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' RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

This Court should deny Defendant/Appellant Arizona Department of Economic Security's ("DES") request for review because the Court of Appeals ("COA") exercised valid authority when it interpreted A.R.S. § 46-460(D)(8)'s "bona fide research" exception to determine whether Plaintiff/Appellant Amy Silverman's ("Silverman") proposed research qualified. It is puzzling that DES would argue now that the COA issued an advisory opinion in this case when DES itself argued *extensively* below in favor of the COA issuing an opinion which interpreted the "bona fide research" exception provided in § 46-460(D)(8). *See* DES Opening Brief (7/18/2022) at 14-30. Specifically, DES requested that the COA: 1) reject the Superior Court's ("SC") interpretation of § 46-460(D)(8) used to both deny DES' motion to dismiss and grant judgment in favor of Plaintiffs/Appellees; and 2) issue an opinion which adopted DES' proffered interpretation of § 46-460(D)(8) in support of an order finding that DES' motion to dismiss should have been granted by the SC. *See id*. DES expressed no concerns within such argument that it might be requesting an interpretation and finding that would amount to an advisory opinion. DES raises such argument now only because the COA largely rejected DES' proffered interpretation of § 46-460(D)(8), which would have prevented journalists like Silverman from qualifying for the

exception. The Court should not entertain DES' attempt to color the COA's disagreement with DES' own proposed interpretation as an "advisory opinion."

Regardless, given the substantial evidence and explanation provided in the record below supporting Plaintiffs/Appellees' records request to DES, it cannot be said that the COA issued an advisory opinion. To the contrary, Plaintiffs/Appellees have demonstrated in their Cross-Petition for Review (7/28/2023) that the COA should not have even remanded this case for further discovery, as there was ample evidence and explanation in the record for the COA to have applied its test to find that Silverman's research qualified as "bona fide research." *See* Cross-Petition for Review (7/28/2023) at 2-9.

Justiciability doctrines, including the prohibition against advisory opinions, generally derive from Article III, § 2 of the U.S. Constitution's "case and controversy" requirement. *See Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 217-18 (1995) (interpreting Article III of the U.S. Constitution's requirements for justiciability). Although Arizona's Constitution does not contain a "case or controversy requirement," the bar against advisory opinions is incorporated within Arizona's Constitution and evaluated through standing and ripeness doctrines. *See Brush & Nib Studios, LC v. City of Phoenix*, 247 Ariz. 269, 279, ¶ 35 (2019); *see also City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 209, ¶ 8 (2019) ("Our courts exercise restraint to ensure they 'refrain from issuing advisory opinions,

[and] that cases be ripe for decision and not moot..."); *Crawford v. Favour*, 34 Ariz. 13, 21 (1928) (no clause can be found in the Arizona Constitution authorizing advisory opinions).

The prohibition of advisory opinions is meant to prevent the expenditure of judicial resources on "troubles which do not exist; may never exist and the precise form of which, should they ever arise, we cannot predict." *See Citibank v. Miller & Schroeder Fin., Inc*., 168 Ariz. 178, 182 (App. 1990) (quoting *Velasco v. Mallory*, 5 Ariz.App. 406, 410-11 (1967)). Despite the general prohibition against advisory opinions, courts are authorized to interpret ambiguous statutory language by looking to other jurisdictions that have interpreted a similar statute or phrase. *See Branch v. State*, 15 Ariz. 99, 104 (1913) ("Where the wording of a statute is ambiguous and uncertain . . . cases from other jurisdictions construing a like statute or interpreting its words are persuasive and helpful."). In this case, the COA used its authority, as it did in *Branch,* to interpret an ambiguous statutory phrase. For this reason, the COA's interpretation of "bona fide research" was valid.

Looking to the New York case *Newsday, Inc. v. State Comm'n on Quality of Care for Mentally Disabled*, 601 N.Y.S.2d 363, 365 (Sup. Ct. 1992), the COA found that the New York court's interpretation that "bona fide research" required an "academic, administrative or scientific" purpose was persuasive. *See* COA Opinion (6/13/2023), ¶ 20 (Appx. No. 7). However, the COA opted to use the term

"educational" in lieu of the term "academic" in recognition that the latter term may be unduly restrictive, excluding those conducting research in vocational and commercial fields of study. *See id*.

In its decision, the COA determined that journalists like Silverman, among others, could qualify for the "bona fide research" exception to the records' confidentiality mandate of § 46-460(A) provided that prospective researchers describe in detail the specific information sought and the purpose of the research, the expected outcomes of the research, and the methodology that will be employed to maintain record confidentiality. *Silverman v. Ariz. Dep't of Econ. Sec.*, No. 1 CA-CV 22-0209, 2023 Ariz.App.LEXIS 250 *11, ¶ 20, ¶ 24 (June 13, 2023). By issuing its interpretation of an ambiguous term, the COA appropriately used its authority to address whether Silverman's record request could fall within the "bona fide research" exception provided by § 46-460(D)(8). In providing concrete categories of purpose which qualify as "bona fide research," and a standard requiring specificity of purpose and methodology, it is inconceivable that the COA's test for the "bona fide research" exception – which still requires redaction of all personal identifiers – could somehow render A.R.S. § 46-460(A) superfluous. In fact, finding that the question of what constitutes such research cannot be answered here would render the state's commitment to open records

almost meaningless. Plaintiffs/Appellees request that the Court deny DES' Petition for Review.

II. STATEMENT OF FACTS

Plaintiff/Appellee Silverman accepts Section I(A) of the facts presented by Defendant/Appellant DES in their Petition for Review, which outlines the confidentiality mandate of A.R.S. § 46-460(A) and its "bona fide research" exception, as well as reasserts the facts presented in Plaintiff/Appellee's Cross-Petition for Review, including those establishing Silverman's extensive history as a successful investigative journalist. *See* Petition for Review (7/13/2023) at 3-4 *and* Cross-Petition for Review (7/28/2023) at 2-4.

A. Silverman Provided the COA with an Extensive Factual Record That Allowed the COA to Reasonably Analyze the Term "Bona Fide Research."

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. *See* Complaint, IR-1, ¶ 8 (Appx. No. 1). 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*. 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. *See* Complaint, IR-1, ¶ 9 (Appx. No. 1). Mr. York further asserted that none of the exceptions in subsections B, C, or D applied to the request. *Id.,* ¶ 10.

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). Silverman asserted that the exception in subsection (D)(8) of A.R.S. § 46-460 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.

B. 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).

III. REASONS TO DENY REVIEW.

The COA did not issue an advisory opinion when it interpreted the meaning of "bona fide research." The COA appropriately used its authority to address the central issue of the case – the ambiguous statutory language of § 46-460(D)(8). Furthermore, the COA's definition of "bona fide research" is neither so general nor

so broad to render § 46-460(A) superfluous. The court should not grant review on these bases.

A. The COA Did Not Issue An Advisory Opinion When It Established Its Interpretation Of The A.R.S. § 46-460(D)(8) "Bona Fide Research" Exception.

DES argues that the COA issued an improper advisory opinion by interpreting § 46-460(D)(8)'s "bona fide research" exception because the parties had placed "no real facts before the courts." DES Petition (7/13/2023) at 9-10. DES relies heavily on *Young v. Rose*, 230 Ariz. 433, 438 (Ct. App. Div. 1 2012) in support of such argument. DES' reliance upon *Young* is misplaced for two reasons.

First, DES fails to acknowledge that the Arizona Rules of Civil Procedure, which were the procedural basis for the *Young* court's analysis, are not applicable to this Special Action. Special Actions follow an inherently different process under the Arizona Rules of Procedure for Special Actions, which are designed to provide a much more streamlined process of adjudication. *See Lewis v. Arizona Dep't of Econ. Sec*., 186 Ariz. 610, 616 (Ct. App. Div. 1 1996) ("To allow a wide range of discovery, attendant with the delays involved, would tend to defeat the very purpose of a special action."). In keeping with the expedient nature of Special Actions, a hearing should only provide sufficient information for the SC judge to determine if there is a Rule 4(f) triable issue of fact or if judgment is appropriate

based upon the pleadings alone. The *Young* court largely overturned the superior court's dismissal of the plaintiff's lawsuit at the Arizona Rule of Civil Procedure 12(b)(6) stage because the plaintiff should have been permitted a greater opportunity to provide evidence on a determinative factual issue for the case (within circumstances that should have prompted the superior court to allow for a full summary judgment presentation under Rule 56). *Young*, 230 Ariz. at 438, ¶¶ 26-28. It is incorrect for DES to suggest that the COA should have approached this Special Action case through the prism of the Arizona Rules of Civil Procedure as the *Young* court had.

Second, beyond this fundamental procedural difference, the *Young* court's refusal to decide the legal issue of what constitutes an electronic signature for purposes of Arizona's Electronic Signature Act was based upon an important substantive distinction from the nature of § 46-460(D)(8)'s "bona fide research" exception. The *Young* court provided that, in order to establish an electronic signature, the plaintiff was required to demonstrate that "the parties agreed to conduct the transaction by electronic means … which is 'determined from the context and surrounding circumstances, including the parties' conduct.'" *Young*, 230 Ariz. at 438, ¶ 30. The *Young* court explained that "[r]esolving these types of issues is not possible based solely on the complaint and the [real estate agreement]." *Id*. The determination of whether Silverman's records request

qualifies as "bona fide research" is inherently different from the legal determination in *Young* because it does not require such an extended showing of the intent of other parties, but rather only that Silverman provide adequate information about her own research – which she has done here.

Contrary to DES' claim, Plaintiffs/Appellees placed sufficient facts and explanation before the SC and COA to permit the COA to interpret the ambiguous statutory meaning of "bona fide research" in A.R.S. § 46-460(D). As was established in the prior proceedings, Silverman's 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). In particular, 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). To accomplish this, Silverman requested the adult protective services reports, investigations, and other materials that provided the data for the APS quarterly reports from April 2019 to March 2020. *See* Complaint, IR-1, Exhibit 1 (Appx. No. 1).

In later communications, Silverman 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). It is impossible to know what Silverman's research would uncover without access to the requested records, but Silverman's previous "research on these issues . . . already yielded a series of published articles that have prompted further investigation and calls for reform." *See* Response to Motion to Dismiss, IR-10 at 3 (Appx. No. 2). Considering the extensive factual record and the unique procedures outlined for Special Actions, the COA did not issue an improper advisory opinion by interpreting the phrase "bona fide research."

B. The COA's Definition of "Bona Fide Research" Does Not Render A.R.S. § 46-460(A) Superfluous.

DES' contention that the COA's definition of "bona fide research" renders A.R.S. § 46-460(A) superfluous is simply incorrect. The purpose of the statute, clearly established by the language of A.R.S. § 46-460(A), is to establish a general provision for restricted access to confidential information; *and* to introduce exceptions. The COA merely defined one of the exceptions not already defined by the statute. By defining § 46-460(D)(8), the COA gave § 46-460(A) greater clarity in providing specific instruction on what "bona fide research" may include. The COA did not change the meaning intended by the language of the statute.

DES characterizes the COA's categorization of "research" as generic, and essentially, all encompassing. Petition for Review (7/13/2023) at 15 ("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."). To the contrary, the COA defined "research" specifically as having an "educational, administrative or scientific" purpose. *See* COA Opinion (6/13/2023), ¶ 20 (Appx. No. 7). It is inconceivable how research on these three very specific categories could allow most anyone the ability to obtain records from DES as "bona fide research." Indeed, the COA also 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.

Even if this Court were to accept DES' argument that the exception is broad, it still only allows release of heavily redacted information. Sec. 46-460(D)(8) (allows exemption for "[a]ny person who is engaged in bona fide research, *if no personally identifying information is made available*") (emphasis added). So, release to researchers will not diminish the most fundamental protection provided by the statute. These requirements indicate that, far from rendering § 46-460(A) superfluous, the defined categories of acceptable "research" and the requirements

of researchers stated in the COA's opinion both uphold the general confidentiality of this sensitive information and the policy in favor of agency accountability to the public under the Public Records Law, A.R.S. § 39-121.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs/Appellees request that the Court deny DES' Petition for Review.

Respectfully submitted,

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