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' SUPPLEMENTAL BRIEF

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INTRODUCTION AND SUMMARY OF SUPPLEMENTAL ARGUMENT

Plaintiffs/Appellees/Cross-Petitioners Amy Silverman ("Silverman") and TNI Partners (the "Daily Star") file this supplemental brief to address the rephrased issues on appeal, and particularly to address the second question's issue of state and federal constitutional considerations that are relevant to this case.

Because the state has exempted Arizona Department of Economic Security ("DES") records from release, but then made an exception for "bona fide research," it has recognized a public interest in holding the agency accountable to the public for how it provides its services. The claim by DES and the finding by the Court of Appeals that would allow DES to somewhat arbitrarily decide not to release the records for journalistic research is improper, which becomes clear when examining the decision in light of the First Amendment limitations on content-based distinctions limiting who can receive government records.

The U.S. Supreme Court has repeatedly recognized the interests in a First Amendment-based right of access to government-held information. While several cases point out that the news media does not have a *special* right of access created by the First Amendment (*see Branzburg v. Hayes*, 408 U.S. 665 (1972), *Houchins v. KQED*, 438 U.S. 1 (1978)), the Court nonetheless has recognized the *public* right of access under the First Amendment to many government proceedings, particularly criminal trials, which is typically (but not exclusively) exercised by the

news media (*see Press-Enterprise v. Superior Court*, 464 U.S. 501, 511-513 (1984)). This recognition of a public right should inform this Court's examination of what can qualify as "bona fide research" under A.R.S. § 46-460(D)(8). Importantly, the 1970s-era cases that declined to recognize a *special* right all pre-date the U.S. Supreme Court's findings of a general public right of access to courts under the First Amendment.

The right of access here is primarily statutory; it was the Legislature which exempted DES records and then made an exception in the public interest for bona fide research. But the constitutional interests help define how this Court should interpret the exception.

ARGUMENT

I. Protection of a Free Press by the First Amendment of the United States Constitution and Article 2, Section 6 of the Arizona Constitution Supports Inclusion of Journalists Within the Bona Fide Research Exception.

Journalists, as members of the press, have broad protections under both the First Amendment to the United States Constitution and Article 2, Section 6 of the Arizona Constitution because they play a vital role in ensuring an informed public. This is especially the case for reporting about the government. It is important that this fundamental press function, and the broad constitutional protections provided to secure such press function, are considered when determining whether journalists such as Silverman should be included within the bona fide research exception.

A. There are Important First Amendment Interests that Should be Considered when Determining Whether Journalists Should be Included Within the Bona Fide Research Exception.

The First Amendment, which is applicable to the states through the Fourteenth Amendment, provides that federal and state governments "shall make no law . . . abridging the freedom of speech, or of the press." Limiting the bona fide research exception to exclude journalists would conflict with Silverman's First Amendment rights in two important ways. First, Silverman relies on the First Amendment's protection of the press to carry out her work as an investigative journalist. Second, such a limitation would function like a categorical content-based exclusion of journalists that is not justified by the reasons provided by DES.

1. Withholding records from Silverman Because of her Status as a Journalist Runs Contrary to the First Amendment Guarantee of a Free Press.

The press, which includes journalists like Silverman, is explicitly protected by the First Amendment. The United States Supreme Court has a long history of protecting the press from Government restrictions. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 720-21 (1931) (holding that Minnesota courts could not enjoin the publication of a newspaper that accused local government officials of misconduct); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 543, 570 (1976) (holding that a trial court judge could not restrain the press from reporting on a murder trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980)) (holding that

the right of the press and public to attend criminal trials is "implicit in the guarantees of the First Amendment.").

Such protection for the press is necessary because it allows the public to be informed on the government's operation and, in turn, allows the public to hold the government accountable. Ratification of the First Amendment ensured that "[t]he Government's power to censor the press was abolished so that the press would remain forever free to censure the Government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring). *See also Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (reasoning that an "informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

The protection of a free press provided by the First Amendment is especially important when the government is the subject of investigative journalism. In *New York Times*, the Supreme Court held that the United States could not enjoin the New York Times and the Washington Post from publishing confidential information about the United States' Vietnam War policies. 403 U.S. at 714. In *Nebraska Press*, the Court reasoned that the press could not be restrained from reporting on criminal trials because "[t]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive

public scrutiny and criticism." 427 U.S. at 560. In both cases, the United States Supreme Court recognized that the press must retain broad protection when reporting on the operations of government institutions.

While the United States Supreme Court has yet to recognize a constitutional right of access to government records for the press, the Court has recognized First Amendment protection for access to court proceedings by the press and public. The Court held that the press and public have a right of access to court proceedings in criminal trials in *Richmond Newspapers,* illustrating that there is a right of access to some government information. 448 U.S. at 580. This right of access was further bolstered in *Press-Enterprise Co. v. Superior Court* ("*Press Enterprise I*"), where the Court held that the right of access includes access to *voir dire*. 464 U.S. at 511-513.).And again in *Press-Enterprise Co. v. Superior Court* ("*Press Enterprise II*"), where the Court held that the right of access also extends to pre-trial hearings. 468 U.S. 1, 13 (1986).

Furthermore, even in the earlier pre-*Press-Enterprise* cases declining to recognize a First Amendment right of access to prisons or particular prisoners, the Court recognized the constitutional interests at stake and specifically noted that it would not recognize a special right of access largely because "alternative means of communication" were available between journalists and prisoners. *See Pell v. Procunier*, 417 U.S. 817, 823-4 (1974) ("we think that the regulation cannot be

considered in isolation, but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison. … we regard the available 'alternative means of [communication as] a relevant factor' in a case such as this where 'we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests.'") (internal citations omitted; bracketing in original).

In the present case, no such alternative means of obtaining the information are available, and this limitation is a meaningful factor in considering the need for a recognition of constitutional protection.

Silverman's access to records is necessary for her work as an investigative journalist and member of the press. Silverman's research involving DES records serves a valuable purpose, providing the public with information on the effectiveness of a government institution. DES claimed in their opening brief to the Court of Appeals that research serving this purpose may lead to unfair criticism of DES and the Arizona government. Appellant's Opening Brief at 19 (7/18/2023). This was used to justify withholding records from Silverman. This justification for withholding records is, however, not supported by United States Supreme Court precedent.

Nebraska Press and *New York Times* demonstrate that investigating the government and informing the public about its actions, just as Silverman intends to

do with her research, is an important reason for protection of a free press. In both cases, the United States Supreme Court supported its holdings on the grounds that the First Amendment limits restrictions on the press from speaking about the government. *Nebraska Press*, 427 U.S. at 543; *New York Times*, 403 U.S. at 717. Following the holdings in *Nebraska Press* and *New York Times*, the fact that a governmental agency is the subject of Silverman's research only bolsters First Amendment protection for her access to records under the bona fide research exception. Accordingly, a limitation on the bona fide research exception to exclude Silverman because of her status as a member of the press runs contrary to the First Amendment's broad protections that have consistently been affirmed by the United States Supreme Court.

Importantly, the bona fide research exception allowance for Silverman by the Court of Appeals does not create any special privileges for the press, but instead allows for access to records for both the press and public alike if the individual requesting records is engaged in research that "serves a public purpose." *Silverman v. Arizona Dep't of Econ. Sec.*, 255 Ariz. 348, 354 ¶ 21 (App. 2023). Silverman is engaged in research that serves a valuable public purpose, and United States Supreme Court precedent acknowledges the importance of this purpose. Accordingly, the bona fide research exception should not exclude individuals like

Silverman who are engaged in research that serves the purpose of informing the public about the operations of DES.

2. Withholding Records from Silverman Because of her Status as a Journalist Implicates the First Amendment's Protection Against Content-Based Restrictions of Speech.

The First Amendment precludes the restriction of "expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A restriction on speech is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. Content-based restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id*.

DES has withheld records from Silverman because the content of her research does not serve a purpose that DES finds permissible. Upon denial of Silverman's request, DES stated that the bona fide research exception is limited to research that might provide DES with information that is beneficial to improving DES. Complaint, IR-1, ¶ 11 (Appx. No. 1). This reasoning for denial demonstrates that DES has narrowed the meaning of the bona fide research exception to only allow for research that provides a certain type of content.

Additionally, DES' concern about criticism that may result from journalistic research further proves that a restriction of Silverman's access to records is content

based. DES claims that criticism of DES and the Arizona government may result from journalistic research is reason to restrict access to journalists such as Silverman. This concern is plainly related to the content of journalistic research—content that serves the core purpose of informing the public of the operations of a state institution.

B. A Limit on the Bona Fide Research Exception to Exclude Journalists Would Also Be Inconsistent with Article 2, Section 6 of the Arizona Constitution.

Article 2, Section 6 provides that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." This Court has "consistently found that [Article 2, Section 6] provides greater protection for speech than the First Amendment." *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 306 ¶ 169 (2019) (Bolick, J., concurring). Such heightened protection extends to the rights of the press, which is exemplified by comparing this Court's case law regarding court access to United States Supreme Court precedent. In *Phoenix Newspapers, Inc. v. Jennings*, this Court held that Article 2, Section 6 allowed the press and public access to court proceedings for criminal trials. 107 Ariz. 557, 559 (1971). The United States Supreme Court did not establish First Amendment protections for this right until 1980 in *Richmond Newspapers*. Here, we see this Court finding protection for an important right of the press despite that right not yet existing under the First Amendment.

The holding in *Phoenix Newspapers* establishes that the rights of the press under Article 2, Section 6 are not limited to the rights of the press under the First Amendment. Therefore, even if this Court finds that the First Amendment does not protect journalists against exclusion from the bona fide research protection, it may still find that journalists shall not be excluded under the greater protection provided by Article 2, Section 6.

Article 2, Section 6 is clear in its sweeping protection; people "may freely speak, write and publish on all subjects." Excluding journalists from the bona fide research exception based on the subject matter of their research offends this right.

II. The Court of Appeals Erred In Granting Undeserved Deference To DES's Interpretation of § 46-460(D)(8) And Overbroad Discretion To DES Under § 46-460(D).

This Court should not grant deference to DES's interpretation of § 46-460(D)(8) because DES's interpretation of that provision has not been formalized as a rule, or, to the extent it has, constitutes an invalid rule under § 41-1030(A). *See* A.R.S. § 41-1030(A).

These considerations, combined with the First Amendment interests noted *supra*, suggest that an allowance for journalists to qualify as performing "bona fide research" is warranted and proper.

Under A.R.S. § 41-1001, "'Rule' means an agency statement of general applicability that implements, interprets or prescribes law or policy, or describes

the procedure or practice requirements of an agency." A.R.S. § 41-1001. In *Arizona State University Board of Regents v. Arizona State Retirement System*, the Court of Appeals was asked to determine whether a policy adopted by the Arizona State Retirement System ("the System") was a rule under the § 41-1001. *See generally Ariz. State Univ. ex rel. Ariz. Bd. of Regents v. Ariz. State Ret. Sys.*, 237 Ariz. 246 (App. 2015). The Court of Appeals determined that the policy adopted by the System was a rule within the meaning of § 41-1001. *ASU*, 237 Ariz. at ¶ 14. The Court held that "barring any exemptions, an agency statement is a rule, subject to the APA's [Administrative Procedure Act] rulemaking procedure, if it, first, is generally applicable, and, second, implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency." *ASU*, 237 Ariz. at ¶ 16.

A. DES's statement concerning how it applies § 46-460(D)(8) is generally applicable.

The Court of Appeals in *ASU Board of Regents* first disposed of the general applicability requirement, relying on a statement of the policy made during an administrative hearing before the Office of Administrative Hearings: "At the administrative hearing, the System acknowledged it had applied the Policy consistently to all System employers since its adoption, and, thus, the Policy satisfies the general applicability requirement." *ASU*, 237 Ariz. at ¶ 16.

In this case, DES's policy satisfies the general applicability requirement. In its reply brief to the Court of Appeals, DES admitted that "DES has consistently interpreted the "bona fide research" exception to apply to research designed to facilitate administrative improvements through academic analysis and direct reporting to APS of proposed improvements to consider." Appellant's Reply Br. At 16.

B. DES's statement implemented and interpreted § 46-460(D)(8).

Next, the Court of Appeals in *ASU* decided that the System's policy satisfied the second requirement, finding that that it both implemented and interpreted law or policy. The Court relied on *Carondelet Health Services, Inc. v. Arizona Healthcare Cost Containment System Administration* ("AHCCCS") in concluding that the System interpreted law promulgating its policy. *Carondelet Health Servs. v. Arizona Health Care Cost Containment Sys. Admin.*, 182 Ariz. 221 (App. 1994).

Carondelet involved a session law which directed AHCCCS to adjust its hospital reimbursement multipliers based on new six-month charges and volume reports. The session law at issue left to AHCCCS's discretion how to implement its mandate. *Id*. The Court of Appeals held in that case that AHCCCS's methodology for calculating reimbursements constituted a rule because, among other reasons, the session law did "not set forth the calculations to be made" and did not direct "how the amount of reimbursement [was to] be determined." *Carondelet*, 182 Ariz.

at 228. Analogizing to *Carondelet*, the Court of Appeals in *ASU* concluded the System had interpreted the law at issue, saying: "In other words, to implement [the session law at issue], one must first interpret it." *ASU*, 237 Ariz. at ¶ 19.

This case also involves an agency (DES) interpreting a law (§ 46-460(D)(8)), one that directs them to make an exception, but does not specify the scope of the exception. To implement § 46-460(D)(8), one must first interpret it, which DES admits to doing here. Appellant's Final Reply Br. 16. In interpreting the § 46-460(D)(8) in a statement of general applicability to implement it, DES promulgated a rule.

CONCLUSION

Plaintiffs/Appellees/Cross-Petitioners ask this Court to affirm that the Court of Appeals did not err in holding what qualifies as bona fide research under A.R.S. § 46-460(D)(8). However, as argued in the cross-petition, the Court of Appeals did err in preserving discretion to DES to deny records to those that qualify as performing bona fide research. Cross Pet. 9-13. Finally, the record is sufficient to find that Silverman satisfies the bona fide research exception.

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