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 RESPONSE TO AMICUS CURIAE BRIEFS OF THE AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AND THE GOLDWATER INSTITUTE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Legislative Documents

Treatises

Other Authorities

INTRODUCTION

The Amicus Briefs of The Goldwater Institute ("Goldwater") and The American Civil Liberties Union of Arizona (the "ACLU") (collectively, "Amicus Briefs") assert broad, policy-based arguments that aim to prevent the government from maintaining any required control over confidential and/or sensitive records. In real-world application, the Amicus positions would provide virtually everyone, well-intended or not, with the right to obtain records Arizona statutes, for good reason, expressly protect as confidential. The Amicus Briefs do so by falsely assuming that there is no superior, or even counterbalancing, government interest to the right of any "studious" or inquisitive person to see all sorts of details about the abuse of the disabled, infirm, and elderly that are collected by the Arizona Department of Economic Security ("DES") though Adult Protective Services ("APS") in fulfilling its legislated mission to care for, assist, and investigate abuse of many of society's most vulnerable members. *See* A.R.S. §§ 46-451(A)(2), (10)-(12), -452(A)(1).

However, the records at issue here are not personal information submitted voluntarily by able, self-advocating adults as a prerequisite to obtaining a government benefit like a driver's license, professional license, or the right to vote. There is no reason to assume that someone would voluntarily surrender personal life details, or knowingly arrange a *quid pro quo* that gives up private details to gain certain government benefits. Instead, the records for abuse or exploitation cases

investigated by APS—which concern developmentally disabled adults, persons with dementia or other cognitive issues associated with age or other physical conditions, or adults with other physical, mental or health disabilities or challenges—can be submitted into the government record without the victim's knowledge or consent, in a quest to preserve the dignity, health and welfare of a vulnerable person. There are good reasons to protect private details accumulated this way from persons claiming to be a "studious voter," a genealogical researcher, or a genuinely inquisitive person in the classes the Amicus Briefs seek unfettered rights of access for.

Thus, the Amicus positions would undermine the statutorily enumerated policy of protecting the confidentiality of sensitive investigatory records and render the term "bona fide research" meaningless. *See* A.R.S. § 46-460(A), (D)(8). It would also make DES' role of protecting confidentiality concerning investigations of vulnerable adult abuse, neglect and exploitation nearly impossible. *See* A.R.S. § 46-460(D); *see also Silverman v. Ariz. Dep't of Econ. Sec.*, 255 Ariz. 348, ¶ 23 (App. 2023) ("[W]e find it reasonable to require that researchers provide detailed descriptions outlining the specific information needed, the research's purpose and expected outcomes, and how they will maintain the confidentiality of the records."). Stated differently, the Amicus arguments would tie the hands of DES, at the expense of vulnerable individual victims and reporters of vulnerable person abuse, neglect and exploitation, and even persons that might be wrongfully accused of the same.

I. THE AMICUS ARGUMENTS ERRONEOUSLY IGNORE THE LEGISLATIVE EXPECTATION UNDER A.R.S. § 46-460(A) THAT DES WILL GENERALLY PROTECT THE CONFIDENTIALITY OF APS INVESTIGATORY RECORDS.

To begin, the Amicus Briefs contend that courts must construe the "bona fide research" exception in A.R.S. § 46-460(D)(8) in one direction – as broadly as possible. They stake this argument on three points: (1) the public records policy embodied elsewhere in Arizona statute; (2) the fact that the legislature could not have selected a classification broader than described by the word "research" without having rendered the confidentiality requirements of A.R.S. § 46-460 for APS records entirely meaningless; and (3) the fact that "bona fide" is a near-empty concept, meaning only "done in good faith," which itself is not something DES has much right to inquire about. In sum, the Amicus contend that the term "research" falls just short of "any and every purpose" in its breadth, and that DES cannot resist production of APS records no matter what type of inquiry or investigatory purpose might be motivating the request, with the sole exception being the ambiguous category of "investigative purpose[s] . . . tainted by improper, unlawful, malicious, or prurient motives." [Goldwater Amicus at 2] The Amicus arguments violate numerous standards for judicial construction, and most notably ignore the fact that "bona fide research" represents an ***exception*** to an otherwise broad, legislative

policy of preserving confidentiality for APS investigatory records. The default direction for statutory construction here favors prohibiting release by DES.[1]

A. Amicus improperly rely on Arizona Public Records Statutes.

The Amicus arguments portray Arizona policy about government records as exclusively defaulting toward public production and compelling that the records here be provided to almost ***any*** requestor who might claim to be inquisitive about them. [Goldwater Amicus at 7-19; ACLU Amicus at 7-14] Specifically, Goldwater argues that the Court of Appeals' ("COA") interpretation of "bona fide research" that includes three categories—educational, vocational, and scientific—is too narrow. The Amicus Briefs argue that this Court should expand the term to include "any type of good faith inquiry" not tainted by "improper, unlawful, malicious, or prurient motives." [Goldwater Amicus at 2, 9] Strikingly, Goldwater argues that "research" covers "any serious effort to study a question to find a correct answer" and thus should include "genealogical, biographical, legal inquiry, etc., no less than 'educational,' 'administrative,' 'scientific,' or 'public' purposes." [Goldwater Amicus at 9-10] Goldwater also contends that the term includes other individuals and entities, including "academics, students, scientists, activists, health care

[1] The rules of construction also compel the Court to recognize DES' inherent discretion about whether to release any records under the plain language of A.R.S. § 46-460(D): "Employees of [DES] . . . ***may release*** any information that is otherwise held confidential under this section, except the reporting source's identity, to the following or under any of the following circumstances." (emphasis added).

providers, economists, and even studious voters." [Goldwater Amicus at 15] This Court might reasonably wonder if ***any*** requesting party would ever be unable to articulate at least one question about which they are inquisitive or "studious" and to which they believe APS records might have some relevance. For instance, per the Goldwater definition, one need only claim to be a self-professed "studious voter" or "activist," or perhaps a ***potential*** "studious voter" or "activist" with a general desire to know how Arizona government operates to qualify as conducting "bona fide research." Adopting this definition, however, would cast a net so wide such that virtually anyone seeking records for study or inquiry of any kind would have access.

The Amicus Briefs justify their near limitless definition of "research" by misapplying Arizona law. True, Arizona statutes generally facilitate at A.R.S. §§ 39-121, -121.02 broad public access to records concerning the activities of Arizona government entities. But even these statutes do not always side with disclosure. Rather, they contain multiple restrictions intended to preserve confidentiality of certain records the Arizona Legislature has deemed important to protect. These include records depicting images of certain crime witnesses and victims, A.R.S. § 39-121.04, records from personnel files of certain government officials identifying home address or telephone numbers, A.R.S. §§ 39-123, -124, or records revealing information about certain infrastructure, A.R.S. §§ 39-126, -126.01. Moreover, other Arizona statutes impose a wide variety of restrictions to protect citizen privacy,

such as the statutes that demand DES maintain confidentiality regarding all developmentally disabled persons receiving services from DES – just the type of persons whose potential abuse the record reflects the Cross-Petitioner may desire to investigate. *See* A.R.S. § 36-568.01(A); *see also, e.g.* A.R.S. § 36-2604(A) (confidentiality of prescription medication use provided to Arizona Pharmacy Board). The lesson of these statutes is that the broad preferences for disclosure under Arizona law are carefully balanced against other equal expressions of broad regard for confidentiality of certain records. A.R.S. § 46-460 is one such example.

The Amicus Briefs also contend that placing ***any*** procedural safeguards against wide distribution of confidential information would improperly "project the legal concept of a 'fishing expedition' frowned upon in courtroom discovery" onto a journalist's work, including that of Appellees (collectively, the "Newspaper Parties"). [ACLU Amicus at 11] But for Amicus to argue that DES has no interest whatsoever in having procedural safeguards to maintain confidentiality of certain records to protect a vulnerable group of individuals and related investigatory information is contrary to the policy and logic dictated by A.R.S. § 46-460.

The policy of open access yields when countervailing interests of "privacy, confidentiality, or the best interest of the state in carrying out its legitimate activities outweigh the general policy of open access." *Carlson v. Pima Cnty.*, 141 Ariz. 487, 491 (1984) (citing A.R.S. § 39-121 et seq.). In other words, the Arizona policy

regarding disclosure of public records is not absolute. *See Carlson*, 141 Ariz. at 491; *see also Griffis v. Pinal Cnty.*, 215 Ariz. 1, 4-5, ¶¶ 10-11 (2007) (public records "does not encompass documents of a purely private or personal nature"); *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191 Ariz. 297, 301, ¶ 12 (1998) (privacy interest not lost on information simply because it is available from other public sources). Indeed, public disclosure must sometimes yield "to the burden imposed on private individuals or the government itself by disclosure." *London v. Broderick*, 206 Ariz. 490, 493, ¶ 9 (2003); *see also Arpaio v. Davis*, 221 Ariz. 116, 121, ¶¶ 21-22 (App. 2009) (applying Arizona Supreme Court Rule 123(f)(4)(A)(i)-(ii) to find no abuse of discretion in declining to produce thousands of random and unidentified judicial records where compliance required unreasonable expenditure of time and resources). And the exceptions to disclosure attempt to address the tension between the public interest in open access and "the need to protect confidential information, personal privacy of those who interact with government offices, and overriding interests of the government." *London*, 206 Ariz. at 493, ¶ 9 (citing *Carlson*, 141 Ariz. at 490). "When the release of information would have an important and harmful effect on the duties of the officials or agency in question, there is discretion not to release the requested documents." *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257-58 (1991).

Here, A.R.S. § 46-460 creates a statutory mandate for DES to maintain the confidentiality of "all information," including personally identifying information, gathered by APS, a division of DES, during investigations of suspected abuse, neglect, and exploitations of vulnerable individuals. It provides certain exceptions by which DES ***may*** release the information, and grants DES discretion to determine if a requestor qualifies. *See* A.R.S. § 46-460(D). Critically, the statute concerns the protection of ***confidential*** sensitive information, which (by definition) is not meant to be widely disseminated absent the identified exceptional circumstances. *See Confidential*, *Black's Law Dictionary* (11th ed. 2019) ("Confidential" is defined as information "meant to be kept secret; imparted in confidence."). Deeming a record "confidential," as the legislature did in A.R.S. § 46-460, takes it outside the purview of A.R.S. § 39-121, for the countervailing government interest of confidentiality is one that can override broad disclosure of certain sensitive information. *See Mathews v. Pyle*, 75 Ariz. 76, 81 (1952); *see also Carlson*, 141 Ariz. at 491 (unlimited access and inspection may lead to "substantial and irreparable private or public harm.").

Indeed, DES has a duty to protect confidential materials to allow investigations to progress without interference by outsiders with suspects, witnesses, and confidential sources who may be reluctant to cooperate if the information is released. And even when an investigation is finished, protecting sensitive or embarrassing details of abuse or exploitation remains an important interest, as does

protecting the privacy interests of purported victims and families who could justly fear potential consequences of broad dissemination, even if personal identifying information is redacted. Given the unique methods by which government acquires the private details at issue here, often outside the consent or involvement of the reported victim, these objectives are consistent with the "best interest of the state," the Arizona state personal privacy policies embodied in Ariz. Const. art. II, § 8, and the statutory authority provided to DES to best care for, assist, and investigate abuse of vulnerable individuals. *See* A.R.S. §§ 46-451(A)(2), (10)-(12), -452(A)(1).

Open and unrestricted access to ***any*** member of society must yield to the countervailing interest as provided in A.R.S. § 46-460. To adopt the Amicus arguments would effectively rewrite the statute to eliminate the word "confidential." *See McCaw v. Ariz. Snowbowl Resort*, 254 Ariz. 221, 227, ¶ 17 (App. 2022) ("[I]t is not the function of courts to rewrite statutes.") (citation omitted). Simply put: privacy, confidentiality, and the best interest of the state outweigh the presumption of broad and unfettered disclosure.

II. AMICUS ARGUE FOR A DEFINITION OF "BONA FIDE RESEARCH" THAT WOULD SWALLOW THE CONFIDENTIALITY POLICY OF A.R.S. § 46-460.

Amicus next argue for a definition of "bona fide research" that permits unrestricted access to confidential records of vulnerable individuals. [*See* Goldwater Amicus at 2, 9] They argue for an expansive definition of "research" that includes

many other purposes not named by the COA. [*See* Goldwater Amicus at 9-10] But interpreting A.R.S. § 46-460 in such a way would swallow the entire confidentiality policy of the statute, and would discard principles of statutory interpretation.

A. Amicus' reading of "bona fide research" would, in effect, create an absurd result by allowing anyone to obtain confidential records.

Adopting the Goldwater argument that "research" should cover "any serious effort to study a question to find a correct answer" [Goldwater Amicus at 9-10] would cast a net so wide such that virtually ***anyone*** seeking records for study of ***any*** kind would have access to the documents. It would render the exception superfluous and swallow the rule, all while discarding the policy behind A.R.S. § 46-460. This is directly contrary to principles of statutory interpretation under Arizona law.

When interpreting a statute, courts "give effect to each sentence and word so that provisions are not rendered meaningless." *Comm. for Pres. of Established Neighborhoods v. Riffel*, 213 Ariz. 247, 249, ¶ 8 (App. 2006) (citing *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11 (2003)). Stated differently, "[s]tatutes are to be given, whenever possible, such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." *State v. Deddens*, 112 Ariz. 425, 429 (1975). This includes rejecting interpretations that, in effect, swallow the rule. *See Huhtamaki, Inc. v. Maricopa Cnty.*, 255 Ariz. 79, ¶ 15 (App. 2023) (declining to adopt an interpretation that created "absurd result" and caused exception to "swallow the rule"). It also includes exercising restraint by not reading in additional terms or

adopting an interpretation that ignores terms already provided. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012) (explaining that the surplusage canon stands for the proposition that "it is no more the court's function to revise by subtraction than by addition."). Indeed, the "primary aim of statutory construction is to find and give effect to legislative intent." *UNUM Life Ins. Co. of Am. v. Craig*, 200 Ariz. 327, 329-30, ¶ 11 (2001). And courts presume the legislature "did not intend an absurd result" and avoid such outcomes. *In re Est. of Zaritsky*, 198 Ariz. 599, 603, ¶ 11 (App. 2000); *see also* A.R.S. § 1-211(B) ("Statutes shall be liberally construed to effect their objectives . . . .").

Here, the legislative history and policy behind A.R.S. § 46-460(D) matters. *See Silverman*, 255 Ariz. at 348, ¶¶ 17-18, 23; *see also* BILL SUMMARY, H.R. 54, 1st Sess. (Ariz., May 21, 2019); SENATE FACT SHEET, S. 54, 1st Sess., at 3 (Ariz., May 21, 2019). The underlying confidentiality provision of the statute is there for a reason, and it facilitates DES exercising its statutory authority to best care for, assist, and investigate abuse of vulnerable individuals, while preserving their privacy. *See* A.R.S. § 46-460(A); *see also* A.R.S. §§ 46-451(A)(2), (10)-(12), -452(A)(1).

Interpreting A.R.S. § 46-460 in a way that would eviscerate the policy behind it would ignore its spirit and purpose. *See Aros v. Beneficial Ariz., Inc.*, 194 Ariz. 62, 66 (1999) (when a statute is facially unclear, courts determine legislative intent by interpreting it as a whole, considering "the statute's context, subject matter,

historical background, effects and consequences, and spirit and purpose.") (quoting *Zamora v. Reinstein*, 185 Ariz. 272, 275 (1996)); *see also Ariz. Life & Disability Ins. Guar. Fund v. Honeywell, Inc.*, 190 Ariz. 84, 87 (1997) (courts attempt to interpret statutory provisions to fulfills their goals). Put differently, the Amicus Briefs seek to render the term "confidential" meaningless. And adopting their proposed definition would lead to an absurd result that is inconsistent with the statute's confidentiality objective. *See Silverman*, 255 Ariz. at 348, ¶¶ 17-18.

Moreover, the proposed definition of "bona fide research" would replace an already ambiguous term with several even ***more*** ambiguous terms, including "taint," "improper," "malicious," or "prurient." [*See* Goldwater Amicus at 2] Again, principles of statutory construction caution against this. *See* Scalia & Garner, *supra*, at 174-79. Additionally, Amicus' broad definition would require the government and courts to engage in a psychological assessment of a requesting party—without ***any*** defined standards to do so—to determine if the requestor is asking for records in "good faith." Asking them to do so with no clear guidance is, however, an absurd result. *See Lake Havasu City v. Mohave Cnty.*, 138 Ariz. 552, 557 (App. 1983) ("Statutes must be given a sensible construction which will avoid absurd results.").

The expansive definition the Amicus Briefs propose would enable any individual to have free dominion over confidential records and would impose a significant burden on DES to review, redact, and produce a mountain of documents

for an enormous class of individuals. For perspective, the Newspaper Parties' request would result in DES spending approximately 94,500 employee hours (or one year of full-time work for 41 DES records specialists and 7 DES records team members) to identify, redact, and review the requested documents. [APPV2-045:14-046:18] Adopting the Amicus' broad definition would exacerbate this absurd expenditure of resources. This constitutes an unreasonable administrative burden that outweighs the interest of unrestricted access. *See Jud. Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 397, ¶ 17 (App. 2011) ("[T]he burden of producing public records can outweigh the public's interest in inspecting those records."); *see also Hodai v. City of Tucson*, 239 Ariz. 34, 43, ¶¶ 27-28 (App. 2016) (unreasonable administrative burden would result by requiring search of 1,400 email accounts, in addition to time for redactions). The Court should consider the unreasonable administrative burden imposed on DES to locate and redact such a vast number of documents and how that burden would hinder DES' core functions, which in this case involves protecting and serving vulnerable adults. *See Am. C.L. Union v. Ariz. Dep't of Child Safety*, 240 Ariz. 142, 153, ¶ 36 (App. 2016) (courts should consider the resources and time it takes to locate and redact information, and impact on agency's core functions) (citing *Hodai*, 239 Ariz. at 43, ¶ 27).

In sum, Amicus' broad definition would undercut the statute's intent to protect confidential records and would allow unrestricted access to almost ***anyone***. It would

require the government and the courts to evaluate the psychological state of requesting parties with no set standards for doing so. It would impose a significant burden on DES and hinder its ability to carry out its statutory duty. It would also improperly ignore the policy behind the statute. This absurd result must be avoided.

III. THE COA ACKNOWLEDGED THAT A.R.S. § 46-460 REQUIRES A REQUESTOR TO EXPLAIN THE PURPOSE OF THE REQUEST.

DES requires a myriad of details from a requestor under the "bona fide research" exception. [*See* APPV1-092:24-100:25; *see also* APPV1-107-125] The COA recognized the necessity of this practice and held that, to qualify as "bona fide," a researcher 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." *See Silverman*, 255 Ariz. at 348, ¶¶ 2, 23-24. And the COA ruled that a researcher must put forth a "detailed plan" showing how the research will aid DES in improving its operations and illustrate the "purpose and expected outcomes of the research, and show how [the researcher] will maintain record confidentiality." *See id.* at ¶ 23. Conversely, the COA determined that providing minimal information in a request prevents a fact finder from determining if the "bona fide research" exception applies. *See id.* at ¶¶ 2, 25 (finding the record insufficiently developed to determine if Ms. Silverman's request qualified as bona fide research).

The Amicus Briefs, however, see the COA's requirement for a detailed

request as hindering investigative journalism and argue against any pre-approval process. [*See* Goldwater Amicus at 8-14; ACLU Amicus at 10-15] They ask the Court to read A.R.S. § 46-460 in a way making enforcement of the underlying policy impossible. This demand contrasts starkly with the basic rules of statutory construction.

A. Courts do not adopt statutory construction that renders enforcement impossible, and preventing DES from inquiring about how the requested information will be used does just that.

Again, as outlined *supra*, courts interpret statutes to avoid rendering any clause, sentence, or word "superfluous, void, contradictory or insignificant." *State v. Super. Ct. for Maricopa Cnty.*, 113 Ariz. 248, 249 (1976). In other words, "statutes are not to be interpreted woodenly and without regard to their aim." *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 594 (1983) (citation omitted). Rather, statutes must be construed so that they are reasonable, workable, and capable of being enforced. *See State Farm Auto. Ins. Co. v. Dressler*, 153 Ariz. 527, 531 (App. 1987) (courts have a duty to avoid absurd results stemming from literal interpretations). And courts seek for the "spirit of the law" to prevail. *Id.*

Here, DES must be able to safeguard confidential records from a requesting party who seeks to share them with unauthorized individuals. Indeed, confidential records should not be widely disseminated upon receipt, nor should they be shared on social media or other websites. But stripping DES of ***any*** authority to prevent

widespread dissemination would make enforcement of A.R.S. § 46-460 nearly impossible. DES must have some control over how these confidential records are disclosed. The Amicus Briefs ask the Court to eliminate ***any*** procedural safeguards. [*See* Goldwater Amicus at 8-14; ACLU Amicus at 10-15] Again, such an interpretation undermines the statutory intent and spirit of A.R.S. § 46-460.

Notably, as it applies here, counsel for the Newspaper Parties argued at a February 2022 status conference that after the "bona fide research" exception applies, it "becomes an open records case[] . . . . And the presumption should be for access," and that traditionally journalists are not required to explain why they want records, for "[p]art of public accountability is being able to see the raw data of the government ***and do what you want with it*** . . . ." [APPV2-135:4-17] (emphasis added). This statement directly contrasts with Amicus' contention that Ms. Silverman promised to maintain confidentiality of personally identifying information. [*See* ACLU Amicus at 6-7; *see also* Goldwater Amicus at 7] It is not a "myopic view," as Goldwater contends [Goldwater Amicus at 7], to prevent broad dissemination of records the legislature designated as "confidential." Rather, it is an express recognition that certain records must maintain their confidentiality to protect the rights and interests of vulnerable individuals.

Indeed, to allow a researcher to obtain confidential records without a clearly stated goal would obstruct the statute's underlying policy. *See* Scalia & Garner,

supra, at 63-65 ("The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered."); *see also Citizens Bank of Bryan v. First State Bank, Hearne*, 580 S.W.2d 344, 348 (Tex. 1979) (courts should select a construction that carries out the statute's manifest object). And allowing such unfettered access would make enforcement nearly impossible, which is an unreasonable outcome. *See State v. LeMatty*, 121 Ariz. 333, 337 (1979).

Moreover, A.R.S. § 46-460(D) explicitly grants DES discretion in reviewing a request, for "[DES] ***may*** release any information that is otherwise held confidential under this section" if an exception is met. (Emphasis added). Indeed, under the "Mandatory/Permissive Canon," the general rule is that "shall" is mandatory and "may" is permissive. *See* Scalia & Garner, *supra*, at 112-15. The inclusion of the word "may" in A.R.S. § 46-460(D) grants DES discretion in releasing these records; release is not mandated. *See Silverman*, 255 Ariz. at 348, ¶ 29 ("The statute's use of 'may' as a modal verb indicates permissive intent and a grant of discretion.") (citation omitted). Indeed, the statutory language does not compel DES to release records when no procedure exists to prevent misuse. Thus, meeting the "bona fide research" exception merely unlocks DES from the confidentiality mandate and invokes its discretion to release records in the circumstances it believes are appropriate consistent with the confidentiality policy of A.R.S. § 46-460(A).

Amicus seek to make A.R.S. § 46-460 ineffective and render enforcement

impossible. Courts do not adopt interpretations of statutes that lead to such an outcome, nor do they interpret them in a way that obstructs the underlying legislative intent. Rather, courts seek to make statutes workable and reasonable. Adopting the Amicus arguments here would violate this principle.

B. The explanation requirement does not constitute an unlawful prior restraint on free speech.

Goldwater asserts that requiring a requesting party to provide an explanation about the nature of their request is an illegal prior restraint. [Goldwater Amicus at 16-19] Specifically, Goldwater argues there should not be any review process, and the records should be disclosed automatically. [*See* Goldwater Amicus at 16-19] But this argument flatly ignores the compelling governmental interest at play here: maintaining confidentiality of certain sensitive records to safeguard against their misuse, facilitate investigations, and protect the privacy of vulnerable adults.

As an initial matter, the statute does not create a "prior restraint," for it does not seek to "drive certain ideas or viewpoints from the marketplace." *See Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 148 (2d Cir. 2005) (citation omitted). Rather, A.R.S. § 46-460 is part of a statutory scheme that commands DES to protect interests of vulnerable individuals. *See* A.R.S. §§ 46-451(A)(2), (10)-(12), -452(A)(1), -460(A), (D)(8). It is a legislative directive to DES to protect the confidentiality of sensitive personal information. There is no prior restraint here.

Assuming *arguendo* that the statute creates a prior restraint, it is not rendered

invalid. Indeed, not all prior restraints are unlawful, and a presumption of invalidity can be overcome if the restriction (1) "serves a compelling governmental interest," (2) "is necessary to serve the asserted compelling interest," (3) "is precisely tailored to serve that interest," and (4) "is the least restrictive means readily available for that purpose." *Nash v. Nash*, 232 Ariz. 473, 482, ¶ 32 (App. 2013) (quoting *Hobbs*, 397 F.3d at 149) (cleaned up). Protecting the well-being of vulnerable populations is a compelling governmental interest. *See Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126 (1989) (protecting children's psychological well-being is a compelling interest). Keeping sensitive information confidential in certain contexts is also a compelling interest. *See In re Nat'l Sec. Letter*, 33 F.4th 1058, 1071 (9th Cir. 2022) (holding national security is a compelling interest, and keeping sensitive information confidential to protect such interest is permissible).

Here, DES has a legitimate compelling interest in keeping certain records confidential and preventing wide dissemination of the same. Indeed, DES has been tasked to care for, assist, and investigate abuse of vulnerable individuals, including the disabled, infirm, and elderly, while protecting their privacy. Protecting the vulnerable individuals' well-being and privacy could be easily compromised if confidential information was disclosed. Requiring a requestor to provide DES with an explanation of why they are seeking the information is a small prerequisite to further an important objective. It is not overly burdensome and is not an arbitrary

roadblock. Instead, it protects against malicious or irresponsible actors who may take advantage of or irresponsibly publish sensitive information to embarrass or harass everyone from the investigated victims themselves to government employees or officials by distributing salacious stories. This statutory scheme leaving discretion to DES was well-thought-out. It sets up no broad psychological or motivational evaluations by the government, and provides the courts clear standards by which to evaluate DES' invocation of the "bona fide research" exception. In other words, it is narrowly tailored to serve a compelling governmental interest.

CONCLUSION

Amicus aim to stop DES from effectively carrying out its statutory duty to protect the health, safety, and privacy interests of vulnerable Arizona citizens, and ask this Court to disregard core principles of statutory interpretation and read A.R.S. § 46-460 absurdly to swallow the general rule of confidentiality. Instead, the Court should acknowledge the countervailing interests, including the judicially recognized government interest in protecting private, personal information, and the best interests and policy of the state expressed in the A.R.S. § 46-460 confidentiality requirements.

RESPECTFULLY SUBMITTED this 1st day of April, 2024.

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