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.: CV-23-0181-PR 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 RESPONSE TO APPELLEES' CROSS-PETITION FOR REVIEW

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INTRODUCTION

Arizona courts do not issue advisory opinions. *Welch v. Cochise Cnty. Bd. of Supervisors*, 251 Ariz. 519, 523, ¶ 12 (2021) (citing *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209 ¶ 8 (2019); *see also Bennett v. Brownlow*, 211 Ariz. 193, 196 ¶ 16 (2005)). An improper advisory opinion includes deciding legal issues based on hypothetical facts. *Young v. Rose*, 230 Ariz. 433, 439 ¶¶ 31, 32 (App. 2012). Arizona courts therefore especially avoid advisory opinions that "hypothesize about possible factual scenarios to provide meaningful guidance." *Id*. (remanding for more developed factual record before construing statute).

The Court of Appeals ("COA") ignored Arizona's prohibition against advisory opinions and violated its constitutional authority by prospectively defining multiple broad categories of "bona fide research" it deemed eligible for an exception to the confidentiality mandate imposed on the Arizona Department of Economic Security ("DES") by A.R.S. § 46-460(A), which statutorily protects the confidential investigatory files of DES's Adult Protective Services ("APS") program. *Silverman v. Ariz. Dep't of Econ. Sec.*, No. 1 CA-CV 22-0209, 532 P.3d 340, 346 ¶ 20 (June 13, 2023). Yet, the COA's broad categories of "bona fide research" have no clear correlation to the commercial reporting at issue in this case and the limited facts currently known.

The Plaintiffs/Appellees Amy Silverman and TNI Partners (the "Newspaper

Parties") now seek to exacerbate the COA's improper advisory opinion. They demand that this Court (1) ignore the COA's ruling that the Superior Court ("SC") improperly deprived DES of the opportunity to conduct necessary discovery, *id*., at 347 ¶¶ 25, 26, and instead declare that their records request qualifies for a confidentiality exception as a matter of law under the COA's extra-broad advisory definition of "bona fide research." The Newspaper Parties also ask that this Court simultaneously strip DES of any authority under A.R.S. § 46-460(D) to evaluate the reasonableness of their request.

STATEMENT OF THE CASE AND FACTS

DES's separate Petition for Review provides a thorough explanation of the relevant facts and procedural history. [S*ee* Appellant's Pet. at 3 - 9]. Some notable aspects of the COA's Opinion that bear repeating, however, include:

- "[T]he 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)]." *Silverman v. Ariz. Dep't of Econ. Sec.*, No. 1 CA-CV 22-0209, 532 P.3d 340, 347 ¶ 25 (June 13, 2023). But, 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

erroneously granted summary judgment in response to DES's motion to dismiss "apparently based on the allegations in the complaint alone." *Id.* at 344 ¶ 14. Summary judgment was improperly granted "before the parties could conduct discovery or the court could take evidence" so that the court cannot 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*., at 347 ¶ 25.

- DES has statutory authority to evaluate records requests and make decisions regarding disclosure, even if a confidentiality exception applies. *Id*., at 347 ¶ 27. However, the factual record is insufficient to determine whether DES had a valid basis for denying Silverman's request, such as the "unreasonable administrative burden" created by the volume of records requested by the Newspaper Parties. *Id*., at 347-348 ¶ 30.

Despite correctly ruling that further discovery was needed, the COA overreached its authority by devising a broad, multi-category definition of "bona fide research" without sufficient factual context to meaningfully define the term. *Id.,* at 346 ¶¶ 20, 21. In so doing, the COA issued an expansive advisory opinion unrelated to the limited facts in this case — or even potential facts anticipated to

arise on remand. *Progressive Specialty Ins. Co. v. Farmers Ins. Co. of Arizona*, 143 Ariz. 547, 548 (App. 1985) (declining to issue advisory opinions or declare legal principles with no practical effect on settling the litigants' rights). The COA found that "bona fide research" for purposes of A.R.S. § 46-460(D)(8) is split into three categories, including: (1) "educational" (further divided into "academic," "vocational" and "commercial fields of study"), (2) "administrative," and (3) "scientific" research purposes. *Silverman*, 532 P.3d at 346 ¶ 20. The improper advisory nature of the COA's "bona fide research" definition is the subject of DES's separate Petition for Review. [S*ee* Appellant's Pet. at 9-16].

ISSUES PRESENTED FOR REVIEW

The issues for review are:

1. Whether the COA correctly held that discovery and development of a specific factual record is necessary to find a Special Action Plaintiff has satisfied the statutory exception under A.R.S. § 46-460(D)(8).

2. Whether the COA correctly 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).

REASONS THE CROSS-PETITION FOR REVIEW SHOULD BE DENIED

I. The Newspaper Parties Seek an Advisory Opinion That They Satisfied the "Bona Fide Research" Exception Under A.R.S. § 46-460(D)(8).

A. The Newspaper Parties Have Failed to Disclose Evidence of Conducting "Bona Fide Research."

The COA's attempt to prematurely construe the meaning of "bona fide research" before discovery created a statutory definition from whole cloth in need of facts to which it might be applied, and then instructed the parties to try finding such facts. But here the Newspaper Parties ask this Court to leapfrog any such factual assessment and preemptively apply the COA's definition to their scarcely-defined "research" project by assuming hypothetical facts about the Newspaper Parties' intentions. This would only compound the advisory nature of the COA's Opinion. *Young*, 230 Ariz. 433, 439 ¶¶ 31, 32 (declining to construe meaning of electronic signature statute with insufficient factual record).

DES requires a host of detailed information from document seekers requesting records under the "bona fide research" exception. [*See* APPV1-092:24-100:25 (IR 23); *See also* APPV1-107-125]. The COA analyzed whether a small portion of that information had been provided by the Newspaper Parties and concluded it had not. *Silverman*, 532 P.3d at 347 ¶ 25 (Newspaper Parties did not provide detailed descriptions of the information sought or their research purpose, expected outcomes, and methodology for maintaining confidentiality). For that

reason alone, the COA correctly held that "the record is not sufficiently developed to determine whether the journalistic activities at issue in this case constitute 'bona fide research' and qualify for the statutory exception to confidentiality of records under A.R.S. § 46-460(D)(8)." *Id*., at 342 ¶ 2. The record below belies the Newspaper Parties' contention that they have satisfied the minimum required disclosures necessary to determine if they are truly conducting "bona fide research."

B. No Facts Demonstrate the Newspaper Parties' Confidentiality Methodology.

Whether the "bona fide research" exception applies here must be determined from the very specific facts of the Newspaper Parties' records request, which facts are currently unknown. Among the most important factual omissions by the Newspaper Parties is the detailed methodology they will employ to maintain confidentiality of APS's sensitive investigatory records. *See Silverman*, 532 P.3d at 343 ¶ 4, 347 ¶ 25. The Newspaper Parties have not explained who they may share the confidential records with, how they will safeguard them from access by unauthorized individuals, or their intentions for safely disposing of them. [APPV1-098:24-099:3]. Indeed, the Newspaper Parties have not even agreed to refrain from publicly releasing the records on the internet.

Their *only* explanation of their "detailed" methodology for maintaining confidentiality is a general acknowledgement that personally identifying

information would need to be redacted. [APPV2-084:11-13; *see generally* Appellees' Cross-Pet. at 8]. The Newspaper Parties merely acknowledge the minimum statutory requirement that "no personally identifying information [be] made available," even for bona fide research unless such information is essential to the research and DES's director gives prior approval. A.R.S. § 46-460(D)(8).

However, the Newspaper Parties undermine even that acknowledgement, introducing yet another factual dispute requiring resolution on remand. At the February 2022 SC status conference, the Newspaper Parties' counsel argued that after determination that the "bona fide research" exception applies to the Newspaper Parties' request, "then this becomes an open records case[] … under the public records law. And the presumption should be for access," whereby "traditionally, across the board in open records cases, courts … never require journalists to say why they want these public records and what they'll do with them. Part of public accountability is being able to see the raw data of the government and do what you want with it …." [APPV2-135:4-17].

The Newspaper Parties' true intention, then, is gaining full access to the records under the more permissive public records law, which may ultimately include demanding unredacted records allowing Silverman to contact otherwise confidential sources or victims referenced in the investigatory files. The implications of this factual dispute highlight the extreme importance of allowing

DES to conduct discovery, as ordered by the COA, ascertaining how the Newspaper Parties will protect and utilize APS's confidential files. *Silverman*, 532 P.3d at 347 ¶¶ 25, 26.

C. Insufficient Facts Exist About the Purpose, Expected Outcomes and Scope of Silverman's Purported Research.

The COA correctly noted that the Newspaper Parties have not detailed their research purposes, expected outcomes, how the specific documents sought relate to their goals, or the full scope of their request. *Id*., at 347 ¶ 25. Silverman confirmed that she lacked a research plan, was unaware of exactly what data she might discern from the records, and that her only purpose for the records was commercial journalism. [APPV2-136:6-137:4]. Silverman has never explained in detail what she is investigating, the types of stories she intends to write, other sources of information she has consulted, or how the requested records will further her goals. [APPV2-131:1-9]. As such, the paltry factual record does not reflect the extent of the Newspaper Parties' request.

DES's Counsel provided the SC with an example of potential bona fide research requests received by DES to demonstrate the level of detail typically provided and how that compares to the Newspaper Parties' grossly deficient submission. [*See* APPV1-148-49 (IR 26)]. The Newspaper Parties have not provided sufficient detail on the defining characteristics of a typical research endeavor, such as specifically targeted objectives, outcomes or deliverables,

established procedural paths and controls for bias, methods for validity testing and peer evaluation, or the standard by which their resulting news stories will determine if Arizona is effectively serving developmentally disabled individuals. [APPV1-098:24-099:13].

Also, the vast majority of records the Newspaper Parties request are unrelated to Silverman's stated purpose of researching the overall effectiveness of state services to the developmentally disabled. [APPV2-106:1-8; APPV2-128:2-8]. An open question remains whether the Newspaper Parties are "engaged in bona fide research," as required by the statute, given that the majority of records sought pertain to citizens who are not developmentally disabled or under state care. [APPV1-098:8-23; *see* A.R.S. § 46-460(D)(8)].

The Newspaper Parties' have made highly generalized, ambiguous statements about the most critical issues in this case — the purposes and nature of Silverman's purported "bona fide research" efforts. DES is entitled to test their factual assertions and present any deficiencies that arise about whether the Newspaper Parties' efforts are truly the type of "bona fide research" the Arizona Legislature intended. Furthermore, DES has been denied due process by being deprived of the opportunity to answer the Newspaper Parties' Complaint, conduct discovery and present the full facts prior to a final ruling. [APPV1-092:27-093:4]. As the COA held, further discovery is needed to fully assess these issues.

Silverman, 532 P.3d at 347 ¶¶ 25, 26.

D. DES Has Good Cause for Requesting Discovery.

The Newspaper Parties' reliance on *Lewis v. Dep't of Econ. Sec.* for the proposition that discovery is not warranted in this special action is unhelpful. [Appellees' Cross-Pet. at 6-7; *Lewis v. Arizona Dep't of Econ. Sec*., 186 Ariz. 610 (App. 1996)]. In *Lewis*, Appellant sought an order requesting to propound written discovery but failed to provide the trial court with a detailed explanation of the specific information sought or its significance to the legal issue before the court. *Lewis*, 186 Ariz. at 615. Even after the trial court denied his request for failure to show good cause for seeking discovery, he made no attempt to substantiate the basis for his request. *Id.*, at 615-16.

Conversely, DES has repeatedly shown good cause for its discovery request into, at a minimum, the nature, scope and intended uses of the Newspaper Parties' document demand. [*See* APPV1-092:24-100:25]. And the Newspaper Parties offer no authority for their contention that "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." [Appellees' Cross-Pet. at 7].

Notably, the COA in *Lewis* specifically found "the only issue presented in this case was one of law rather than of fact," and Appellant conceded the discovery sought "would not have affected the determination of th[e] legal issue" before the

court. *Lewis*, 186 Ariz. at 616. Here, the opposite is true. The COA correctly ruled that resolution of the legal issue depends on the as-yet undiscovered facts. *Silverman*, 532 P.3d at 346 ¶ 22. The COA properly vacated the SC ruling and remanded for further factual development. *Id*., at 342-43 ¶ 2. Absent these facts, Appellees' Cross-Petition seeks an improper advisory opinion.

II. The COA Correctly Ruled DES Has Discretion Under A.R.S. § 46-460(D) to Deny Records Requests If It Did Not Act Arbitrarily and Capriciously.

A. The Newspaper Parties Seek An Advisory Opinion Regarding DES's Discretion Under A.R.S. § 46-460(D).

As a threshold matter, the question posed by the Newspaper Parties is not squarely at issue. The Newspaper Parties challenge the COA's ruling that — after a requester has satisfied the "bona fide research" exception under § 46-460(D)(8) — DES retains discretion to, nonetheless, deny disclosure. [Appellees' Cross-Pet. at 9-13]. However, the factual record is insufficient to determine whether the Newspaper Parties' request qualifies as "bona fide research." *Silverman*, 532 P.3d at 347 ¶¶ 25, 26. After discovery, the SC may rule the exception is not satisfied, in which event the scope of DES's authority to, nonetheless, deny her request (such as due to unreasonable administrative burden) is irrelevant. Moreover, there are insufficient facts to determine whether DES acted arbitrarily and capriciously in denying the Newspaper Parties' request. *Id*., at ¶ 27. Given the procedural posture

of the case, Arizona's prohibition against advisory opinions, and the COA's ruling, this issue is premature.

B. The Arizona Legislature Provided DES Discretion to Evaluate Records Requests.

The COA correctly ruled that the statute "confers discretion upon DES in determining whether to disclose [its] records once an exception has been established." *Id*., at ¶ 29. Per § 46-460(D), "[e]mployees of [DES] ***may*** release any information that is otherwise held confidential under this section . . ." if an exception is met. (Emphasis added). As the COA recognized, the Legislature's use of "may" in A.R.S. § 46-460(D) "'indicates permissive intent and a grant of discretion'" to DES when determining whether to disclose APS's confidential information. *Silverman*, 532 P.3d at 347 ¶ 29 (quoting *Garcia v. Butler in & for Cnty. of Pima*, 251 Ariz. 191, 194 ¶ 13 (2021)). While DES agrees with the Newspaper Parties that it is not *prohibited* from releasing the records when an exception applies, DES is also not *compelled* to do so by the plain statutory language. [*See* Appellees' Cross-Pet. at 9-11]. Likewise, Arizona's Public Records Law, A.R.S. § 39-121 et seq., is subject to reasonable limitations.

The Legislature knows how to use mandatory language when it desires. *Garcia*, 251 Ariz. at 195 ¶ 15 (recognizing that "shall" and "may not" are mandatory terms) (citations omitted). Whereas the Legislature used mandatory language in § 46-460(A) in prescribing that DES "may not" release confidential

information, it chose not to use such mandatory language in § 46-460(D), instead explicitly stating DES "may" release the otherwise confidential information if an exception applies. That the Legislature mandated how DES must act under § 46-460(A) but did not do so under § 46-460(D) supports the interpretation that the Legislature intended to grant DES a reasonable degree of discretionary control over its confidential information, even when an exception applies. *Id*., at ¶¶ 15, 16 (use of restrictive language in one part of a statute but not the other indicates legislature's intent to narrowly apply the language)).

Furthermore, when the meaning of a statute is disputed, its legislative history is important. *Hayes v. Cont'l Ins. Co*., 178 Ariz. 264, 269 (1994). Here, legislative history confirms that A.R.S. § 46-460(D) "[a]llows" and "[a]uthorizes" DES employees to release otherwise confidential information. *See* BILL SUMMARY, H.R. 54, 1st Sess. (Ariz., May 21, 2019); SENATE FACT SHEET, S. 54, 1st Sess., at 3 (Ariz., May 21, 2019). Such permissive language in the legislative history supports the conclusion the Legislature intended through A.R.S. § 46-460(D) to grant DES reasonable discretion on whether and under what circumstances to grant or deny records requests even where an exception applies.

Indeed, the Legislature's intent to confer DES discretion is built directly into the statutory language at § 46-460(D)(8), which even grants DES's director discretion to approve the release of personally identifiable information otherwise

protected by the statute. Likewise, the Legislature granted DES discretion to "adopt rules to implement the purposes of the [DES] and the duties and powers of [DES's director] under this chapter" in § 46-460(E).

C. Newspaper Parties' Requested Relief Would Substantially Burden DES.

Not only do the Newspaper Parties ask this Court to swallow the confidentiality rule of § 46-460(A) by adopting the COA's expansive definition of "bona fide research" and requiring no facts, they seek to simultaneously divest DES of *any* opportunity to evaluate such requests under § 46-460(D). Such an outcome would improperly render the entire statute superfluous in that most any request could qualify as "bona fide research" and DES would have no discretion to test the reasonableness of such requests. *See, City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, 552 (2005) (courts shall not interpret a statute to render it superfluous). The end result would require unfettered access to APS's records on Arizona's most vulnerable citizens, thereby negating the Legislature's general intent to keep such records confidential.

The Newspaper Parties attempt to draw a false equivalency between one person requesting their own file and the commercial journalist here requesting thousands of APS records about unrelated, vulnerable citizens. [Appellees' Cross-Pet. at 11-12, citing § 46-460(D)(1), (3)]. While DES retains discretion in both situations, the administrative burden and confidentiality considerations bear much

more heavily in the latter.

Indeed, the administrative and financial impact of the Newspaper Parties' requested relief would be extensive. To respond, DES would have to identify, collect, review, and redact an estimated 17,863 investigatory files. [APPV2-045:14-046:18]. After DES prepares the files, they are sent to the Arizona Attorney General's Office for further review. *Id*. DES conservatively estimates it would take DES and the Arizona Attorney General's Office a minimum of 94,500 employee hours, which translates to a solid year of full-time work for 41 DES records specialists and 7 DES records team members, requiring re-assignment of dozens of key employees or hiring and training substantial new staff. *Id*.

The administrative burden would increase exponentially if numerous "researchers" made similar demands. As the COA noted, unreasonable administrative burden is at least one valid basis for denying records requests, and DES retains discretion to make reasonable assessments. *Silverman*, 532 P.3d at 347-48 ¶ 30 (citing *Hodai v. City of Tucson*, 239 Ariz. 34, 43 ¶ 27 (App. 2016)). At a minimum, then, the parties must develop a record demonstrating the burden on DES, the volume of documents requested, and the labor required to satisfy the Newspaper Parties' request. *Id*.

According to the Newspaper Parties' proposed statutory interpretation, however, DES is *required* to disclose its otherwise confidential records if *any* of

the exceptions available under A.R.S. § 46-460(D) are met. [Appellees' Cross-Pet. at 11]. For instance, DES would be forced to release APS's confidential records if it merely "disclose[s] statistics" or chooses to respond to a public allegation of abuse. *See* A.R.S. § 46-460(D)(6), (7). This type of mandatory disclosure would be an absurd result. *Lake Havasu City v. Mohave County*, 138 Ariz. 552, 557 (App. 1983) (nonsensical statutory constructions creating absurd outcomes are avoided).

The COA's interpretation of A.R.S. § 46-460(D) is reasonable. DES has discretion (but no obligation) to disclose its otherwise confidential records when an exception is met, though it "cannot exercise its discretion arbitrarily or capriciously." *Silverman*, 532 P.3d at 347 ¶ 29. The COA correctly remanded the case for further facts to determine if DES acted arbitrarily and capriciously in denying the Newspaper Parties' request. *Id*., at ¶ 30.

CONCLUSION

The Court should deny the Cross-Petition and accept DES's Petition for Review to address the improper advisory opinion.

RESPECTFULLY SUBMITTED this 27th day of September, 2023.

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