

**SUPREME COURT OF ARIZONA**

BARRY GOLDWATER INSTITUTE FOR  
PUBLIC POLICY RESEARCH,

Plaintiff/Appellant,

v.

CITY OF PHOENIX; JEFF BARTON;  
DENISE ARCHIBALD, and SHEREE  
RUCKER,

Defendants/Appellees.

Arizona Supreme Court  
No. CV-25-0033-PR

Court of Appeals, Division One  
No. 1 CA-CV 24-0176

Maricopa County Superior Court  
No. CV 2023-003250

**BRIEF OF *AMICUS CURIAE***  
**LEAGUE OF ARIZONA CITIES AND TOWNS IN SUPPORT**  
**OF DEFENDANTS/APPELLEES CITY OF PHOENIX *ET AL.***

**FILED WITH WRITTEN CONSENT OF THE PARTIES**

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## TABLE OF CONTENTS

Table of Contents .....	i
Table of Authorities .....	ii
Interest of <i>Amicus Curiae</i> .....	1
Introduction .....	2
Argument.....	4
I. Prior Arizona public records case law does not require the level of proof urged by Goldwater .....	4
A. <i>Mitchell</i> and the “specific, material harm” requirement .....	4
B. The “best interests of the state” cases .....	6
C. The “privacy” cases .....	16
II. Disclosure of public records pertaining to executive session topics should be decided by balancing the public’s need for disclosure with the potential harm to the state .....	22
Conclusion .....	26
Certificate of Compliance .....	27
Certificate of Service .....	28

## TABLE OF AUTHORITIES

### Cases

<i>A. H. Belo Corp. v. Mesa Police Department</i> , 202 Ariz. 184 (App. 2002)	17, 18, 20
<i>Abraham v. Arizona Board of Regents</i> , 259 Ariz. 158 (App. 2025) (review pending) .....	6, 12, 13, 15, 25
<i>Arizona Board of Regents v. Phoenix Newspapers, Inc.</i> , 167 Ariz. 254 (1991) .....	7, 14, 24
<i>Barry Goldwater Institute v. City of Phoenix</i> , 259 Ariz. 182 (App. 2025)...	6, 13, 14
<i>Bolm v. Custodian of Records</i> , 193 Ariz. 35 (App. 1998) .....	9, 10, 24
<i>Carlson v. Pima County</i> , 141 Ariz. 487 (1984) .....	2, 6, 8, 19
<i>Griffis v. Pinal County</i> , 215 Ariz. 1 (2007).....	6
<i>Hodai v. City of Tucson</i> , 239 Ariz. 34 (App. 2016) .....	11, 12, 15, 25
<i>Judicial Watch, Inc. v. City of Phoenix</i> , 228 Ariz. 393 (2011).....	10, 11, 15, 25
<i>KPNX-TV v. Yuma County Superior Court</i> , 183 Ariz. 589 (App. 1995) ..	8, 9, 14, 25
<i>Mathews v. Pyle</i> , 75 Ariz. 76 (1952).....	2
<i>Mitchell v. Superior Court</i> , 142 Ariz. 332 (1984).....	3, 4, 5, 20
<i>Phoenix Newspapers v. Keegan</i> , 201 Ariz. 344 (App. 2001) .....	10, 15
<i>Phoenix Newspapers, Inc. v. Ellis</i> , 215 Ariz. 268 (App. 2007) .....	18, 20
<i>Salt River Pima-Maricopa Indian Community v. Rogers</i> , 168 Ariz. 521 (1991) .....	6
<i>Schoeneweis v. Hamner</i> , 223 Ariz. 169 (App. 2009).....	19, 20
<i>Scottsdale Unified Sch. Dist. v KPNX Broad. Co.</i> , 191 Ariz. 297 (1998) ..	16, 17, 20
<i>Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.</i> , 188 Ariz. 499 (App.1997).....	16

**Statutes**

A.R.S. § 38-431.03..... 22, 23, 24, 25  
A.R.S. § 39-121.....2  
A.R.S. § 39-121.01 (B) .....2  
A.R.S. § 39-121.02 (A).....2

**Rules**

ARIZ. R. CIV. APP. P. Rule 14 .....1  
ARIZ. R. CIV. APP. P. Rule 16 .....1

## **INTEREST OF *AMICUS CURIAE***

Pursuant to Rule 14 and Rule 16, ARIZ. R. CIV. APP. P., this amicus curiae brief (this “brief”) is submitted by the League in support of Defendants/Appellees City of Phoenix and its officials (collectively the “City”). This brief is being lodged with the written consent of the parties.

The League is a voluntary association of the 92 incorporated cities and towns in the State of Arizona, representing approximately 79% of Arizona’s total population. The League provides collective advocacy, education, training, technical assistance, and information-sharing for and amongst the cities and towns of Arizona. The League respectfully submits this brief in support of the City because the issues presented involve matters of fundamental importance to Arizona cities and towns, namely their ability to withhold sensitive information from public disclosure during negotiations and document preparation. The League’s goal is to complement the City’s positions without repeating the same arguments.

This case threatens to narrow municipalities’ legal authority to withhold documents when privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure. The outcome urged by Appellant Barry Goldwater Institute for Public Policy Research (Goldwater) will place municipalities in a compromised negotiating position not only in labor negotiations of the type at issue

in this case but also in normal personnel, contract, and property acquisition negotiations, among others.

The League's members have a substantial interest in ensuring that they continue to have a valid legal basis to withhold from public disclosure information that will give the other party an unfair and inappropriate advantage in negotiations, to the detriment of the municipality and its citizens.

### **INTRODUCTION**

Under Arizona's public records law, "[p]ublic records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." A.R.S. § 39-121. All officers and public bodies are required to maintain all records "reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities that are supported by monies from this state or any political subdivision of this state." A.R.S. § 39-121.01 (B). A person denied access to requested public records may file a special action to obtain access. A.R.S. § 39-121.02 (A).

When faced with a public records request, the custodian of the public record may refuse to allow inspection of the public records "where the countervailing interests of confidentiality, privacy or the best interests of the state" justify non-disclosure. *Carlson v. Pima County*, 141 Ariz. 487, 491 (1984), citing *Mathews v. Pyle*, 75 Ariz. 76, 80 (1952). *Carlson* recognized "that an unlimited right of

inspection might lead to substantial and irreparable private or public harm....” *Id.* at 491. A party seeking to block disclosure of public records under Arizona’s public records law has the burden to show “the probability that specific, material harm will result from disclosure....” *Mitchell v. Superior Court*, 142 Ariz. 332, 335 (1984) .

Goldwater urges the Court to adopt a rule requiring a party seeking to block disclosure of public records to prove a level of specific, material, and probable harm that is tantamount to concrete injury. Petition for Review (hereafter Petition) at p. 8; Goldwater Supplemental Brief (hereafter Goldwater Supp) at p.3.

Goldwater’s position is contrary to *Mitchell* and the entire body of Arizona precedent, which allows non-disclosure based on *probability* of harm. Courts rarely uphold non-disclosure, so there is no need to increase the burden of proof for showing the likelihood of harm.

The League urges the Court to affirm the decision of the Court of Appeals. The City of Phoenix presented a day’s worth of testimony on the probability of harm resulting from the disclosure. Adopting a more rigorous requirement for non-disclosure will put all Arizona governments at a distinct and substantial disadvantage in all types of negotiations.

## ARGUMENT

### I PRIOR ARIZONA PUBLIC RECORDS CASE LAW DOES NOT REQUIRE THE LEVEL OF PROOF URGED BY GOLDWATER

Goldwater contends that its rigorous application of *Mitchell*'s "burden of showing the probability that specific, material harm will result from disclosure" requirement is needed to avoid having the "best interests of the state" exception swallow up the general rule in favor of disclosure. Petition at p.8; Goldwater Supp. at pp.8 & 12. But the general rule in favor of disclosure is alive and well. The few reported public records cases upholding non-disclosure show that disclosure is the rule and non-disclosure is the exception. The proof of probable harm introduced by the City of Phoenix and accepted by the trial court and court of appeals in this case is similar in nature and extent to the proof upheld in the other reported cases, and there is no rash of non-disclosure to justify tightening the required proof of harm.

#### A. *Mitchell* and the "specific, material harm" requirement

*Mitchell* announced the "burden of showing the probability that specific, material harm will result from disclosure" requirement but provided no meaningful explanation of the rule's application because the only harm mentioned by the party seeking non-disclosure was a vague privacy interest. Gary Mitchell was a convicted criminal sentenced to a 28-year prison term for sexual assault. The Arizona Daily Star obtained an order releasing Mr. Mitchell's presentence report under a procedure promulgated by the presiding judge of the Pima County Superior Court, which

directed all presentence reports to be sealed unless opened by the order of a Superior Court judge. *Mitchell*, 142 Ariz. at 333-34. Mr. Mitchell filed a petition for special action seeking to withhold release of the report, but the court of appeals declined to accept jurisdiction. The Arizona Supreme Court accepted Mr. Mitchell's petition for review and held that the presiding judge's order violated Rule 26.6(e) of the Arizona Rules of Criminal Procedure and was inconsistent with Arizona's policy favoring disclosure of public records. *Id.* at 334. Responding to Mr. Mitchell's assertion that release of the report violated his right of privacy by revealing information pertaining to his personal life, the Court stated:

While confidentiality may be preserved on a case-by-case basis, we recognize that the public's need for information about the disposition of offenders is compelling, and that it is the public policy of this state to fulfill that need. Thus, when a newspaper seeks information as a member of the public, and a *convicted* offender wishes to bar disclosure on the ground of infringement of his privacy, the rights involved are not coequal, and any decision about which claim is to prevail must ordinarily favor the public's right of access. The burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, is on the party that seeks non-disclosure rather than on the party that seeks access.

*Id.* at 335 (italics in original).

We have found eleven reported Arizona cases upholding at least some minimal non-disclosure of public records<sup>1</sup> based on “countervailing interests of confidentiality, privacy or the best interests of the state...” *Carlson*, 141 Ariz. at 491. A review of the facts and holdings of those cases underscores how rarely courts uphold non-disclosure, shows that the type and probability of “harm” justifying the non-disclosure in those cases is consistent with the court of appeals’ holding in this case, and belies Goldwater’s contention that the general rule in favor of disclosure is at risk of being swallowed up.

#### **B. The “best interests of the state” cases**

Eight published Arizona cases uphold at least some non-disclosure based on the “best interests of the state” determination. The court of appeals opinion in this case is one of the eight, as is the court of appeals opinion in *Abraham v. Arizona Board of Regents*, 259 Ariz. 158 (App. 2025) (*review pending*), which is also pending review in this Court. These eight cases, discussed in chronological order,

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<sup>1</sup> Two additional reported Arizona cases upheld non-disclosure based on a determination that the records in question were *not* public records. *See, Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 521 (1991) (a check distribution list in the state treasurer’s office containing personal information about community members and their property interests in the Pima Freeway right-of-way held not a public record), and *Griffis v. Pinal County*, 215 Ariz. 1 (2007) (personal emails created or kept on a government email system do not necessarily qualify as public records). There is no dispute that the records requested in this case are public records. *Barry Goldwater Institute v. City of Phoenix*, 259 Ariz. 182, 185 ¶9 (App. 2025).

show that non-disclosure has historically been narrowly upheld and has not required the level of concrete proof of harm demanded by Goldwater in this case.

*Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254 (1991), involved withholding ASU President applicants' names and resumes. ABOR and its recruiter determined "that confidentiality was critical in attracting and recruiting the most highly qualified prospects for the ASU presidency" and "that publishing the names of prospects in a university presidential search reduces the number of applicants by one-fourth, in effect skimming the cream off the pool of prospects." *Id.* at 255. So when the Arizona Republic and Mesa Tribune asked to inspect the resumes of those being considered, ABOR released the names and full resumes only of the three finalists, provided redacted resumes of 14 other interviewees, and withheld the names, resumes, and other information of the 256 initial prospects for the position. *Id.* at 256. ABOR filed a declaratory judgment action seeking judicial confirmation of its partial release of public records, and the newspapers countersued for special action relief under the public records law, seeking the remaining records. The trial court ordered the release of all the records, ABOR appealed, and the appeal was transferred to the Arizona Supreme Court. *Id.* at 257. The Court affirmed the trial court's decision ordering the full disclosure of names and resumes of the 17 interviewees. *Id.* at 258. But the Court upheld ABOR's decision not to release names or resumes of the 256 original prospects, stating:

Revealing the names of all prospects, those nominated without their permission, and even those nominated with the prospects' tacit permission, *could* chill the attraction of the best possible candidates for the position. The interests of ASU and the citizens of this state are best served by not discouraging the "cream" from applying. The "countervailing interests of confidentiality, privacy [and] the best interest of the state [were, therefore,] appropriately invoked to prevent inspection...."

167 Ariz. at 258 (italics added; brackets in original), quoting *Carlson*.

*KPNX-TV v. Yuma County Superior Court*, 183 Ariz. 589 (App. 1995), involved the non-disclosure of a surveillance video and a crime scene video relating to a Yuma County Deputy Sheriff's murder of two Southwest Border Alliance (SBA) task force members at the SBA headquarters in Yuma. The Yuma Police Department declined KPNX-TV's public records request for the videos on the basis that they would reveal confidential and sensitive information about the SBA headquarters. The Yuma County Superior Court judge conducted an *in camera* inspection of the videos and upheld the non-disclosure of the two videos. KPNX-TV filed a special action challenging the Superior Court decision. The court of appeals did its own *in camera* inspection of the videos and ordered release of the crime scene video to KPNX-TV, finding that it focused on evidentiary details, did not reveal the layout of the SBA building, and posed no security risk. *Id.* at 593. But the court upheld the non-disclosure of the surveillance camera video, stating:

We agree that the State has legitimate security concerns about public disclosure of a videotape showing undercover officers, the SBA evidence locker, and the location of the surveillance

camera. The data on the videotape *could* be photographed or manipulated to provide a graphic study of the officers' faces and the contents, construction, and security of the evidence locker. The risk that anyone *might* use this video information to harm an officer or to burglarize the evidence locker *seems slight*, but the risk exists and its potential harm to life and law enforcement is great.

*Id.* at 593 (italics added).

*Bolm v. Custodian of Records*, 193 Ariz. 35 (App. 1998), involved attorney John Bolm's public records request for personnel records of two Tucson Police Department (TPD) officers who were defendants in a civil suit filed by Mr. Bolm on behalf of a client. After a four-day show-cause hearing, the trial court ordered most of the personnel records released but upheld the City's non-disclosure of TPD personnel evaluations and internal affairs investigation (IAD) records. *Id.* at 37 ¶4. Mr. Bolm challenged the trial court's order upholding the non-disclosure of these records "because the City made no specific showing that disclosure of the specific records requested would result in any specific harm." *Id.* at 41 ¶19 (internal quotations omitted). The court of appeals disagreed, holding that the findings made by the trial judge based on three City witnesses were sufficient to support the non-disclosure. *Id.* at 41-42 ¶19. Nowhere in the court of appeals opinion is there any specific statement of what harm would result from the disclosure, and the court faulted Mr. Bolm for not making the testimony of the three City witnesses part of

the record on appeal to *refute* the trial court’s non-disclosure determination. *Id.* at 41-42, ¶15 and footnote 7.

*Phoenix Newspapers v. Keegan*, 201 Ariz. 344 (App. 2001), involved a newspaper’s public records request for a full copy of the state Arizona Instrument to Measure Standards (AIMS) test, administered to about 50,000 Arizona high school sophomores, and future versions of which would be a high school graduation requirement. *Id.* at 346 ¶3. The State offered to let the newspaper view the test so long as it did not take notes or copies. The newspaper filed a special action seeking a copy of the test. The trial court held that “anchor” questions that would be repeated in future AIMS tests would be withheld from disclosure, but that all other questions must be disclosed. The newspaper appealed, and the court of appeals affirmed, holding that the anchor questions could not be used again if they were disclosed, and since the relative difficulty of different years’ AIMS tests were judged based on the strength of the answers to the anchor questions, their release would compromise the State’s ability to determine the relative difficulty of the tests. *Id.* at 349-350 ¶¶24-27.

*Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393 (2011), involved a public records request by Judicial Watch for activity logs created by a special Phoenix Police Department task force to protect the Mayor of Phoenix. The City disclosed an annotated calendar but withheld handwritten logs (“Worksheets”)

listing the times, locations, and badge numbers of the officers' activities on the task force, claiming in part that "the information could be used to undermine the Mayor's safety." *Id.* at 394-95 ¶¶3-4. Judicial Watch filed a special action to obtain the Worksheets. The trial court conducted an *in camera* review, determined that the Worksheets were public records, and "found that release of the Worksheets would hamper the security detail's ability to protect the Mayor and his family...." *Id.* at 395 ¶6. The trial court declined to require redaction of the security-related information, determining that doing so would provide the same information as was in the already-produced annotated calendar. *Id.* at 395 ¶7. On appeal, the court of appeals did its own *in camera* inspection of the annotated calendar and the Worksheets. The court held that the security information was properly withheld in the best interests of the state but determined that it could be redacted. With the redactions, the court found that the Worksheets provided more specificity and detail than was found in the annotated calendar, and required disclosure of the redacted Worksheets. *Id.* at 398 ¶23.

*Hodai v. City of Tucson*, 239 Ariz. 34 (App. 2016), involved Beau Hodai's public records request for TPD cell phone tracking equipment called "Stingray." TPD initially disclosed four redacted documents consisting of 20 pages of contract information (*Id.* at 37 ¶3) but disclosed no further information in response to the request, contending that responding would be too time-consuming. *Id.* at 37-38 ¶3.

Mr. Hodai then filed a special action complaint to obtain the information. TPD attached to its answer affidavits from an FBI agent and a TPD lieutenant regarding Stingray, asserting “detrimental effect if technical information about [Stingray] were released.” *Id.* at 38 ¶4. TPD then filed hundreds of pages under seal pertaining to the request. The trial court ruled that all the documents submitted under seal were properly withheld, and Mr. Hodai appealed. The court of appeals held that all the information other than a proposed redaction of a PowerPoint presentation was properly withheld, finding that the affidavits supporting non-disclosure showed specific harm:

“That a person experienced with the technology believes it could be “easily” thwarted if the information was released is not merely a possible harm based on a hypothetical situation, but one rooted in experience.”

*Id.* at 39-40 ¶12. The court went on to say: “[T]he harm here is specific—even providing the name or minor details of the investigation would link it to the use of the equipment, revealing a sensitive investigative technique in an ongoing case.” *Id.* at 42 ¶21.

*Abraham v. Arizona Board of Regents*, 259 Ariz. 158 (App. 2025) (*review pending*), involves Matthew Abraham’s public records request to the University of Arizona for “Qualtrics Surveys” of faculty, staff, and graduate student feedback on leadership position candidates (*Id.* at 169 ¶48) and application materials pertaining to the search for two program heads. *Id.* at 171 ¶59. The university withheld and

redacted Qualtrics Survey data to the extent necessary to protect the anonymity of commenters. *Id.* at 170 ¶¶49 and ¶¶54-55. The court of appeals upheld the university’s non-disclosure based on a determination that “anonymous feedback about job applicants is generally more honest” and respondents “would *likely* be less forthright and thorough” if they know their responses could be traced back to them. *Id.* at 170 ¶51 (italics added). The university justified withholding the application materials pertaining to the search for two program heads based on the chief human resources officer’s testimony, explaining that an internal search guide “emphasized the importance of preserving candidate confidentiality,” “that [maintaining confidentiality] helps attract candidates who may require anonymity before applying or remaining in the candidate pool,” and “that breaching confidentiality *could* create conflict and discord among the search committee.” *Id.* at 171 ¶59 (italics added; internal quotation marks omitted). The court of appeals found these justifications sufficient. *Id.* at 171 ¶60.

The court of appeals opinion being reviewed here follows the same approach. *Barry Goldwater Institute v. City of Phoenix*, 259 Ariz. 182 (App. 2025), involves Goldwater’s request for public records pertaining to labor negotiations. The trial court held a day-long evidentiary hearing and found that the “potential for undue pressure, impasse, and collusion” was harm sufficient to justify withholding the records while the negotiations were pending. *Id.* at 263 ¶12. The court of appeals

affirmed, holding that the trial court’s “finding of potential material harm rather than probable material harm” was not reversible error. *Id.* at 266 ¶23.

Analysis of the nature of harm found in each of the “best interest of the state” cases shows that the court of appeals was correct—no concrete proof of harm has previously been required. The only way to know with certainty that “undue pressure, impasse, and collusion” will occur with release of the records in this case would have been for them to be released and for the concrete harm to have occurred. By then it would be too late to “unring the bell” and undo the damage. The same is true for each of the prior cases. The public body is not required to suffer the actual harm. It is required to present, and the court must weigh, evidence of the likelihood of harm:

- ABOR provided evidence of probability that release of the 256 prospects’ identities and information would reduce the pool or quality of candidates (*Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. at 255)
- The Yuma Police Department presented evidence that “[t]he data on the videotape *could* be photographed or manipulated” to the “*potential* harm to life and law enforcement” (*KPNX-TV v. Yuma County Superior Court*, 183 Ariz. at 593, italics added)
- The State asserted that release of the AIMS test “anchor” questions would probably increase test scores and compromise the ability to determine the

relative difficulty of the tests (*Phoenix Newspapers v. Keegan*, 201 Ariz. at 349-350 ¶¶24-27)

- The Phoenix Police Department believed release of the unredacted Worksheets could interfere with the police task force’s ability to protect the Mayor (*Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. at 394-95 ¶¶3-4)
- The Tucson Police Department submitted affidavits asserting that providing Stingray details could be used to reveal a sensitive investigative technique in a pending case (*Hodai v. City of Tucson*, 239 Ariz. at 42 ¶21)
- The university believed non-anonymous comments of Qualtrics Survey commenters “would *likely* be less forthright and thorough” (*Abraham v. Arizona Board of Regents*, 259 Ariz. at 170 ¶51, italics added)
- The university submitted evidence that “breaching confidentiality [of program head candidates] *could* create conflict and discord among the search committee.” (*Abraham v. Arizona Board of Regents*, 259 Ariz. at 171 ¶59, italics added)

Whether these rise to the level “potential material harm” or “probable material harm” is arguable. They don’t rise to the level of concrete harm urged by Goldwater in this case. Considering how rarely courts uphold non-disclosure, there is no need to increase the burden of proof for showing the likelihood of harm.

### C. The “privacy” cases

Although this case is a “best interests of the state” case, the four reported Arizona public records cases we have found upholding at least some non-disclosure based on a “privacy” determination also show that non-disclosure has been narrowly upheld without the more concrete determination of “harm” urged by Goldwater.

In *Scottsdale Unified Sch. Dist. v KPNX Broad. Co.*, 191 Ariz. 297 (1998), KPNX made a public records request seeking teacher names, home addresses, and birth dates to do background checks after receiving a tip that a substitute teacher was acting sexually inappropriately in a classroom full of children. The district refused to disclose the home addresses and birth dates, and KPNX filed a special action to obtain the birth dates.<sup>2</sup> The trial court held that the school district could withhold the birth dates, finding among other things that birth dates “are private information and provide significant identifying information allowing access to extensive personal data in a computerized society....” 191 Ariz. at 299 ¶6. The court of appeals reversed, finding that the birth dates were available from other sources and were therefore neither private nor confidential. *Scottsdale Unified Sch. Dist. v. KPNX Broad. Co.*, 188 Ariz. 499, 505 (App.1997). The Arizona Supreme Court vacated

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<sup>2</sup> KPNX did not pursue its request for home addresses in the special action. 191 Ariz. at 299 ¶4.

the opinion of the court of appeals and affirmed the trial court, holding that the teachers' privacy rights justified non-disclosure of the birth dates, stating:

The trial court found that defendants have no reason to believe that any of the thousands of teachers involved in this case have been involved in inappropriate behavior. Defendants correctly point out that they did discover misconduct by a teacher who is a registered sex offender. Perhaps there are others, but defendants have produced no evidence or even a tip about any specific individual. Defendants, of course, are not required to prove that there are teachers that pose a threat to public school children. But when defendants are unable to provide any basis at all for believing that such a teacher might exist among the thousands of individuals whose legitimate expectations of privacy are sought to be invaded, the public interest in disclosure is at best speculative.

191 Ariz. at 304 ¶23.

*A. H. Belo Corp. v. Mesa Police Department*, 202 Ariz. 184 (App. 2002), involved KTVK-TV's request for the audio tape of an emergency call by a babysitter frantically seeking help with a 16-month-old child named Dominic whose cries and whimpers can be heard in the background. The department released a transcript of the call but refused to release the tape, citing among other things the privacy interests of the injured child and his family. The trial court held a hearing and did an *in camera* review of the audio tape, and ordered the tape released. In a split decision (then-Judge Timmer dissenting), the court of appeals reversed, stating:

KTVK-TV denies that Dominic and his family have a cognizable privacy concern, but the evidence shows otherwise. The tape not only contains the babysitter's frantic pleas for help and descriptions of the child's symptoms; it also contains the cries

and whimpers of the child. Dominic’s mother testified at the hearing that broadcasting the tape would interfere with her family’s healing processes and “remind [her] of that painful day.” She said that it would be hard to hear her son’s “helpless” cries on the tape. Mesa reinforced her testimony with a letter she had written expressing concern that, if played to the public, the 911 call could “torment” her son. In short, and understandably, Dominic’s parents seek to stop their child’s private suffering from being stuff for public broadcast and display.

202 Ariz. 187 ¶12.

A notice of claim filed by a conservator on behalf of a minor arising out of a sexual assault by a school janitor was at issue in *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268 (App. 2007). In the probate court proceeding, the conservator sought and obtained an order sealing the notice of claim. The newspaper filed a motion to quash the order. The probate court denied the newspaper’s motion, finding that the notice of claim was not a public record, and even if it was, that the child’s privacy interests outweighed the newspaper’s right to disclosure. The newspaper sought and obtained special action relief in the court of appeals, which held that the notice of claim is a public record and the child’s privacy interests were satisfactorily protected by maintaining the confidentiality of her name by using a pseudonym. *Id.* at 273 ¶23. The court remanded and directed the trial court to hold an *in camera* review of the notice of claim to determine whether any information other than the child’s identity should be redacted from the notice of claim before its release to the newspaper. *Id.* at 274 ¶26.

*Schoeneweis v. Hamner*, 223 Ariz. 169 (App. 2009), is similar. Scott Schoeneweis was a professional baseball player whose wife, Gabrielle, died of an overdose of cocaine and lidocaine. Scott was appointed personal representative of his wife’s estate and sought an order from the probate court sealing the death certificate and other documents concerning the cause of her death. The probate court denied the request without doing an *in camera* review of the documents. Scott filed a special action challenging the probate court’s ruling, and the court of appeals remanded the case, directing the probate court to do an *in camera* inspection of the documents, stating:

In the circumstances of this case, we conclude that the failure to conduct an *in camera* review to balance the competing interests of privacy and access amounts to an abuse of discretion. We therefore grant relief and direct the superior court to review *in camera* the documents at issue and employ the tools identified in *Carlson* as appropriate.

In this case, *in camera* review will surely lead to the determination that many of the records are not appropriately subject to public inspection. For example, it is difficult to conceive of circumstances that would justify the public disclosure of autopsy photographs here. Other privacy concerns, including the ongoing privacy interests of living crime victims, must be weighed against the need for public awareness of the government’s performance of its law enforcement functions.

*Id.* at 175-76, ¶¶22-23.

In each of these “privacy” cases, the court did a balancing test comparing the privacy interest to the public’s interest in disclosure. After a privacy interest was

identified, the party seeking disclosure was required to explain how the public's interest in disclosure outweighed the privacy interest.

- *Mitchell* determined that the public's compelling need for information about criminal offenders outweighed a convicted offender's right to private information in the presentence report. 142 Ariz. at 335.
- *Scottsdale Unified Sch. Dist. v KPNX Broad. Co.* balanced the broadcaster's need for birth dates against the teachers' expectation of privacy and held that the teachers' privacy rights prevailed despite the availability of the birth dates from other sources. 191 Ariz. at 304 ¶23.
- *A. H. Belo Corp. v. Mesa Police Department* held that a family's privacy interest in seeking closure from a traumatic event outweighed a broadcaster's right to receive and broadcast a dramatic audio tape of a 911 phone call. 202 Ariz. 187 ¶12.
- *Phoenix Newspapers, Inc. v. Ellis* held that the public's right to know the contents of a notice of claim outweighed a minor sexual assault victim's right to privacy in all matters except her name and other personal identifying information. 215 Ariz. at 274 ¶26.
- *Schoeneweis v. Hamner* held that the trial court on remand would need to do an *in camera* review to weigh the public's right to details about the death of a

famous person's wife against her family's privacy rights, but that autopsy photos should certainly be withheld (223 Ariz. at 175-76, ¶¶22-23)

The party seeking non-disclosure in the privacy cases was not required to provide the kind of concrete evidence of harm sought by Goldwater in this case. In each case, the court identified the privacy interest and the likelihood of harm based on common sense consideration of the normal effects of releasing the privacy information. In each case, the court only upheld non-disclosure to the extent needed to protect the specific privacy interest and required disclosure of everything else.

The public's need to know the government's business was satisfied in each case—the teachers' names, the 911 call transcript, the child sexual assault victim's notice of claim, and the public figure's death certificate and autopsy. But specific personal details were withheld—teachers' birth dates and home addresses, the child sexual assault victim's name and other personal information, and sensational but privately injurious elements like audio of a baby's torment and autopsy photos.

The balancing of privacy interests against the public's need to know the government's business in the "privacy" cases is the same type of judgment call the courts make in weighing the evidence of harm in the "best interests of the state" cases.

## **II. DISCLOSURE OF PUBLIC RECORDS PERTAINING TO EXECUTIVE SESSION TOPICS SHOULD BE DECIDED BY BALANCING THE PUBLIC'S NEED FOR DISCLOSURE WITH THE POTENTIAL HARM TO THE STATE**

Arizona's policy of open government is reflected in its public records law and open meeting law. Arizona's open meeting law expressly authorizes a public body to hold certain discussions in executive session, out of the hearing of the public. *See* A.R.S. § 38-431.03, listing nine general topics of discussion which are permitted to be held in executive session.

One of the permitted executive session topics is at issue in this case—discussions with the public body's representatives regarding negotiations with employee organizations. A.R.S. § 38-431.03 (A)(5). Other sensitive topics will be affected by the outcome of this case, including public officer appointments, legal advice, contract negotiations, litigation, real property negotiations, and security plans. A.R.S. § 38-431.03 (A)(1), (3), (4), (7), and (9).

Arizona's open meeting law allows these topics to be discussed in executive session without first requiring a determination or finding that the public body will be harmed if the discussion occurs in a public meeting. The law rightly assumes that the public body will be compromised if its discussions with the public body's representatives on these sensitive topics occur in the public's hearing.

Executive session topics do not occur in a vacuum. Before and after discussing a labor negotiation with the city's council in executive session, the city's

representatives inevitably have written communications and documents discussing “the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body” (A.R.S. § 38-431.03 (A)(5)) and other related issues that will be, will have been, or may be discussed in the executive session.

The negotiating disadvantage associated with the nine permissible executive session topics is so obvious to the Arizona legislature that it allows such discussions to be broadly shielded from open meetings, without any prior determination of harm. But the same negotiating disadvantage from openly releasing public records pertaining to these same nine topics is deemed by Goldwater an insufficiently “speculative” harm to justify withholding public records. Petition at p. 8; Goldwater Supp. at p.3.

As discussed in section I of this brief, the reported Arizona public records law cases to date do not require the rigorous proof of harm that Goldwater urges in this case. With respect to labor negotiations and other topics permitted to be discussed in executive session, the level of proof demanded by Goldwater would undermine A.R.S. § 38-431.03 by requiring disclosure of public documents that reveal the precise public body discussion and proposed positions that the public is shielded from hearing.

Municipal governments are fiduciaries of public resources. To negotiate effectively—whether in labor, real estate, procurement, or intergovernmental

contexts—they must be able to withhold drafts and proposals that would compromise their bargaining position if disclosed. Forcing disclosure before negotiations conclude would disadvantage cities and towns, distort outcomes, and ultimately harm the public fisc.

A.R.S. § 38-431.03 implicitly assumes that a public body will be harmed by airing the nine listed executive session topics in open session. Several of the reported Arizona cases (discussed in more detail in section I of this brief) where non-disclosure was upheld involve executive session topics:

- Covered by A.R.S. § 38-431.03 (A)(3) (“[d]iscussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer”)<sup>3</sup>
  - *Arizona Board of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254 (1991) (withholding names and resumes of ASU President prospects)
  - *Bolm v. Custodian of Records*, 193 Ariz. 35 (App. 1998) (withholding personnel evaluations and internal affairs investigation records)

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<sup>3</sup> *London v Broderick*, 206 Ariz 490 (2003), dealing with Arizona Supreme Court Rule 123’s similar “best interests” exception, also fits here. It involved non-disclosure of information concerning a public employee disciplinary investigation.

- *Abraham v. Arizona Board of Regents*, 259 Ariz. 158 (App. 2025) (*review accepted September 9, 2025*) (withholding application materials pertaining to the search for two program heads)
- Covered by A.R.S. § 38-431.03 (A)(9) (“security plans, procedures, assessments, measures or systems relating to ... the security or safety of ... operations....”)
- *Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393 (App. 2011) (withholding city police department activity logs for the mayor’s security detail)
- *KPNX-TV v. Yuma County Superior Court*, 183 Ariz. 589 (App. 1995) (security concerns regarding the Southwest Border Alliance headquarters in Yuma)
- *Hodai v. City of Tucson*, 239 Ariz. 34 (App. 2016) (security concerns about releasing “Stingray” equipment operations)

For topics shielded from public discussion under Arizona’s open meeting law, the League urges the Court to apply a balancing test, requiring the public’s need for disclosure to be balanced against the potential harm resulting from the disclosure, similar to the balancing test undertaken in the “privacy” cases discussed in section I (see pages 19-21 above). This will avoid the kind of “potential material harm” versus

“probable material harm” versus “concrete material harm” debate presented by this case.

### CONCLUSION

The Court of Appeals correctly applied settled Arizona law. Arizona courts have recognized that public access must sometimes yield to confidentiality where privacy, confidentiality or the best interests of the state are at stake. The respectfully urges this Court to affirm the decision below and preserve the careful balance between transparency and effective municipal governance.

RESPECTFULLY SUBMITTED on October 24, 2025.

/s/

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to ARCAP 14(b), the undersigned certifies that this brief is double spaced, uses Times New Roman 14 point proportionally spaced typeface and contains approximately 6,654 words.

/s/ \_\_\_\_\_  
Frank Cassidy

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 24, 2025, the following was done:

1. This brief was filed with the Arizona Supreme Court via the Court's Electronic Filing System.

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