

**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

Jonathan Riches (025712)
Scott Day Freeman (019784)
Parker Jackson (037844)
**Scharf-Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE**
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ISSUES PRESENTED 2

FACTS 2

REASONS FOR GRANTING THE PETITION 7

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. 7

II. The Court of Appeals erred by not conducting the *Carlson* balancing test *de novo*. 12

III. The Court of Appeals’ remand decision does not cure the problem. 14

CONCLUSION 15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abraham v. Arizona Board of Regents</i> , 563 P.3d 632 (App. 2025)	13, 15
<i>ACLU v. Arizona Dep’t of Child Safety</i> , 240 Ariz. 142 (App. 2016)	8
<i>Arizona Board of Regents v. Phoenix Newspapers, Inc.</i> , 167 Ariz. 254 (1991)	10
<i>Carlson v. Pima County</i> , 141 Ariz. 487 (1984)	passim
<i>Cox Ariz. Publ’ns, Inc. v. Collins</i> , 175 Ariz. 11 (1993)	2, 10, 12, 14
<i>Griffis v. Pinal Cnty.</i> , 215 Ariz. 1 (2007)	2, 12, 13, 14
<i>Hodai v. City of Tucson</i> , 239 Ariz. 34 (App. 2016)	8
<i>In re Est. of Shumway</i> , 198 Ariz. 323 (2000)	13
<i>Lamb v. Indus. Comm’n</i> , 13 Ariz. App. 408 (1970)	6
<i>Mathews v. Pyle</i> , 75 Ariz. 76 (1952)	9
<i>Mitchell v. Superior Ct.</i> , 142 Ariz. 332 (1984)	passim
<i>Phoenix Newspapers, Inc. v. Keegan</i> , 201 Ariz. 344 (App. 2001)	7, 8

<i>Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.</i> , 191 Ariz. 297 (1998)	13
<i>Smith v. Town of Marana</i> , 254 Ariz. 393 (App. 2022)	9
Statutes	
A.R.S. § 39-121.01.....	3
A.R.S. § 39-121.02.....	16
A.R.S. § 12-341.....	16
A.R.S. § 12-348.....	16
A.R.S. § 12-2030.....	16
Regulations	
Phoenix City Code § 2-218.....	4
Rules	
ARCAP 21	16
ARCAP 23(d)(4)	16
Other Authorities	
1 <i>Debates and Proceedings of the House of Commons in 1620 and 1621</i> (Oxford: Clarendon Press, 1766).....	8

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 union¹ 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 jurisdiction⁷ 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 expansive¹³ 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 speculation¹⁴ 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 interests¹⁵ 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. KPXM 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

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:

/s/ Parker Jackson

Jonathan Riches (025712)

Scott Day Freeman (019784)

Parker Jackson (037844)

**Scharf-Norton Center for Constitutional
Litigation at the GOLDWATER
INSTITUTE**