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: CV-23-0181-PR Court of Appeals Case: 1 CA-CV 22-0209 Maricopa County Superior Court Case No. LC2021-000182-001

PLAINTIFFS'/APPELLEES' CROSS-PETITION FOR REVIEW

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I. Introduction.

This Court should accept review to correct the cumbersome process the Court of Appeals ("COA") has created for a requester to qualify for the "bona fide research" exception allowing access to Adult Protective Services ("APS") records. While correctly finding that a journalist's research can qualify as "bona fide research," the COA nonetheless stated that additional discovery had to be performed to reveal more about Plaintiff/Appellee Amy Silverman's ("Silverman") experience, intentions and procedural protections, despite the fact that such information was available in multiple places in the record. The COA also incorrectly found that the applicability of the "bona fide research" exception was completely discretionary on the part of Defendant/Appellant Arizona Department of Economic Security ("DES"). Respectfully, Silverman brings this cross-appeal to argue that the COA's holdings on these two issues are contrary to the purpose and judicial interpretations of the Public Records Law, which is first and foremost meant to promote government transparency and accountability.

II. Issues for Review.

Plaintiffs'/Appellees Silverman and TNI Partners (the "Arizona Daily Star") (collectively "Appellees") request that the Court review the following two issues:

1. Whether the COA incorrectly held that discovery is necessary to find a Special Action Plaintiff has satisfied a statutory exception, when the

Superior Court judge has already heard arguments and determined that the showing was sufficient.

2. Whether the COA incorrectly held that § 46-460(D) provides DES with the discretion to deny the disclosure of requested records even if the requester has satisfied the "bona fide research" exception under § 46-460(D)(8), which discretion is subject to review by a court only under an arbitrary and capricious standard.

III. Material Facts for Review.

A. Silverman is an experienced investigative journalist seeking to research whether DES failed to provide services to those with intellectual and developmental disabilities.

Silverman is an award-winning investigative journalist who has over three decades of experience researching and examining government records to inform the public and hold the government accountable. *See* Response to Motion to Dismiss, Index of Record-10 at 2 ("IR") (Appx. No. 2). Silverman performs research on issues involving the ability of developmentally disabled Arizonans to access government services. *See* Complaint, IR-1, ¶ 2 (Appx. No. 1). Silverman uses her research to produce news articles that inform the public of the effectiveness of DES services to citizens with disabilities. *Id.,* ¶ 2. As noted in the cites above, this information was presented to the Superior Court before and during the hearing on whether Silverman qualified for the exception under subsection

(D)(8).

B. The Public Records Request.

On May 7, 2020, Silverman requested public records from DES for investigative reports of closed cases from APS, fully understanding that DES would likely redact identifying information. *Id.,* ¶ 8. DES Public Records Coordinator, Mark York, denied the request in its entirety, explaining that he believed such release of records was prohibited under A.R.S. § 46-460. *Id.,* ¶ 9. Mr. York further asserted that none of the exceptions in subsections B, C, or D applied to the request. *Id.,* ¶ 10. Silverman asserted in response that the exception in subsection (D)(8) for "[a]ny person who is engaged in bona fide research" applied to her request as an investigative journalist. *Id.,* ¶ 11. DES rejected this claim, arguing instead that the "bona fide research" exception is limited to research that might provide DES with information that is beneficial to improving DES. *Id.,* ¶ 12.

C. Silverman has provided detailed descriptions and explanations regarding the purposes, expected outcome, and methodologies of her research.

Silverman has stated that her research was intended to "produce news articles that [would] . . . inform the public on the effectiveness of the Department of Economic Security's services to citizens with disabilities." *See* Complaint, IR-1, ¶ 2 (Appx. No. 1). Specifically, the research was intended "to inform the public of

the extent to which citizens with intellectual and developmental disabilities are, or are not, adequately cared for and protected." *See* Response to Motion to Dismiss, IR-10 at 3 (Appx. No. 2). Silverman's "research on these issues . . . already yielded a series of published articles that have prompted further investigation and calls for reform." *Id*. Silverman recognized the importance of privacy considerations for such documents and understood that personally identifying information would have to be redacted. *See generally* Oral Argument Tr. (1/19/2022) (Appx. No. 4); *See also* Complaint, IR-1, Exhibit 1 (Appx. No. 1). At no point during the proceedings has Silverman ever failed to provide the purpose, goal, outcome, methodology or scope of her request in relation to her research. *See generally* Appellees' Answering Brief (9/12/2023); Status Conference Tr. (2/11/2022) (Appx. No. 6); Status Conference Tr. (1/28/2022) (Appx. No. 5); Oral Argument Tr. (1/19/2022) (Appx. No. 4); Response to Motion to Dismiss, IR-10 (Appx. No. 2); Complaint, IR-1 (Appx. No. 1).

IV. Reasons to Grant Review.

A. The record establishes that Silverman provided descriptions and explanations regarding the purposes, expected outcomes, and methodologies of her research sufficient to satisfy the Court of Appeals' test for the "bona fide research" exception, particularly considering the flexibility on issues of factual development allowed judges in a Special Action.

A.R.S. § 46-460(A) generally prohibits the release of certain types of personally identifying information and records from the APS program of DES.

Section 46-460(D) however provides eight categorical exceptions to such prohibition, including the release of information and records to "any person who is engaged in bona fide research . . . ." § 46-460(D)(8). Silverman sought to utilize this exception in a detailed public records request to DES with a purpose to research whether DES failed to provide services to those with intellectual and developmental disabilities.

The Legislature did not define "bona fide research" for purposes of § 46-460(D)(8). The COA held that "bona fide research" includes research for "educational, administrative, or scientific purposes." COA Opinion (6/13/2023), ¶ 20 (Appx. No. 7). The COA specifically held that journalists may qualify for the "bona fide research" exception so long as their research pertains to one of these purposes, including when "their research serves a public purpose, such as informing the public of ways DES and APS could improve treatment and security of vulnerable adults." *Id*. The COA explained that "prospective researchers must, at a minimum, provide detailed descriptions that outline the specific information sought and the project's purpose, expected outcomes, and the methodology the researcher will employ to maintain the confidentiality of the records." *Id*., ¶ 24.

Silverman had from the start provided detailed descriptions and explanations in support of her records request to DES that would satisfy each of these components, which were available for review in the record on appeal. Without any

express consideration of such explanations from Silverman, the COA incorrectly decided that there was an insufficient record to analyze Silverman's request under the "bona fide research" definition it had established and remanded the case to the Superior Court for further discovery. *Id*., ¶¶ 25-26.

Appellees do not request review of the COA's definition of "bona fide research" under § 46-460(D)(8), including the exception's applicability to journalists when "their research serves a public purpose, such as informing the public of ways DES and APS could improve treatment and security of vulnerable adults." *Id*., ¶ 20. Appellees also do not request review of the COA's holding that a researcher under § 46-460(D)(8) must provide "descriptions that outline the specific information sought and the project's purpose, expected outcomes, and the methodology the researcher will employ to maintain the confidentiality of the records." *Id*., ¶ 24. Appellees request only that the Court review the COA's holding that the record was insufficient to determine that Silverman satisfied the "bona fide research" exception. *Id*., ¶¶ 25-26, in the context of a Special Action. Specifically, the COA provided that "We […] do not know 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." *Id.,* ¶ 24. This was simply incorrect.

Appellees' Special Action is governed by the Arizona Rules of Procedure

for Special Actions, not by the Arizona Rules of Civil Procedure. Arizona Rules of Procedure for Special Actions 4(d) and (f) contemplate simply that there will be a complaint and an answer (or responsive pleading) filed for the special action, and that discovery will only take place (under a special order) if a triable issue is raised in these filings. Special Actions are designed to provide a uniquely speedy procedure and adjudication of the issue involved, which in this case, is a basic public records request. *See Lewis v. Arizona Dep't of Econ. Sec.*, 186 Ariz. 610, 616 (Ct. App. 1996) ("To allow a wide range of discovery, attendant with the delays involved, would tend to defeat the very purpose of a special action."). Because Special Actions are designed to provide a uniquely expedient procedure for adjudication, a hearing should provide enough information for the superior court judge to determine if a Rule 4(f) triable issue of fact is being raised or if a judgment is appropriate, which is also consistent with the Public Record Law.

The purpose, or goal, of Silverman's research was provided several times in her records request and Special Action filings and proceedings. Silverman's research sought records related to the effectiveness of APS services for Arizonans with developmental disabilities, which she intended to form the basis of news articles to inform the public on the findings of such research. *See* Appellees Answering Brief (9/12/2023) at 1; Response to Motion to Dismiss, IR-10 at 3 (Appx. No. 2); Final Judgment, IR-31 at 2 (Appx. No. 3); Complaint, IR-1, ¶ 2,

(Appx. No. 1). Specifically, Silverman was researching whether APS failed to deliver medical services to those with intellectual and developmental disabilities. *Id*. This purpose was reiterated during oral arguments. *See* generally Oral Argument Tr. (1/19/2022) (Appx. No. 4). While the expected outcome(s) were contingent on the documents provided by DES, it is clear that Silverman expected that the requested records would establish that DES failed in many instances with respect to services provided to Arizonans with developmental disabilities. *Id*.

Silverman requested the adult protective services reports, investigations, and other materials that provided the data for the APS quarterly reports. *See* Complaint, IR-1, Exhibit 1 (Appx. No. 1). In that same communication, she limited her request's scope to materials used for the quarterly APS reports from April 2019 to March 2020. *Id*. In subsequent communications between Appellee's counsel and DES Director Wiseheart, it was further specified that the requested records included all incident reports received by the Division of Developmental Disabilities ("DDD") between January 1, 2019, and December 31, 2019, regardless of whether the reports formed the basis of a report to the Independent Oversight Committee. *See* Complaint, IR-1, Exhibit 3 (Appx. No. 1). Because of the important privacy interests in protecting vulnerable adults, Silverman acknowledged that personally identifying information would need to be redacted as part of a methodology to keep the information confidential. *See generally* Oral

Argument Tr. (1/19/2022) (Appx. No. 4).

In short, the Superior Court determined that it had sufficient evidence within the rules of Special Actions and the intent of the Public Records Law to determine that Silverman qualified for the exception for "bona fide research."

B. Section 46-460(D) does not provide DES with discretion to refuse disclosure if the "bona fide researcher" exception is satisfied.

Section 46-460(D) introduces the eight exceptions to § 46-460(A) by providing that "Employees of the department of economic security ***may*** release any information that is otherwise held confidential under this section . . . to the following or under any of the following circumstances: . . . ." (Emphasis added). The plain language of this introduction to the exceptions simply provides that § 46-460 does not prohibit the release of APS information and records in those specific circumstances. The COA however incorrectly held that the word "may" in § 46-460(D) somehow established additional "discretion" for DES to refuse to disclose information or records even if "an exception" under § 46-460(D) "has been established." COA Opinion (6/13/2023), ¶ 29. The COA also explained that a court may only overturn DES' denial if DES acted "arbitrarily or capriciously," that is only when "there has been "'unreasoning action,' without consideration and in disregard for facts and circumstances.'" *Id*. (citation omitted). As such, even if Silverman had established that her request qualified as "bona fide research" under

§ 46-460(D)(8), the COA held that the appellate record was also insufficient to determine if DES' denial of Silverman's records request constituted "unreasoning action."

1. The COA's interpretation of the term "may" in § 46-460(D) is not consistent with the plain language of the statute.

Arizona courts "construe statutes to give effect to the legislature's intent," the "best indicator" of which is "the statute's plain language." *Glazer v. State*, 244 Ariz. 612, 614 (2018) (citations omitted). Such "'plain language' interpretation," however, "does not focus on statutory words or phrases in isolation." *Id.* Rather, "[w]ords in statutes should be read in context in determining their meaning" and courts should "look to the statute as a whole. . . ." *Id.*

There is nothing in § 46-460(D)'s plain use of the term "may" which indicates discretion for DES to refuse disclosure if an exception has been satisfied. Rather, "may" is plainly intended to mean that § 46-460(A) does not prohibit DES from disclosing records in the circumstances outlined by § 46-460(D). This is clear when comparing the language accompanying § 46-460(D)'s use of "may" to language accompanying § 46-460(A)'s use of "may not" in its general prohibition of disclosure. Generally, DES "may not" disclose the specified information and records under § 46-460(A) "except as provided by subsections B, C, and D" of § 46-460. DES however "may release any information that is otherwise confidential under this section [(§ 46-460(A))]" under each of the circumstances provided § 46-

460(D). The term "may" is only meant to express circumstances where the prohibition in § 46-460(A) does not apply.

2. The COA's interpretation of the term "may" in § 46-460(D) would otherwise result in absurd applications to the other exceptions provided in that subsection.

When interpreting statutes, Arizona courts "presume that the legislature did not intend an absurd result and [a court's] construction must avoid such a consequence." *In re Estate of Zaritsky*, 198 Ariz. 599, ¶ 11 (Ct. App. 2000). The COA's interpretation of "may" in § 46-460(D) would be "absurd" when applied to most of the other exceptions that subsection provides. For instance, exception one provides that confidential information "may" be released to "[t]he client when a request is made in writing specifically requesting information that directly relates to the person requesting the information." Accepting the COA's interpretation would allow DES to deny an individual access to his or her own confidential information. Likewise, exception three states that confidential information "may" be released "[p]ursuant to the consent of the client who is receiving adult protective services." The COA's interpretation would result in a similarly absurd situation in which DES could withhold a client's information from personally authorized individuals. Moreover, exceptions six and seven deal with general disclosure of statistics and otherwise efforts to confirm, clarify, or correct information. The only reasonable application of the term "may" to those

circumstances is a basic grant of permission for disclosure, not a creation of additional agency discretion.

The COA's reliance on *Butler* was misplaced because applying *Butler's* construction would produce an outcome contrary to the public policy rationale of A.R.S. § 39-121 (the Public Records Law), the COA's devised two-part test, and an analysis of § 46-460 in context of the entire statute. Furthermore, the construction accepted by the COA is not a faithful interpretation of how the Supreme Court interpreted the statute of issue in *Butler*. Aside from looking at the plain language of the statute, the *Butler* Court comprehensively examined the statute in its entirety to derive statutory meaning. *Garcia v. Butler*, 251 Ariz. 191, 195 (2021) ("Because subsection (B) uses permissive language to grant the court discretion to act on the state's request for a screening, and because subsections (B)(1)-(2) use mandatory language to set forth what the court must do if it grants the screening, we are persuaded that § 13-4518's plain language gives the trial court discretion when the state requests an SVP screening.").

3. The COA's interpretation of § 46-460 is contrary to the policy objectives of the Public Records Law.

The Public Records Law states that "public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121. Even confidential public records, such as those discussed in this case, are subject to exceptions to the confidentiality rule,

including the exception for bona fide researchers provided in A.R.S. § 46-460.

§ 39-121's obligatory language ("shall") conveys the social significance of public access to public records. The availability of these records under this statute empowers the public to hold government agencies accountable. Accepting the COA's interpretation of § 46-460 and granting DES unfettered discretion to deny record requests, even from those who would otherwise qualify under the statute, is contrary to the objective of agency accountability under § 39-121.

V. Conclusion.

For these reasons, Appellees request that the Court review the identified issues from the COA's Opinion.

Respectfully submitted,

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