

**IN THE SUPREME COURT
STATE OF ARIZONA**

MATTHEW ABRAHAM, PHD,

Petitioner,

v.

ARIZONA BOARD OF REGENTS,

Respondent.

Supreme Court
No. CV-25-0020-PR

Court of Appeals, Division Two
No. 2 CA-CV 2024-0073

Pima County Superior Court
No. C20214306

**SUPPLEMENTAL BRIEF OF AMICUS CURIAE
GOLDWATER INSTITUTE
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE

The Goldwater Institute (GI) is well known to this Court as an advocate for individual liberty and constitutionally limited government. See [*Legacy Found. Action Fund v. Citizens Clean Elections Comm’n*](#), 254 Ariz. 485, 493 ¶ 28 (2023); [*State v. Mixton*](#), 250 Ariz. 282, 291 ¶ 35 (2021). As part of its work, GI frequently submits public records requests. Indeed, GI operates a website devoted to instructing the public on how to use public records laws.¹ In addition, GI has appeared in state and federal courts to vindicate its own public records requests and those of others. See, e.g., [*Silverman v. Arizona Dep’t of Econ. Sec.*](#), 257 Ariz. 384 (2024); [*Goldwater Institute v. U.S. Dep’t of Health & Hum. Servs.*](#), 804 Fed. Appx. 661 (9th Cir. 2020); *Fairfax Cnty. Sch. Bd. v. Tisler*, No. 2021-13491 (Fairfax Cnty. Va. Cir. Ct., Nov. 16, 2021). GI is also the petitioner in *Goldwater Institute v. City of Phoenix*, No. CV-25-0033-PR (Ariz. filed May 2, 2025) (pending), which involves substantially similar questions to those raised here, and also appeared as amicus in support of the Petition for Review in this case.

INTRODUCTION

The Public Records Law doesn’t call for deference. On the contrary, it was written to ensure public access, thereby reinforcing democratic control over the government’s operations. To arm public entities with the extra power that comes with judicial deference towards its decision to withhold documents requested under those laws will seriously undermine the policy of public access and the goal of transparency. The deference incorporated into the Court of Appeals’ newfangled test is therefore unwarrantable, especially because it applies deference at exactly the point where the government is most likely to try to evade its disclosure obligations by speculating about potential harms resulting from disclosure.

¹ [*You Have the Right to Know What Your Government is Up To*](#), Goldwater Institute (last accessed Oct. 6, 2025).

Remarkably, however, the Board of Regents (ABOR) takes the position that the government should get even *more* deference than the decision below says. This Court should reject both options. Deference in cases where the government invokes the so-called “best interests of the state” exception effectively reverses the burden of proof and eviscerates the presumption of transparency. The Court should reaffirm its prior holdings that *de novo* review applies when analyzing whether the denial of access to public records is wrongful.

The Court should also reject ABOR’s arguments regarding the destruction of records that exist at the time a request is submitted.

ARGUMENT

I. The test adopted below is fatally flawed.

The lower court established a two-step analysis for adjudicating withholding disputes. First, it said, the records custodian withholding the document must “articulate[] a sufficient, specific harm arising from disclosure.” Op. at 10 ¶ 39. The reviewing court owes no deference at that step. *Id.* at 11 ¶ 40. But at the second step, the court defers to the official’s assertion that disclosure of the record at issue will result in the asserted “harm.” *Id.* ¶ 42.

The first problem with this is that it’s too easy to “articulat[e]” some “specific harm” that could arise from disclosure, especially given the “numerous exceptions” to the public records laws, [AUDIT-USA v. Maricopa County](#), 254 Ariz. 536, 538 ¶ 7 (App. 2023), and the fact that some of them, especially the “best interests of the state” exception, are so ill-defined.² To “articulate” just means to specify or identify. [Mangrum v. Wal-Mart Stores, Inc.](#), 950 S.W.2d 33, 39 (Tenn.

² This is the “least developed” and most “amorphous” of the exceptions to transparency courts have fashioned. [Goldwater Inst. v. Phoenix](#), 563 P.3d 656, 665 ¶ 33 (Ariz. App. 2025). It “is not confined to the narrow interest of either the official who holds the records or the agency It includes the overall interests of the government and the people.” [Phoenix Newspapers, Inc. v. Keegan](#), 201 Ariz. 344, 349 ¶ 18 (App. 2001).

App. 1997). So, for example, the “articulable suspicion” standard in search-and-seizure law has been defined as the “minimal level” of justification, [*Illinois v. Wardlow*](#), 528 U.S. 119, 123-24 (2000), because it only requires an officer to identify facts from which inferences could be drawn that might justify stopping someone.

The government can virtually always *articulate* some potential harm that might arise from disclosure. That requires little imagination, especially in a case, like this one, involving the vague “best interests” exception. That term is so broad that it’s easy to fashion an “articulation”—more precisely, a *speculation*—that disclosing documents would harm the state’s interests.

Were this Court to adopt ABOR’s proposed “pure abuse of discretion” standard—which, to be frank, is rubber-stamp deference, *see* ABOR’s Supp. Br. at 15—that would be the end of the legal “analysis,” and, in practice, the end of any public records dispute. It certainly would contradict this state’s longstanding presumption in favor of transparency. *See, e.g., Carlson v. Pima Cnty.*, 141 Ariz. 487, 490 (1984) (“a clear policy favoring disclosure”); [*Griffis v. Pinal Cnty.*](#), 215 Ariz. 1, 5 ¶ 12 (2007) (noting “strong presumption in favor of disclosure”).

Even the Court of Appeals didn’t go that far. Yet its two-step analysis is still excessively lenient, particularly given the deference accorded by the second part of the test that court established. It’s on *this* issue—whether disclosure will, indeed, result in the harm the government has articulated—that the rubber meets the road in virtually every public records dispute. Deferring *here* will effectively neuter the public records guarantee, especially in controversial matters where public transparency is likely to be most crucial. In short, to defer at this step risks empowering agencies to write their own “Get Out of Disclosure Free” cards.

Under a standard as ill-defined as “best interests of the state,” the government will virtually *always* be able to plausibly assert that disclosure will

harm the state's "interests."³ In fact, even where the government admits that disclosure will not harm its best interests *today*, it can still contend that disclosure is contrary to its best interests because such disclosure will set a precedent that might lead to some bad thing in the *future*. That's why this Court constrained all the common law disclosure exceptions by firmly placing the burden "on the party that seeks non-disclosure rather than on the party that seeks access." [*Mitchell v. Superior Ct.*](#), 142 Ariz. 332, 335 (1984) (emphasis added). It's also why that burden requires the government to be specific instead of general. See [*id.*](#) ("showing the *probability* that *specific, material* harm *will* result from disclosure" (emphasis added)). And it's why this Court has repeatedly emphasized that *in camera* inspection is the preferred method of testing that burden, especially where the "best interests of the state" exception has been invoked. See, e.g., [*Mathews v. Pyle*](#), 75 Ariz. 76, 81 (1952) ("In no other way can such [best interests of the state] questions be determined."); [*Carlson*](#), 141 Ariz. 487, 490-91 (1984) (describing *in camera* review and redaction as "practical alternative[s] to the complete denial of access").⁴

³ It's for this reason that, as more explained in Goldwater's Supplemental Brief in *Goldwater Institute v. City of Phoenix*, *supra*, the "best interests" exception, to the extent it's retained by this Court, must be narrowly interpreted to preserve the presumption favoring disclosure. Goldwater Supp. Br. At 8–16.

⁴ ABOR argues that Abraham "flatly rejected an *in-camera* review at trial." Resp. Br. at 3 n.3. The transcript quote it relies on, however, is not so clear. It seems that an observation was merely made that the trial court *could* have conducted *in-camera* review, but such was not arranged in advance of trial. See *id.*; cf. [*Griffis*](#), 215 Ariz. at 3, 6 ¶¶ 4, 17 (remanding for *in camera* inspection even over objection of records custodian). Importantly, ABOR does not appear to have offered or requested such an inspection, see ABOR Resp. to GI Amicus Br. at 5, even though the burden of proof was theirs, not Abraham's. See [*Cox Ariz. Publ'g, Inc. v. Collins*](#), 175 Ariz. 11, 15 (1993) (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]"). That's not to say *in camera* review is always required. See Goldwater Am. Br. at 8 n.5; [*State ex rel. Morke v. Donnelly*](#), 455 N.W.2d 893, 897–98 (Wis. 1990) (*in camera* inspection not required where "the [general] content of the requested records" "was known by all parties involved, including the court, without inspection," and the "public interest in allowing inspection of the records ...

It's at step two of the Court of Appeals' newly fashioned test that the government is most likely to offer pure speculation as the basis for withholding a record—as the City of Phoenix in fact did in [Goldwater Institute v. Phoenix](#), *supra*. Yet it's at this very step—where skepticism is *most* warranted—that the Court of Appeals' test calls for deference. And the risk of wrongful withholding increases the more controversial the subject of the records request. On matters of significant dispute, when transparency is most important, the government is most likely to claim that disclosure *could possibly* lead to a situation that's not in the state's "best interests." That's precisely where deference is least appropriate.

The Court of Appeals' new test therefore drastically undermines Arizona's "strong presumption in favor of disclosure." [Griffis](#), 215 Ariz. at 5 ¶ 12. For more than three quarters of a century, this Court has said that the government cannot be "the sole judge as to what information regarding the affairs of his office should be made public," because that would be "inconsistent with all principles of Democratic Government." [Mathews](#), 75 Ariz. at 80–81. That hasn't changed, and shouldn't change now.⁵

Certainly nothing in [Silverman](#) changed it. Although ABOR argues (for the first time, in its Supplemental Brief) that the [Silverman](#) Court "confirm[ed] the

outweighed any interest of the public in ... withholding the records" (citing [Newspapers, Inc. v. Breier](#), 279 N.W.2d 179 (Wis. 1979)).

⁵ ABOR's contention that "[d]iscretion is particularly appropriate in cases ... where the underlying records requests seek broad categories of documents relating to decisions within the University context" is risible. ABOR Supp. Br. at 14. On the contrary, the whole point of the public records laws is to ensure transparency in government decision-making. [Bolm v. Custodian of Recs. of Tucson Police Dep't](#), 193 Ariz. 35, 40 n.4 (App. 1998) ("the whole purpose of the [Public Records Act] is to shed public light on the activities of our governmental entities." (quoting [Fairley v. Superior Ct.](#), 78 Cal.Rptr.2d 648, 652 (App. 1998))). The fact that "the legislature has enacted specific statutory public records exemptions for ABOR," ABOR Supp. Br. at 14, far from supporting ABOR's argument, proves the opposite: that when the Legislature intends to grant an exception, it does so explicitly.

denial of public records under [A.R.S. § 39-121.02](#) is reviewed for abuse of discretion,” that isn’t true. ABOR Supp. Br. at 8.

For one thing, [Silverman](#) wasn’t about the Public Records Law. It concerned a different statute ([Section 46-460](#)), which creates an exception to disclosure for certain records maintained by the Department of Economic Security (DES). The only citation to the Public Records Law in [Silverman](#) was to support the general premise that “Arizona provides a general right to inspect public records.” 257 Ariz. at 388 ¶ 10 (citing [A.R.S. § 39-121](#)). The Court then recognized that the statutory exception to that general rule means that “*unlike with other public records*,” those records covered by [Section 46-460](#) “*are presumptively restricted from release*.” [Id.](#) ¶ 11 (emphasis added).⁶ Analysis of an exception to that exception then followed. [Id.](#)

True, [Section 46-460](#) contains arguably discretionary language, including the word “may” and certain rulemaking authority. But the [Silverman](#) Court specifically cautioned DES not to exercise that authority to disincentivize the public from requesting records under the exception at issue. [Silverman](#), 257 Ariz. at 391 ¶ 26. Ultimately, the Court remanded; it did *not* “apply[] abuse of discretion to [the] withholding decision” as ABOR claims. ABOR Supp. Br. at 8.⁷

⁶ This demonstrates that the Legislature knows how to invert the presumption favoring disclosure when it wants to, and that its detailed records statutes set forth public policy regarding (at least) confidentiality. *See also* [Schoenweis v. Hamner](#), 223 Ariz. 169, 173 ¶ 14 (App. 2009) (characterizing “confidentiality” exception as covering records “made confidential *by statute*” (emphasis added)).

⁷ Relatedly, ABOR continues to point to the Rules of Procedure for Special Actions (“RPSA”) as requiring an abuse-of-discretion standard. This is wrong for reasons set forth in Goldwater’s petition-stage amicus brief at 6–8. These include the fact that whether a public officer’s action was “arbitrary and capricious or an abuse of discretion” is only one of three grounds for bringing a special action. [RPSA 3\(c\) \(2024\)](#). *See also* [RPSA 4\(c\)](#). Another is whether a defendant “proceeded, or threatening to proceed, without or in excess of jurisdiction or legal authority.” [RPSA 3\(b\) \(2024\)](#). *See also* [RPSA 4\(b\)](#). The newly revised rules continue to maintain that “an abuse of discretion ... can include a legal error.” [RPSA 4\(c\)](#). *See also* Goldwater Am. Br. at 6. And legal errors are still, and always have been, subject to *de novo* review, even if they occur during an exercise

Also, while the Court did direct the superior court to decide whether DES abused its discretion, *id.* at 393 ¶ 32, that simply represented an acknowledgment that records custodians have some level of discretion *in the first instance* to conduct the required balancing test, which is subject to judicial review. *Carlson*, 141 Ariz. 491 (“Such discretionary refusal is subject to judicial scrutiny.”). And cases such as *Cox* (which ABOR largely ignores), have repeatedly clarified that courts review even discretionary denials of access to public records *de novo*. See Abraham Supp. Br. at 9–10 (citing cases). *Silverman*’s dicta did not destroy *de novo* review in all public records cases.

II. The Court should reject ABOR’s arguments regarding the retention and destruction of requested records.

ABOR cites caselaw interpreting the federal Freedom of Information Act (“FOIA”) for the proposition that “FOIA does not obligate entities to retain records.” ABOR Supp. Br. at 5 (citation omitted). But that doesn’t help ABOR, because whatever federal law might be, our Public Records Law *does* expressly require government entities to retain records. In fact, it does so in two separate subsections of [A.R.S. § 39-121.01](#), in addition to the State Library statutes ABOR references.

[Subsection B of Section 39-121.01](#) requires that “[a]ll officers and public bodies” must “maintain all records ... reasonably necessary or appropriate... .” That includes records as defined in the State Library statute—even those “made confidential by statute.” [A.R.S. § 41-151\(2\)](#). Importantly, for records falling within Subsection B, *there is no disposal provision*.

Separately, Subsection C adds this:

of discretion. See, e.g., *Carlson*, 141 Ariz. at 491; *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*.”).

Each public body shall be responsible for the preservation, maintenance and care of that body's public records, and each officer shall be responsible for the preservation, maintenance and care of that officer's public records. It shall be the duty of each such body to carefully secure, protect and preserve public records from deterioration, mutilation, loss or destruction, unless disposed of pursuant to [§§ 41-151.15](#) and [41-151.19](#) [(the State Library statutes)].

[Id. § 39-121.01\(C\)](#).

The State Library statutes reiterate the duty to preserve records:

All records made or received by public officials or employees of this state or the counties, cities and towns of this state in the course of their public duties are the property of this state. Except as provided in this article, the director and every other custodian of public records shall carefully protect and preserve the records from deterioration, mutilation, loss or destruction and, when advisable, shall cause them to be properly repaired and renovated.

[Id. § 41-151.15\(A\)](#).

“Records may not be destroyed or otherwise disposed of by any agency of this state unless it is determined by the State Library that the record has no further administrative, *legal*, fiscal, research or historical value.” [Id. § 41-151.15\(C\)](#) (emphasis added); *see also* [id. § 41-151.19](#) (public officers are required to “consult periodically” with the State Library on those matters). Records determined to be of continuing value “*shall be preserved*.” [Id.](#) (emphasis added). Conversely, “[t]hose records determined to be of *no* legal, administrative, historical or other value shall be disposed of” in accordance with State Library directives and annually reported. [Id.](#) Unauthorized records destruction is a felony. [Id. § 38-421](#).

Contrary to ABOR’s characterization, Abraham’s position would not “require ABOR to ignore its retention policies” or “forever preserve records that were ever the subject of a public records request.” ABOR Supp. Br. at 6 n.3. But a proper understanding of the Public Records Law and related statutes *does* require ABOR to preserve records “reasonably necessary or appropriate to maintain an accurate knowledge of their official [or taxpayer-funded] activities,” [A.R.S. § 39-](#)

[121.01\(B\)](#), and those that have “*further* administrative, *legal*, fiscal, research or historical value.” [Id. § 41-151.15\(C\)](#) (emphasis added).

It’s true that ABOR may generally dispose of records according to retention schedules approved by the State Library. But such retention schedules assume that any reference value⁸ of the record has already been served, such that consulting further with the State Library is unnecessary. See [A.R.S. § 41-151.19](#). That clearly is not the case where a timely records request remains active and unfulfilled, or denied and a dispute regarding the denial is known or reasonably foreseeable.

Here, Abraham’s original request for the not-yet-destroyed recording was submitted just *three days* after the meeting occurred, and it was requested a second time less than two weeks later. See COA Op. Br. at 12. The recording was destroyed some *ten months* later, and communications exchanged between the parties in the interim indicate the university’s awareness of the dispute. *Id.* This timeline does not support ABOR’s assertion that the university was merely following internal policy and retention schedules, which typically would only require retention for three months for transcription purposes. ABOR Supp. Br. at 6 & n.3.

This Court should hold that public records that exist at the time of a timely records request must be retained by the custodian at least until the applicable statute of limitations has lapsed or any reasonably foreseeable legal matter involving the records has been resolved. Further, in direct response to the question presented, the Court should hold that if a public entity destroys a record after

⁸ In recognition of the State Library statutes, this Court defines “reference value” for its own records to mean “the value a record may serve in providing historical, legal, financial, legislative or other background on an issue such as history of an on-going program; receipt of notice; or facts and opinions underlying a purchase or policy decision.” [Admin. Order 2025-86](#) at 2.

receiving a request, the request has been “deemed denied,” [A.R.S. § 39-121.01\(E\)](#), and the requester may bring an action under [Subsections 39-121.02 \(A\)](#)⁹ or [\(C\)](#) or *both*.

CONCLUSION

The Court should reverse the decision below and apply a unitary, *de novo* review to all withholding of public records. The Court should also hold that public records disputes may not be evaded by destroying requested records.

Respectfully submitted October 14, 2025 by:

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**Scharf-Norton Center for Constitutional
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⁹ Injunctive or special action relief in an action brought under Subsection A might include the enforcement of the statutory duty, “when advisable,” (i.e., if feasible) to “properly repair[],” “renovate[],” or recover improperly destroyed records. [A.R.S. § 41-151.15\(A\)](#).