

[40] *Id*. at 28-29.

[41] Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS UNIV. PUB. L. REV. 57, 59 (2012). *See also* Mark P. Thomas & Steven Tufts, *Blue Solidarity: Police Unions, Race and Authoritarian Populism in North America*, 34 WORK, EMPLOYMENT AND SOCIETY 126 (2020).

For example, in 2016, Chicago's Police Accountability Task Force identified the collective bargaining agreements ("CBA") in that city as having baked into official policy the "code of silence"—that is, when police officers commit misconduct, another officer will not report it.[42] Further, the Task Force found, the CBAs, which required that citizen complaints include a signed affidavit, discouraged community members from reporting police abuse at all.[43] Chicago's CBA also required that, when an officer shoots someone, that officer is not required to give a statement to investigators for 24 hours, which allows time for officers to coordinate false stories with others—exactly what transpired after the high-profile shooting of Laquan McDonald.[44]

An analysis of 178 municipal police department union contracts, including the Phoenix Police Department's, found that 88 percent of those contracts contain provisions that can impede legitimate disciplinary actions against officers who commit misconduct.[45] These provisions include: delaying interrogations in a misconduct investigation and providing officers with the evidence against them

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[42] Police Accountability Task Force, *Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities they Serve* (2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf.

[43] *Id.* at 70-71.

[44] *Id.* at 71.

[45] Stephen Rushin, *Police Union Contracts*, DUKE L. J. 1191, 1224 (2017).

before the interrogation; limiting public access to disciplinary records; opposing civilian oversight; banning anonymous complaints or establishing statutes of limitations for complaints; and requiring arbitration in disciplinary appeals.[46] The study's author, criminal law professor Stephen Rushin, argues for transparency in contract negotiations, because without it, the people most vulnerable to police abuse have no voice in the accountability procedures that would prevent police brutality.[47] One quasi-experimental study of Florida law enforcement found that collective bargaining rights among police leads to an increase in, not misconduct generally, but violent misconduct specifically.[48]

Furthermore, collective bargaining agreements have historically, and continue to, allow police unions to circumvent regulatory processes, advancing union goals rather than protecting the public interest.[49] For example, 1960s police unions eliminated two major citizen review boards in New York City and Philadelphia.[50] A January 2017 Department of Justice report on Chicago revealed a police union

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[46] *Id.* at 1222-1239.

[47] *Id.* at 1247-1248,1251-1252.

[48] Dhammika Dharmapala, Richard H. McAdams, & John Rappaport, *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, J. OF L., ECON., AND ORGANIZATION 38, 1 (2022).

[49] Walter Katz, *Beyond Transparency: Police Union Collective Bargaining and Participatory Democracy*, 74 SMU L. REV. 419, 435 (2021).

[50] Samuel Walker, *The Neglect of Police Unions: Exploring One of the Most Important Areas of American Policing*, 9 POLICE PRAC. & RES. 95, 102 (2008).

opposed the use of data to identify problematic patterns of behavior because police officers thought it would result in arbitrary and unfair discipline.[51]

In Phoenix, PLEA has a proven record of obstructing attempts at accountability and civilian oversight. It negotiated a contract that allowed hundreds of officers to erase records of their misconduct, a process known as "purging."[52] It objected to the release of an officers' name when that officer fatally shoots someone. [53] In 2022, PLEA supported a bill, HB 2721, codified as A.R.S. § 38-1117, that neutered the Office of Accountability and Transparency ("OAT") by requiring any government body that meaningfully investigates police misconduct to be comprised of at least two-thirds police officers.[54] Although a Civilian Review Board exists, it

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[51] Catherine L. Fisk & L. Song Richardson, *Police Unions,* 85 GEO. WASH. L. REV. 712, 746 (2017).

[52] Justin Price, *Phoenix police routinely 'purge' officer discipline records, keep misconduct secret*, AZ CENTRAL (Aug. 23, 2019), https://www.azcentral.com/story/news/local/arizona-investigations/2019/08/23/phoenix-police-routinely-purges-officer-misconduct-discipline-records/1955828001/.

[53] Sullivan et al., *In Fatal Shootings by Police, 1 in 5 Officers' Names Go Undisclosed*, WASHINGTON POST (Apr. 1, 2016), https://www.washingtonpost.com/investigations/in-fatal-shootings-by-police-1-in-5-officers-names-go-undisclosed/2016/03/31/4bb08bc8-ea10-11e5-b0fd-073d5930a7b7_story.html.

[54] Phoenix Law Enforcement Association, *Approved Bills in 2022*, OUR MAGAZINE (Sept. 1, 2022), https://azplea.com/article/approved-bills-in-2022; TJ L'Heureux, *How Phoenix undercut its own police oversight agency*, PHOENIX NEW TIMES (April 2, 2024), https://www.phoenixnewtimes.com/news/how-phoenix-undercut-its-own-police-oversight-agency-18485121

only has power to review OAT's reports and make recommendations.[55]

Contextually speaking, this discussion takes place amidst Phoenix police's documented history of abuse and constitutional violations. In June, the Department of Justice ("DOJ") released the report on its years-long investigation of the Phoenix Police Department and the City of Phoenix.[56] Among many other troubling findings, the DOJ found reasonable cause to believe that the Phoenix Police Department uses excessive force, including unjustified deadly force; that its officers discriminate against Black, Hispanic, and Native American people; and that they violate individual's rights to freedom of speech and expression.[57] The DOJ wrote, "Phx PD will need to be held accountable to implement the reforms we identify."[58]

Throughout the country, police unions have sought, and succeeded, to block accountability and transparency measures proposed by the DOJ through consent decrees.[59] In Phoenix, PLEA has objected to federal oversight and the DOJ's

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[55] P.C.C. § 20-16.

[56] U.S. Dept. of Just., Civil Rights Division, *Investigation of the Phoenix Police Dept.: Executive Summary* (June 13, 2024), https://www.justice.gov/crt/media/1355891/dl?inline.

[57] *Id.* at 1.

[58] *Id.* at 4.

[59] *See, e.g.,* Tina Daunt, *Police Union Sues to Block Federal Consent Decree*, L.A. TIMES (Oct. 11, 2000), https://www.latimes.com/archives/la-xpm-2000-oct-11-me-34906-story.html; Adeshina Emmanuel, *How Union Contracts Shield Police Departments from DOJ Reforms*, IN THESE TIMES (June 21, 2016), https://inthesetimes.com/features/police-killings-union-contracts.html (providing examples in Portland, Seattle, and Pittsburgh).

findings of a pattern and practice of excessive force and violations of the Phoenix community's constitutional and civil rights.[60] PLEA's president has tried to reject any possibility of a consent decree.[61] Police groups' influence on state politics is evident: one day after an endorsement from the Arizona Police Association, U.S. Senate candidate Ruben Gallego urged the DOJ not to seek a consent decree.[62] Given that the police, their Union, and the City all refuse to hold police accountable, the public's interest in the disclosure of records at issue in this case cannot be higher.

IV. Public access to police union collective bargaining agreements should not be limited to final agreements, since negotiation records have important value in understanding the final agreements.

Transparency in the negotiation process itself has public importance, because the government may concede on police accountability areas to avoid increasing wages and benefits, which results in greater harm to communities most likely to suffer from police abuse. When the government excludes the public from this

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[60] Melissa Blasius, *Phoenix officers union releases report challenging DOJ's use-of-force findings*, ABC 15 ARIZONA (Aug. 29, 2024), https://www.abc15.com/news/local-news/investigations/phoenix-officers-union-releases-report-challenging-dojs-use-of-force-findings.

[61] Serena O'Sullivan, *New survey shows many Phoenix police officers would consider leaving if DOJ takes over*, KTAR NEWS 92.3 FM (Jul. 3, 2024), https://ktar.com/story/5578607/doj-consent-decree-could-hurt-retention-of-phoenix-police-officers/.

[62] Peter Valencia, *Letter: Rep. Ruben Gallego opposes consent decree between DOJ and Phoenix PD*, AZ Family (Aug. 27, 2024), https://www.azfamily.com/2024/08/27/letter-rep-ruben-gallego-opposes-consent-decree-between-doj-phoenix-pd/.

process, these communities are unable to address concerns related to their own experiences. Access to draft proposals exchanged between the parties would allow Arizona citizens to see what tradeoffs their government makes when negotiating with police unions. "The core purpose of the public records law is to allow the public access to official records… so that the public may monitor the performance of government officials and their employee."[63] In other words, the public has a right to know *how* the government reaches its outcomes, not just what those outcomes look like. Knowing how a party responds to proposals is essential to understanding how it negotiates. As Isabel Garcia explained, the public cannot exercise its right to know how the government negotiates without seeing the proposals it receives.[64] Additionally, the public has a strong interest in understanding how the government values various contract terms, which it can only learn by comparing draft and final MOUs.[65]

Isabel Garcia explained how understanding the specific terms of the negotiation protects the public's safety and welfare while promoting democracy:

> [B]eing able to see a draft MOU or a proposed MOU for the upcoming year…strengthens our education to the public, and it also informs our advocacy efforts if we see that…there's going to be increases to…pays and salaries, or…increased protections that are

[63] *Phoenix Newspapers*, 201 Ariz at 351.

[64] Declaration of Isabel Garcia, at 3.

[65] *Id.*

> going to make it more difficult to hold police accountable for misconduct.[66]

Explaining how participation in the negotiation process allows the public to influence the final contract, Ms. Garcia continued: "transparent or an open door negotiation process would be…great for civic engagement and education and to actually have an impact in eliminating provisions that would decrease police accountability."[67]

Furthermore, public participation ensures policies, regulations, and laws are amended, provide a proper solution, and operate efficiently.[68] For example, in Austin, Texas, the public rallied together to voice concerns after the Austin Police Department failed to hold officers accountable for their participation in the shooting of a teenager and violent arrest of a school teacher.[69] As a result of their efforts, the city council unanimously approved a police contract that removed the 180-day limit to file a complaint to initiate an investigation; eliminated the classification of short

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[66] *Id.* at 22-23.

[67] Amended Transcript of Proceedings, *supra* note at 28-29.

[68] *Barack Obama, Transparency and Open Government: Memorandum to Heads of Executive Departments and Agencies,* The White House (Jan. 21, 2009), https://obamawhitehouse.archives.gov/realitycheck/the_press_office/Transparency_and_Open_Government (highlighting the benefits of public participation and impact on the government).

[69] Kathryn McKelvey et al., *Exploratory Analysis of Nix the 6 Collective Bargaining Agreements (CBAs)* 28 (2023), https://campaignzero.org/wp-content/uploads/2024/04/NT6CBAs_043024.pdf

suspensions; and created the Office of Police Oversight to receive anonymous complaints and disclose its findings.[70] Here, draft or proposal MOUs guarantee the City meets its objectives for the year. Once the public comment period passes, "the influence that the public has on changing the contract is minimal."[71] The public comment period is the "key to…advocacy efforts."[72]

Public advocacy and participation in politics—the right "to petition the Government for a redress of grievances"—is the key component to self-government.[73] The City presents this potential for participation as a harm, warning of "politicizing labor negotiations" and "public posturing by negotiators."[74] The people of Arizona have a strong interest in holding accountable the government in labor negotiations with its police forces. To do so, the public must have access to public records that show how the people who negotiate with or on behalf of the government have acted. Democratic participation does not harm Arizona's government. Denying access to the 2021 draft MOU silenced public participation, eliminated the opportunity for change, and ignored Arizona's history of

[70] *Id.* at 35.

[71] Amended Transcript of Proceedings, *supra* at 26-27 (explaining further that, in Poder's experience, when the negotiation period ends the public is unable to influence contract changes).

[72] *Id.* at 30 (stating further that since 2018, the organization has not seen changes after the end of the public comment period).

[73] U.S. Const. Amend. 1.

[74] Superior Court's Under Advisement Ruling, at 10.

championing a transparent government and educated public.

The Phoenix City Code typically promotes the public's right to know by requiring authorized employee organizations to submit their proposed MOUs to the city council by December 1 and file a copy thereof with the City Clerk as a public record.[75] This limited form of disclosure at least allows the public to compare the proposed and final MOU. In the present case, however, PLEA refused to submit an MOU to the City or City Clerk, instead submitting generic "letters of intent" to bargain.[76] This approach deprived the public of the ability to comment on any differences between the previous MOU and PLEA's proposal unless the parties happened to reach an impasse.[77] The public's statutory right to access government records becomes particularly important when deprived of other avenues to access the information.[78] This is particularly true when, as here, PLEA simply ignored its obligations under the Phoenix City Code.

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[75] *Id.* at 5.

[76] *Id.* at 4-5.

[77] *Id.* at 5.

[78] *A.H. Belo Corp. v. Mesa Police Dept*., 202 Ariz. 184 (App. 2002) (reasoning that the public's interest in a record depends on whether it can access the information elsewhere).

CONCLUSION

"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. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[79] Arizona law has been written and interpreted to promote broad public knowledge, but the lower court's ruling only encourages public ignorance and should not be tolerated. The lower court committed reversible error by misapplying the "best interests of the state" exception to Arizona's robust Public Records Law to override the presumption of public records disclosure. Additionally, the City's negotiation records with PLEA have profound public importance, not only because police unions can influence transparency and accountability in police/community relations, but also because the proposals themselves show what aspects of accountability and transparency our government was willing to concede in exchange for other contract items like wages and benefits. For these reasons, amici respectfully urge this Court to reverse.

Respectfully submitted this 2nd day of October 2024.

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[79] Letter of James Madison to W. T. Barry (August 4, 1822), available at https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text

ARIZONA COURT OF APPEALS

DIVISION ONE

Barry Goldwater Institute for Public Policy Research, Plaintiff / Appellant, v. City of Phoenix, Jeff Barton, Denise Archibald, and Sheree Rucker, Defendants /Appellees.	1 CA-CV 24-0176 Maricopa County Superior Court No. CV 2023-003250 **CERTIFICATE OF COMPLIANCE** `

BRIEF OF AMICI CURIAE PODER IN ACTION AND AMERICAN CIVIL LIBERTIES UNION OF ARIZONA

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