

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:
CV-23-0181-PR

Court of Appeals Case:
1 CA-CV 22-0209

Maricopa County Superior Court Case
No. LC2021-000182-001

**BRIEF OF AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA**

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INTRODUCTION

Journalism, especially investigative journalism, is bona fide research that serves a public purpose: in this case, informing the public of the efficacy of a government agency. The Court of Appeals, though correct in its holding that reporter Amy Silverman’s investigative journalism may qualify as “bona fide research,” erred in putting forth an unworkable, narrow, and unrealistic evidentiary standard that journalists must reach if they hope to access any Adult Protective Services (“APS”) reports under A.R.S. § 46-460(D)(8). The court below also erred in finding that the record was insufficient to conclude whether Ms. Silverman’s efforts qualified as bona fide research. Finally, a reading of “bona fide research” that includes investigative journalism does not violate Arizonans’ right to privacy under the Arizona Constitution because, pursuant to that same statute, the Arizona Department of Economic Security (“DES”) must redact all “personally identifying information” from any disclosure.¹

STATEMENT OF INTEREST OF AMICUS CURIAE

The ACLU of Arizona, the state affiliate of the national American Civil Liberties Union (“ACLU”), is a statewide nonpartisan, nonprofit organization with over 20,000 members throughout Arizona dedicated to protecting the constitutional rights of all. The fight for freedom of speech has been a bedrock of

¹ A.R.S. § 46-460(D)(8).

the ACLU’s mission since the organization was founded in 1920, driven by the need to protect the constitutional rights of conscientious objectors and anti-war protesters. The ACLU’s work to protect freedom of expression has continued over the last almost-100 years, including consistent efforts to protect individual rights guaranteed by the federal and state Constitutions and to resist efforts to curtail such rights. In addition, the ACLU of Arizona has a strong interest in protecting the right to privacy implicitly protected by the U.S. Constitution and explicitly guaranteed by the Arizona Constitution. The ACLU of Arizona frequently files amicus curiae briefs in Arizona and federal courts on a wide range of civil liberties and civil rights issues.

ARGUMENT

I. The Court of Appeals’ Correct Holding that Investigative Journalism Qualifies for the Bona Fide Research Exception to A.R.S. § 46-460(D)(8) is Supported by the Arizona and United States Constitutions.

The Opinion below correctly construed the term “research” to include research for “educational, administrative, or scientific purposes.”² This construction is consistent with and, indeed, is supported by the freedom of the press guarantee of the First Amendment of the U.S. Constitution and by Article 2, section 6 of the Arizona Constitution.

² *Silverman v. Arizona Dep’t of Econ. Sec.*, 255 Ariz. 348, ¶12-21 (App. 2023).

A. The Media, and by Extension Journalists, Play a Crucial Role in Holding State Institutions Accountable for Their Actions By Exercising Their Right to Freedom of Press under the First Amendment.

In a free society, the media plays a crucial role in holding state institutions accountable. Indeed, the right to freedom of the press enshrined in the First Amendment guarantees that the government will not impede the speech of media organizations. In his concurrence discussing the role the press plays in American democracy, Supreme Court Justice Hugo Black noted that “[t]he press was to serve the governed, not the governors.”³ This succinct statement explains that freedom of the press is critical for democracy in which the government is held accountable to its people.

The media (and by extension, journalists) play three key roles in upholding our democracy: (1) the media serves as a “watchdog” over institutions, promoting accountability, transparency and public scrutiny; (2) the media acts as a “civic forum” for political debate, promoting informed electoral choices and actions; and (3) it serves as an “agenda-setter” for policymakers, informing the government’s response to social issues.⁴

At issue here is government accountability. The media ensures the

³ *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

⁴ See Pippa Norris, *A Virtuous Circle: Political Communications in Postindustrial Societies* (2000).

accountability of state and public actors through “uncovering and publicizing the chain of logic, decisions, and events that lead to specific outcomes, especially outcomes that run counter to the public interest.”⁵ In other words, the media can independently investigate government wrongdoing and then report such wrongdoing to the public.

Journalists play a crucial role in the protection of democracy because they serve to keep the public informed about government actions and thus facilitate public trust (or mistrust) of elected officials and government institutions. As such, “the news media both set the parameters for what the governed can know about their government and serve as an important mechanism — if not the key mechanism in democracies — through which government accountability can be provided to the public.”⁶

Importantly, journalists are unable to play this critical role if they are themselves uninformed about government action. Therefore, it is necessary to safeguard their ability to request and access government information. While the First Amendment itself does not grant a right of access to government information,⁷ states are free to grant greater access to government records for journalists, researchers,

⁵ Steve Buckley et al., *Broadcasting, Voice, and Accountability* 13 (2011).

⁶ Margaret T. Gordon, *Public trust in government: the US media as an agent of accountability?*, 66 Int’l Rev. of Admin. Sciences 1 (2000).

⁷ *Houchins v. KQED*, 438 U.S. 1, 15 (1978).

and others as Arizona has done through its Public Records Law⁸ and through the “bona fide research” exception in A.R.S. § 46-460(D)(8), which the Court of Appeals below correctly held applies to journalists. When journalists can access government information, they are able to expose corruption and abuses of power in government institutions. In Arizona specifically, the media has played a significant role in exposing government abuses of power in recent years. For example, in September 2021, ABC15 released a seven-part series, “Politically Charged,” in which the news station “exposed how the Phoenix Police Department and the Maricopa County Attorney’s Office colluded at the highest levels to target protestors and used their power to silence, frame, and punish critics.”⁹ As a result of this investigative journalism, more than a dozen officers and prosecutors were reassigned, five officers face criminal investigations, assistant police chiefs were demoted, one prosecutor was disbarred, class-action law suits were filed, and perhaps most significantly, the Department of Justice launched a pattern or practice investigation of the Phoenix Police Department that includes efforts to determine whether the Phoenix Police engages in “retaliatory activity against people for

⁸ A.R.S. § 39-121 *et seq.*

⁹ Dave Biscobing, *ABC15 special report reveals depth of Phoenix, MCAO corruption in protest cases*, ABC 15 AZ (Sept. 11, 2021), <https://www.abc15.com/news/local-news/investigations/protest-arrests/abc15-special-report-reveals-depth-of-phoenix-mcao-corruption-in-protest-cases>.

conduct protected by the First Amendment.”¹⁰ ABC15 journalists would have been unable to expose Phoenix PD to the extent they did if they were unable to access information and records such as courtroom footage, police reports, meeting minutes, and other government information.

In the same way investigative journalism served to expose corruption and abuse of power in the Phoenix Police Department and the Maricopa County Attorney’s Office, Silverman sought to use investigative journalism tactics to inquire into the actions of DES and APS regarding the agencies’ treatment of vulnerable adults. As a journalist, Silverman serves as a watchdog over state agencies and investigates in the public interest. This role requires “ready and timely access to information of public interest,” such as information relating to state treatment of vulnerable adults.¹¹ Furthermore, “[a]ccountability of those in power relies heavily on being able to source and retrieve information concerning decision-making processes.”¹² Therefore, safeguarding Silverman’s ability to request and access this information (while still maintaining confidentiality of individuals) also means safeguarding the media’s ability to hold the state accountable for its actions, thus

¹⁰ Office of Public Affairs, U.S. Department of Justice, Press Release, “Justice Department Announces Investigation of the City of Phoenix and the Phoenix Police Department,” Aug. 5, 2021, <https://www.justice.gov/opa/pr/justice-department-announces-investigation-city-phoenix-and-phoenix-police-department>.

¹¹ Buckley, *supra* note 5, at 20.

¹² *Id.* at 21.

solidifying the greater institution of democracy in which the government is held accountable by an informed public. The Court of Appeals therefore correctly held that Silverman, and journalists generally, qualify for the “bona fide research” exception.

B. Article 2, Section 6 of the Arizona Constitution Grants Broad Protections to Journalist’s Speech.

The Arizona Court of Appeals’ correct holding that journalists such as Silverman qualify under the “bona fide research” exception of A.R.S. § 46-460(D)(8) is independently supported by Article 2, section 6 of the Arizona Constitution, which guarantees that “[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”¹³ Like the First Amendment of the U.S. Constitution, Article 2, Section 6 of the Arizona Constitution guarantees the freedom of the press. However, Article 2, Section 6 provides broader protections than the First Amendment.¹⁴

When interpreting this section, this Court has found that “[t]he words of the Arizona Constitution are too plain for equivocation” and as such Article 2, Section 6 means that “[t]he right of every person to freely speak, write and publish may not

¹³ ARIZ. CONST. art. II, § 6.

¹⁴ *See Mountain States Tel. & Tel. Co. v. Arizona Corp. Com’n*, 160 Ariz. 350, 354 (1989) (acknowledging that the Arizona Supreme Court has “previously given art. 2, § 6 greater scope than the first amendment”).

be limited....”¹⁵ Because journalists clearly fall within the universal phrase of “every person,” they qualify for the broad protections of Article 2, Section 6. As such, their rights to “freely speak, write, and publish” may not be limited by government agencies such as the DES.

In *Phoenix Newspapers*, the Supreme Court of Arizona also acknowledged that subjecting journalists to censorship by the judiciary “would take from the public its right to be informed of a proceeding to which it is an interested party.”¹⁶ This same concept applies to government agencies such as DES. Preventing journalists such as Silverman from obtaining government information, and thus censoring her, deprives the public of its right to be informed about the actions of DES. The public has an interest in ensuring that vulnerable adults are treated appropriately by the institutions charged with their care. When DES censors Silverman by rejecting her information requests and preventing her from obtaining government information, DES is simultaneously depriving the public of its right to be informed of government actions.

II. The Court of Appeals Erred in its Overly Narrow Construction of What Qualifies as “Bona Fide.”

Although the Court of Appeals correctly held that journalists may qualify for

¹⁵ *Phoenix Newspapers, Inc. v. Superior Court In and For Maricopa County*, 101 Ariz. 257, 259 (1966).

¹⁶ *Id.*

the “bona fide research” exception, the court below erred by requiring that, for a journalist’s efforts to so qualify, and thus access *any* APS reports, that journalist must provide “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.”¹⁷ The court went even further, concluding that the record on appeal was insufficient because Ms. Silverman did not establish “which documents relate to her goals [or] the scope of her request.”¹⁸ Requiring researchers to tailor their request to this degree of specificity is not practically workable and discourages investigation, which will ultimately reduce the transparency of government agencies. Bona fide research does not always begin with the question the writer—in this case, a reporter—eventually seeks to answer. Forcing journalists to pre-determine a confined subset of information could foster tunnel vision and skew the factual picture, turning investigative journalism on its head.

Consider the methodology known as grounded theory.¹⁹ In working with this methodology, researchers develop their questions and hypotheses through first analyzing a preexisting data set, rather than knowing what question they seek to answer before they begin collecting data. Grounded theory is popularly used in

¹⁷ *Silverman*, ¶ 24.

¹⁸ *Silverman*, ¶ 25.

¹⁹ See Barney Glaser & Anselm Strauss, *Discovery of Grounded Theory: Strategies for Qualitative Research* (1967).

journalism.²⁰ Establishing the stringent requirements put forth by the Court of Appeals will have a discouraging, if not outright chilling, effect on the work of investigative journalists, like Ms. Silverman.

Requests for government records, and public records requests generally, are a critical investigative journalism tool, especially in crafting the caliber of stories that lead to investigation and reform in troubled government agencies. For example, in a study of over 12,500 prize-winning investigative reporting pieces, Stanford researcher James Hamilton found that 40 percent of stories that triggered policy review utilized public records requests.²¹ Hamilton explains how investigative journalists use the Freedom of Information Act (“FOIA”), and its state counterparts, to help them in:

gathering documents to corroborate tips and leaks; looking for information to confirm a hypothesis or trend; broadly fishing in an area thought promising because of potential controversy or scandal; or exploring data in search of surprising patterns and outliers. Journalists may enter the FOIA process with a hypothesis to test, or with little idea about what may be going on in an agency. Documents and data provided can inform later interviews with human sources, become the basis for statistical analysis, disprove

²⁰ Steen Steensen & Laura Ahva, *Theories of Journalism in a Digital Age*, DIGITAL JOURNALISM 3 (2015).

²¹ James T. Hamilton, *FOIA and Investigative Reporting: Who’s Asking What, Where, and When—And Why It Matters*, in 130 TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION (David E. Pozen & Michael Shudson eds., 2018).

an early hunch, or even lead a reporter to an entirely new and unanticipated story.²²

Importantly, journalism is not law. Courts should not project the legal concept of a “fishing expedition,”²³ frowned upon in courtroom discovery, onto its analysis of a journalist’s legitimate and important work of serving the public through access to information. When reporters undertake a new research project, they simply may not know the names of the documents they are seeking. Requiring them to identify “the specific information sought” when they are barely mapping the terrain of an agency like APS is not workable. Journalists cannot know what they do not know.

Here, contrary to the Court of Appeals’ decision, the record was sufficient to conclude that Silverman’s request constitutes bona fide research. Investigating “how the state protects vulnerable citizens,” Silverman’s stated research interest in her request to DES, is as legitimate, as bona fide, and as relevant to the public interest as one can conceive. It is a question of the use of taxpayer money. It is a question of providing for the wellbeing of others in our community. It is, further, an accountability inquiry into the operations of a quasi-law enforcement agency, one whose actions may result in arrests, indictments, and criminal convictions. The media, the courts are aware, acts as the “eyes and ears of the public. They can be a powerful and constructive force, contributing to remedial action in the conduct of

²² *Id.* at 131.

²³ *See R.S. v. Thompson*, 251 Ariz. 111, ¶ 30 (2021).

public business.”²⁴ And, as the Supreme Court noted in *Richmond Newspapers, Inc. v. Virginia*, “people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”²⁵

The Arizona Department of Child Safety, for example, has repeatedly found itself the subject of investigative journalism. The media have reported about a child dying from untreated diabetes in DCS care,²⁶ racial disparities in DCS investigations,²⁷ and, of course, the litany of scandals that led to the disintegration of the original Arizona’s Child Protective Services and creation of the Department of Child Safety.²⁸ DCS is a valuable analogue to APS here, as both agencies have a mission of protecting and providing safety for vulnerable individuals. Indeed, before former governor Jan Brewer dismantled the entire Child Protective Services system

²⁴ *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

²⁵ 448 U.S.555, 572 (1980).

²⁶ Jennifer Kovalski, *9-year-old boy with diabetes died days after being taken into Arizona's foster care system*, ABC 15 AZ (Aug. 30, 2023), <https://www.abc15.com/news/local-news/investigations/9-year-old-boy-with-diabetes-died-days-after-being-taken-into-arizonas-foster-care-system>.

²⁷ Eli Hager & Agnel Phillip, *For Black Families in Phoenix, Child Welfare Investigations Are a Constant Threat*, ProPublica, (Dec. 8, 2022), <https://www.propublica.org/article/for-black-families-in-phoenix-child-welfare-investigations-are-constant-threat>.

²⁸ Fernanda Santos, *Thousands of Ignored Child Abuse Allegations Plague Arizona Welfare Agency*(Dec. 10, 2013), <https://www.nytimes.com/2013/12/11/us/thousands-of-ignored-abuse-allegations-plague-arizona-welfare-agency.html>.

in 2014, it was the Department of Economic Security that operated the agency.²⁹

For public agencies, records transparency can risk embarrassment to the agency. The Court of Appeals contemplated this risk.³⁰ In its view, DES would completely avoid the risk of embarrassment and exposure to the public, putting forth a definition of “bona fide research” that would only include parties working collaboratively with DES, and never include neutral, investigative journalists.³¹ It would be unspeakably cynical, however, to claim that the public should not have been informed about the death of children in state custody or about the harm done to Black communities in Arizona, because the research or dissemination of these topics would cause harm to DCS’ reputation, or because the news companies publishing these articles had not been working collaboratively with DCS/CPS. Thus, the standard this Court adopts to determine whether someone is engaged in bona fide research must be capable of application without respect to the viewpoint that a researcher is likely to have (or presumed to have) because viewpoint discrimination in the free speech realm is particularly pernicious.³²

²⁹ Caroline Cournoyer, *Arizona Gov. Brewer Abolishes Child Welfare Agency in State of the State*, *Governing* (Jan. 14, 2014), <https://www.governing.com/news/headlines/brewer-dissolves-child-welfare-agency-in-state-of-the-state.html>.

³⁰ *Silverman* at ¶ 29.

³¹ Appellant’s Supplemental Brief, 10-11.

³² *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163-64 (2015).

Moreover, Article 2, section 6 of the Arizona Constitution states that “[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”³³ These narrow and restrictive requirements imposed by the Court of Appeals therefore infringe on Silverman’s and other journalist’s right to “freely speak, write, and publish on all subjects” because it impedes her ability to obtain information associated with her freedom of expression.

III. Authorizing DES to Disclose Confidential Records About Vulnerable Adults to a Researcher “Engaged in Bona Fide Research,” if No Personally Identifying Information is Made Available, Does Not Run Afoul of Arizonans’ Explicit Right to Privacy.

Unlike the U.S. Constitution, which implicitly protects the right to privacy,³⁴ the Arizona Constitution does so explicitly through the Private Affairs Clause, providing that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”³⁵ While this Court has recognized that the Private Affairs Clause provides broader protections to the home than the Fourth Amendment, it has declined to extend greater protections than the Fourth Amendment in other contexts.³⁶

³³ ARIZ. CONST. art. II, § 6.

³⁴ *see Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

³⁵ ARIZ. CONST. art. II, § 8.

³⁶ *E.g.*, *State v. Mixton*, 250 Ariz. 282, 292, ¶ 38 (2021) (concluding, in lockstep with the federal courts, that the Private Affairs Clause does not require a warrant to obtain IP address or ISP subscriber information).

As argued in *amicus curiae* briefs submitted in *Mixton* and *State v. Gentry*,³⁷ amicus here continues to urge this Court to decline to follow a lockstep approach when interpreting the Arizona Constitution, as such an approach fails to reconcile the unique textual and historical differences of the applicable portions of the Arizona Constitution, while relegating our state constitution to a “mere appendage” of the national constitution.³⁸ Critically, however, authorizing DES to disclose confidential records about vulnerable adults to a researcher engaged in bona fide research *if no personally identifiable information is made available* does not run afoul of Arizonans’ right to privacy.

Importantly, any privacy concerns in the DES records requested here are diminished because of the requirement that any records disclosed must be for “bona fide research” and only “if no personally identifying information is made available” through the disclosure. At the same time, as argued, *supra*, in Section I, the disclosure of anonymized DES records furthers the important public policy goals enshrined in the First Amendment and Article 2, section 6 of the Arizona Constitution, and the public’s interest in accessing government records to hold the government accountable. Such need to hold the government accountable is particularly strong here, when the records at issue relate to vulnerable adults, who

³⁷ 247 Ariz. 381 (App. 2019), *petition for review denied*.

³⁸ Clint Bolick, *State Constitutions: Freedom’s Frontier*, CATO SUPREME COURT REVIEW, Sep. 15, 2016.

may be unable to challenge problematic government action themselves.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to affirm the Court of Appeal’s holding that journalism qualifies as “bona fide research” under A.R.S. § 46-460(D)(8) and further urges this Court to clarify the standard for determining what constitutes bona fide research in light of the important right to freedom of the press guaranteed by the Arizona and U.S. constitutions.

Respectfully submitted this 11th day of March, 2024.

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