

**ARIZONA SUPREME COURT**

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’S SUPPLEMENTAL BRIEF REGARDING  
PETITION FOR REVIEW**

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## INTRODUCTION

Petitioner Arizona Department of Economic Security (“DES”) answers here the additional issues implicated in this Court’s Order of February 6, 2024, granting the Petition for Review and Cross-Petition for Review. The Arizona Court of Appeals (“COA”) erred by adopting a definition of “bona fide research” for A.R.S. § 46-460(D)(8) that: (1) fails to harmonize that exception with the clear, consistent and limited purpose of the many other confidentiality exceptions in § 46-460(B)-(D); (2) renders those other confidentiality exceptions meaningless; and (3) attempts to create a priority right of access to government investigatory files for journalists that has no constitutional support. The record on appeal supports only a determination that the Cross-Petitioners’ request for records from DES does not meet the “bona fide research” exception.

### **I. COURTS ARE REQUIRED TO INTERPRET A.R.S. § 46-460(D)(8)’s EXCEPTION IN HARMONY WITH THE INTENT OF THE REMAINING EXCEPTIONS OF THAT SECTION.**

The COA characterized the term “bona fide research” as used in A.R.S. § 46-460(D)(8) as “ambiguous,” *Silverman v. Arizona Dep’t of Econ. Sec.*, 255 Ariz. 348, 353 ¶ 16 (App. 2023), but ignored key rules of construction Arizona courts must apply to otherwise ambiguous statutory language.

When statutory language gives rise to different interpretations, as it does here, we will adopt the interpretation that is most harmonious with the statutory scheme and legislative purpose. In doing so, we examine the policy behind the statute and the evil it seeks to remedy. *State v. Helffrich*, 174 Ariz. 1, 5, 846 P.2d 151, 155 (App.1992). We also look

at the effects and consequences of a particular interpretation and compare them to other acts that are in pari materia; we will then construe the provisions to harmonize rather than contradict one another “if sound reasons and good conscience allow.” *Ban v. Quigley*, 168 Ariz. 196, 198, 812 P.2d 1014, 1016 (App.1990), *review dismissed*, 169 Ariz. 477, 820 P.2d 643 (1991).

*Manuel M. v. Arizona Dep't of Econ. Sec.*, 218 Ariz. 205, 210–11 (App. 2008), *as corrected* (Apr. 11, 2008). The COA properly acknowledged it was supposed to “construe the ‘bona fide research’ exception to further the statute’s purpose of preserving the records’ confidentiality,” and it correctly rejected the interpretation of “bona fide research” offered by Cross-Petitioners as so loose it rendered the confidentiality provisions of § 46-460(A) meaningless. *Silverman*, 255 Ariz. at 353 ¶ 17. However, the COA disregarded Arizona’s statutory construction rules by failing to analyze the broader statutory scheme in which the “bona fide research” exception operates, failing to examine the policy behind the statutory language and the evil it seeks to remedy, and failing to evaluate the legislative history of the exception.

Instead, the COA said it was adopting a definition of “research” from a New York decision based on a generalized conclusion that the Arizona and New York statutes share a “similarity.” But despite that, the COA immediately departed from the New York approach it had just adopted. The COA rejected how the New York statute tied “bona fide research” to “academic” efforts. It then replaced “academic” efforts with the far broader category of “educational” efforts so that the definition

would not exclude “those conducting research in vocational or commercial fields of study.” *Silverman, et al.*, 255 Ariz. at 354 ¶ 20. The COA did not explain how or why the purpose, statutory language, legislative history or structure of the confidentiality statutes associated with enactment of A.R.S. § 46-460 required including all varieties of “vocational and commercial” research that serve the purpose of “informing the public of ways DES and APS could improve treatment and security of vulnerable adults.” *See id.* The court simply made an implicit value judgment that such forms of “research” merited a confidentiality exception, and noted “[w]e see no reason to exclude [from the “bona fide research” exception] those conducting bona fide research in vocational or commercial fields of study.” *Id.*

If this Court examines the role of the “bona fide research” exception within the entire statutory scheme, applies the robust confidentiality command reflected in the exception’s legislative history, and properly harmonizes the exception language with the other exceptions in § 46-460(B), (C) and (D), the Court should conclude that “bona fide research” carves a narrow exception that does not include private journalism conducted independent of DES research and improvement programs.

**A. The Legislative History of § 46-460 Reflects a Consistent Policy to Protect the APS Records from Disclosure to the General Public.**

The “bona fide research” exception was enacted along with the remainder of A.R.S. § 46-460 through Chapter 321, S.B. 1538 in the First Regular Session of the Fifty-Fourth Legislature in 2019. 2019 Ariz. Legis. Serv. Ch. 321 (S.B. 1538). That

legislation made modifications to a substantial number of statutes and was titled “Vulnerable Adults – Reporters – Confidential or Privileged Information.” *Id.* (amending A.R.S. §§ 11-483(1), 11-484(J), (K), 13-2401(A), (C), 16-153(F),(K), 28-454(K), 39-123(F), 39-124(C), 41-1959(A),(C), 46-451(A),(C), 46-454 and adding new sections A.R.S. §§ 46-460, 46-461). Where, as here, the courts find statutory language ambiguous, even the title of the bill through which the language was enacted provides important evidence of legislative intent. *See State v. Pinto*, 179 Ariz. 593, 596 (App. 1994) (focusing on description of legislation in bill preamble). Here, the bill’s title reveals that its primary purpose is to supply enactments defining what is confidential or privileged information in government files related to vulnerable adults or to reporters of vulnerable adult abuse, neglect, or exploitation.

Per precedent like *Manuel M.*, 218 Ariz. at 210–11, construing courts must also account for the statutory scheme in which the “bona fide research” exception was enacted. Here, that scheme expresses a clear purpose to prohibit the general public from accessing any records the legislature has designated as “confidential.” The enacting bill included numerous provisions confirming “that the general public [can] be prohibited” from accessing various categories of records designated confidential by the legislature.<sup>1</sup>

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<sup>1</sup> 2019 Ariz. Legis. Serv. Ch. 321 (S.B. 1538) (allowing prohibition of general public from accessing records protected by A.R.S. §§ 11-483, -484, A.R.S. § 16-153(A)).

The bill also made amendments to multiple sections of the Arizona statutes that establish specific categories of government records regarding vulnerable persons as “confidential” and protected from public disclosure.<sup>2</sup> Finally, the amendment enacted the two new statutory sections, A.R.S. §§ 46-460, -461, that created the requirement for confidentiality and prohibitions against public disclosure for the APS records at issue here. These include the broad confidentiality command to which the “bona fide research” exception applies, *see* A.R.S. § 46-460(A) (directing protection of “all personally identifying information” concerning anyone in an APS program and requiring that “*all information that is gathered or created by [APS] and that is contained in [APS’s] records is confidential and may not be released*” except as provided in the § 46-460 exceptions. (emphasis added)). And, they include the provisions of the new statutory section, A.R.S. § 46-461, reflecting legislative intent to allow limited disclosure of APS information to non-government groups, but only when such groups’ members use the records in cooperation with APS agents for “official purposes” while remaining subject to express, ongoing prohibitions against public disclosure. 2019 Ariz. Legis. Serv. Ch. 321 (S.B. 1538).

More specifically, the new provisions in A.R.S. § 46-461 allow APS officials

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<sup>2</sup> *See id.* (amending A.R.S. § 41-1959 to provide that DES records related to department of child safety investigations are confidential limit their release; and amending A.R.S. § 46-454(F) to confirm that records concerning vulnerable adults made available by DES for investigation of abuse, neglect, or exploitation are confidential and may be used only in proceedings resulting from authorized reports).

to “establish a multidisciplinary adult protection team” that may include a variety of government officers, along with non-government “adult disability and advocate groups.” A.R.S. § 46-461(A). This cooperative government-private team “may provide public and professional education and develop resources” to help DES carry out its adult protection functions. *Id.* at 46-461(B). The statute authorizes APS to “make available to members of the multidisciplinary . . . team” all records necessary “*for the official duties* without the designation of the client’s name unless the client’s name is required *for official purposes.*” *Id.* at 46-461(C) (emphasis added). However, echoing the restriction that disclosures of APS records must be for official duties and official purposes only, the statute further states:

*The case information received by members of the multidisciplinary adult protection team shall be maintained as confidential unless a consent to release has been given pursuant to this section or pursuant to a court order...*

\* \* \*

A person to whom information is released pursuant to this section *is prohibited from using or releasing the information except in the proper performance of the person’s official duties* unless a consent to release has been given pursuant to this section or pursuant to a court order or a grand jury subpoena.

*Id.* at 46-461(C), (E) (emphasis added). The parallel confidentiality exceptions in A.R.S. § 46-460(D)(5) recognize this very limited exception to absolute confidentiality of APS investigatory records that are used by a “statutorily created team that is mandated to review adult protective services and the clients served in the completion of the [team’s] official duties.” Thus, the new statutes in which the

“bona fide research” exception resides are part of a consistent statutory scheme mandating the confidentiality of all APS records except where disclosure serves narrow, governmental purposes assigned to APS. The Arizona rules of statutory construction required the COA to employ its interpretive powers to support that policy, not to offer an advisory hypothetical opinion that “bona fide research” might allow broad disclosure of detailed APS investigatory records to journalists who share no cooperative or regulated relationship with the government agencies that are legislatively delegated responsibility for vulnerable adult protection.

**B. The Courts Are Required to Harmonize “Bona Fide Research” with the Policy of the Other 13 Exceptions under § 46-460.**

The “bona fide research” exception at A.R.S. § 46-460(D)(8) is just one of 14 separate confidentiality exceptions the statute recognizes. Those 14 exceptions can all be interpreted harmoniously.

First, they all involve disclosures made for specific government purposes that fulfill the statutory obligation of DES/APS to enhance the protection of Arizona’s vulnerable adults against abuse, neglect, and exploitation. The limited exceptions in A.R.S. § 46-460(B), (C)(1) – (5), and (D)(1) – (7) permit release of confidential APS information (1) to other governmental agencies that share vulnerable adult protection responsibilities and powers, (2) for use in government-run proceedings or investigations that directly protect vulnerable adults, or (3) as required by court order, by the consent or direction of a specific vulnerable APS client, or as needed

to protect the best interests of a particular APS client. And while they allow APS to fulfill the public education component of its governmental protective duties by releasing general statistics or summary information not tied to any particular APS case (A.R.S. § 46-460(D)(6)), or making limited statements to confirm information about a particular case of vulnerable adult abuse that had already been made public by a source outside DES (A.R.S. § 46-460(D)(7)), none of the exceptions, including the “bona fide research” language, contemplate release of APS client-specific records to a non-government employee or agent that is not specifically approved by or needed by APS to protect specific APS clients.

In other words, none of the other § 46-460 exceptions expressly contemplate the release of even a single APS investigatory file to the media, especially without any ongoing restrictions against the recipient’s public disclosure of the records. To the contrary, § 46-460(F) contemplates that disclosures of case-specific information authorized by the various exceptions are each imbued with ongoing prohibitions against public disclosure, whose violation shall be criminally prosecuted.

Interpreting the “bona fide research” exception as broad enough to include requests of commercial journalists for a broad range of case-specific investigatory files for which they can provide no government investigatory or prosecutorial services and that involve sensitive information about vulnerable adults for whom they will never provide any direct protective services makes the “bona fide research”

an outlier and contradiction to the confidentiality preservation mission of § 46-460 and its other confidentiality exceptions. In so doing, the COA ignored this Court’s rule that “we must ‘strive to construe a statute and its subsections as a consistent and harmonious whole.’” *State v. Green*, 248 Ariz. 133, 135 (2020).

The rule of construction is no different even if, as the COA found, § 46-460 is “ambiguous” in its use of the term “research.” “When a statute's words do not disclose legislative intent, the court must read the statute as a whole, and give meaningful operation to all of its provisions.” *Wyatt v. Wehmuller*, 167 Ariz. 281, 284 (1991). It must endeavor “to interpret different sections of the same statute consistently, [citation omitted], and to construe apparently conflicting statutes in a way that gives effect to all.” *State v. Razo*, 195 Ariz. 393, 394 (App. 1999).

Rather than harmonizing and supporting the consistent objectives of the other confidentiality exceptions under § 46-460, the COA’s interpretation undermines those objectives. The purpose of the narrow exceptions is to preserve confidentiality of the records of statutorily protected vulnerable adults and the reasons for doing so are obvious and sound. Disclosing details of abuse of a vulnerable adult can hamper investigations by exposing to suspects what officials already know about a case. The inability of investigators to assure confidentiality of APS files can substantially chill witness reporting, and thereby frustrate the prosecution of abuse. The investigatory details also can prove highly embarrassing or personally sensitive to the vulnerable

adult victim. The widespread release of APS investigatory files might even invite further abuses by identifying those who have already proven vulnerable to exploitation.<sup>3</sup> All these important reasons for preserving confidentiality can be compromised by the “bona fide research” definition the COA adopted.

Importantly, the COA had a record that allowed it to fully harmonize and reconcile the “bona fide research” exception with the clear purposes of the other 13 confidentiality exceptions under § 46-460, just as DES has done in its practices. The COA noted that DES has applied the “bona fide research” exception by requiring an application from research groups offering “a detailed plan that shows how the research will help DES improve its operations, show the purpose and expected outcomes of the research, and show how the [researcher] will maintain record confidentiality.” *Silverman, et al.*, 255 Ariz. at 354 ¶ 23. Much like the exceptions allowing release of certain APS records to non-government “adult disability and advocate groups” for use only in their “official duties” as part of the APS “multidisciplinary adult protection team,” see A.R.S. §§ 46-460(D)(5), 46-461(B),(C), DES enters into relationships with other non-government research entities whereby such entities study aspects of its APS programs and make reports and recommendations on strengths, weaknesses, and strategies for improvement.

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<sup>3</sup> Arizona precedent holds that such risks of harm can justify limiting press access to government proceedings. See *State v. Meek*, 9 Ariz. App. 149, 152 (1969) (dangers of press statements to reputational interests justified press exclusions from court).

[See Arizona Court of Appeals Case no. 1 CA-CV 22-0209, Appellant’s Opening Brief, at pp. 17, 29-30; Appellant’s Appendix Vol. 1, Appendix 14, at APPV1-144–149]. But these are collaborative relationships with entities who are verified by DES as having expertise in such research efforts and provide detailed commitments for maintaining the confidentiality of APS records. [See *id.*]. In this way, DES implements the “bona fide research” exception to improve its programs for protecting vulnerable adults. DES’s narrowed interpretation of “bona fide research” to include only those programs it has determined will adequately help fulfill its statutory obligations of protecting Arizona adults while maintaining confidentiality fully harmonizes that exception with the purpose of the other A.R.S. § 46-460 exceptions. The COA erred in rejecting DES’s interpretation and failing to harmonize the “bona fide research” exception with the rest of §§ 46-460, -461.

## **II. THE COA INTERPRETATION OF “BONA FIDE RESEARCH” CONTRADICTS, AND RENDERS SUPERFLUOUS, DISCLOSURE PROHIBITIONS UNDER A.R.S. §§ 46-460, -461.**

The COA broadened the interpretation of “bona fide research” to cover a host of efforts in which private parties seek confidential records for “educational” purposes and to inform others *outside* DES what it learns about APS investigations. See *Silverman, et al.*, 255 Ariz. at 354 ¶¶ 20 - 22. But this creates an irreconcilable conflict between the restrictive way §§ 46-460 and -461 handle other authorized disclosures of APS records to specific non-government interested parties.

For example, while the COA reads into the “bona fide research” exception a requirement that journalists inform DES how they plan to maintain confidentiality of records they obtain, *Silverman*, 255 Ariz. at 346 ¶ 23, the COA does not suggest that DES is empowered to enforce such plans after providing the broad release demanded here. The COA points to no law that would prohibit the commercial journalist who clears the hurdle of proposing some process for preserving confidentiality from ultimately using and disclosing the records they obtain in any way that suits their commercial needs. The journalist would have discretion to use the released records for their personal, non-governmental objectives, irrespective of how those uses might interfere with APS’s duty to protect vulnerable adults.

The foregoing starkly contrasts with how A.R.S. § 46-461(C), (E) and A.R.S. § 46-460(D)(5), (F) prevent such publications by other private group members who obtain APS records as part of their official duties on the DES multidisciplinary adult protection team. While the statutes authorize APS to give such private citizens records concerning APS investigations, such persons are expressly prohibited from releasing those records without either express DES consent under § 46-461(E), a court order or a grand jury subpoena. They may be criminally prosecuted by the state under A.R.S. § 46-460(F) for using or disclosing APS records in violation of their express statutory confidentiality obligations.

The COA’s interpretation of “bona fide research” therefore creates two

classes of private citizens who may receive confidential APS records for research. The first is engaged in an appointed team relationship with DES/APS, and is strictly prohibited from making any disclosure outside official government duties. The second class contains journalists who have no formal, appointed or cooperative relationship with DES/APS, and who do not intend to use the confidential records to support DES/APS programs. The COA even acknowledges these journalists may be trying to expose what they believe is DES negligence or incompetence. *Silverman*, 255 Ariz. at 347 ¶ 29. Yet, by seeking the APS investigatory files through the “bona fide research” exception as defined by the COA, the journalists avoid ongoing statutory prohibitions on public disclosure of the file records.

The COA’s interpretation contradicts and renders superfluous § 46-461(C), (E)’s express restrictions on disclosures of APS records by private advocacy groups. It opens the door for any such group member to evade the heavy non-disclosure mandates and threat of criminal prosecution that membership on APS’s multidisciplinary adult protection team imposes by avoiding such a cooperative relationship and portraying their request as an attempt at “educational” research and reporting under § 46-460(D)(8). The COA erred in crafting a definition for “bona fide research” that makes the § 46-461(C), (E) restrictions superfluous.

### **III. THE COA’S INTERPRETATION OF “BONA FIDE RESEARCH” RESTS ON CONSTITUTIONALLY UNJUSTIFIED PREFERENCES FOR JOURNALIST INVESTIGATIONS.**

Multiple opinions of the U.S. Supreme Court decline to recognize any constitutional special right of access to government records or operations for journalists. See, e.g. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972). In those opinions, “[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” *Branzburg*, 408 U.S. at 684 (citing *Zemel v. Rusk*, 381 U.S. 1, 16 - 17 (1965); *New York Times Co. v. United States*, 403 U.S. 713, 728 - 730 (1971), (Stewart, J., concurring)); *Houchins*, 438 U.S. at 13-14 (“We . . . reject the . . . conclusory assertion that the public and the media have a First Amendment right to government information . . .”).

The *Houchins* opinion explained why it is unwise for courts to presume that members of the press enjoy any sort of special access rights to government information. “There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.” *Houchins*, 438 U.S. at 14 (citation omitted). “The public’s interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” *Id.* Instead, federal First Amendment precedent recognizes that even though news gathering may be hampered by such restrictions:

the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive

session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.

*Branzburg*, 408 U.S. at 684-85.

The Supreme Court has highlighted the inappropriateness of resting judicial decisions on any assumption that media access to government operations “is essential for informed public debate” about such operations, or on any assumption that “media personnel are the best qualified persons for the task of discovering malfeasance in public institutions.” *Houchins*, 438 U.S. at 13-14. The latter assumption “finds no support in the decisions of th[e U.S. Supreme] Court or the First Amendment.” *Id.* at 14. Also, “[e]ditors and newsmen who inspect a [government operation] may decide to publish or not to publish what information they acquire,” and though “[p]ublic bodies and officers . . . may be coerced by public opinion to disclose what they might prefer to conceal,” “[n]o comparable pressures are available to anyone to compel publication by the media of what they might prefer not to make known.” *Id.*

Just as importantly, the government has several other options for “keeping the public informed” about deficiencies in government operations and the need for reforms, such as “[c]itizen task forces [like the § 46-461 multidisciplinary adult protection team] and . . . visitation committees,” grand juries with their subpoena

powers, prosecutor and judge-initiated inquiries, and the “arsenal of weapons for inquiry relating to tax-supported institutions” that are reserved to members of the legislature. *Houchins*, 438 U.S. at 13. “But the choice as to the most effective and appropriate method is a policy decision to be resolved by legislative decision.” *Id.*

Specifically chastising any decision by a court to prefer intervention by the press for such public education functions, the U.S. Supreme Court has warned, “[w]e must not confuse what is ‘good,’ ‘desirable,’ or ‘expedient’ with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication.” *Id.* Moreover, “[b]ecause the Constitution affords no guidelines,” courts must adhere to the policy decisions made in statute about who gets access to public records. Otherwise, “hundreds of judges . . . would . . . be at large to fashion ad hoc standards, in individual cases, according to their own ideas of what seems ‘desirable’ or [‘]expedient’” for investigating government activity. *Id.*

There is nothing in the Arizona Constitution that could justify this Court departing from the U.S. Supreme Court holdings discussed above when deciding if members of the press deserve some greater right of access to government records than the general public under this state’s constitution. The “[f]reedom of speech and press” section of the Arizona Constitution provides, “[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” Ariz. Const. Art. 2, § 6. As explained below, that language does not rank

journalists above other citizens, nor guarantee them access to government records.

While the state may not impose limitations on citizen's rights to publish news about open government proceedings, *see Phoenix Newspapers, Inc. v. Super. Ct. In and For Maricopa Cnty*, 101 Ariz. 257, 260 (1966), nothing in applicable state or federal law prohibits the government from refusing journalists access to government proceedings or records in the same way the government restricts the access of the general public. *See Morgan v. Dickerson in & for Cnty. of Cochise*, 253 Ariz. 207, 209-10 (2022), *cert. denied sub nom. Morgan v. Arizona*, 143 S. Ct. 979 (2023); *Meek*, 9 Ariz. App. at 152. The question of whether journalists enjoy elevated rights of access to public records under Ariz. Const. art. 2, § 6 appears to be a case of first impression for this Court. However, this Court has recently applied the U.S. Supreme Court's First Amendment analysis in *Houchins* that the right of members of the press to access government proceedings and records is only coextensive with, and subject to the same restrictions as, the access rights of the general public. *See Morgan*, 253 Ariz. at 209-10 (*quoting Houchins*, 438 U.S. at 9, 14 to hold that journalist's arguments for access to juror names "risk conflict with the accepted principle that the First Amendment does not guarantee 'a right of access to all sources of information within government control.'"); *see also KPNX Broad. v. Superior Ct. In & For Maricopa Cnty.*, 139 Ariz. 246, 256 (1984) (applying *Branzburg*).

Likewise, the COA has previously adopted the analysis reflected in U.S.

Supreme Court decisions applying First Amendment principles. *See id.* In *Meek*, the COA rejected arguments by a newspaper reporter challenging the constitutionality of this Court’s rule allowing exclusion of all persons except counsel and court officers from a preliminary examination of a criminal complaint. *Meek* discussed specifically “the powers given [to the Supreme Court of Arizona] in the Arizona Constitution,” and ruled that “[f]reedom of the press or freedom of speech should not be construed to give the news media [a] constitutionally protected right to gain access to information [from the government].” *Meek*, 9 Ariz. App. at 152. “We can find no Arizona case which states that the fair administration of criminal justice is subordinate to the right of the press to gather material apprising the public of the workings of justice. On the other hand, we find the United States Supreme Court repeatedly espousing a philosophy contrary to this, view.” *Id.* (citing numerous U.S. Supreme Court decisions).

In addition, *Morgan*, 253 Ariz. at 214 (Bolick, J., concurring) noted the role of Arizona’s unique express privacy protection at Ariz. Const. art. 2, § 8 (“[n]o person shall be disturbed in his private affairs ... without authority of law”) in deciding the constitutional question about the journalist’s right of access. Ariz. Const. art. 2, § 8. “Whatever the scope of that right . . . the State plainly has a compelling interest in enforcing it to protect juror privacy. *Id.* The confidentiality rights at issue here, especially of vulnerable adults and those who report suspected

abuse, invoke equally compelling individual privacy interests that justify DES in interpreting “bona fide research” to exclude commercial journalistic research that is not being conducted in coordination with DES.

So, the plain language of Ariz. Const., art. 2, § 6 and existing Arizona precedent indicate that the Cross-Petitioners here can claim no special, constitutional right of access to the APS files. Rather, this Court should expressly adopt the analysis in *Houchins* and *Branzburg* as applicable to art. 2, § 6 rights, and confirm that the COA had no authority under the federal or state constitutions to construe the “bona fide research” exception in any way that might impose a subjective belief that journalists investigating certain topics deserve special access rights.

That is, however, what the COA did here. It justified including “journalist” inquiries in the “bona fide research” exception because their research may “serve[] a public purpose, such as informing the public of ways DES and APS could improve treatment and security of vulnerable adults.” As such, the journalist’s expressed goals “could be said to further educational or administrative purposes” and thereby meet the COA’s “bona fide research” definition. *Silverman*, 255 Ariz. at 354 ¶ 21.

The COA further ruled it would constitute “unreasoning action” for DES to deny disclosure where a journalist plans “to investigate alleged negligence or incompetence by DES” or for DES to deny access to records that “might substantiate such allegations.” *Id.*, 255 Ariz. at 356 ¶ 29. The COA’s statements reflect that the

COA assumes the reporting generically proposed by the Cross-Petitioners has a special, positive societal value. And those statements suggest that the COA justified including broad journalist requests for APS investigatory records within “bona fide research” through an implied conclusion that journalists who profess a plan to expose government incompetence, negligence, or other malfeasance will do so in a good or desirable way, performing a valuable public service and fulfilling what the COA considers to be objective “educational or administrative purposes.” Those are the sort of faulty assumptions *Houchins* cautioned against. Upholding the COA’s interpretation of “bona fide research” allows subjective values of judicial officers to guide statutory interpretation. The Court should overturn the COA interpretation.

#### **IV. THE RECORD IS ADEQUATE TO RULE IN DES’S FAVOR.**

Should this Court agree with the analysis above, then the record supports a ruling that the Cross-Petitioners do not qualify for the “bona fide research” exception. If the Court favors upholding the COA’s definition of “bona fide research”, then the courts would require substantial additional evidence about the Cross-Petitioners’ purpose(s), means of collection, targeted records, and plans for preserving confidentiality to determine whether the prerequisites to the exception exist here. This Court would have to remand for full discovery and development through trial of a complete factual record and decision on those issues.

RESPECTFULLY SUBMITTED this 23rd day of February, 2024.

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