IN THE SUPREME COURT

STATE OF ARIZONA

AMY SILVERMAN; and TNI PARTNERS, Plaintiffs/Appellees, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, Defendant/Appellant.	Supreme Court No. CV-23-0181-PR Court of Appeals Division One Case No. 1 CA-CV 22-0209 Maricopa County Superior Court No. LC2021-000182

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS APPELLEES

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The identity and interest of amicus is set forth in the accompanying Motion for Leave to File Brief Amicus Curiae of Goldwater Institute.

INTRODUCTION AND SUMMARY OF ARGUMENT

There are few things that government should hide from the public in any democracy. Arizona law recognizes the important principle that self-government requires an informed citizenry that can have access to information about the operation of public institutions, so that they can improve the quality of public services, spot inefficiencies or wrongdoing by public officials, and exercise their power as citizens to supervise their government. *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 191 Ariz. 297, 302 ¶ 21 (1998). For these reasons, Arizona law presumes in favor of disclosure in its public records statutes, and allows government to overcome that presumption only in a few narrow circumstances: namely when "confidentiality, privacy or the best interests of the state" are sufficiently weighty to outweigh the public's interest in disclosure. *Carlson v. Pima Cnty.*, 141 Ariz. 487, 491 (1984).

Statutes purporting to exempt records from disclosure by declaring them confidential should be interpreted narrowly and construed in favor of transparency, in service of this state's "well settled … general 'open access' policy toward public records." *Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 81 (App. 1996). And

that means the phrase "[a]ny person who is engaged in bona fide research" in A.R.S. § 46-460(D)(8)—an exception to an exception to disclosure—should be liberally construed to allow as much disclosure as possible in circumstances where "no personally identifying information is made available." *Id.*

Those public policy considerations counsel in favor of a broader conclusion than the Court of Appeals reached here. But so do constitutional considerations such as free speech and the separation of powers. The court below interpreted "bona fide research" to include journalism in addition to other kinds of educational, administrative, or scientific research. A-123–24 ¶ 20. But this is still too narrow an interpretation to satisfy the requirements of Arizona's "well settled … general 'open access' policy," *Purcell*, 187 Ariz. at 81, and it amounts to judicial legislating. Nothing in the statute confines "bona fide research" to journalists, educators, administrators, or scientists, and for the court to draw such a line risks placing courts in the role of deciding who does and does not qualify as a "journalist," etc. Such decisions would almost inevitably work as a prior restraint on citizens exercising their free speech rights.

The Court should hold that "bona fide research" means any type of good faith inquiry—that is, any investigative purpose not tainted by improper, unlawful, malicious, or prurient motives—and reinstate the Superior Court's order compelling production of the records at issue.

ARGUMENT

I. The "bona fide research" exception must be read in light of Arizona's general policy of openness.

Arizona has long followed what this Court calls a "strong policy" presuming in favor of the disclosure of public records. *Carlson*, 141 Ariz. at 491. While the legislature has established exceptions to this policy in certain sensitive areas, the general rule is one of openness, because "[t]he core purpose of the public records law is to allow the public [to] … monitor the performance of government officials and their employees." *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 351 ¶ 33 (App.2001). *See also KPNX Broad. Co.*, 191 Ariz. at 302–03 ¶ 21 ("[t]he purpose[s] of the Public Records Law … [are] 'to open agency action to the light of public scrutiny'" and "to allow citizens 'to be informed about what their government is up to.'" (citations omitted)). Simply put, the reason for transparency requirements is to enable citizens to judge whether their government "'is doing its [ ] job right.'" *Id.* (citation omitted).

For those reasons, exceptions to the disclosure statutes should be narrowly construed, *see, e.g., ACLU of N. Calif. v. Superior Ct.*, 134 Cal. Rptr.3d 472, 480 (App. 2011) ("Since disclosure is favored, all exemptions are narrowly construed." (citation omitted)); *Fox v. Bock*, 438 N.W.2d 589, 593 (Wis. 1989) ("Exceptions should be recognized for what they are, instances in derogation of the general legislative intent, and should, therefore, be narrowly construed." (citation

omitted)); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 884 P.2d 592, 597 (Wash. 1994) ("[D]isclosure provisions must be liberally construed, and its exemptions narrowly construed.")

Nondisclosure should be permitted only "where the countervailing interests of *confidentiality*, privacy or the best interests of the state [are] appropriately invoked." *Carlson*, 141 Ariz. at 491 (emphasis added).[1] And these countervailing interests must be of a precise and direct nature. In *Church of Scientology v. City of Phoenix Police Dep't*, 122 Ariz. 338, 339 (App. 1979), the court rejected the government's effort to withhold documents where it claimed that disclosure would "undermine[]" the "efficient functioning of law enforcement agencies." It said that, in order to meet its burden of proving that an exception to disclosure applied, the government had to show that "specific harm will be done by the disclosure of these particular documents." *Id.* *See also* *Moorehead v. Arnold*, 130 Ariz. 503, 505 (App.

[1] The only Public Records Law exception at issue here is that of confidentiality—whether the requested, redacted records are made confidential by A.R.S. § 46-460. *See* *Schoeneweis v. Hamner*, 223 Ariz. 169, 173 ¶ 14 (App. 2009) (confidentiality exception refers to records "made confidential by statute"); *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273 ¶ 20 (App. 2007) ("Without an express statutory exemption a bare assertion of confidentiality does not make a document any less a public record."). Thus, although the statute reflects and carefully mitigates a concern for the privacy interests of vulnerable adults receiving DES services, the Public Records Law's *privacy* exception is *not* at issue here, nor does it appear to have been invoked or seriously argued. *See* APPV1-015 (claiming only that "APS records are confidential under A.R.S. § 46-460.").

1981) (publicly funded activities are "not meant to be clothed in secrecy, but to be subject to open discussion and debate.")

Here, the legislature created an exception to the disclosure rule, but then established an exception to the exception. In such a case, Arizona courts should maintain their focus on the general policy of openness. Section 46-460(A) makes confidential

> all personally identifying information concerning any person who is involved in an adult protective services program, including the reporting source's identity, other than a perpetrator against whom an allegation of abuse, neglect or exploitation has been substantiated …, and all information that is gathered or created by adult protective services and that is contained in adult protective services records … .

But the legislature then listed over a dozen exceptions to this non-disclosure, one of which provides for disclosure to "[a]ny person who is engaged in bona fide research, if no personally identifying information is made available." A.R.S. § 46-460(D)(8).

The specificity of the language used here indicates that the legislature acted in light of its understanding of Arizona's openness policy, and did not intend to overrule or alter that policy. *Cf.* *State v. Pennington*, 149 Ariz. 167, 168 (App. 1985) ("It is presumed the legislature is aware of existing case law when it passes a statute … and when it retains the language upon which those decisions are based, it approves the interpretations." (citation omitted). Section 46-460(A)'s exception from disclosure applies only to a specific,

narrowly defined class of information—personally identifying information[2] about a particular group of people—and the exceptions to that exception are correspondingly *broadly* worded. It permits disclosure in "*any* of" a long list of circumstances, including to "*[a]ny* person who is engaged in bona fide research." A.R.S. § 46-460(D)(8) (emphasis added).

The specificity of this language[3] is reinforced by what follows: an exception to the exception to the exception, and then an exception to that! Information may be provided to bona fide researchers as long as it includes "no personally identifying information," but even personal identifying information may be provided if it "is essential to the research" and the agency approves the disclosure. *Id.* A researcher may even contact a person receiving DES services if the agency obtains the subject's consent. *Id.*

[2] This phrase is, of course, a term of art well known from privacy statutes such as A.R.S. § 13–2001(10).

[3] The Arizona Legislature has demonstrated time and time again that when it wants to exempt certain types of information from disclosure, it is capable of doing so with specificity. *See* AG Agency Handbook Appendix 6.1 (cataloguing various statutory exceptions to disclosure). Its carve-outs from those exceptions should be viewed in the exact same light as other non-exempt records, that is, with a presumption that the information they cover is to be disclosed to the public upon request and proper redaction.

The point is that the statute is written with broad disclosure rules and narrow exceptions, reflecting throughout an awareness and approval of the policy of openness.

DES's argument disregards this fact. In its myopic view, the statutory scheme "expresses a clear purpose to prohibit the general public from accessing any records the legislature has designated as 'confidential.'" Appellant's Supp. Br. at 4. But the opposite is true: the statute expresses a purpose to protect a narrow class of information, and with broadly termed exceptions. These policy considerations warrant interpreting the "bona fide research" exception broadly.

II. Arizona's openness policy requires courts to broadly construe the term "bona fide research."

"There are no sweeping exemptions from the public records laws of this state, and a governmental entity always bears the burden of overcoming the presumption of disclosure." *ACLU v. Ariz. Dep't of Child Safety*, 240 Ariz. 142, 151 ¶ 29 (App. 2016) (cleaned up).

The exception at issue here turns on the definition of "bona fide researcher." The Court of Appeals viewed this as an ambiguous term, COA Op. ¶ 16, A-122. But this is doubtful. Certainly the term "bona fide" is not ambiguous. *See* Black's Law Dictionary (11th ed. 2019) ("in good faith"). And the word "research" is not ambiguous, either. It simply means inquiry in the pursuit of an answer to a question—as in the dictionary definitions cited in Paragraph 15 of the Court of

Appeals' decision. A-121. An *ambiguous* term is a term reasonably susceptible of two equally plausible meanings. *See, e.g.,* *Coburn v. Sievert*, 35 Cal. Rptr.3d 596, 603 (App. 2005). Yet the Court of Appeals never identified any plausible alternative meaning of the word "research" or cited any source that limits the term with any other qualifier such as "academic," "educational," "administrative," or "scientific." *See* A-123 ¶¶ 19–20. Just because the ordinary definition of the term "research" is broad does not mean it is ambiguous.

True, "research" is distinct from *idle curiosity* or *trivial or superficial examination*. The word refers to a serious or in-depth examination, motivated by a genuine effort to obtain an answer. Arizona regulations define it that way, for example. Ariz. Admin. Code R9-14-701(A)(14) ("'Research' means a systematic investigation to establish facts that may contribute to knowledge from which an individual may draw inferences or a general conclusion."). So do federal regulations. *See* 28 C.F.R. § 46.102(d) (similar). Other courts have interpreted it that way, also. *See, e.g.,* *Haigley v. Dep't of Health & Mental Hygiene*, 736 A.2d 1185, 1194 (Md. App. 1999) (citing *Webster's* to define "research" as "careful, systematic, patient study and investigation in some field of knowledge, undertaken to discover or establish facts or principles"); *Urso & Brown, Inc. v. Dir., N.J. Div. of Tax'n*, 19 N.J. Tax 246, 262 (2001) (citing *Websters* to define research as "careful or diligent search" and "studious inquiry."); *Friends of Animals v. U.S.*

Fish & Wildlife Serv., 28 F.4th 19, 29 (9th Cir. 2022) (citing *Merriam-Webster's* to define it as "the collecting of information about a particular subject."). *See also In re Kidd's Est.*, 106 Ariz. 554, 563 (1971) (Udall, J., dissenting) (citing *Webster's* to define research as "studious inquiry or examination.").

It's revealing that there is no other word the legislature could have used to describe in the place of "research" that would have been broader, without eliminating the nondisclosure option entirely. For example, had it said "bona fide investigation" or "bona fide inquiry," that would not have made the statute any clearer, narrower, or broader, than it is.

The Court of Appeals was certainly correct that "research" includes journalism. A.123–24 ¶¶20-21. But that is because the term "research" includes any serious effort to study a question to find a correct answer. It therefore also includes genealogical, biographical, legal inquiry, etc., no less than "educational," "administrative," "scientific," or "public" purposes. Indeed, the same arguments the Court of Appeals used to establish that *journalism* qualifies—and that the statute is not confined to scientific research—also show that "research" is broader than journalism, too. The court found "no reason" to "restrict potential researchers to only 'academic' research purposes," because journalism helps "inform[] the public," *Id.*, but the word "research" is not confined to "public" discourse any more than it is confined to "academic." Genealogical or biographical research, for

example, may be entirely private—indeed, highly personal—yet these are certainly "research" by any plausible definition.

Moreover, research is often not confined to single, discrete questions; to determine the answer to one question often requires answering others, and it may not be possible to even articulate a specific question at the outset of one's research. But that does not make it anything less than bona fide research. Certainly nothing in the statute suggests otherwise. If the Court of Appeals saw no reason to limit the concept of "bona fide research" to academics, it also gave no reason for limiting it to journalists.

In this respect, the Court of Appeals' decision is not only too narrow, but it exceeds the boundaries of interpretation and engages in actual alteration of the statute. It is, of course, not the judiciary's role to insert limitations into the statute that are not there. Courts "must take the statute as it is written," *City of Phoenix v. Lane*, 76 Ariz. 240, 245 (1953), and not "rewrite [it] under the guise of judicial interpretation." *Fleming v. Dep't of Pub. Safety*, 236 Ariz. 210, 214 ¶ 15 (App. 2014) (citation omitted). Yet the court imposed a pre-approval requirement that it created out of whole cloth: it declared that a person seeking records under this provision must give the government "sufficient support or explanation that establishes their research is for educational, administrative, or scientific purposes." A-124 ¶ 22.

This pre-approval requirement is not only nowhere in the statute, but the actual text of the statute appears to contradict it. The statute does require pre-approval in other situations; if "personally identifying information" is sought, the researcher must obtain the director's approval, and to obtain it, must show that this information "is essential to the research." A.R.S. § 46-460(D)(8). But by the *exclusio alterius* principle, the fact that this situation requires pre-approval strongly implies that no such requirement applies to other circumstances.

Nevertheless, the Court of Appeals held *that the definition of "bona fide"* requires a researcher to first submit "sufficient support or explanation" to demonstrate that his or her research has sufficient public justification to warrant the disclosure of the information. A-124 ¶ 22. That was legal error for two reasons.

First, the preapproval requirement in the statute only applies to a narrow circumstance not presented here. As the court below acknowledged, Silverman did not seek names and addresses of any individuals. A-119 ¶ 4.

Second, the term "bona fide" is not ambiguous—it simply means "in good faith" or, put another way, *genuine*—and it does not impose a substantive limit on the kinds of research a person may obtain the records to pursue. *Cf. ABCDW LLC v. Banning*, 241 Ariz. 427, 438 ¶ 49 (App. 2016); *Edwards v. Niagara Credit Sols., Inc.*, 584 F.3d 1350, 1353 (11th Cir. 2009); *Royal Oaks Country Club v. Dep't of Revenue*, 541 P.3d 336, 340 ¶ 18 (Wash. 2024); *Am. Credit Indem. Co. v. HCG Fin.*

Servs., Inc., No. 89 C 9583,1991 WL 119129 (N.D. Ill. 1991) (finding term "bona fide sales" unambiguous and applying the common legal definition of "bona fide"); *see also* *United States v. Am. Libr. Ass'n*, 539 U.S. 194, 209 (2003) (discussing federal statutory language allowing public library officials to disable internet content filter "to enable access for bona fide research or other lawful purposes" and noting that such language allowed officials to unblock a filtering mechanism altogether without further explanation from a patron as to why she sought access to the information (citation omitted)).

Nothing in the statute therefore limits the *kinds* of research a person may pursue in seeking the information, or requires that it be of a public, or scientific, or journalistic nature. Instead, "bona fide" requires only genuineness, and "research" requires only a serious effort to obtain answers to questions. The wording therefore excludes only *bad faith* or *non-research* purposes—e.g., improper, unlawful, malicious, or prurient purposes—and does not entitle the government to impose a pre-approval demand generally on researchers. In *Lopez v. Metropolitan Government of Nashville & Davidson County*, 594 F. Supp. 2d 862 (M.D. Tenn. 2009), the federal government sought information from the Nashville Police Department regarding sexual assaults or harassment occurring on school buses in in the city. *Id.* at 863. Nashville sought to quash the subpoena, citing the state's confidentiality laws, but the court rejected this argument because, among other

things, the confidentiality statute included a list of exceptions, like those at issue here—and one of those was for persons engaged in "bona fide research." *Id.* at 866. The court noted that this made it "[im]possible to argue that the exceptions from disclosure are limited only to those involved in the reporting, investigation, and administration of specific instances of child sexual abuse or those with authority to enforce criminal laws." *Id.* In other words, bona fide research is such a broad term that it cannot be limited substantively in the way that the court below held.

Like the Court of Appeals, DES tries to read limitations into the exception that are not in the statutory text. These include assertions that the research should be done "in cooperation with APS agents," Appellant's Supp. Br. at 5, or should "serve[] narrow, *governmental* purposes," *id.* at 7 (emphasis added), or "provide…*government* investigatory or prosecutorial services," *id.* at 8 (emphasis added), or "help DES improve its operations." *Id.* at 10. Again, nothing in the statute requires this, either explicitly or implicitly. When the state does intend to impose a requirement of that sort, it knows how; California, for example, has a statute that authorizes the release of personal identifying information about gun owners to "nonprofit bona fide research institution[s] *accredited by* the United States Department of Education or the Council for Higher Education Accreditation *for the study of the prevention of violence*." Cal. Penal Code § 11106(d) (emphasis

added). *See further* *Doe v. Bonta*, 650 F. Supp.3d 1062 (S.D. Cal. 2023) (discussing this statute). The Arizona statute, by contrast, contains no such substantive limitation on the types of research or types of entities that may seek the information. To impose a requirement, therefore, that a researcher give the government "sufficient support or explanation," A-124 ¶ 22 or "provide detailed descriptions" of a researcher's "purpose, expected outcomes, and … methodology," A-125 ¶ 24, is to go beyond the statute and threaten Arizona's openness policy.

This conclusion is bolstered by comparing this case with the New York case that the court below cited. In *Newsday, Inc. v. State Comm'n on Quality of Care for Mentally Disabled*, 601 N.Y.S.2d 363, 365 (1992), the court found that only *scientific research* qualified for the exception to non-disclosure. But that statute specifically required preapproval from a hospital's institutional research board. *See id.* at 364. The court saw this as proof that the statute was intended only to allow exceptions for *scientific* researchers. No such requirement applies here, which is why the Court of Appeals correctly held that journalists also qualified. But by the same logic, non-journalist researchers must also qualify, since nothing in the Arizona statute limits access to journalists, either. Biographers, genealogists, and others pursuing research, broadly defined, should qualify as well.

In short, any member of the public engaged in good faith research should have access to adult protective services records that do not reveal personally identifying information of vulnerable adults. This includes investigative journalists, whose research will be used for the "core purpose of the public records law" of "monitor[ing] the performance of government officials and their employees." *Keegan*, 201 Ariz. at 351 ¶ 33 (citation omitted). It also includes government watchdog organizations—like amicus—whose public policy researchers seek and use public records to formulate policy reform proposals and inform the public about the operations and practices of the government. Other private entities and persons, such as academics, students, scientists, activists, health care providers, economists, and even studious voters, should not be excluded from the definition of persons who conduct "bona fide research." The only members of the public who should be excluded are those who seek records in bad faith—for purposes *other than* research—such as those who seek to target specific vulnerable adults receiving DES services (particularly any abusers or alleged abusers), frivolous requestors merely seeking to burden the agency, and the like.

Thus, even under a broad reading of the exception, both "bona fide" and "research" can be given meaning without overshadowing the strong public policy of disclosure inherent in Arizona's Public Records Law.

III. The preapproval requirement created by the Court of Appeals threatens important free speech values.

The Court of Appeals' limitation of records availability to certain types of researchers pursuing certain types of projects, as pre-approved by the state also threatens constitutional values because it imposes a type of prior restraint on the release of information.

A prior restraint is any kind of rule that conditions the exercise of a constitutional right on government permission. "The elements of a prior restraint are: (1) the speaker must apply to the decisionmaker before engaging in the proposed communication; (2) the decisionmaker is empowered to determine whether the applicant should be granted permission based on his/her review of the proposed content of the communication; (3) approval of the request requires affirmative action by the decisionmaker; and (4) approval is not a matter of routine, but involves the 'appraisal of facts, the exercise of judgment, and the formation of an opinion' by the decisionmaker." *Crue v. Aiken*, 204 F. Supp.2d 1130, 1137 (C.D. Ill. 2002) (citation omitted).

While the Constitution does not ordinarily entitle a person to access information held by the government, *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (plurality), when the government permits access based on certain conditions, it can cross the line into a prior restraint situation. And by imposing a pre-approval requirement on journalists seeking records—one that forces researchers to satisfy

the department with respect to their purposes, expected outcomes, etc.—the decision below gives the government power not only to refuse requests, but also implicitly to demand conditions for approval. This is precisely the danger that prior restraint requirements pose. Whenever a person must obtain permission from a government entity, that requirement empowers the government not only to refuse outright, but—more insidiously—to demand things in exchange for approval, or to pressure the applicant to, so to speak, return the favor. Such a requirement also increases the power of an administrative official—rather than a judicial official—to make a unilateral decision, or to delay any decision "until the issue of [the information's] release is finally settled, at which time it may have become obsolete or unprofitable." Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Probs. 648, 657 (1955).

A prior restraint may exist where the government imposes conditions on access to information in the government's possession. In *Crue*, for example, a public university required official approval before journalists or others could interview student athletes. The court found this to be a prior restraint. 204 F. Supp.2d at 1141. In *Edward A. Sherman Publishing Co. v. Goldberg*, 443 A.2d 1252, 1257 (R.I. 1982), an order allowing the media to attend a juvenile court hearing, but only on certain limiting conditions about what the media could publish, was a prior restraint. A similar condition on access was also found to be a

prior restraint in *San Bernardino County Department of Public Social Services v. Superior Court*, 283 Cal. Rptr. 332 (App. 1991).

In *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986), the Third Circuit found that a local government's selective choice to disclose some information, but not other information, to a media company investigating a pollution case was a prior restraint, and explained that

> the ultimate prior restraint … is ignorance of governmental affairs imposed by nondisclosure. If [newspaper] had been required to submit for prior approval what it intended to publish about the [government], no one would doubt that the speech-press clause was violated. If the [government] had by rule or practice permitted access to records on the condition that only such information as it approved of could be published, few would doubt that the rule or practice operated as a forbidden prior restraint. The selective nondisclosure of governmental records as a practical matter imposes, with respect to governmental activities, a prior restraint having the identical effect. The people cannot discuss governmental activities of which they are kept in ignorance. They cannot make the choices required of voters by our system of self-government on the basis of information about the activities of those in power if information about those activities is withheld from them. Indeed, the [government]'s position presents the problem of prior restraint in its most pernicious form because it permits the selective release of information in the unbridled discretion of those holding the reigns [*sic*] of governmental power. Thus, it presents the possibility—indeed virtually the certainty—that such public debate about governmental affairs as does occur will be distorted by governmental interference.

Id. at 1186.

The judicially created preapproval requirement in this case runs a significant risk of transforming Arizona's policy of openness into its opposite: a permission-

based mechanism that empowers the government to choose whom to give information to, why, and on what terms. Because courts should "construe statutes, when possible, to avoid constitutional difficulties," *State v. Gomez*, 212 Ariz. 55, 60 ¶ 28 (2006), this Court should decline to endorse a statutory interpretation that is not only unwarranted by the text but also creates a potential for abuse.

CONCLUSION

The Court should vacate the Court of Appeals' opinion and hold that "bona fide research" means any genuine investigative purpose—i.e., any serious inquiry not motivated by improper, unlawful, malicious, or prurient goals.

Respectfully submitted this 11th day of March 2024 by:

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