Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2019-000306-001 DT 09/08/2020

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
J. Eaton
Deputy

PHILLIP B

ADITYA DYNAR

v.

GREGORY MCKAY (001)
ARIZONA DEPARTMENT OF CHILD SAFETY (001)
MIKE FAUST (001)

PHILIP R WOOTEN

JUDGE GERLACH
OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Phillip B. appeals the Decision and Order of the Arizona Department of Child Safety, which found that an allegation of child abuse was substantiated and, as a result, ordered the entry of his name in the Department's central registry. (The "Decision" (7/28/19)) The court has considered the opening and reply briefs submitted on Phillip's behalf, the answering brief filed on behalf of the Department, relevant matters of record including transcripts of the evidentiary hearing that was conducted, and the presentations of the parties' attorneys during an oral argument held on July 14, 2020. The court has decided to affirm the Decision.

A. Issues Presented.

Then-Department director Gregory McKay received a recommended decision from an administrative law judge who conducted a two-day evidentiary hearing. That decision concluded that the abuse attributed to Phillip was unsubstantiated. [Admin. Law Judge Decision (7/1/19) at 6] As permitted by A.R.S. §41-1092.08(B), McKay rejected that conclusion. [Decision at 1, 3]

Phillip maintains that the Decision must be reversed because:

(i) It is unsupported by the evidence. [See section B, below]

(ii) The procedure that led to the Decision is unconstitutional because McKay was allowed to disregard what an administrative law judge had concluded and, in effect, become the trier-of-fact without observing any live testimony and despite the department's role as the investigator and prosecutor. [See section C(2), below]

(iii) The evidentiary standard applicable in these cases, *viz*., probable cause, is unconstitutional. [See section C(3), below]

(iv) The standard of review that an appellate court applies when considering appeals from decisions of the Department is unconstitutional. [See section C(4), below]

B. Sufficiency of the Evidence.

When presented with the appeal of an administrative agency decision, this court must begin by determining whether the decision is supported by substantial evidence or is contrary to law, arbitrary, capricious, or an abuse of discretion. A.R.S. §12-910(E); *Berenter v. Gallinger*, 173 Ariz. 75, 77 (App. 1992). A decision supported by substantial evidence is neither arbitrary nor capricious. *Callen v. Rogers*, 216 Ariz. 499, 508, ¶34 (App. 2007) ("A decision supported by substantial evidence may not be set aside as arbitrary and capricious"); *Smith v. Arizona Long Term Care Sys.*, 207 Ariz. 217, 220, ¶14 (App. 2004) (same); *see also Association of Data Processing Serv. Org. v. Board of Gov. of Fed. Res. Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J., joined by Ginsburg, J. ("[I]t is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial")). The arbitrary and capricious standard and the abuse of discretion standard are the same. *Meditrust Fin. Servs. Corp. v. The Sterling Chems., Inc.*, 168 F.3d 211, 214-15 & n.8 (5th Cir. 1999) (numerous citations omitted); *Canseco v. Construction Laborers Pension Trust*, 93 F.3d 600, 605 (9th Cir. 1996) ("We have equated the abuse of discretion standard with 'arbitrary and capricious' review"). And, it seemingly defies credulity to think that a decision can be contrary to law even though it is supported by substantial evidence and is not arbitrary, capricious, or an abuse of discretion. *See generally Arizona Bd. of Regents v. Superior Court*, 106 Ariz. 430, 430 (1970) (suggesting that an administrative action is illegal only if it was arbitrary, capricious, or an abuse of discretion). Accordingly, the question presented is whether the Decision is supported by substantial evidence.

Evidence is substantial if it is sufficient to support a conclusion "even if the record also supports a different conclusion." *JHass Group L.L.C. v. Arizona Dep't of Fin. Inst.*, 238 Ariz. 377, 387, ¶37 (App. 2015) (citation omitted); *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 409, ¶35 (App. 2003) (stating that "[s]ubstantial evidence exists if either of two inconsistent factual conclusions [is] supported by the record"); *DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984) ("If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion"); *see also Gonzales v. City of Phoenix*, 203 Ariz. 152, 153, ¶2 (2002) (explaining that substantial evidence is evidence that "could lead reasonable persons to find the ultimate facts sufficient to support [the decision under review]").

When treating with whether substantial evidence supports the Decision, this court must view the record in any reasonable way that is consistent with what was decided. *E.g., Lewis v. Arizona St. Pers. Bd.*, 240 Ariz. 330, 334, ¶15 (App. 2016) (stating that, on appeal, the evidence must be viewed "in the light most favorable to upholding" the agency's decision, which will be "affirm[ed] if any reasonable interpretation of the record supports the decision"); *Baca v. Arizona Dep't of Econ. Sec.*, 191 Ariz. 43, 46 (App. 1997) (same). When doing so, this court, like all other appellate courts, does not decide what weight to give to any testimony or other evidence, but instead, leaves that for the agency. *Culpepper v. State*, 187 Ariz. 431, 436 (App. 1996) ("In reviewing factual determinations by an administrative agency, this court does not reweigh the evidence or substitute its judgment for that of the agency"); *Blake v. City of Phoenix*, 157 Ariz. 93, 96 (App. 1988) ("We will not substitute our judgment for that of the agency if it was persuaded by the probative force of the evidence before it . . . [even when] we would have reached a different conclusion had we been the original arbiter of the issues" (alterations added)); *see also United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 287 (App. 1983) (stating that "[t]he weight to be given conflicting evidence is for the trier of fact, not a reviewing court").

Thus, "[t]o reverse an agency's decision, the reviewing court must find that there was no substantial evidence to support the agency's decision." *Smith v. Arizona Dep't of Transp.*, 146 Ariz. 430, 432 (App. 1985); *see also Ontiveros v. Arizona Dep't of Trans.*, 151 Ariz. 542, 543 (App. 1986) ("An administrative decision may be set aside only if it is unsupported by competent evidence"). Phillip has not met that standard. Indeed, fairly considered, the discussions of the evidence that appear in the two Phillip briefs amount to nothing more than complaints about the Decision adopting a view of the record that is not to Phillip's liking.

Phillip's opening brief asserts (at 1, 24, 26, 29) that the evidence presented in the proceeding below established only that Phillip placed his hand on the child-victim's shoulder. The record, however, includes statements from two eyewitnesses and the child-victim, each of whom reported that Phillip grabbed the child by his shirt and held him for 2-3 minutes in a way that, at

times, made it difficult for the child to breathe. [Decision at 1, para. 1 (adopting Admin. Law Judge Decision (7/1/19) at 1, para. 5; 2, paras. 8-10); see also discussion at p. 7, below]

Phillip attempts to discredit those eyewitness statements by characterizing them as having been "successfully impeached." [Reply at 7, 14] That is merely another way of saying that Phillip disapproves of the weight that the Decision ascribes to those statements. That disapproval, however, is beside the point. "The purpose of judicial review of an administrative decision is not to decide whether the record supports appellant's version of the facts." *Berenter*, 173 Ariz. at 77; *see also Carondelet Health Servs. v. Arizona Health Care Cost Contain. Sys. Admin.*, 182 Ariz. 502, 504 (App. 1995) ("[I]n appeals taken under the [Arizona] Administrative Review Act, . . . it was not the superior court's function to decide whether [appellant's] version of the facts is supported by the evidence").

The Phillip reply also complains (at 3, 12) that treating those reported statements as credible is inappropriate because they are hearsay evidence. That, however, does not preclude the Decision from relying on them. *E.g.*, *Begay v. Arizona Dep't of Econ. Sec.*, 128 Ariz. 407, 409-10 (App. 1981) (recognizing that an administrative decision may be based solely on inadmissible hearsay). More important, those statements, which appear in Department Exhibit 4, were admitted in evidence without any objection asserted on Phillip's behalf. [Hrg. Tr. (3/26/19) at 24] As such, Phillip has conceded that the Decision was permitted to rely on the eyewitness statements, as they appear in Exhibit 4, for their truth. *Starkins v. Bateman*, 150 Ariz. 537, 544 (App. 1986) ("[I]f hearsay evidence is admitted without objection it becomes competent evidence admissible for all purposes)); *Michele T. v. Department of Public Safety*, No. 2 CA-JV 2016-0048, at *2 n.3, ¶9 (Ariz. Ct. App. Oct. 5, 2016) (same).[1]

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[1] Phillip's opening brief does not object to the eyewitness statements as hearsay. Indeed, the word "hearsay" appears in the opening brief only once (at 18) and not in the context of an evidentiary objection. A reference does appear in the opening brief (at 9) about the preservation of Phillip's right to cross-examine witnesses, but the brief's accompanying transcript citations do not establish a preserved hearsay objection. Instead, the brief cites a section of the hearing transcript when Phillip's attorney discusses witnesses he intends to call and urges that their testimony should be given more weight than any hearsay testimony that the Department may present. The opening brief (at 9) also cites a section of the transcript that, only if liberally construed, could be read to preserve a hearsay objection, but that objection, if it is an objection, applies only to a statement that Phillip's co-employee made to a Department investigator and nothing beyond that. This court has not allowed that co-employee's statement to influence the outcome here.

The only evidentiary objections asserted on Phillip's behalf during the evidentiary hearing that even arguably pertain to the recorded eyewitness statements in Department Exhibit 4 are a "broad objection as to relevance" and a contention that "the state has failed to lay a foundation." [Hearing Tr. (3/26/19) at 5] Neither of those objections, however, preserved the hearsay objection that Phillip now asserts on appeal. *E.g., State v. Long*, 119 Ariz. 327, 328 (1978) ("[R]aising one objection at trial does not preserve another objection on appeal"); *State v. Fischer*, 219 Ariz. 408, 417, ¶32 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground" and concluding that hearsay objection was waived (citation and internal quotation marks omitted)); *see also State v. Guerrero*, 173 Ariz.

Additionally, to overcome the consequence of those eyewitness statements, Phillip, without benefit of any support, would have the court accord trier-of-fact status to the ALJ, who decided to look past them. [Reply at 18] Indeed, Phillip's reply announces that the ALJ, and not the Department director, was the trier-of-fact in this case, as if the mere assertion of a self-interested conclusion makes it an accomplished fact. [*Id.*][2]

The argument that the ALJ must be accorded trier-of-fact status is a policy argument and not a legal argument because the designation of department heads, and not ALJs, as triers-of-fact in cases of this sort is a choice that the legislature made. A.R.S. §41-1092.08(B). This court has neither a duty nor the authority to substitute another set of policy preferences for those of legislative bodies. *In re Pinal Cty. Mental Health No. MH-201000029*, 225 Ariz. 500, 506, ¶20 (App. 2010) ("[T]his court is not free to amend the unambiguous language of our statutes to conform to our own notions of public policy"); *see also Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws").[3]

Matter of Pima County, Juvenile Action, No. 63212-2, 129 Ariz. 371 (1981), on which the Phillip reply relies (at 11), does not assist Phillip's argument regarding McKay's authority to reject an ALJ's fact findings. That case "involved a juvenile proceeding in which the juvenile court referred the initial finding of delinquency to a referee pursuant to a statute then in effect . . . . That statutory scheme is distinct from the [Administrative Procedure Act]. Significantly, the relationship of the juvenile court to the referee was one of appellate review. See H.R. 2227, 33rd Leg., 2d Reg. Sess. § 2 (Ariz. 1978)." *Ritland v. Ariz. State Bd. of Med. Exam'rs*, 213 Ariz. 187, 190, ¶9 (App. 2006). In other words, *Pima County* merely applies the well-recognized principle that, on appellate review, a trier-of-fact's credibility determinations will not be disturbed. Here, the Department director functioned no differently from the Board of Medical Examiners in *Ritland,* which was permitted to reject an ALJ's recommendation because the Board reviewed the record and found factual support for declining to adopt the ALJ's credibility findings. 213 Ariz. at 188, ¶1. Although McKay was "not bound by the ALJ's findings of fact, including those related to

169, 171 (App. 1992) (stating that objection for lack of foundation without more fails for lack of specificity). The hearing transcript (at 6) also includes a statement by Phillip's attorney that he would not "go into" other objections at that time. Neither the Phillip briefs nor the transcript itself establish that, later on, a hearsay objection to the eyewitness statements was asserted on Phillip's behalf before Exhibit 4 was finally admitted in evidence.

[2] The reply brief (at 18) asserts that the ALJ was the trier of fact and McKay was only an "appellate reviewer[]." Unable at the oral argument to identify any statute designating the ALJ as the trier-of-fact, Phillip's attorney urged recognition of the ALJ in that way based only on "tradition."

[3] Phillip also maintains that allowing the director to function as the trier-of-fact is unconstitutional. That argument is the subject of section C(2), below.

credibility" [*Ritland*, 213 Ariz. at 191, ¶12 (numerous citations omitted)] and his review of the record did not require him to observe any witnesses personally [*Adams v. Indus. Comm'n*, 147 Ariz. 418, 421 n.1 (App. 1985); *see also Pine-Strawberry Improvement Ass'n v. Ariz. Corp. Comm'n*, 152 Ariz. 339, 340 (App. 1986)], that McKay undertook the required review of the record here is not a subject capable of fair dispute [see Decision at 3 n.5 (McKay considered the recording of the hearing conducted by the ALJ)].

Record evidence identified by McKay in the Decision that supports a conclusion contrary to what the ALJ decided includes the following:

> (i) A statement by Gabriel (the child-victim) that Phillip pushed on his (Gabriel's) neck, making it difficult to breathe. [Decision at 2 (citing DCS Hrg. Exh. 4 at 5)]
>
> (ii) A statement by an eyewitness (Enrique Moreno) that "it looked like [Phillip] has his hands around Gabriel's neck." [*Id.* at 2 (citing DCS Hrg. Exh. 4 at 6] Although "looked like" could be viewed as equivocal, Enrique's description of what Gabriel was experiencing at the time was unequivocal: "Gabriel could not breathe and his face was red." [*Id.*]
>
> (iii) A statement by a second eyewitness (Zaccheaus Villegas), who said that Phillip "grabbed Gabriel by the neck and put pressure on Gabriel's neck, to the point that he (Zaccheaus) heard Gabriel say that he couldn't breathe." [*Id.* at 2-3 (citing DCS Hrg. Exh. 4 at 7 (parenthetical added)]
>
> (iv) A statement by a third eyewitness and one of Phillip's co-employees (Lam Lul), who said that Phillip grabbed Gabriel by the neck of his shirt, which was "not normal," and maintained that hold with an outstretched arm for approximately three minutes. [*Id.* at 3 (citing DCS Hrg. Exh. 4 at 8)]
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> (v) Statements by a person to whom Phillip reported (R.J. McGill[4]) that, even when safety precautions are required to prevent an unruly child from harming another person or property, they do not include grabbing that child by his t-shirt to the point that it rips, as happened here. [See *id.* at 3; see also Hrg. Tr. (3/26/19) at 56, 59][5]

[4] McGill was Phillip's program coordinatoor. [Hrg. Tr. (6/10/19) at 77]

[5] Further, the record establishes that, at the time of the event, Phillip was 6 feet, 2 inches tall and weighed 300 pounds, while Gabriel was about 5 feet, 2 inches tall and weighed 135-140 pounds. [Hrg. Tr. (6/10/19) at 68, 86-87]

Under no authority is that evidence, all of which Phillip allowed to be admitted without objection,[6] insufficient to support McKay's decision to reject the ALJ's credibility findings.

Phillip's reply also attempts (at 12) to discredit the Decision by maintaining that Phillip was "deprived of the opportunity to confront his accusers and cross-examine the witnesses against him – a right and private interest that must be protected and preserved to comply with the Due Process Clause." Neither that, nor anything resembling that contention appears in Phillip's opening brief, and it is not a rebuttal to any issue introduced in the Department's response brief. Accordingly, Phillip has waived any argument that pertains to the asserted inability to "confront his accusers." *California Cas. Ins. Co. v. State Farm Mut. Auto Ins. Co.,* 185 Ariz. 165, 170, n.1 (App. 1996) (stating that "[a]n argument raised for the first time in a reply brief will not be considered, even if it is legally sound"); *see also Nelson v. Rice*, 198 Ariz. 563, 567 n.3, ¶11 (App. 2000) (argument raised in reply brief "is waived by [appellant's] failure to raise it in its opening brief"). In any event, the reply's reliance (at 3) on *Crawford v. Washington*, 541 U.S. 36 (2004), which is not cited in the opening brief, is misplaced because "[t]he protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions." *Austin v. United States*, 509 U.S. 602, 608 (1993).[7]

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[6] See n. 1, above, and accompanying text.

[7] Leaving aside that a word-check of the opening brief reveals the absence of the word "confrontation," and the brief's single use of the word "confront" does not appear in the context of cross-examination, contrary to what is required by rule, the opening brief includes no argument supported by applicable authority regarding a denial of the ability to cross-examine anyone. See JRAD 7(a)(5) (requiring each argument to be supported "with citations of legal authorities"). Moreover, the opening brief makes no attempt to show with citations to the record (as opposed to the brief's unsupported, self-interested generalizations) how Phillip was prejudiced by the purported inability to cross-examine, and for that reason as well, the argument fails. *E.g., County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 598, ¶12 (App. 2010) (stating that denial of due process is not reversible error when the appellant "fails to demonstrate how it was unreasonably prejudiced by the deprivation"); *see also Fisher v. Arizona State Bd. of Nursing*, No. 1 CA-CV 18-0167, 2019 WL 764028, at *2, ¶9 (Ariz. Ct. App. 2019) ("The party asserting a denial of due process must show prejudice"); *see generally Wilson v. Gray*, 345 F.2d 282, 286 (9th Cir.1965) ("[T]he accused may waive his right to cross examination and confrontation and . . . the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics or strategy").

In any event, the opening brief has directed the court's attention to nothing in the record establishing that the ALJ denied any attempt made on Phillip's behalf to compel the attendance of any witness that Phillip's attorney wished to, but did not, cross-examine. See Ariz. Admin. Code R21-1-310 ("A party who wishes to have a witness testify at a hearing shall first attempt to obtain the witness or evidence by voluntary means," and otherwise "shall request a subpoena"); see also A.R.S. §41-1092.07(C) ("The administrative law judge may issue subpoenas to compel the attendance of witnesses"). That is especially relevant here where more than two months passed between the first and second day of the ALJ hearing, and Phillip's briefs make no attempt to explain why that was an insufficient amount of time to have subpoenas issued. Moreover, at least one of the witnesses about whom the opening brief seemingly complains was present at the hearing and could have been cross-examined. [See Open. Br. at 9 (citing Hrg. Tr.

In short, even allowing Phillip the benefit of the doubt (to which he is not entitled[8]) means only that a reasonable person, given the record here, could reach either of two mutually exclusive conclusions, *viz.*, child abuse has been substantiated and child abuse has not been substantiated. That, in turn, means that substantial evidence supports the Decision. *E.g., Eastern Vanguard*, 206 Ariz. at 409-10, ¶35 (stating that an administrative agency decision will be upheld "if either of two inconsistent factual conclusions [is] supported by the record"). Stated otherwise, because Department Exhibit 4, to which Phillip did not object, is competent evidence supporting a finding of child abuse, a contention that no competent evidence in the record supports the Decision necessarily fails. *See e.g.*, *Ontiveros*, 151 Ariz. at 543 ("An administrative decision may be set aside only if it is unsupported by competent evidence").

C. Constitutional Challenges.

Phillip's opening brief (at 1, 15-16) asks this court to declare five statutes and two administrative rules unconstitutional, both "facially and as applied." The statutes are A.R.S. §§8-804, 8-811, 12-910(E), 41-1092.08(B), and 41-1092.08(F). The rules are Ariz. Admin. Code R21-1-501(13) and Ariz. Admin. Code R21-1-501(17).

One who asserts a facial challenge contends that a statute always operates in an unconstitutional manner. *Simpson v. Miller*, 241 Ariz. 341, 344-45, ¶7 (2017) (stating that the party asserting a facial constitutional challenge "must establish that [the statute] is unconstitutional in all of its applications" (citation and internal quotation marks omitted)); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (stating that "a plaintiff can only succeed in a facial challenge by establishing . . . that the law is unconstitutional in all of its applications (citation and internal quotation marks omitted)). One who asserts an as-applied challenge does not dispute that a law is constitutional as written but contends that its application to a particular person or in a specific set of circumstances is unconstitutional. *Korwin v. Cotton*, 234 Ariz. 549, 559, ¶32 (App. 2014); *see also Dalila P. v. Department of Child Safety*, No. 2 CA-JV 2018-0140, 2019 WL 126866, at *4, ¶16 (Ariz. Ct. App. Jan. 8, 2019) (same).[9]

(3/26/19) at 19 (allowing hearsay evidence without precluding cross-examination of the witness responsible for the statement: not only was that witness present, but the Department conceded that he could be cross-examined))] Fairly understood, therefore, if Phillip experienced any adverse prejudice from the inability to cross-examine witnesses, given the record here, that prejudice was self-inflicted, and neither Phillip brief cites anything in the record that supports a contrary conclusion.

[8] See discussion at p. 3, above, regarding this court's obligation to review the record in any reasonable manner that supports the Decision.

[9] The Phillip briefs contend that the challenged statutes and rules violate the due process clauses of both the United States and Arizona constitutions. Although both briefs assert that the Arizona constitution affords Phillip greater

1. Central Registry – Maintenance, Use, and Notification: A.R.S. §8-804.

Phillip would have this court declare A.R.S. §8-804 unconstitutional. [Open. Br. at 1, 15] Yet, the references to that statute throughout Phillip's opening brief merely repeat or paraphrase what the statute says without any accompanying argument that questions the statute's constitutionality. Therefore, any constitutional challenge to that statute that could have been asserted has been waived. *E.g., Polanco v. Indus. Comm'n,* 214 Ariz. 489, 492 n.2, ¶6 (App. 2007) (stating that, on appeal, argument mentioned only in passing and without elaboration is waived (citations omitted)).

2. The Department Director as Trier-of-Fact: A.R.S. §§41-1092.08(B, F).

a. Facial Challenge.

A.R.S. §§41-1092.08(B, F) permit the Department director to, as here, modify or reject the decision of an ALJ who has conducted an evidentiary hearing. Phillip maintains that the statute is unconstitutional on its face because it allows investigatory, prosecutorial, and adjudicatory functions to be combined in a single department. [Open. Br. at 38]

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protection than the United States constitution, neither of the briefs explains how, aided by relevant citations to the record, it is possible to conclude that the due process clause of the Arizona constitution has been violated in the circumstances here when the due process clause of the United States constitution has not. Indeed, a discussion regarding greater protection afforded by the Arizona constitution consumes six pages, or more than 10 percent, of the opening brief, without one citation to anything in the record, much less any record citation supporting the contention that a violation of the Arizona constitution has occurred that does not rise to the level of a violation of the United States constitution.

Instead, the Phillip briefs forego that discussion and merely urge that "[t]his Court should . . . independently evaluate Arizona's Due Process clause and conclude that it provides [Phillip] greater protection" than the United States constitution. [Reply at 25] Asking the court to, on its own (i.e., "independently") reach a conclusion that Phillip desires seemingly amounts to a request that this court assume the role of Phillip's standby counsel, ignoring that "[i]t is not incumbent upon the court to develop an argument for a party." *Ace Auto. Prods., Inc. v. Van Duyne,* 156 Ariz. 140, 143 (App. 1987). In any event, to the extent the Phillip briefs urge an outcome based solely on the Arizona constitution without regard to the United States constitution, the argument fails because it has not been sufficiently developed. *See e.g.,* JRAD 7(a)(5) (requiring arguments to be supported with references to the record); *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Hatco,* 142 Ariz. 364, 369-70 (App. 1984) (declining to consider argument lacking fact citations to the record); *see also City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 195, ¶88 (App. 2008) (recognizing that when appellant "fails to adequately develop its argument," it is waived); *Sholes v. Fernando*, 228 Ariz. 455, 457 n.1, ¶1 (App. 2011) (stating that issues "not argued sufficiently" are not considered). As a result, a separate analysis regarding the Arizona constitutional standards is not required, and the analysis here applies equally to both the federal and state constitutions.

A facial challenge is the "most difficult challenge to mount successfully" [*United States v. Salerno,* 481 U.S. 739, 745 (1987)], not insignificantly because courts must presume that the challenged statute is constitutional [*Hernandez v. Lynch*, 216 Ariz. 469, 473 (App. 2008) (stating that "we are *instructed* to interpret statutes, if possible, as constitutional" (emphasis added, citations and internal quotation marks omitted)); *see also State v. Ramos*, 133 Ariz. 4, 6 (1982) (stating that "[a]n act of the legislature is presumed constitutional" even when there is a "debatable[] basis for enactment of the statute")]. As such, "unless [a statute's] invalidity is established beyond a reasonable doubt it will be declared constitutional." *Roberts v. Spray*, 71 Ariz. 60, 69 (1950) (citations omitted)); *Lisa K. v. Arizona Dep't of Econ. Sec.*, 230 Ariz. 173, 177, ¶9 (App. 2012) (recognizing that courts "will not declare an act of the legislature unconstitutional unless convinced beyond a reasonable doubt that it conflicts with the federal or state constitutions" (citation and internal quotation marks omitted)); *Tucson Elec. Power Co. v. Apache County*, 185 Ariz. 5, 11 (App. 1995) (stating that a statute is presumed constitutional absent "proof beyond a reasonable doubt").[10]

Phillip has the burden to prove facial invalidity. *Eastin v. Broomfield*, 116 Ariz. 576, 580 (1977); *Tucson Elec. Power*, 185 Ariz. at 11. That requires showing that "*no circumstances exist* under which the challenged statute would be found valid." *Lisa K.*, 230 Ariz. at 177, ¶8 (applying standard recognized in *Salerno*, 481 U.S. at 745 (emphasis added)); *accord State v. Wein*, 244 Ariz. 22, 32, ¶34 (2018); *see also Washington State Grange*, 552 U.S. at 449 (stating that "a plaintiff can only succeed in a facial challenge by establishing that *no set of circumstances exists* under which the Act would be valid (emphasis added, citation and internal quotation marks omitted)); *Phelps Dodge*, 207 Ariz. at 106, ¶29 (recognizing that an administrative regulation is facially unconstitutional only if "no circumstances exist under which the regulation would be valid").

Both Phillip briefs overlook that, when treating with a facial validity challenge, a court must consider two factors: the substantive rule of law and the breadth of the remedy that is required. *E.g., Bucklew v. Precythe*, 139 S.Ct. 1112, 1127 (2019). The Phillip briefs address the former by asserting due process and separation of powers claims. Neither brief, however, addresses the latter, i.e., the "no circumstances" test is the subject of no discussion in either of the Phillip briefs. Accordingly, Phillip's facial validity argument regarding a Department director's authority to reject an ALJ's recommended decision has been waived. *Polanco*, 214 Ariz. at 492 n.2, ¶6 (stating that argument not fully developed in appellant's brief is waived); *see also Clear*

[10] The same principles apply to administrative rules. *Phelps Dodge Corp. v. Arizona Elec. Power Co-op, Inc.*, 207 Ariz. 95, 106, ¶ 29 (App. 2004) (recognizing that "[w]e must construe the challenged [administrative] Rule to be constitutional if possible"); *see generally Smith v. Arizona Citizens Clean Elec. Comm'n*, 212 Ariz. 407, 412, ¶18 (2006) (rules of interpretation for administrative rules and regulations are the same as the rules for interpreting statutes).

Channel, 218 Ariz. at 195, ¶88 (same).[11]

Both Phillip briefs and statements by his attorney during the oral argument seem to assume, at least implicitly, that the no circumstances test warrants no consideration here because Phillip's claims are based on due process and separation of powers considerations. First, nothing Phillip has submitted includes legal authority supporting that contention, and as such, that argument may be disregarded. *In re $26,980.00 U.S. Currency*, 199 Ariz. 291, 299, ¶ 28 (App. 2000) (arguments "offered without elaboration or citation to any . . . legal authority" are not considered on appeal); *Ness v. Western Sec. Life Ins. Co.*, 174 Ariz. 497, 503 (App. 1992) (stating that "[a]rguments unsupported by any authority will not be considered on appeal"). Second, not only is the contention unsupported, it is also unsupportable. The no circumstances test does apply to constitutional challenges based on due process and separation of powers claims. *E.g., Salerno*, 481 U.S. at 745 (due process claim); *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 670 (D.C. Cir. 2008) (separation of powers claim), *aff'd in part and rev'd in part on other grounds*, 561 U.S. 477 (2010); *United States v. Tafoya*, 541 F.Supp.2d 1181, 1183 (D. N.Mex. 2008) (separation of powers claim); *Lisa K.*, 230 Ariz. at 175, ¶1 (due process claim).

Although there has been some discussion in federal court cases about whether the no circumstances test applies to all facial validity challenges, this court's research has uncovered no Arizona court decision recognizing an exception in any case, much less any Arizona case suggesting that the test has no applicability in child-abuse or similar matters. Moreover, if federal courts have recognized exceptions, they have done so only in first amendment cases and abortion cases in which an undue burden has been asserted. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992); S*alerno*, 481 U.S. at 745. But see *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012–13 (1992) (Scalia, J., dissenting from denial of certiorari (stating that only first amendment cases warrant recognition of an exception to the no circumstances test)).

Phillip's failure to treat with the no circumstances test, however, is, at least in one sense, beside the point. That is because that test cannot be met here. Phillip has conceded that, when a Department director adopts an ALJ's fact-finding conclusions, sections §§41-1092.08(B, F) operate in a constitutionally permissible way. [Reply at 21] This is the fifth case that this court

[11] It is not as if a constitutional challenge is accorded some sort of special status, such that a less than completely developed argument is given the benefit of the doubt. Even when the constitutionality of a statute is facially challenged, the argument is waived when, as here, it is not fully developed. *See State v. Valenzuela*, 237 Ariz. 307, 316, ¶34 (App. 2015), *vacated on other grounds*, 239 Ariz. 299 (2016); *see also Commodity Futures Trading Comm'n v. Tokheim*, 153 F.3d 474, 476 n.3 (7th Cir. 1998) ("[P]erfunctory and undeveloped arguments are waived even where those arguments raise constitutional issues" (citation, internal quotation marks, ellipsis, and parentheses omitted)); *Utah Environ. Congress v. MacWhorter*, No. 2:08-CV-118-SA, 2011 WL 4901317, at *16 (D. Utah Oct. 4, 2011) (concluding that "inadequately briefed" facial challenge was waived).

has treated in the last 13 months in which an appellant has challenged the Department's decision that a claim of child abuse was substantiated. In three of those cases, the Department director accepted the ALJ decision, and in the fourth, the director modified the ALJ decision without changing the result. Given the outcomes of those other four cases, there can be no reasonable dispute that sections §§41-1092.08(B, F) are capable of satisfying even Phillip's standard of constitutionality.[12]

In short, neither of the Phillip briefs show beyond a reasonable doubt that A.R.S. §§41-1092.08(B, F) *always* operate in an unconstitutional manner. Thus, even if not waived, the contention that those provisions are facially unconstitutional fails.

b. As-Applied Challenge.

Phillip's opening brief asserts that the Decision is inconsistent with principles of due process because it purportedly denies Phillip a protected liberty interest based on (i) a stigmatization that produces a loss of reputation [Open. Br. at 23, 27, 28-29] and (ii) the accompanying loss of employment opportunities in his "chosen profession" [*id*. at 24].

Even though access to the central registry is available only to limited parties [A.R.S. §8-804(B)], those parties may include prospective employers, and thus, a person whose name has been placed there experiences a reputational harm. *See Carroll v. Robinson*, 178 Ariz. 453, 460 (App. 1994) (concluding that "publication to a person's present or future employer constitutes public disclosure"). But because an injury to one's reputation, alone, is not sufficient to state a due process claim, an actionable deprivation of a liberty interest will be recognized only when reputational harm is accompanied by a "concrete alteration of 'status.'" *Montoya v. Law Enforcement Merit System Council*, 148 Ariz. 108, 109 (App. 1985); *see also Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that effect on one's reputation, without more, is not a constitutionally protected liberty or property interest).

An accompanying loss of employment is sufficient to warrant recognition of an affected liberty interest. *E.g.*, *Carroll*, 178 Ariz. at 460 ("A dismissal from employment implicates an individual's Fourteenth Amendment liberty interest if the discharge stigmatizes the individual with charges of moral turpitude," including molestation); *Montoya*, 148 Ariz. at 109-10 & n.4 (accusation of dishonesty and forced resignation implicates a liberty interest). Here, evidence establishes that Phillip was "removed" from employment at New Horizons, a group home for boys,

[12] This court may take judicial notice of its own files. *In re Sabino R.*, 198 Ariz. 424, 425, ¶4 (App. 2000). The other four cases are: *Antwon B v. Hanchett*, case no. LC 2018-000491; *Goodman v. Arizona Dep't of Child Safety*, case no. LC 2019-000210; *Nelson v. Arizona Dep't of Child Safety*, case no. LC 2019-000270; and *Dorsey v. McKay*, case no. LC 2019-000253.

in September, 2018, and ten months later, he had not been allowed to return. [Hrg. Tr. (6/10/19) at 89] Nothing in the Department's response brief suggests that is evidence of anything other than the loss of employment.[13]

Consistent with due process requirements, therefore, Phillip was entitled to a hearing and an opportunity to clear his name. *Gaveck v. Arizona St. Bd. of Podiatry Exam.*, 222 Ariz. 433, 437, ¶14 (App. 2009) (recognizing that due process generally requires "notice and an opportunity to be heard in a meaningful manner and at a meaningful time" (citation omitted)). Phillip does not dispute that he was allowed a hearing in which he was represented by an attorney.

The opening brief (e.g., at 26, 37-38) contends that, nevertheless, Phillip was denied due process because neither McKay nor the administrative process itself was neutral. Without the benefit of anything resembling factual support for those contentions, the Phillip briefs rely instead on self-interested characterizations to support the claimed lack of neutrality. For example, Phillip's briefs, at least implicitly, accuse McKay of abandoning his statutory duty by "sid[ing] with his own agency's theory of the case" without concern for its merits and then go on to attack the administrative process as "stacked." [Open. Br. at 12, 38; see also *id.* at 26 (claiming that the director was not neutral), Reply at 1 (referring to a "statutory scheme" that "stack[s] the deck")]

Both Phillip briefs ignore that their attempt to discredit the outcome here as the result of a decision-maker and process that were not neutral succeeds "*only* upon a showing of actual bias." *Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, 152 (App. 1999) (rejecting due process claim: "institutional bias" (defined as "strong institutional reasons to rule in favor of the board or organization") requires proof of "actual bias" (emphasis added)); *Berenter*, 173 Ariz. at 82 (same: rejecting due process claim); *see also Simon v. Maricopa Med. Center*, 255 Ariz. 55, 63, ¶29 (App. 2010) (stating that bias must be proven by a preponderance of the evidence); *Havasu Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.,* 167 Ariz. 383, 387 (App. 1990 (stating that a claim of bias requires showing "that the mind of the decision maker [was] 'irrevocably closed' on the particular issues being decided"). Without evidence establishing a lack of neutrality, the

[13] The opening brief also states (at 4) that Phillip was placed on administrative leave by the Peoria Unified School District. The statement is unaccompanied by a citation to the record, and thus, warrants no consideration. *State v. One Single Family Residence at 1810 East Second Ave., Flagstaff, Ariz.*, 193 Ariz. 1, 2 n.2 (App. 1997) (declining to consider facts stated in appellant's brief that were not supported by citations to the record); *Matter of Estate of Killen*, 188 Ariz. 562, 563 n.1 (App. 1996) (disregarding appellant's statement of facts because it was not "supported by appropriate references to the record"). The record also suggests that Phillip's employment at New Horizons was infrequent. [Hrg. Tr. (6/10/19) at 89 (Phillip's testimony that, between July and September, 2018, he "could have worked there two or three times")] Nevertheless, the court is unaware of any reason that loss of what appears to be part-time employment should alter the analysis here. *See Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994) (recognizing that damage to reputation stemming from placement on a register of child abusers "places a tangible burden on . . . employment prospects," which is sufficient to implicate a liberty interest).

absence of bias is presumed. *E.g., Emmett McLoughlin Realty , Inc. v. Pima County*, 212 Ariz. 351, 357, ¶24 (App. 2006) ("All decision makers, judges and administrative tribunals alike, are entitled to a presumption of honesty and integrity" (citation and internal quotation marks omitted)); *Berenter*, 173 Ariz. at 82 ("Administrative officers are presumed to be fair"); *Pavlik*, 195 Ariz. at 152 (same); *cf. Cropper*, 205 Ariz. 181, 185, ¶22 (2003) (recognizing that "[a] party challenging a trial judge's impartiality must overcome a strong presumption that trial judges are free of bias and prejudice" (citation and internal quotation marks omitted)).

Like the claimant in *Berenter*, whose due process claim was rejected, Phillip has failed to "identify any evidence in the record to support a claim of actual bias." 173 Ariz. at 83. For example, evidence of the frequency that McKay rejected ALJ recommended decisions that were contrary to what the Department's investigators concluded may have (emphasis "may") supported an inference of personal bias. Or, evidence over a period of time sufficient to yield a reliable sample size showing the frequency with which Department directors, present and past, have favored the conclusions of Department investigators over ALJ recommendations to the contrary may have suggested institutional bias.

In effect, Phillip's contention is that one should assume, without case law or factual support, that a process that places investigation, prosecution, and decision-making responsibilities in the same agency is unconstitutional. That notion flies in the face of well-settled law that "the combining of investigatory and adjudicatory functions [in a single agency] does not violate due process" unless actual bias is shown. *Berenter*, 173 Ariz. at 82. And, what the Phillip briefs attempt to pass off as bias is merely self-interested "speculation, suspicion, apprehension, or imagination," which is not enough. *Cropper*, 205 Ariz. at 185, ¶22; *see also Emmett McLoughlin*, 212 Ariz. at 357, ¶25 ("[M]ere speculation about bias is not sufficient"); *Pavlik*, 195 Ariz. at 152 ("[M]ere speculation regarding bias will not suffice").[14]

Without factual support for the claimed lack of neutrality, the opening brief (at 41) retreats to an attack on the director's authority as an unconstitutional concentration of power. To get there,

[14] Phillip's opening brief suggests that the Department director cannot be trusted to function as a neutral arbiter because he is "a political gubernatorial-appointee executive-branch official" while the ALJ is said to be "insulated" from the purportedly untoward forces that infect the director's decision-making abilities. [See Open. Br. at 38; see also *id.*at 20 n.4] Phillip's briefing misapprehends that the ALJ is an at-will employee serving at the pleasure of the head of the Office of Administrative Hearings. A.R.S. §§41-741(2, 8, 21), 41-1092.01(H); *see also Hall v. Elected Officials' Retirement Plan*, 241 Ariz. 33, 49 (2016) (Bolick, J., dissenting in part and concurring in part) (recognizing that "[m]ost Arizona state employees are at-will employees"). And the head of OAH, in turn, like the Department director, is "a political gubernatorial-appointee executive-branch official" who serves at the pleasure of the governor. A.R.S. §§38-211(D), 38-295(A), 41-1092.01(B). Thus, the distinction between a Department director who serves at the pleasure of the governor and an ALJ who serves at the pleasure of one who serves at the governor's pleasure is a distinction without a difference.

the brief relies on *Horne v. Polk*, 242 Ariz. 226 (2017). That reliance, however, is misplaced. Indeed, there is no meaningful difference between what Phillip urges here and the failed argument asserted in *Horne*, where the court stated that "[a] single agency may investigate, prosecute, and adjudicate cases, and an agency head may generally supervise agency staff who are involved in those functions." 242 Ariz. at 230, ¶14. The process becomes problematic *only* when the "agency head makes an initial determination of a legal violation [and] participates *materially* in prosecuting the case" before making the final decision. *Id.* (emphasis added); *see also Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 372 (App. 1987) ("[I]t is well settled that a combination of investigatory and judicial functions within an agency does not violate due process").

Under *Horne*, therefore, the success of Phillip's argument regarding the purportedly unconstitutional concentration of power in the Department director turns on two facts, *viz.*, the extent to which the director reviewed the record and the extent to which he participated in the investigation and prosecution of the case. Neither Phillip's opening brief nor reply cites anything suggesting that the director here failed to review the record before issuing the Decision, and it is difficult to imagine how such an argument could be made with a straight face given the manner in which the Decision is written. [See especially Decision at 3 n.5] Moreover, Phillip's opening brief concedes (at 40) that McKay participated in neither the initial investigation nor the prosecution of the case.

In sum, Phillip's as-applied challenge to A.R.S. §§41-1092.08(B, F) fails because no evidence in the record supports a finding of actual bias and because no evidence in the record establishes that the Department director either failed to review the record or participated in the investigation and prosecution of this case.[15]

3. Probable Cause: A.R.S. §§8-811(E, K), Ariz. Admin. Code R21-501 (13, 17).

The Department maintains a central registry that lists the names of individuals for whom an allegation of child abuse or neglect has been "substantiated." A.R.S. §8-804(A). A report of child abuse or neglect warrants placement in the central registry when "probable cause exists to sustain the department's finding that" the abuse occurred. A.R.S. §§8-811(E, K); see also Ariz.

[15] It warrants noting, even though the outcome here is unaffected, that according trier-of-fact status to the ALJ, as Phillip urges, creates its own problem. The ALJ's decision appears to draw an adverse inference from the failure of the Department to present eyewitness testimony. [ALJ Decision (7/1/19) at 5, para. 5] Apart from the two eyewitnesses, including Phillip, who testified on his behalf, the only other eyewitnesses to the event were children. The legislature has decided that a child who is a victim of abuse, and children who witness abuse, are not required to testify at a hearing. A.R.S. §8-811(J)(1). At a minimum, as written, the ALJ's decision to assign more weight to what Phillip and a co-worker (Lul) had to say because they were eyewitnesses who provided in-person testimony [see ALJ Decision at 5, para. 5] comes perilously close to saying that, in this case, the legislature's policy regarding child eyewitnesses at least should be discounted.

Admin. Code R21-1-501(13, 17). The finding of abuse or neglect can be used to evaluate a person's qualifications for certification, licensure, or employment with the State of Arizona or its contracting agencies for positions involving the direct provision of services to children. A.R.S. §8-804(B). Phillip insists that the probable cause standard, and thus, sections 8-811(E, K) and administrative code sections R21-1-501(13, 17) are unconstitutional, both facially and as-applied.

Even if one were to assume that a probable cause standard is inconsistent with due process, however, that does not assist Phillip. Probable cause, which "means *some* credible evidence" [Ariz. Admin. Code R21-501(13) (emphasis added)] is merely the minimum standard that must be met. Here, a preponderance of the evidence standard was applied.[16]

To be sure, the Decision states that probable cause is the applicable standard. But, effectively ignoring that statement, the Decision then goes on to adopt a definition (at 2) that recognizes preponderance of the evidence as the standard that governs the outcome in this case. Thus, the Decision (at 2) states that the evidentiary standard applied here is "more evidence for, (rather) than against" the fact of abuse. That is substantively no different from what Arizona judges routinely tell juries when explaining that preponderance of the evidence means evidence that "outweighs the opposing evidence." RAJI (Civil) Std. Instr. 2 (5th ed. 2013).[17]

One who, like Phillip, asserts a denial of due process must show resulting prejudice, without which the claim fails. *E.g., County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 598, ¶12 (App. 2010) (stating that denial of due process is not reversible error when the appellant "fails to demonstrate how it was unreasonably prejudiced by the deprivation"); *see also Fisher v. Arizona State Bd. of Nursing*, No. 1 CA-CV 18-0167, 2019 WL 764028, at *2, ¶9 (Ariz. Ct. App. 2019) ("The party asserting a denial of due process must show prejudice"). The Decision's finding that the abuse attributed to Phillip was proven by a preponderance of the evidence means that Phillip was not adversely affected by an unconstitutional probable cause standard of proof.

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[16] Probable cause is an evidentiary standard that is less than a preponderance of the evidence standard. *E.g.*, *State v. Martin*, No. 1 CA-CR-16-0064, 2016 WL 6699305, at *2, ¶9 (Ariz. Ct. App. Apr. 18, 2017) (suggesting that probable cause is a lower standard than preponderance of the evidence); *State v. Galaviz*, No. 1 CA-CR 14-0310, 2015 WL 4739979, at *2, ¶10 (Ariz. Ct. App. Aug. 11, 2015) (same); *see also Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (same); *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975) (same). *But see Matter of Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 284 (1983) (stating that "probable cause requires a reasonably prudent person to find more probably than not the existence of the contested fact"). Phillip's opening brief (at 21) and reply (at 17) agree that probable cause is a lower evidentiary standard than preponderance of the evidence.

[17] The Decision (at 1) also concluded that "[t]he record *clearly* supports a finding that [Phillip] abused" a child. (Emphasis added) By any reasonable measure, a fact that is "clearly" proven is a fact that far exceeds a probable cause (i.e., "some credible evidence" standard. In addition, the Decision found (at 2) that Phillip "grabbed the child by the neck and restricted his breathing." That finding is stated unconditionally and unqualifiedly, and as such, it, too, exceeds a finding of mere probable cause.

To overcome that, Phillip's opening brief insists (at 27, 35) that anything short of a clear and convincing statutory standard of proof fails to pass constitutional muster. In support of that contention, Phillip relies on a misreading of *Santosky v. Kramer*, 455 U.S. 745 (1982).

When analyzing what an appropriate standard of proof should be, *Santosky* applied a three-factor test identified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Applied here, that test requires consideration of the following:

> (i) Phillip's interest in future employment, free from the stigmatization resulting from his name appearing in the central registry.
>
> (ii) The State's interest in protecting children from abuse. See e.g., *Arizona Dep't of Econ. Sec. v. Leonardo*, 200 Ariz. 74, 84, ¶29 (App. 2001) (recognizing "the state's interest in protecting children from abuse and neglect"); see also *Ruben M. v. Arizona Dep't of Econ. Sec.*, 230 Ariz. 236, 239, ¶12 (App. 2012) (stating that "the state has a compelling interest in protecting child welfare").
>
> (iii) The risk of an erroneous outcome and its consequences.

Although *Santosky* adopted a clear and convincing standard of proof, contrary to what Phillip's opening brief maintains (at 27), *Santosky* did not "mandate" a clear and convincing standard of proof for all cases. Instead, after balancing the interests of all affected parties, *Santosky* concluded that a clear and convincing standard was appropriate because a permanent termination of parental rights was at stake, and in those circumstances, the risk of an erroneous outcome should be borne moreso by the government than by the parent. 455 U.S. at 768-69.

To accept Phillip's argument is to assume that Phillip should be accorded the same status as a parent in a parental rights termination proceeding. Yet, neither Phillip brief attempts to make that showing. Moreover, both briefs overlook that, in cases similar, if not identical, to this case, courts treating with stigmatizing state actions have concluded that, because the competing interests at stake are fairly evenly balanced, a preponderance of the evidence standard is constitutional. Thus, in *Valmonte v. Bane*, a case that, as here, involved a central register that identifies individuals accused of child abuse, the court concluded that a preponderance standard was appropriate because it evenly balances the risk of an erroneous decision between the accused-adult and the child-victim. 18 F.3d 992, 1004 (2d Cir. 1994). Courts in other cases with individuals whose interests in continued and future employment were at least as compelling as Phillip's have reached the same conclusion. *E.g.*, *Matter of Polk*, 90 N.J. 550, 569 (1982) (physician disciplinary proceeding finding sexual abuse of juvenile female patients); *Gandhi v. State of Wisconsin Med. Bd.*, 168 Wis.2d 299, 307 (App. 1992) (physician disciplinary proceeding involving inappropriate touching).

Further to the question of whether Phillip should be accorded the same status as a parent, it should be remembered that the right to parent is recognized as a fundamental right. *E.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Graville v. Dodge*, 195 Ariz. 119, 123, ¶19 (App. 1999); *see also Meier v. German*, No. 1 CA-CV 18-0499 FC, 2019 WL 2538018, at *2, ¶¶6-7 (Ariz. Ct. App. June 20, 2019). Unlike the right to parent, a right to employment in one's "chosen profession," which Phillip asserts here [Open. Br. at 24], is not a fundamental right. *Dittman v. California*, 191 F.3d 1020, 1031 n.5 (9th Cir. 1999) (recognizing that "[t]he [Supreme] Court has never held that the 'right' to pursue a profession is a fundamental right"); *see also Sagana v. Tenorio*, 384 F.3d 731, 743 (9th Cir. 2004) (same); *Edelstein v. Wilentz*, 812 F.2d 128, 132 (3d Cir. 1987) ("The Constitution does not create fundamental interests in particular types of employment"); *see generally Massachusetts Bd. of Retire. v. Murgia*, 427 U.S. 307, 313 (1976) ("This Court's decisions give no support to the proposition that a right of governmental employment [p]er se is fundamental").[18]

Further, adoption of the clear and convincing standard, as Phillip urges, would require abused children to assume the risk of an erroneous decision and the consequences from it. *See Kent K. v. Bobby M.*, 210 Ariz. 279, 287, ¶37 (2005) (McGregor, J.) (recognizing that requiring proof by clear and convincing evidence in a child's best interests inquiry "places the risk of an erroneous conclusion . . . squarely upon the child"). No authority cited in Phillip's briefs, nor any that this court's independent research has located, suggests that is a reasonable, much less a constitutionally-required, outcome in the circumstances here.[19]

Accordingly, because Phillip was denied no liberty or property interest attributable to an unconstitutional burden of proof, it is not necessary to decide whether a probable cause standard is constitutional. *Planned Parenthood Arizona, Inc. v. American Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 270 (App. 2011) (recognizing "fundamental rule" that, "unless absolutely necessary to decide the case," constitutional questions should be avoided (citation and internal quotation marks omitted)); *see also Jean v. Nelson*, 472 U.S. 846, 857 (1985) (recognizing that federal courts are "obligat[ed]" to "avoid constitutional adjudications except where necessary").

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[18] Without discussion, Phillip's opening brief (at 27) also cites *Addington v. Texas*, 441 U.S. 418 (1979), where a clear and convincing standard was applied in a case involving an involuntary civil commitment. Here again, neither Phillip brief attempts to explain, and no sound reason is apparent, why Phillip's asserted right to pursue his profession should be treated on the same level as an "individual's interest in not being involuntarily confined indefinitely" [*id.* at 426].

[19] The holding in *Kent K.* is not contrary to the holding in *Santosky*. *Kent K.* rejected a clear and convincing standard as applicable when deciding whether severance of parental rights was in a child's best interests *after* the court had found "statutory grounds for termination of parental rights by clear and convincing evidence." 210 Ariz. at 287-88, ¶¶38-40.

4. Standard of Review: A.R.S. §12-910(E).

Decisions of Arizona administrative agencies, like decisions of federal agencies, are subject to what can be called deferential substantial evidence review. Phillip maintains that standard is unconstitutional. [Open. Br. at 1, 15-16, 43]

The standard consists of two parts:

(i) The substantial evidence test, which is described above [see section B]; and

(ii) Deference that appellate courts give to agency fact-finding when applying the substantial evidence test.

The former is the result of action taken by the legislature. A.R.S. §12-910(E). The latter "has been fully developed by Arizona case law." *Webster v. State Bd. of Regents*, 123 Ariz. 363, 365 (App. 1979).

a. Substantial evidence.

Although Phillip's opening brief (at 1, 15) asserts that section 12-910(E) is facially unconstitutional, here again, the brief ignores the no circumstances test. Thus, a facial validity challenge to the statute has been waived. [See section C(2)(a), above]

The contention [Open. Br. at 39] that the statute is unconstitutional as applied here disregards the many Arizona appellate court decisions that have recognized that standard as appropriate when treating with appeals from administrative agency decisions. *E.g., Ritland*, 213 Ariz. at 191, ¶15; *Shaffer v. Arizona St. Liquor Bd.*, 197 Ariz. 405, 409, ¶17 (App. 2000); *Avila v. Arizona Dep't of Econ. Sec.*, 160 Ariz. 246, 248 (App. 1989); *Smith v. Arizona Dep't of Transp.*, 146 Ariz. at 432; *DeGroot*, 141 Ariz. at 336; *Webster*, 123 Ariz. at 365-66. Those cases, moreover, mirror federal cases, where initial recognition of substantial evidence review applicable to agency decisions reaches back more than 100 years. *I.C.C. v. Union Pac. R.R. Co.*, 222 U.S. 541, 548 (1912) (stating (five weeks before Arizona became a state) that courts determine only "whether there was substantial evidence to sustain the order").[20]

[20] Today, the federal Administrative Procedures Act codifies substantial evidence review at 5 U.S.C. §706(2)(E) (stating that courts may reverse agency fact-findings only if they are "unsupported by substantial evidence"). See also e.g., *United States v. Eurodif S.A.*, 555 U.S. 305, 316 n.6 (2009) ("The specific factual findings on which an agency relies in applying its interpretation are conclusive unless unsupported by substantial evidence"); *Noriega-Perez v. United States*, 179 F.3d 1166, 1176 (9th Cir. 1999) (9th Cir. 1999) ("Pursuant to the APA, factual findings may only be overturned on appeal if they are 'unsupported by substantial evidence'" (citations omitted)). "Substantial evidence"

Thus, the Phillip briefs seemingly embrace the idea that, for decades upon decades, every court that has undertaken substantial evidence review failed to apprehend that the standard being applied was unconstitutional. To put it another way, and remembering that the federal and Arizona standards are substantively the same, in effect, the Phillip briefs assume that they have unearthed a principle, *viz.* the unconstitutionality of the substantial evidence standard, that has escaped numerous judges, including the likes of Hugo Black, Louis Brandeis, William Brennan, William O. Douglas, Jerome Frank, Felix Frankfurter, Henry Friendly, Learned Hand, Sandra Day O'Connor, and Earl Warren.[21] Fairly considered, what the Phillip briefs are urging is nothing more than that the outcome here should be dictated by an appellant's unsupported, self-interested announcement of what the governing standard ought to be.

b. Deference to agency fact-finding.

Phillip contends that both a denial of due process and a violation of the separation of powers doctrine will result unless this court undertakes "de novo review of all factual issues." [Open. Br. at 43] This court, however, like all appellate courts that review agency decisions, does conduct a de novo review. *E.g., Johnson v. Mofford*, 193 Ariz. 540, 544, ¶¶18-19 (App. 1998) (recognizing that substantial evidence review is de novo); *Gaveck*, 222 Ariz. at 436, ¶12 ("Whether substantial evidence exists is a question of law for [an appellate court's] independent determination"); *Golob v. Arizona Med. Bd. of State*, 217 Ariz. 505, 509 (App. 2008) ("[W]e independently study the record to assess whether substantial evidence supports the agency's decision"); see also section B, above.

Thus, Phillip's argument is not so much an attack on the failure to engage in de novo review on appeal, but instead, on the manner in which this, and all other appellate courts, undertake that review. Phillip would have appellate courts conduct their own, independent evaluation of the evidence presented to the agency. [Open. Br. at 43] In doing so, Phillip effectively insists that this court must disregard a long line of Arizona cases recognizing that appellate courts are not permitted to evaluate record evidence and then make their own factual determinations. See e.g.,

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has been defined in federal cases as evidence sufficient to withstand a directed verdict motion. *N.L.R.B. v. Columbian Enamel. & Stamp. Co.*, 306 U.S. 292, 300 (1939).

[21] See *Bennett v. New Jersey*, 470 U.S. 632 (1985); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *Voris v. Eikel*, 346 U.S. 328 (1953); *Radio Corp. of Am. v. United States*, 341 U.S. 412 (1951); *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951); *N.L.R.B. v. Fansteel Metal. Corp.*, 306 U.S. 240 (1939); *Western Paper Makers' Chem. Co. v. United States*, 271 U.S. 268 (1926); *N.L.R.B. v. Local 815, Internat'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers of Am., Independent*, 290 F.2d 99 (2d Cir. 1961); *Wende v. McManigal*, 135 F.2d 151 (2d Cir. 1943); *Rockmore v. American Hatters & Furriers, Inc.*, 15 F.2d 272 (2d Cir. 1926).

Blake, 157 Ariz. at 96 (reversing superior court's decision on appeal: "We will not substitute our judgment for that of the agency if it was persuaded by the probative force of the evidence before it"); *Smith v. Arizona Dep't of Transp.*, 146 Ariz. at 432 (reversing superior court's decision on appeal: "When an administrative decision is appealed to the superior court, the court may not substitute its own judgment for that of the administrative agency"); see also *Gaveck*, 222 Ariz. at 436, ¶11 (recognizing that an appellate court "*must* defer to the agency's factual findings" (emphasis added)).[22]

The due process and separation of powers issues that Phillip raises are not, as the opening brief maintains (at 1), issues of first impression. Instead, they are issues that have been around for more than 85 years, beginning with *Crowell v. Benson*, 285 U.S. 22 (1932). In that case, Benson attempted to enjoin a work-related injury award made to an employee by an administrative agency under authority granted by the Longshoremen's and Harbor Workers' Compensation Act. Much like Phillip here, Benson argued that the system for adjudicating the claim violated procedural due process and Article III of the United States constitution, which delegates judicial power only to courts.

The Supreme Court held that due process concerns did not require de novo review of agency fact-finding other than facts of constitutional significance. *Id.* at 46. A fact of constitutional significance is, for example, a failure to provide notice, a denial of an opportunity to be heard, or factual findings made without evidentiary support. *Id.* at 47-48. The merits of a claim, however – *viz.*, the nature, extent, and consequences of the employee's injuries in *Crowell* or whether Phillip physically abused a child in this case – are not facts of constitutional significance. Thus, in terms equally applicable here, the court in *Crowell* held that requiring de novo review of facts supporting a claim "would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." *Id.* at 46.

Turning to whether an administrative agency could exercise adjudicatory authority, the Court divided administrative proceedings into two classes: public rights claims and private rights claims. Public rights claims are, as here, claims that "arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Id.* at 50. The Court concluded that deciding such claims was not exclusively a matter for the judiciary. Instead, the Court held that "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Id.*; *see also Shoaee v. I.N.S.*, 704 F.2d 1079, 1083 (9th Cir. 1983) ("[I]t is

[22] During the oral argument, Phillip's attorney maintained that independent de novo review would not be required if this court elected to treat the ALJ as the trier-of-fact. As noted above (see n. 2), the purported basis for treating the ALJ as such is based, not on any applicable legal authority, but only on Phillip's view of what is "tradition[al]."

settled law that Congress can delegate 'quasi-judicial' powers such as fact finding to administrative agencies, subject to judicial review, without violating the constitutional mandate of separation of powers" (citing *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 450 (1977)). In other words, Congress is permitted to assign responsibility for the resolution of disputes between the government and a private party to either an article III court or a non-article III administrative agency. By the same reasoning, the Arizona legislature does not violate the separation of powers doctrine by assigning decision-making authority regarding placement of names on the state's central registry to an administrative agency. *See e.g.*, *Batty v. Arizona St. Dental Bd.*, 57 Ariz. 239, 250-51 (1941) (recognizing that Arizona constitution provision vesting judicial power (article 6, section 1) was not violated when the legislature chose to "confer upon the board of dental examiners the power to hear and determine" whether facts existed that "the legislature said would justify a revocation of license").[23]

The opening brief's reliance (at 49) on *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), for the principle that a legislative body may not vest review of judicial decisions "in officials of the Executive Branch" hardly assists Phillip because the ALJ in this case, whom Phillip would have recognized as the appropriate trier-of-fact, is an employee of Arizona's executive branch of government. [See n. 14, above] And, thoughtfully read, *Burney v. Lee*, 59 Ariz. 360 (1942), on which the opening brief also relies (at 49), has nothing to say about the issue presented, *viz.* the authority of a legislative body to delegate the adjudication of public rights claims to administrative agencies.

Citing *Horne*, the opening brief (at 43) asserts that this court not only "has the authority" but also the "duty to conduct a 'de novo review of all factual and legal issues.'" Fairly considered,

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[23] In 1765, William Blackstone defined public rights as rights that belonged to "the whole community, considered as a community, in its social aggregate capacity." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 135 S.Ct. 1932, 1965 (2015) (Thomas, J., dissenting) (quoting 1 William Blackstone, *Commentaries* 119 (1765); 4 William Blackstone, *Commentaries* 5 (1769)). The Supreme Court first invoked the public rights doctrine in *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1855). There, the Court held that Congress may not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." 59 U.S. at 284. But the Court provided an exception for public rights: "At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.* The Supreme Court has never held that, in actions like this one, where the government is a party, the public rights exception does not apply. Thus, in *Atlas Roofing*, the Court concluded that, in cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within Congress' power to enact, Congress may assign the adjudication of those rights to an administrative agency, even though "the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency." 430 U.S. at 455. This is a case initiated by the government in its role as *parens patriae*, and thus, it is beyond fair dispute that this is a case involving a public right.

that assertion is less a misreading of *Horne* and more a troubling misstatement of what that case says. In the context of summarizing the Supreme Court's opinion in *Concrete Pipe Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 618 (1993), *Horne* stated that "de novo review of all factual and legal issues" by a neutral adjudicator is required *"[w]here an initial determination is made by a party acting in an enforcement capacity*." 242 Ariz. at 232, ¶21 (emphasis added). That italicized language, which appears in the same sentence from which the opening brief quotes but which that brief chose to leave on the proverbial cutting room floor, defeats Phillip's contention about this court's purported duty to conduct a de novo factual review. That is because not only is there no evidence that McKay assumed any role in the initial determination made by the Department, there is no evidence that he had anything to do with the case before the file landed on his desk after the ALJ's recommended decision was sent to him, which Phillip's opening brief (at 40) concedes. And, as *Horne* concluded, when an agency head, like McKay here, has no connection to a case other than preparing the agency's final decision, no due process violation occurs. *Id.* at 234, ¶27 (holding that violation of due process occurs only when a "final decisionmaker in an agency adjudication" also "serve[s] as an accuser [and] advocate").

In a further attempt to squeeze some benefit out of *Horne*, Phillip's opening brief also urges (at 42), as it does elsewhere, that even if Phillip has been denied no right under the United States Constitution, the same cannot be said about the Arizona constitution because it affords greater protections than those provided by the federal constitution. As explained [see n. 9, above], that argument has been waived. Other than asserting that protections provided by the Arizona constitution surpass those provided by the United States constitution, the Phillip briefs make no showing supporting a conclusion that the Arizona constitution does not permit what has occurred here even though the United States Constitution does. Instead, the Phillip briefs rely, and repeatedly so, on unsupported self-serving characterizations, such as the director being improperly motivated to rule against Phillip [Open. Br. at 12], or the procedure here being "stacked against [Phillip]" [*id.* at 32], or the director being affected improperly by political forces [*id.* at 39], or only an ALJ can be trusted to be neutral [*id.* at 26]. In doing so, the Phillip briefs seemingly misapprehend that, under no recognized standard, is the mere assertion of a self-interested conclusory fact its own proof. *Cf. Puglisi v. United States*, 586 F.3d 209, 216-17 (2d Cir. 2009) (recognizing that "an attorney's unsworn statements in a brief are not evidence" (citation and internal quotation marks omitted)); *Woerth v. City of Flagstaff*, 167 Ariz. 412, 420 (App. 1991) (recognizing that an unsworn and unproven assertion in a memorandum is not a fact (citations omitted)).

Finally, in a not insignificant way, Phillip's opening brief, in effect, refutes itself with a hard-to-miss omission. In support of the contention that deference to agency fact-finding constitutes an abandonment of independent judicial judgment, the opening brief relies on two concurring opinions written by Supreme Court Justice Clarence Thomas. [Open. Br. at 43] In

both of those opinions, Justice Thomas expresses his objection to the practice of deferring to an administrative agency's interpretation of federal statutes. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (questioning "our broader practice of deferring to agency interpretations of federal statutes" and stating that judicial power "requires a court to exercise its independent judgment *in interpreting and expounding upon the laws*" (citation and internal quotation marks omitted, emphasis added)); *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1217 (2015) (Thomas, J., concurring) (same). Deference to agency statutory interpretations and deference to agency fact-finding are, by no reasonable measure, the same thing. *See e.g., JH2K I LLC v. Arizona Dep't of Health Servs.*, 246 Ariz. 307, 310, ¶8 (App. 2019) ("We will not disturb an agency's factual findings that the evidence substantially supports," but "we are not bound by its legal conclusions or statutory interpretations"); *JHass Group*, 238 Ariz. at 383, ¶20 (recognizing deference to agency factual determinations while stating that "we are not bound by . . . the agency's legal conclusions"); *see also New Mexico Health Connections v. United States Dep't of Health & Human Servs.*, 340 F.Supp.3d 1112, 1160 (D. N. Mex. 2018) ("[C]ourts must still respect agency fact-finding and the administrative record when reviewing agency action for constitutional infirmities; they just should not defer to the agency on issues of substantive legal interpretation" (citation omitted)). Thus, correctly understood, Phillip's argument regarding deference to agency fact-finding is left unsupported by any relevant authority.[24]

c. Phillip's Alternative.

During the oral argument, Phillip's attorney suggested that the inquiry regarding section 910(E) and deference to agency fact-finding can be avoided if the court, instead, orders the Department to remove Phillip's name permanently from the central registry because of what Phillip contends is the absence of a "substantiated finding," as that term is defined by Ariz. Admin. Code R21-10501(17). That argument does not appear in the opening brief (or the reply brief for that matter), and therefore warrants no consideration. *Barlow v. Arizona Peace Officer Standards & Training Bd.*, No. 1 CA-CV 19-0378, 2020 WL 1274507, at *2 n.2, ¶8 (Ariz. Ct. App. Mar. 17, 2020) ("Because [appellant] raises this argument for the first time at oral argument on appeal, we cannot consider it"); *Dabush v. Seacret Direct LLC*, No. 1 CA-CV 18-0288, 2019 WL 2651082, at *3 n.3, ¶12 (Ariz. Ct. App. June 27, 2019) ("We do not consider arguments raised for the first time at oral argument on appeal"). To be sure, Phillip's attorney maintained that the argument is preserved in a footnote that appears in the opening brief (at 20-21, n.9). This court does not read that footnote as sufficient to preserve what was urged at the oral argument. In any event, at best,

[24] Phillip's reply suggests (at 29) that, absent de novo appellate review of agency fact-finding, appellate courts will engage in no more than a cursory review of the record. Leaving aside that the suggestion is unaccompanied by any reference to factual support, one study has found that substantial evidence review results in the reversal of agency decisions in a far from insignificant percentage of cases. David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 141 (2010) ("[I]n substantial-evidence review, . . . appellate courts reverse agency formal adjudications of fact slightly more than one third of the time").

the argument is mentioned only in passing, and thus fails as incompletely developed. See e.g., *MacMillan v. Schwartz*, 226 Ariz. 584, 591, ¶33 (App. 2011) ("Merely mentioning an argument in an appellant's opening brief is insufficient"); *Polanco*, 214 Ariz. at 492 n.2, ¶6 (stating that, on appeal, argument mentioned only in passing and without elaboration is waived (citations omitted)). And, apart from that, the argument is unsupported by any authority recognizing that this court is permitted to order the permanent removal of Phillip's name from the central registry even though substantial evidence establishes that an act of child abuse occurred. See e.g., *Ness* 174 Ariz. at 503 (stating that "[a]rguments unsupported by any authority will not be considered on appeal").

D. Summary.

Not only do the Phillip briefs misread the authorities on which those briefs attempt to rely, but imagining this to be a case of first impression, they effectively assume history away by disregarding well-settled legal principles that apply here. Meanwhile, record support for factual assertions indispensable to the success of what the Phillip briefs urge is not to be found in either of them. As such, what is left is an appeal that would have five statutes and two administrative rules declared unconstitutional based merely on an appellant's own say-so.

IT IS ORDERED:

1. The decision of the Arizona Department of Child Safety in *In the Matter of Phillip B.* (case no. 19C-1028237-DCS) is affirmed.

2. This case is remanded to the Arizona Department of Child Safety for any further proceedings that may be necessary.

3. No matters remain pending in connection with this appeal. This is a final order. JRAD 13; Ariz. R. Civ. P. 54(c).

/s/ Douglas Gerlach
Honorable Douglas Gerlach
Judge of the Superior Court

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