

IN THE SUPREME COURT

STATE OF ARIZONA

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY,

Defendant/Appellant,

v.

AMY SILVERMAN AND TNI
PARTNERS, AN ARIZONA
PARTNERSHIP, D/B/A ARIZONA
DAILY STAR,

Plaintiffs/Appellees.

Arizona Supreme Court Case No.:

COA Division One Case No.:
1 CA-CV 22-0209

Maricopa County Superior Court Case No.:
LC2021-000182-001

**APPELLANT ARIZONA DEPARTMENT OF ECONOMIC SECURITY'S
PETITION FOR REVIEW**

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INTRODUCTION

The rule against courts issuing advisory opinions is “the oldest and most consistent thread in the federal law of justiciability.” *Flast v. Cohen*, 392 U.S. 83, 96 (1968). This Court recognized early in its history that the Arizona Constitution prohibits advisory opinions by the state’s courts. *See Crawford v. Favour*, 34 Ariz. 13, 21 (1928) (no clause can be found in the Constitution of Arizona authorizing advisory opinions); *see also, Kleck v. Wayland*, 53 Ariz. 432, 437 (1939). More recent Arizona precedent confirms that the rule against advisory opinions construing statutory language is especially applicable where the law provides the reviewing court no precedent for defining the statutory phrase, and the evidentiary record offers no facts against which the court can test if or how the statutory language applies. *See, e.g., Young v. Rose*, 230 Ariz. 433, 439 (App. 2012).

The decision of the Court of Appeals (“COA”) ignored this long-established prohibition, issuing a broad advisory pronouncement about categories of “research” that hypothetically qualify as “bona fide research” for purposes of the exception in A.R.S. § 46-460(D)(8) that allows Petitioner Arizona Department of Economic Security (“DES”) to ignore the confidentiality mandates of A.R.S. § 46-460(A) and release the otherwise protected investigatory files of DES’s Adult Protective Services program (“APS”). *Silverman v. Ariz. Dep’t of Econ. Sec.*, No. 1 CA-CV 22-0209, 2023 Ariz.App.LEXIS 250 *11 ¶ 20 (June 13, 2023). In doing so, the COA

invented multiple ambiguous categories of “research” that might qualify as “bona fide research” under A.R.S. § 46-460(D)(8), most of which would be inapplicable to any facts that might be considered in this case. *See id.* Moreover, the COA’s definition allows parties requesting APS records to show a § 46-460(D)(8) exception by merely claiming a subjective “purpose” for their request rather than showing the actual research “efforts” required by the express terms of A.R.S. § 46-460(D)(8). These advisory aspects of the COA’s opinion violate that court’s constitutional authority and require correction under precedent like *Young*, 230 Ariz. at 439.

The COA did correctly rule that the Superior Court (“SC”) erred in granting summary judgment for the Plaintiffs/Respondents, but it did so by recognizing there were no facts in the record yet to support such a ruling. *See Silverman*, 2023 Ariz.App.LEXIS 250 *7 ¶ 14, *15 ¶ 25. This same lack of a factual record makes the court’s creation of an extra-broad advisory definition for “bona fide research” unconstitutional. *See Young*, 230 Ariz. at 438-39 ¶¶ 30, 32 (Because the parties were unable in trial court to submit affidavits or other evidence, “we would be required to hypothesize about possible factual scenarios to provide meaningful guidance” on whether the plaintiffs’ e-mails created an “electronic signature” under the relevant statutory definition, thereby violating the prohibition on advisory opinions.).

ISSUES PRESENTED FOR REVIEW

This Court should accept review to consider the following issues of first impression and statewide importance regarding the courts' authority to construe the statutes that generally protect APS investigation files from public disclosure:

1. Whether the COA exceeded its jurisdiction by issuing, without a factual record, a broad advisory interpretation of A.R.S. § 46-460(D)(8) that added numerous, ambiguous and mostly inapplicable sub-categories to its fact-specific "bona fide research" exception.
2. Whether the COA's advisory definition of "bona fide research" under A.R.S. § 46-460(D)(8) is so broad that it negates the original purpose of the statute and renders the confidentiality protections in § 46-460(A) superfluous in violation of Arizona's rules for statutory construction.

I. FACTS.

A. DES's Statutes Protect Records of the Most Vulnerable Arizona Citizens.

The Arizona Legislature empowered DES to care for, assist, and investigate abuse of the most vulnerable members of society, including disabled, infirm, and elderly adults. *See* A.R.S. § 46-451(F) and (A)(11). DES utilizes APS to investigate

allegations of physical and financial abuse, exploitation, and neglect of vulnerable adults. *See* A.R.S. § 46-451. APS gathers a wide range of sensitive documents including medical records, mental evaluations, financial records, graphic photographs, and witness and family statements. [APPV2-073:25-074:5]. In 2019, the Legislature designated such records as confidential and generally prohibited DES from releasing them. A.R.S. § 46-460(A). This statute does identify an exception to this prohibition at A.R.S. § 46-460(D)(8) for requests made for “bona fide research” but does not define that term. And, as the COA noted, “Arizona has no controlling authority on what qualifies as ‘bona fide research’ sufficient to allow disclosure of vulnerable adult records.” *Silverman*, 2023 Ariz.App.LEXIS 250, *6 ¶ 12.

B. The Insufficient Factual Record Below Prevents Any Meaningful Analysis of “Bona Fide Research.”

Plaintiff/Respondent Silverman is a freelance journalist. [APPV1-005, at ¶ 2 (Index of Record (“IR”) 1)]. Plaintiff/Respondent TNI Partners (collectively, with Silverman, “Newspaper Parties”) owns and operates the Arizona Daily Star newspaper and website. [*Id.* at ¶ 3]. In May, 2020, Silverman demanded the production of a broad range of detailed APS investigatory records “[i]n [her] capacity as a reporter for ProPublica/Arizona Daily Star.” [APPV1-012 (IR 1)]. Silverman did not include any detail regarding the purpose of her request, her proposed methodology, or how the Newspaper Parties intended to protect the

sensitive records. [See APPV1-012 (IR 1)].

DES reviewed the demand and concluded the records fell under A.R.S. § 46-460(A)'s confidentiality requirements and were non-disclosable. [APPV1-015 (IR 1)]. Silverman renewed her demand, providing no additional information about her “research.” [See generally APPV1-017-022 (IR 1)]. Silverman also demanded that the documents be released due to her status as a journalist “studying how the state is protecting vulnerable citizens...,” [id.], but DES reconfirmed that Silverman did not meet the 46-460(D)(8) exception. [APPV1-007, at ¶¶ 12-13 (IR 1)].

C. The Litigation Below.

1. Superior Court.

On June 30, 2021, the Newspaper Parties filed their action seeking to compel DES to produce the APS records under the “bona fide research” exception. [APPV1-004 (IR 1)]. DES filed a Motion to Dismiss, which the SC denied at the close of oral argument. [APPV1-042-056 (IR 6); APPV1-071 (17); APPV2-087:25-088:1; APPV2-088:17-20]. The court simultaneously issued a *sua sponte* order granting the Newspaper Parties’ requested relief and compelling DES to disclose the records. [APPV2-088:4-5]. The parties, however, had not yet conducted discovery and no party had requested conversion of the motion to dismiss to a motion for summary judgment. See *Silverman*, 2023 Ariz.App.LEXIS 250 *4 ¶ 6. Despite DES’s follow-up arguments that the court could not grant a final judgment without allowing DES

to take discovery and make a factual record about the nature, scope and intended uses of the Newspaper Parties' document request [*see* APPV1-092 – APPV1-100], the court confirmed its summary judgment for the Newspaper Parties in a final judgment [APPV2-022].

2. Court of Appeals' Proceeding.

DES appealed the final judgment. In its June 13, 2023 Opinion, the COA accurately recognized that the SC, and therefore the COA, could not answer whether the Newspaper Parties' records requests involved “bona fide research” under A.R.S. § 46-460(D)(8) because the SC improperly granted summary judgment in response to DES's motion to dismiss “apparently based on the allegations in the complaint alone,” and “before the parties could conduct discovery or the court could take evidence.” *Silverman*, 2023 Ariz.App.LEXIS 250 *7 ¶ 14, *15 ¶ 25.

Thus, the COA noted that neither court could know the actual “purpose of [the Newspaper Parties'] research project or [their] expected outcomes, which documents relate to [those] goals, the scope of [the] request, or [the Newspaper Parties'] methodology to keep the information in the records confidential.” *Id.*, at *7 ¶ 14, *15 ¶ 25. In sum, the COA correctly ruled that the case must be remanded because “the record is not sufficiently developed to determine whether the journalistic activities at issue in this case constitute ‘bona fide research’” and “the parties must conduct discovery and present sufficient evidence before the court may enter

judgment in either party's favor on th[e] issue [of whether the Newspaper Parties' request qualified for the 'bona fide research' exception of A.R.S. § 46-460(D)(8)]".

Id., at *15 ¶ 25. The Opinion further explained that:

[E]ven if Silverman's journalistic activities can qualify, A.R.S. § 46-460 vests discretion with DES to determine whether the disclosure of otherwise confidential records falls within the statutory exception. Because the record does not resolve whether DES acted arbitrarily or capriciously in exercising its discretion under the statute to deny Silverman's request, we hold the court also erred in granting judgment for Appellees. Thus, ... we vacate the judgment for Appellees, and remand for further proceedings"

Id., at *3, ¶ 2. DES does not challenge that part of the opinion, which the Court should affirm.

However, the COA also devised an unprecedented and terrifically broad, multi-category definition of what might constitute "bona fide research," untethered to any specific facts in this case. *Id.*, at *12-13, ¶¶ 20, 21. The COA found that "bona fide research" for purposes of A.R.S. § 46-460(D)(8) should be split into three cavernous categories defined by their respective generic "purposes," including: (1) "educational" research purposes, (2) "administrative" research purposes, and (3) "scientific" research purposes. *Silverman*, 2023 Ariz.App.LEXIS 250 *11-12 ¶ 20. Then, the court split the "educational" category further, finding that it includes "academic," "vocational" and "commercial fields of study." *Id.* And, finally, the court opined hypothetically that "a journalist's request may be eligible for the exception if their research serves a public purpose, such as informing the public of

ways DES and APS could improve treatment and security of vulnerable adults,” which “could be said to further educational or administrative purposes.” *Id.*, at *12-13, ¶ 21.

Notably, the plain language of A.R.S. § 46-460(D)(8) nowhere mentions the “purpose” of the records request, nowhere mentions the categories of “educational,” “administrative,” “scientific,” “academic,” “vocational” or “commercial” purposes (“hypothetical categories”) that the COA layered into the statutory definition, and nowhere uses the phrase “public purpose” or defines the journalistic reporting that would sufficiently advise “the public” on improving “treatment and security of vulnerable adults” so that it met the “bona fide research” exception. Moreover, the “research” categories infused into the COA’s definition have no clear correlation to the type of unspecified commercial reporting the Newspaper Parties pled they needed the APS records for. Silverman confirmed that she lacked a research plan, that she was unaware of exactly what data or information she was hoping to discern from the records, and that her only purpose in gathering these records was commercial journalism. [APPV2-136:6-137:4]. The COA faced no issues involving application of A.R.S. § 46-460(D)(8) to “scientific,” “administrative,” “academic” or “vocational” research. Yet, by its new and unnecessary definition for “bona fide research,” the COA offered the Newspaper Parties, and future similar document

seekers, boundless categories of “research” into which they can conveniently inject their records requests.

II. REASONS TO GRANT REVIEW.

The COA’s unwarranted and unnecessary construction of the “bona fide research” term violated precedent prohibiting advisory opinions. And the COA’s willingness to exceed its authority in such an exaggerated way provides good reason for this Court to reemphasize the rule against advisory opinions, and to correct an advisory opinion whose overreach threatens to promote unjustified litigation.

A. The COA is Not Legally Authorized to Issue an Advisory Opinion Where, in the Trial Court, No Specific Facts or Context Were Established.

Appellate courts should not provide advisory opinions or decide any issues that have not been fully developed. *Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Arizona*, 143 Ariz. 547, 548 (App. 1985). “As a matter of judicial restraint, Arizona courts will not ‘issue advisory opinions, address moot cases, or deal with issues that have not been fully developed by true adversaries.’” *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 603 (App. 2016) (quoting *Home Builders Ass’n of Cent. Ariz. v. Kard*, 219 Ariz. 374, ¶ 9 (App. 2008)). Here, the COA was not permitted to issue an advisory opinion interpreting the A.R.S. § 46-460(D)(8) “bona fide research” exception because the parties placed no real facts before the courts,

leaving them insufficient context to meaningfully define the term. *See, e.g., Young*, 230 Ariz. at 439.

Appellate courts may not render advisory opinions anticipating issues that do not yet exist and the precise form of which the courts cannot predict. *Young*, 230 Ariz. at 439 (citing *Citibank v. Miller & Schroeder Fin., Inc.*, 168 Ariz. 178, 182 (App. 1990)); *see also, Comm. for Justice & Fairness (CJF) v. Ariz. Secy. of State's Office*, 235 Ariz. 347, 350 n. 5 (App. 2014). This means Arizona courts have no authority to construe statutory subjects that are not squarely at issue, or for which the relevant facts to which such statutes will be applied are not yet fully developed in the record. *See, e.g., Young*, 230 Ariz. at 439.

The decision in *Young*, 230 Ariz. at 438-39, ¶¶ 29-32 confirms the inappropriateness of the COA's statutory interpretation. There, the relevant Arizona statute (A.R.S. § 32-2151.02(A)) required the signature of a real estate agent to enforce a real estate employment contract, and the parties' dispute required resolution of whether a "thank you e-mail qualifies as an [']electronic signature[']" of the agent as that term was used in A.R.S. § 44-7002(8). That statutory subsection defined "electronic signature" broadly. *Young*, 230 Ariz. at 438 ¶ 29 (quoting A.R.S. § 44-7002(8)). The trial court resolved the issues in favor of the defendant and granted a motion to dismiss.

The COA in *Young* found that any resolution of whether the plaintiff's e-mail qualified as an "electronic signature" under the statute would require a reviewing court to consider evidence outside the pleadings and interpret whether the specific details of the plaintiff's e-mail correspondence with the defendant met the statutory definition of an "electronic signature." *Id.*, at 438 ¶ 29. "Resolving these types of issues is not possible based solely on the complaint and the [real estate agent] Agreement," particularly because "[t]he parties did not have an opportunity to submit affidavits or other evidence relevant to the electronic signature issue" *Id.*, at 438 ¶ 30.

Even though the question of whether the statutory "electronic signature" term could be fulfilled by e-mails "generated significant discussion and diverging viewpoints among courts and commentators," and would still require resolution by the trial court on remand, those facts were insufficient to justify an advisory opinion. *Id.*, at 439 ¶¶ 31, 32.

[w]ithout a more fully developed record, we would be required to hypothesize about possible factual scenarios to provide meaningful guidance. Appellate courts should not render 'advisory opinions anticipative of troubles which do not exist; may never exist and the precise form of which, should they arise, we cannot predict.'"

Id., at 439 ¶ 32.

The parallels here with *Young* are undeniable. Like *Young*, the SC denied the parties the opportunity to develop the comprehensive evidentiary record the COA

agreed is required in deciding if the statutory term “bona fide research” applies to APS records request. *See Silverman*, 2023 Ariz.App.LEXIS 250 *13 ¶ 22, *14 ¶ 25 (finding that the trial court’s summary disposition precluded the appellate court from knowing “the purpose of Silverman's research project or her expected outcomes, which documents relate to her goals, the scope of her request, or her methodology to keep the information in the records confidential.”) Also, like the much-debated “electronic signature” definition in *Young*, the COA acknowledged that the operative statutory term “bona fide research” has never been construed by Arizona precedent, presents a “varying range of possible definitions,” and “the meaning of ‘research’ is ambiguous . . .” *Silverman*, 2023 Ariz.App.LEXIS 250 *6 ¶ 12, *8 ¶ 16.

Given the parallels, *Young* instructs that any attempt by the COA to assist the trial court by supplying statutory construction to the phrase “bona fide research,” and thereby providing hypothetical examples of what records requests might fall within that definition, was an improper advisory opinion.¹

Such hypothetical guidance, unconnected to any specific facts in this case, is precisely what the COA offered. The splitting of “bona fide research” into multiple broad categories defined by generalized underlying “purposes” for the document request were not justified by the factual record. The COA acknowledged it had no

¹ This opinion raises serious due process issues, denying DES the right to be heard on disputed facts before legal standards are applied.

factual record that explained the nature, purpose(s) or use(s) of the Newspaper Parties' request. *Silverman*, 2023 Ariz.App.LEXIS 250, *3, ¶ 2; 15, ¶ 25. Without authority, it provided hypothetical sets of categories that *might* qualify for a “bona fide research” exception.

The COA offered no meaningful guidance on what constitutes “administrative research,” a “vocational field of study,” an “academic field of study,” or on any of the other categories it created. These generic classifications leave trial courts in all cases hereafter, and the parties in this case specifically, no rules or standards for deciding what the court meant by the categories of “research” it created. And the COA definitions require courts reviewing § 46-460(D)(8) issues to answer many new questions. For instance:

- what is a “purpose?”
- how specific and confirmable by evidence must it be?
- must the purpose be singular or could one purpose among multiple intended uses qualify as “bona fide research”?

This introduction of hypothetical categories invites myriad creative characterizations of motives by document-seeking parties, and threatens years of tedious judicial hair-splitting.

Moreover, while the COA tied the various sub-categories of “bona fide research” to the requesting parties' subjective “purpose,” that term exists nowhere

in A.R.S. § 46-460(D)(8). The statute never mentions a “purpose” of the requesting party; rather, its terms are more concrete and objective, requiring that the requesting party “*be engaged in* bona fide research.” *Id.* (emphasis added). There are substantial proof differences between showing that someone is “engaged” in a particular form of research and showing what they subjectively think their research “purpose” is. The former requires proof of activity moving toward a particular, tangible end product. The latter “purpose” standard, however, could be satisfied simply based on what a document seeker “intends” to use the APS records for. This prohibited advisory opinion is a dangerous re-writing of § 46-460(D)(8)’s language that conflicts with the statutory plain language.

B. The COA’s Definition of “Bona Fide Research” Renders A.R.S. § 46-460(A) Superfluous.

Courts shall not interpret a statute in a way that renders it superfluous. *City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 552 (2005). Arizona courts must also interpret statutes “so that no provision is rendered meaningless, insignificant, or void.” *Mejak v. Granville*, 212 Ariz. 555, 557 (2006). Additionally, a sensible statutory construction is necessary to avoid absurd results. *Lake Havasu City v. Mohave County*, 138 Ariz. 552, 557 (App. 1983). Courts have a duty to construe statutes so that they are reasonable, workable, and uphold the “spirit of the

law.” *State Farm Auto Ins. Co. v. Dressler*, 153 Ariz. 527, 531 (App. 1987); *State v. Deddens*, 112 Ariz. 425, 429 (1975).

Ironically, the COA rejected the Newspaper Parties’ definition of “bona fide research” for violating these principles. It found their interpretation of “bona fide research” as any inquiry by a person who “legitimately tries to find answers to questions” “would impose such minimal requirements as to render the confidentiality protections in A.R.S. § 46-460(A) effectively meaningless.” *Silverman*, 2023 Ariz.App.LEXIS 250, *7-8, ¶¶ 15-17. Instead, “any person seeking information could be said to be conducting ‘research’—and therefore qualify for the exception—so long as that person is not engaging in fraud or deception.” *Id.* at *8, ¶ 17.

The COA’s generic categorizations of “research” suffer the same defect. One could find a reasonable way to characterize almost any inquiry into APS records to fit one of the hypothetical category purposes or for some “public purpose” which might aid in educating the public. This is especially so when none of those broad categories are tied to any specific facts. Like the excessively loose definition proposed by the Newspaper Parties, the COA’s ambiguous list of potentially qualifying “research” categories renders the confidentiality policy under A.R.S. § 46-460(A) easy to circumvent. These categories are meaningless, superfluous, contradict the policies of the statute, and risk the “absurd” result of divulging

sensitive information that would harm vulnerable adults the statute intends to protect, as well as discourage individuals from reporting future allegations of vulnerable adult abuse. The COA’s definitional efforts in paragraphs 20, 21 and 22 of the Opinion violate the rules of statutory construction.

III. CONCLUSION; REQUEST FOR ATTORNEYS’ FEES AND COSTS.

Given the foregoing, this Court should accept review and: (1) reverse those portions of the COA Opinion that attempt to define what qualifies as “bona fide research” under A.R.S. § 46-460(D)(8), including the definitional discussions in paragraphs 20, 21 and 22; (2) affirm the COA’s decision that the SC improperly granted summary judgment and that the SC Judgment must be reversed and vacated; (3) remand the case for discovery and further proceedings; and (4) award Petitioner all taxable costs and attorneys’ fees to which it may be entitled under law, including A.R.S. § 12-1840, the Rules of this Court, and any applicable statutes and rules.

RESPECTFULLY SUBMITTED this 13th day of July, 2023.

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