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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Phillip B., *Appellant* vs. **Mike Faust**; **Arizona Department of Child Safety**, *Appellees*	Case No. LC2019-000306-001 (Assigned to Hon. Douglas Gerlach) OAH No. 19C-1028237-DCS

APPELLANT'S OPENING BRIEF
(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

This case presents several issues of first impression of sweeping importance to Arizona administrative law. The Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH) presided over a two-day trial to determine whether the Department of Child Safety's (DCS) allegation of child abuse leveled against Mr. Phillip B. was supported by facts. Following a full-blown trial during which the ALJ heard the testimony of live witnesses and assessed their credibility, the ALJ concluded that DCS failed to prove its allegation that Mr. B. abused a teenager by placing his hand on the boy's shoulder to calm him down.

DCS appealed that decision to the Director of DCS, Gregory McKay. Mr. McKay then proceeded to "delete" those ALJ findings of fact that were contrary to and inconvenient for his theory of the case, replacing such findings with DCS's own unsupported version of what had happened between Mr. B. and the teenager. Based on that flawed record, Director McKay concluded that there was probable cause to "substantiate" the allegation of child abuse and ordered that Mr. B.'s name be entered on Arizona's Central Registry and remain there for 25 years.

Mr. B. filed a timely Judicial Review of Administrative Decision (JRAD) appeal in this Court from Director McKay's decision. He challenges the constitutionality of A.R.S. §§ 8-804, 8-811, 12-910(E), 41-1092.08(B), 41-1092.08(F), and Ariz. Admin. Code (A.A.C.) §§ R21-1-501(13), R21-1-501(17), under the state and federal constitutions, facially and as applied.

The Court should reverse DCS's decision, order that Mr. B.'s name be removed from the Arizona Central Registry, and award attorneys' fees and costs to Mr. B. pursuant to A.R.S. §§ 41-1001.01, 12-348, and the private attorney general doctrine.

STATEMENT OF THE CASE

On July 1, 2019, ALJ Velva Moses-Thompson issued findings of fact and conclusions of law "order[ing] that the report of alleged abuse by [Mr. B.] in this case be unsubstantiated." ALJDec.6.

On July 28, 2019, then-DCS Director Gregory McKay "REJECTED and MODIFIED" the ALJ's decision and ordered that "DCS's proposed finding of abuse in this matter is substantiated and shall be placed on the DCS Central Registry in accordance with A.R.S. § 8-804," and further ordered that the "report in this matter shall remain substantiated." DCSDec.3.

On August 30, 2019, Phillip B. filed a timely JRAD appeal (NOA) in this Court and served notices of claim of unconstitutionality as required by A.R.S. § 12-1841. On December 3, 2019, this Court denied Mr. B.'s Motion for Stay of Agency Decision (StayDec.).

This Court has jurisdiction pursuant to Arizona's Judicial Review of Administrative Decisions Act (JRAD Act), A.R.S. §§ 12-901–914. Appellant Phillip B. files this Opening Brief as provided for in JRAD Rule 6.

STATEMENT OF FACTS

A. Mr. Phillip B. Has Served Children and Youth Throughout His Professional Life Without a Single Blemish

Mr. B. has been teaching for 27 years. Tr.2.62:23–28.[1] He served as the "athletic director," "football, basketball, and girls' basketball coach" at the Peoria Unified School District. *Id.* The school district, however, placed Mr. B on administrative leave following DCS Director McKay's July 28, 2019 decision.

Mr. B. also worked as a caregiver at New Horizons, a group home housing male children. ALJDec.1. On the morning of June 23, 2018, Mr. B. and Mr. Lam L., another caregiver employed by New Horizons, were on duty at the group home when the alleged child-abuse incident occurred involving G.C., a 13-year-old resident of the group home, and Mr. B. ALJDec.1.

Given the mere possibility that Mr. B.'s name might be placed on the Arizona Central Registry, New Horizons fired him in order to maintain its child group home license. Tr.2.89:19; A.A.C. § R9-3-202(G)(6) (child-care group homes "shall not allow" an adult who is "currently under investigation … or has a substantiated allegation" on the Central Registry to be a staff member if they want to keep their state-issued group-home license). Mr. B. has not worked at New Horizons since September 1, 2018. *Id.*

[1] Tr.1 is the Transcript of the March 26, 2019 hearing, and Tr.2 of the June 10, 2019 hearing.

B. Teenagers Fabricate One Incident of Alleged Child Abuse

On June 23, 2019, G.C., a 13-year-old boy, was cursing and kicking chairs (causing one to slide across the floor) because he did not want to do his chores. Tr.2.68:24; ALJDec.4. G.C. has a troubled history, including going "AWOL," and running away. Tr.2.69:27–28.

Mr. B. placed his hand on G.C.'s shoulder to try to calm him down. Tr.2.69:10. That was an "[o]pen hand on [G.C.'s] shoulder" without "gripping" his shoulder. Tr.2.70:4.

G.C. threatened that he would "spit on" and "hit" Mr. B. Tr.2.70:6. Mr. B. then "fully extended" his arm because he did not "want to get spit on." Tr.2.71:1–2. While his hand was on G.C.'s shoulder, G.C. was "moving the whole time," saying "you guys get the F away from me" and using other profanities. Tr.2.72:3–6.

G.C. tried to "forcefully remove himself by turning his shoulder"; his t-shirt tore as a result. Tr.2.71:22–23. G.C.'s shirt was (as is, unfortunately, usually the case with many children in Arizona's child-welfare system) "worn" and "old." Tr.2.37:11.

Mr. Lam L., who witnessed the entire incident while he was standing "three feet" away from G.C. and Mr. B. testified that Mr. B. *did not* place "any part of his body—his arms, hands, forearm—on [G.C.'s] neck." Tr.2.41:2, Tr.2.37:19–21.

Some time later, Mr. L. overheard G.C. tell other children in the group home (Z.V., a 15-year-old boy, and E.M., a 12-year-old boy) that "he was going to get Mr. [B.] in trouble." Tr.2.43:8–11 ("I'm going to get Mr. [B.] fired.").

And so he did.

On July 6, 2018, Z.V., a 15-year-old resident of New Horizons, reported to DCS a fantastical story, claiming that Mr. B. "put his elbow on [G.C.'s] throat, and that [G.C.] made a gasping sound." ALJDec.1. On that same day (July 6th), Z.V. was actually hospitalized at Banner Health Scottsdale because he had "thoughts of hurting himself and others." ALJDec.1–2. When asked by the social worker about the incident involving Mr. B. and G.C., Z.V. claimed that Mr. B. "yelled in [G.C.]'s face and poked [G.C.] in the chest with his index finger," and "grabbed [G.C.] by the neck and put pressure on his neck" in such a way that G.C. "could not breathe and … his face turned red." ALJDec.2. Z.V. also told the case worker that Mr. B. "picked [G.C.] up by the shirt and moved him to his chair." *Id.*

When the caseworker interviewed E.M., another fellow resident, he said that G.C. "was told to sit in another chair but refused to move" and alleged that "[Mr. B.] grabbed [G.C.] by the neck and said, 'go sit in that chair.'" ALJDec.2. E.M. further alleged that it "looked like [Mr. B.] had his hands around [G.C.]'s neck because [G.C.] could not breathe and his face was red." *Id.*

G.C., himself, however, actually gave a much less dramatic account of the event than his buddies Z.V. and E.M. did. G.C. acknowledged that he was not following directions before the incident. ALJDec.2. G.C. said Mr. B. grabbed his shirt at the neck and that Mr. L. witnessed the incident. *Id.* It is significant to note that G.C. *did not* report that Mr. B. did any of the other things that Z.V. and E.M. alleged.

Z.V.'s, E.M.'s, and G.C.'s accusations were false. Mr. L., the only adult other than Mr. B. who witnessed the incident first-hand, testified that Mr. B.:

- *did not* grab G.C.'s shirt or "tr[y] to pick [him] up," Tr.2.56:8–13;
- *did not* "gra[b G.C.] by the shirt collar" or "pres[s] on his neck with his forearm," Tr.2.58:1–14; Tr.2.59:8–11;
- *did not* "mak[e] it hard for [G.C.] to breathe," *id.*;
- *did not* "gra[b G.C.] at the neck," *id.*;
- *did not* have "his hands around [G.C.]'s neck," and G.C.'s face *did not* "turn red," *id.*;
- *did not* "[a]t any point put [his] forearm across [G.C.'s] neck," Tr.2.72:20–73:18;
- *did not* "put [his] hands around [G.C.'s] neck," *id.*;
- *did not* "imped[e]" G.C.'s "breathing," and did not "in any way apply pressure on [G.C.'s] neck," *id.*;
- *did not* "gra[b G.C.] by the neck and appl[y] pressure to the point that [G.C.] … could not breathe," *id.*;
- *did not* "ever touch [G.C.]'s neck on 6/23" or "[a]t any other time," Tr.2.91:21–92:5;
- at no point during the physical contact between G.C. and Mr. B. "did [G.C.] have to struggle to breathe"; G.C.'s breathing was not "impeded in any way"; G.C.'s "back [was not] against a solid, hard surface where he couldn't back up," *id.*;
- *did not* "put his forearm or elbow or any other part of [Mr. B]'s body on [G.C.]'s neck," G.C. *did not* "express any kind of inability to breathe or that his breathing or otherwise his bodily respiration was restricted," Tr.2.8:28–9:5;

- *did not* "h[o]ld [G.C.] with [his] forearm against his neck, causing him to stop or not being able to breathe while [Mr. B.] was holding [G.C.]," Tr.2.88:6–9; and
- *did not* "yan[k] at the shirt" to cause it to tear; it was "[G.C.'s] shaking or pulling [that] caused the shirt to tear." Tr.2.61:10–13.

Lam L. in fact confirmed that Mr. B:

- "put … his open hand" on G.C.'s shoulder and "then as soon as he started touching [G.C.], [G.C.] started to move and jerk away," Tr.59:20–24;
- ended up "grabbing his shirt" to stop G.C. from becoming "physically" "violen[t]" with Mr. B., Tr.2.60:7–21;
- "placed his hand on [G.C.]'s shoulder and admonished him to calm down. After [G.C.] did not calm down, [Mr. B.] tightened his grip on [G.C.]'s shirt but kept his arm extended because he did not want to be 'nose to nose' to [G.C.]." ALJDec.4.

C. DCS Makes an Initial Decision to Substantiate the Child-Abuse Allegation Based on DCS Caseworker's Exaggerated Report

A DCS caseworker investigated the incident by interviewing the children and the adults and misreported the incident as follows: "On or about July 6, 2018, Phillip [B.] abused [G.C.], age 13, when he placed the child in an inappropriate restraint by grabbing the child by the neck of his shirt and placing his forearm against the child's neck, during which time the child's face turned red and he was unable to breath [*sic*]." ALJDec.3. Based upon this wholly inaccurate report, DCS made an initial decision that probable

cause existed to substantiate the child-abuse allegation against Mr. B. pursuant to A.R.S. § 8-811(A).

Mr. B. timely requested an OAH hearing under A.R.S. § 8-811(C).

D. DCS Fails to Show After a Two-Day OAH Trial that Probable Cause Exists to Place Mr. B.'s Name on the Arizona Central Registry

Importantly, DCS did not present the testimony of the caseworker who interviewed the children, or that of the three children themselves—G.C., E.M., Z.V.—thereby shielding all of them from cross-examination. DCS presented the testimony only of Liana V., whose familiarity with the case was limited to conducting a document-based "statutory review" of the "information which DCS had gathered." ALJDec.3. Liana V.'s testimony, in other words, was based solely on her review of the DCS caseworker's inaccurate report, which in turn recounted the three children's recollections of the incident, *all of which was offered for the truth of the matter asserted* and admitted into the record. Mr. B. preserved his right to cross-examine witnesses against him. Tr.1.3:18–4:25; Tr.1.19:6–12.

In the most generous interpretation possible, DCS's sole witness, Liana V. offered nothing more than an opinion, *not* factual testimony, for the simple reason that it was based on her review of DCS reports that someone else had prepared after interviewing the children and adults—reports, as was proved at trial, that contained inaccurate, false and highly exaggerated allegations. Tr.1.7:27–28; Tr.1.29:22–30:18.

Mr. B., Mr. Lam L. (the only other adult eyewitness who saw the entire incident from three feet away), Mr. Reginald M. (RJ) (Mr. B.'s supervisor at New Horizons), and Lynnwood P. (a friend of Mr. B.'s) testified at the trial.

RJ, Mr. B.'s supervisor, testified as follows:

- G.C. "had over 30 incident reports" with the group home showing that "when things would happen with [G.C.], it was due to [G.C.]'s action." G.C. would "star[t] fights, b[e] very disruptive in the home, AWOLing. … he literally came from school, got off the van, normally he walks to the door, he just ran." Tr.1.43:13; Tr.1.44:7–16. G.C. has been known to "try to hurt himself." Tr.2.12:15.
- G.C. was "verbally aggressive" toward Mr. B.; G.C. "flailed and began acting out"; however, G.C. was not "restrained around the neck." Tr.1.46:23–47:2.
- G.C.'s t-shirt that's at issue here was "worn down," not "new." Tr. 1.49:12–14.
- DCS *did not* contact RJ about this incident or regarding Mr. B. Tr.1.54:14–24; 1.55:1–11; 1.66:2–4; Tr.2.28:17–21; 2.29:28–30:8.
- The "type of hold" depends on the position of the staff and the child, depends on "how violent this kid can get. With [G.C.]'s history of violence was high. Let's say you may intervene different." Tr.1.67:14–19. Thus, holds can be of "so many different ways depending on if the kid's sitting, standing, running, about to hit himself." Tr.1.68:2–3.
- DCS's report falsely stated that Mr. B. "placed his arm, or placed pressure on [G.C.]'s neck." Tr.1.69:6–10.

- G.C. was not "choked," and Mr. B. did not place "any kind of a restriction or anything like that around his neck." Tr.2.9:9–13. Mr. B., instead, held G.C. "around the arms and shoulders so as to minimize him being able to reach out or lash out with his hands." Tr.2.13:3–5.
- What "led to the rip [in the shirt] was [G.C.] escalating." Tr.2.14:13. Mr. B. only placed his hand on G.C.'s "shoulder, so like calm down, so like when someone is getting upset you calm them down." Tr.2.14:15–16.
- Mr. B. placing his open hand on G.C.'s shoulder does not even rise to the level of a "hold." Tr.2.5:9–11; *see also* Tr.2.83:9–10 (Mr. B.'s testimony regarding same). That's why the group home management changed the "incident report" that Mr. B. submitted on June 23, 2018 to a "behavior incident report" (BIR). Tr.2.15:13–22. "All" information that was initially in the "incident report" (IR) "is just transferred" to the BIR. Tr.2.16:17–21. That is, the contemporaneous description of the incident that Mr. B. supplied, which is now contained in the BIR, is "the exact same text" that Mr. B. had submitted on the IR. Tr.2.75:22–24.
- There was "no other … incident" between G.C. and Mr. B. Tr.2.11:24–26.
- RJ had to place G.C. in "several holds … because he's struggled with behavior modification." Tr.2.12:26–28.

- Finally, in RJ's opinion, a traditional therapeutic hold[2] should not be used against G.C. because he has in the past "hit himself like on the ground with his head several times before." Tr.2.13:27–28.

The ALJ—the only independent factfinder in the entire administrative proceeding—found the testimony of RJ, Mr. L., and Mr. B. to be credible. Based on the findings of fact entered after trial, the ALJ concluded that probable cause *did not* exist to support a finding of abuse under A.R.S. § 8-804. Because the incident failed to meet the statutory definition of abuse, the ALJ ordered that the report of alleged abuse by Mr. B. be unsubstantiated.

E. DCS Appeals the ALJ Decision to Then-DCS Director McKay Who Deletes the ALJ's Findings of Fact and Credibility Determinations, Reverses the ALJ, and Orders Mr. B.'s Name Be Placed on the Central Registry for 25 Years

DCS was responsible for investigating the child-abuse allegation that created the report containing false information. DCS prosecuted the case against Mr. B., while also failing to produce any witnesses other than a random DCS reviewer's opinion based on such inaccurate information. DCS then appealed the ALJ's decision to its own Director, the very person that oversees this entire fiasco. It is thus unsurprising, while also tragic, that then-Director McKay sided with his own agency's theory of the case.[3]

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[2] Locks and Restraint Holds for School Teachers, https://bit.ly/2NFvieg (video instructions on therapeutic holds).

[3] Mike Faust is the current Director of DCS, as reflected in the caption of the case, but the DCS decision was issued by former director Gregory McKay when he held that office.

In order to reach such a conclusion, however, Director McKay had to amend not only the ALJ's findings of fact, but her conclusions of law as well. Of note, Director McKay struck RJ's testimony from the record. DCSDec.1–2. He also declined to accept the sworn, live testimony of Mr. L. and Mr. B., all of which had been subject to full cross-examination and a credibility determination through the ALJ proceedings. DCSDec.1.

Director McKay also "delete[d]" the ALJ's finding that RJ's, Mr. L.'s and Mr. B.'s "testimony … [was] credible." DCSDec.2 ("The Director deletes Finding of Fact number 22"); ALJDec.4 ("22. I find the testimony of RJ, Mr. [L.], and Appellant [Mr. B.] to be credible.").

Finally, he "delete[d] Conclusion of Law number 5." DCSDec.2. The ALJ, in Conclusion of Law number 5, had explained that DCS "presented no eyewitness testimony that [Mr. B.] placed his forearm against [G.C.]'s neck and that [G.C.] was unable to breathe," had noted that the "children's account of the incident [wa]s inconsistent," and that Mr. L. provided "credible testimony that [Mr. B.] did not place his forearm on [G.C.]'s neck and that [G.C.]'s breathing was not restricted." ALJDec.5. The ALJ had then concluded that DCS "failed to demonstrate probable cause exists to substantiate its proposed finding that [Mr. B.] abused [G.C.]" ALJDec.6.

Upon reversing the ALJ's findings of fact, credibility determinations, and conclusions of law, Director McKay ordered that his Department's "proposed finding of abuse … is substantiated and shall be placed on the DCS Central Registry in accordance

with A.R.S. § 8-804," and that "the report in this matter shall remain 'substantiated.'" DCSDec.3.

Mr. B.'s timely JRAD appeal to Superior Court followed.

ISSUES PRESENTED FOR REVIEW

The statement of issues presented for review "includes every subsidiary issue fairly comprised within the statement." JRAD Rule 7(a)(4). Therefore, the enumeration of issues herein is not construed as exclusive, but rather, such enumeration "includes" every issue that is fairly contained within the issue presented.

1) Whether A.R.S. §§ 8-804, 8-811, A.A.C. §§ R21-1-501(13), R21-1-501(17), which authorize reports and entry of findings of abuse or neglect on the Arizona Central Registry based on probable cause are unconstitutional, facially or as applied to Phillip B., under the state and federal constitutions.
    a. Whether the probable-cause standard to substantiate a child-abuse allegation for placement on Arizona's Central Registry deprives Mr. B. of liberty without due process of law under Ariz. Const. art. II, § 4.
    b. Whether the probable-cause standard to substantiate a child-abuse allegation for placement on Arizona's Central Registry deprives Mr. B. of liberty without due process of law under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.
2) Whether A.R.S. §§ 8-804, 8-811, 12-910(E), 41-1092.08(B), 41-1092.08(F), A.A.C. §§ R21-1-501(13), R21-1-501(17) are unconstitutional, facially or as applied to Phillip B., under the state and federal constitutions.
    a. Whether DCS's authority to *define* the scope of and standard for proving child abuse; *investigate* child-abuse allegations; *prosecute* such allegations before an OAH ALJ; *reject or modify* on administrative appeal the

ALJ's findings of fact, credibility determinations, and conclusions of law; *execute* and *enforce* final judgments; and demand and obtain a *deferential standard of review* in Arizona state courts deprives Mr. B. of liberty without due process of law under Ariz. Const. art. II, § 4 and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

b. Whether DCS's authority to *define* the scope of and standard for proving child abuse; *investigate* child-abuse allegations; *prosecute* such allegations before an OAH ALJ; *reject or modify* on administrative appeal the ALJ's findings of fact, credibility determinations, and conclusions of law; *execute* and *enforce* final judgments; and demand and obtain a *deferential standard of review* in Arizona state courts violates Arizona Constitution's Distribution of Powers Clause of Ariz. Const. art. III, and the Vesting Clauses of Ariz. Const. art. IV, pt. 1, § 1, and Ariz. Const. art. VI, § 1.

ARGUMENT

DCS's decision against Mr. B. should be reversed and an order entered removing his name from the Arizona Central Registry because DCS systematically violated Mr. B.'s rights under the state and federal constitutions. To understand the nature and extent of these violations and the issues presented to the Court, it is necessary to carefully consider the statutory scheme at issue here.

I. STATUTORY FRAMEWORK

DCS maintains a "central registry of reports of child abuse and neglect that are substantiated." A.R.S. § 8-804(A). There are two ways to substantiate a child-abuse report: (1) by DCS based on "the outcome of the investigation … under this article," viz. A.R.S. §§ 8-800–819, or (2) by Arizona state court under A.R.S. § 8-844(C). A.R.S. § 8-804(A). This case only relates to and challenges substantiation by DCS.

While the court can substantiate an allegation of child abuse only if it so "[f]inds by a preponderance of the evidence," A.R.S. § 8-844(C)(1), DCS can substantiate a child-abuse allegation based on a mere finding of "probable cause." A.R.S. §§ 8-811(E), (K), (M)(2). Both DCS- and court-substantiated child-abuse allegations are recorded on DCS's Central Registry. A.R.S. § 8-804(A).

DCS and other public and private bodies dealing with children use the Central Registry to determine if a person is qualified to be or work at, *inter alia*, licensed foster homes, adoptive parent, child welfare agency, child care homes, group homes, and residential treatment centers, shelters or other congregate care settings. A.R.S. § 8-804(B)(1). The Central Registry is used to "determine qualifications for persons who

are employed or who are applying for employment with this state in positions that provide direct service to children or vulnerable adults." A.R.S. § 8-804(B)(2). This would include public and private schools because schools provide "direct service to children."

Any person like Mr. B. who "provides direct services to children or vulnerable adults" is informed of DCS's intention to substantiate a child-abuse allegation against them must report, under penalty of perjury, to employers described in subsections (B)(4), (B)(5), (B)(10), (B)(11), (C), (D), and (E), whether "an allegation of abuse or neglect was made against them" and whether the allegation "was substantiated." A.R.S. § 8-804(K).

DCS investigates child-abuse allegations. A.R.S. §§ 8-804, 8-811, 8-804.01(B)(1). Within 20 days of receiving a notice from DCS that it "intends to substantiate" an abuse or neglect allegation, the accused can "request a hearing on the proposed finding." A.R.S. §§ 8-811(A), (C). DCS at this point is required to review the proposed finding and has the option of amending the proposed finding if it determines there is "no probable cause that the accused person engaged in the alleged conduct." A.R.S. § 8-811(E). But if DCS does not amend the proposed finding, the Office of Administrative Hearings holds a hearing under Arizona's Uniform Administrative Hearings Law (A.R.S. §§ 41-1092–1092.12). A.R.S. §§ 8-811(I), (J). There are several noteworthy exceptions from the Uniform Administrative Hearings Law that apply in DCS substantiation cases:

- The child victim or witness to abuse or neglect "is not required to testify";
- The child's hearsay statement is admissible if "the time, content and circumstances of that statement are sufficiently indicative of its reliability"; and

- The "reporting source is not required to testify," and instead a "written statement from the reporting source may be admitted if the time, content and circumstances of that statement are sufficiently indicative of its reliability." A.R.S. § 8-811(J).

After trial, the ALJ determines "if probable cause exists to sustain the department's finding that the parent, guardian or custodian abused or neglected the child." A.R.S. § 8-811(K). If the ALJ determines that probable cause exists, "the sustained finding shall be entered into the central registry as a substantiated report." *Id.* But if the ALJ determines that "probable cause does not exist to sustain the department's finding," then the ALJ "shall order the department to amend the information or finding in the report." *Id.*

The ALJ is required to issue a written decision explaining the "reasons supporting the decision, including the findings of fact and conclusions of law." A.R.S. § 41-1092.08(A). As relevant here, within 30 days of receiving the ALJ's decision, the DCS Director, *i.e.*, "the head of the agency," "may review the decision and accept, reject or modify it." A.R.S. § 41-1092.08(B). To reject or modify the ALJ's decision, the DCS Director must give "a written justification setting forth the reasons for the rejection or modification of each finding of fact or conclusion of law." *Id.* Thus, the rejection or modification, per the statute, could be of both findings of fact and conclusions of law.

The ALJ's decision becomes the "final administrative decision" if the DCS Director "does not accept, reject or modify" the ALJ's decision within 30 days. The DCS

Director's decision becomes the "final administrative decision" if the DCS Director rejects of modifies the ALJ's decision pursuant to A.R.S. § 41-1092.08(F).

A party "may appeal a final administrative decision" pursuant to the Judicial Review of Administrative Decisions Act, codified at A.R.S. §§ 12-901–914. A.R.S. § 41-1092.08(H). To appeal the DCS Director's decision, a motion for rehearing or review is not necessary under A.R.S. §§ 41-1092.08(H), 41-1092.09(B) because DCS is not a "self-supporting regulatory board"—a term which is defined at A.R.S. § 41-1092(7). DCS is an agency headed by a single political appointee. The DCS Director is nominated by the governor, appointed to office by the governor "with the consent of the senate," and "serves at the pleasure of the governor." A.R.S. §§ 8-452(A), 38-211(A).[4]

"Probable cause" and "substantiated finding" are not defined in statute. DCS-issued rules define these terms instead. DCS Director, in addition to other powers and duties, has the power to "[a]dopt rules to implement the purposes of the department and the duties and powers of the director." A.R.S. § 8-453(A)(5). DCS-promulgated regulations define "probable cause" and "substantiated finding" as follows:

[4] In contrast, the OAH Director is appointed to office by the governor with the consent of the senate but does not serve at the governor's pleasure. The OAH director in turn "hires … full-time administrative law judges" who are insulated from removal by the governor to maintain their independence from the political branches of government. A.R.S. §§ 41-1092.01(B), (C)(3).

- "'Probable Cause' means some credible evidence that abuse or neglect occurred." A.A.C. § R21-1-501(13).[5] The terms abuse[6] and neglect[7] carry specific meanings as defined by statute.[8]

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[5] The generic definition of probable cause is: "an objective good-faith belief that … facts and circumstances would warrant a man of reasonable caution in the belief that [a violation occurred]." *State v. Dean*, 241 Ariz. 387, 398–99 (App. 2017) (cleaned up).

[6] "'Abuse' means the infliction or allowing of physical injury, impairment of bodily function or disfigurement or the infliction of or allowing another person to cause serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior and which emotional damage is diagnosed by a medical doctor or psychologist and is caused by the acts or omissions of an individual who has the care, custody and control of a child. Abuse includes:
(a) Inflicting or allowing sexual abuse pursuant to § 13-1404, sexual conduct with a minor pursuant to § 13-1405, sexual assault pursuant to § 13-1406, molestation of a child pursuant to § 13-1410, commercial sexual exploitation of a minor pursuant to § 13-3552, sexual exploitation of a minor pursuant to § 13-3553, incest pursuant to § 13-3608 or child sex trafficking pursuant to § 13-3212.
(b) Physical injury that results from permitting a child to enter or remain in any structure or vehicle in which volatile, toxic or flammable chemicals are found or equipment is possessed by any person for the purpose of manufacturing a dangerous drug as defined in § 13-3401.
(c) Unreasonable confinement of a child." A.R.S. § 8-201(2).
See also A.A.C. § R21-1-501(1) ("'Abuse' means the same as A.R.S. § 8-201(2).").

[7] "'Neglect' or 'neglected' means:
(a) The inability or unwillingness of a parent, guardian or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes unreasonable risk of harm to the child's health or welfare, except if the inability of a parent, guardian or custodian to provide services to meet the needs of a child with a disability or chronic illness is solely the result of the unavailability of reasonable services.
(b) Permitting a child to enter or remain in any structure or vehicle in which volatile, toxic or flammable chemicals are found or equipment is possessed by any person for the purposes of manufacturing a dangerous drug as defined in § 13-3401.
(c) A determination by a health professional that a newborn infant was exposed prenatally to a drug or substance listed in § 13-3401 and that this exposure was not the result of a medical treatment administered to the mother or the newborn infant by a health professional. This subdivision does not expand a health professional's duty to report neglect based on prenatal exposure to a drug or substance listed in § 13-3401 beyond the requirements prescribed pursuant to § 13-3620, subsection E. The determination

- "'Substantiated Finding' means a proposed substantiated finding that: a. An administrative law judge found to be true by a probable cause standard of proof after notice and an administrative hearing and the Department Director accepted the decision; b. The alleged perpetrator did not timely appeal; or c. The alleged perpetrator was not entitled to an administrative hearing because the alleged perpetrator was legally excluded as defined in subsection (11)." A.A.C. § R21-1-501(17).[9]

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by the health professional shall be based on one or more of the following: (i) Clinical indicators in the prenatal period including maternal and newborn presentation. (ii) History of substance use or abuse. (iii) Medical history. (iv) Results of a toxicology or other laboratory test on the mother or the newborn infant.
(d) Diagnosis by a health professional of an infant under one year of age with clinical findings consistent with fetal alcohol syndrome or fetal alcohol effects.
(e) Deliberate exposure of a child by a parent, guardian or custodian to sexual conduct as defined in § 13-3551 or to sexual contact, oral sexual contact or sexual intercourse as defined in § 13-1401, bestiality as prescribed in § 13-1411 or explicit sexual materials as defined in § 13-3507.
(f) Any of the following acts committed by the child's parent, guardian or custodian with reckless disregard as to whether the child is physically present: (i) Sexual contact as defined in § 13-1401. (ii) Oral sexual contact as defined in § 13-1401. (iii) Sexual intercourse as defined in § 13-1401. (iv) Bestiality as prescribed in § 13-1411." A.R.S. § 8-201(25).
See also A.A.C. § R21-1-501(11) ("'Neglect' or 'neglected' means the same as A.R.S. § 8-201(24) [*sic*].").

[8] Noteworthy in this case, Mr. B.'s conduct *does not* even fall within the statutory definitions of abuse or neglect. Also, DCS has only alleged abuse here, not neglect. ALJDec.6; DCSDec.3. However, the ALJ and DCS decisions do not specify whether an allegation of neglect is also contained within the allegation. Mr. B.'s briefing, therefore, should be construed as referring to both abuse and neglect when it uses the word "abuse" and its grammatical variants. It would be odd for Mr. B to not make sure his name is cleared of any child-abuse or child-neglect allegation from the Central Registry.

[9] Under the definition given in DCS regulations, A.A.C. § R21-1-501(17)(a) or (17)(b), the finding of child abuse against Mr. B. is not a "substantiated finding" because, as relevant here, the ALJ did not find the proposed finding "to be true by a probable cause standard of proof" and Mr. B. timely appealed. The DCS Director's decision here, however, ordered "that the report in this matter shall remain

II. THE PROBABLE-CAUSE STANDARD TO SUBSTANTIATE A CHILD-ABUSE ALLEGATION DEPRIVES MR. B. OF LIBERTY WITHOUT DUE PROCESS OF LAW

As noted, DCS can "substantiate" a child-abuse allegation and thereby place the accused's name on the Arizona Central Registry upon a finding of "probable cause," *i.e.*, "some credible evidence that abuse or neglect occurred." A.R.S. §§ 8-804, 8-811(E), (K), (M)(2); A.A.C. §§ R21-1-501(13), R21-1-501(17). Once the allegation is "substantiated," it is placed on the Arizona Central Registry and remains there for 25 years. That listing means a person like Mr. B. is prohibited from having direct contact with children in all except a narrow set of circumstances. Such a probable-caused-based listing on the Central Registry deprives Mr. B. of liberty without due process of law. Therefore, the DCS's decision should be reversed and Mr. B.'s name ordered removed from the Central Registry.

A. DCS Continues to Deprive Mr. B. of Liberty without Due Process of Law under the United States Constitution

DCS's decision should be reversed because it deprives Mr. B. of liberty without due process of law under the Fourteenth Amendment's Due Process Clause. The U.S. Supreme Court has recognized that a person's reputation is a protected liberty interest. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (holding that a protectable liberty interest is implicated "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."); *Paul v. Davis*, 424 U.S. 693,

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'substantiated,"' notwithstanding the fact that under its own rules proposed findings do not become "substantiated findings" if the accused timely appeals or where the ALJ finds no probable cause and the DCS director rejects or modifies that decision. DCSDec.3.

701 (1976) (holding that harm to reputation coupled with some more tangible interest such as employment is sufficient to invoke the Due Process Clause). "'Stigma plus' refers to a claim brought for injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' [e.g., the loss of employment] or property right (the plus), without adequate process." *Segal v. City of New York*, 459 F.3d 207, 209 n.1 (2d Cir. 2006) (cleaned up); *Bohn v. Dakota County*, 772 F.2d 1433 (8th Cir. 1985) (holding there is "a protectable interest in reputation where the stigma of being identified as a child abuser was tied to a protectable interest in privacy and autonomy of family relationships").

By officially branding Mr. B. a child abuser, DCS is damaging his standing and associations in his community. This stigma forecloses his freedom to teach or care for children—the chosen profession to which Mr. B. has devoted his entire working life. As such, he is deprived of liberty without due process of law that is protected by the Fourteenth Amendment.

Within the full scope of his duties as a group-home manager tasked with caring for troubled teenage boys, Mr. B. placed a hand on a child's shoulder, asking the 13-year-old to "calm down" when the child was "cursing," "kick[ing] furniture chairs," and "not want[ing] to do his chores." ALJDec.4. Far from wrong, his actions are admirable in terms of attempting to deal with a highly agitated and troubled teen. More significantly, however, the actions comprised neither child abuse nor child neglect as defined at A.R.S. §§ 8-201(2), (25). Yet his name has now been placed on the Central Registry

for 25 years, A.R.S. § 8-804(G), based upon the lowest standard of a mere finding of "probable cause."

Whether the Due Process Clause is implicated is not at issue. It plainly is. Rather, the question before this court is whether the "probable cause" standard to "substantiate" a child-abuse or child-neglect allegation can be sustained under the Due Process Clause.

This Court should hold that "probable cause" is an impermissibly low—and unconstitutional—standard of proof when used by the DCS to "substantiate" allegations of abuse or neglect. It is undisputed that "probable cause" is a "low" standard of proof. *Kaley v. United States*, 471 U.S. 320, 354 (2014) (Roberts, C.J., dissenting, joined by Breyer, Sotomayor, JJ.); *see also Abufayed v. Holder*, 632 F.3d 623, 628 (9th Cir. 2011). The answer to the question of whether this standard of proof is also unconstitutional for placing names on Arizona's Central Registry is, however, not entirely clear under existing caselaw applying the Fourteenth Amendment's Due Process Clause.

In *Gerstein v. Pugh*, the U.S. Supreme Court addressed whether the probable-cause standard of proof is unconstitutional in the context of pretrial detention following arrest. 420 U.S. 103 (1975). A probable-cause standard of proof is not constitutionally suspect, *Gerstein* held, because the probable-cause determination there was submitted to and made by "the detached judgment of a neutral magistrate." 420 U.S. at 114. A "neutral determination of probable cause" is "essential … to furnish meaningful protection from unfounded interference with liberty" because the "stakes are … high." *Id.* A probable-cause determination without the procedural safeguard of a neutral magistrate "may

imperil the suspect's job, interrupt his source of income, and impair his family relationships," and otherwise "effect a significant restraint of liberty." *Id.*

In this situation, however, there was only one neutral magistrate—the ALJ—and she determined that there was *no* probable cause that Mr. B. abused or neglected G.C. by placing his hand on G.C.'s shoulder. DCS Director McKay rejected those findings and conclusions and substituted his own judgement. Thus, the one crucial check that was present in *Gerstein* is absent in Mr. B.'s case—that a neutral magistrate make the probable-cause determination. Under the reasoning of *Gerstein*, therefore, DCS unconstitutionally deprived Mr. B. of liberty without due process of law based on this separate, although related, reason alone. The structural due process problems are discussed more fully below, but *Gerstein* clearly presents a straightforward way of resolving the case.

Another principle, besides the structural due process problem that is addressed by *Gerstein*, is at play here under the operative probable-cause standard of proof. In addition to *Gerstein*'s neutral-magistrate requirement, the low probable-cause standard of proof itself sometimes, as here, deprives persons of liberty without due process of law. In addressing that issue, the Supreme Court has "engaged in a straight-forward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process." *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Under the Due Process Clause, the "function of a standard of proof … is to instruct the *factfinder* concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441

U.S. 418, 423 (1979) (emphasis added). The "minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, 455 U.S. at 755.

In a civil dispute between private parties, "application of a fair preponderance of the evidence standard indicates both society's minimal concern with the outcome, and a conclusion that the litigants should share the risk of error in roughly equal fashion." *Id.* at 755 (cleaned up). That is not the case where, as here, there is a "government-initiated proceedin[g]" threatening Mr. B. with a "significant deprivation of liberty or stigma." *Id.* at 756 (cleaned up). Under the Fourteenth Amendment's Due Process Clause, the U.S. Supreme Court "has mandated an intermediate standard of proof—clear and convincing evidence—when the individual interests at stake … are both particularly important and more substantial than mere loss of money." *Id.* at 756 (cleaned up). The Court "has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma." *Id.* (cleaned up).

Mathews articulated three factors that this Court should balance:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. at 335. *See also Kent K. v. Bobby M.*, 210 Ariz. 279, 286 (2005) ("We apply the *Mathews* test to determine the standard of proof required[.]").

In substantiation-by-DCS cases (because this case is a substantiation-by-DCS as opposed to a substantiation-by-court case), the private interest affected is significant, the risk of error from using the probable-cause standard is substantial, and the countervailing government interest favoring that standard is comparatively slight. Evaluating these three *Mathews v. Eldridge* factors should compel the conclusion that the probable cause standard in such proceedings is inconsistent with due process.

As to the first factor, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss." *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (cleaned up). Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss." *Santosky*, 455 U.S. at 758. This balancing, however, cannot be "an ad hoc weighing which depends to a great extent upon how the Court subjectively views the underlying interests at stake." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 562 (1985) (Rehnquist, J., dissenting). Rather, the balancing should be done with a view to "treating individuals fairly and with dignity when important decisions are made about their lives." Erwin Chemerinsky, *Constitutional Law: Principles & Policies Third Edition* 583 (Aspen 2006). The first factor unquestionably goes in Mr. B.'s favor. The 25-year loss of liberty and a near-permanent stigma associated with being labeled a child abuser or child

neglecter is sufficiently grave to warrant a standard of proof much higher than probable cause. Consider, for example, the conduct that constitutes child abuse or neglect as defined: physical injury, sexual abuse, unreasonable confinement, failure to provide food, clothing, shelter, medical care, bestiality. A.R.S. §§ 8-201(2), (25). It is patently unreasonable to label Mr. B. a child abuser or neglecter under this definition when all he did was place his hand on a teenager's shoulder to calm him down.

As to the second factor, additional or substitute procedural safeguards are readily available. For one, a standard such as clear and convincing evidence is well-defined, and almost universally used in child-welfare contexts. Applying that standard redresses a part of the due-process problem. Removing the ability of the DCS Director to reject or modify the findings and conclusions of the neutral magistrate redresses another aspect of the due-process concern, as will be discussed below.

As to the third factor, the fiscal burden on the government to litigate the case in front of the ALJ would remain unchanged. In *Mathews v. Eldridge* itself, the Court determined that there would be substantial expenses as individuals receiving Social Security disability benefits would likely exhaust all appeals if they could keep receiving funds until the procedures were completed. 424 U.S. at 347. Thus, the analysis under the third factor favored the government because otherwise it would be required to provide due process before terminating Social Security disability benefits. Not so here because there is little added cost to the government to meet a heightened standard of proof, say, clear and convincing evidence; the government has the statutory burden to prove (or substantiate) the child-abuse allegation, and the ALJ hearing requirement is also a creation

of statute meaning that this Court's decision will not create a new fact-finding process where none existed before. In *Mathews* the plaintiff had urged the Court to *create* a pre-deprivation adversary hearing process—a suggestion the Court rejected based on the third factor. Here, by contrast, that process is statutorily created and already exists under A.R.S. § 8-811(I).

B. DCS Deprived Mr. B. of Liberty without Due Process of Law under the Arizona Constitution's Due Process Clause

The Arizona Constitution protects Mr. B.'s rights to a greater extent than does the United States Constitution, the Court should reverse DCS's decision because it deprives Mr. B. of liberty without due process of law under the Arizona Constitution's Due Process Clause.

The Arizona Constitution states, "No person shall be deprived of life, liberty, or property without due process of law." Ariz. Const. art. II, § 4. While the words of the state constitution closely track the words of the Fourteenth Amendment to the U.S. Constitution, the state constitution provides broader protections to individual liberty than does its federal counterpart because there are important textual differences between the state and federal Due Process Clauses.

In applying state constitutional provisions, "federal constitutional jurisprudence addressing the issue at hand is always relevant," but the federal constitution only "sets the base-line for the protection of individual liberties." *Brush & Nib Studio, LLC v. City of Phoenix*, 247 Ariz. 269, __, 448 P.3d 890, 927 ¶ 171 (2019) (Bolick, J., concurring) (citing *Petersen v. City of Mesa*, 207 Ariz. 35, 37 ¶ 8 n.3 (2004)). This Court is "entirely free to read its own State's constitution more broadly than" the U.S. Supreme Court "reads

the Federal constitution." *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 293 (1982). The federal constitution "sets a floor for the protection of individual rights. … Other federal, state, and local government entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution." *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (citing Jeffrey Sutton, *51 Imperfect Solutions* (2018); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977)).

Where the words of the federal and state constitutions differ, "we must presume [the state constitution's analog provision] was intended to have a different meaning from its federal counterpart." *Brush & Nib*, at ¶ 172. Where the language "of the state constitutional provision is identical or similar to its federal counterpart, we should examine how the provision was interpreted by the federal courts at the time it was adopted by the State of Arizona to determine its meaning." *Id.* (citing *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 10 (2010); *Moore v. Chilson*, 26 Ariz. 244, 255 (1924)). If the meaning remains "unclear, we should seek to determine the intent of the framers as best we can from the records of our constitution and other reliable historical sources." *Id.* at ¶ 173. This Court also "may look to court decisions and other historical records from … other states prior to our constitution's ratification to help determine the framers' intent in adopting them." *Id.* Further, this Court "always must be mindful of the admonition that government is 'established to protect and maintain individual rights.'" *Id.* (quoting Ariz. Const. art. II, § 2).

The words of the state and federal Due Process Clauses differ in one crucial respect. While the Fourteenth Amendment Due Process Clause provides that "nor shall *any State* deprive any person of life, liberty, or property, without due process of law" (emphasis added), Arizona's provision is in the passive voice, guaranteeing that "[*n*]*o person* shall be deprived of life, liberty, or property without due process of law" (emphasis added). Whereas the Fourteenth Amendment is phrased as a constraint on state government, the state's provision, in contrast, is "a guarantee of the individual right" not to be deprived of life, liberty, or property without due process of law. *Brush & Nib*, at ¶ 45 (majority opinion).

Arizona courts have had no occasion to decide just how much broader is the state's Due Process Clause compared to the federal counterpart. History and context, however, indicate the broad scope of the Clause. *See* John D. Leshy, *The Arizona Constitution* 57–58 (Oxford Univ. Press 2011) (describing history and context). The "doctrine of incorporation" being "virtually unknown at the time of Arizona's statehood (1912), "neither the delegates who created [the Arizona] constitution in 1910, the citizens who adopted it, nor the Congress and president who finally approved its implementation in 1912 could have intended that *federal* constitutional law would protect the rights and liberties of Arizona's populace." Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 Ariz. St. L.J. 115, 116 (1988).

In *Pool v. Superior Court*, Arizona rejected the so-called lock-step approach even where the texts of the state and federal constitutions are virtually identical. 139 Ariz. 98,

108, 677 P.2d 261, 271 (1984). That is the right approach to take with respect to Article 2, Section 4 of the Arizona Constitution. "All Arizona jurists take an oath binding them to support the constitution and laws of the state of Arizona as well as those of the United States. It is their duty and obligation to give due consideration to the Arizona Constitution, at least when lawyers have made an adequate record and raised the proper arguments." *The Double Security of Federalism*, at 146 (per Feldman, V.C.J.). This Court, therefore, "must confront the challenge." *Id.*

On the precise question of whether DCS's probable-cause substantiation deprives Mr. B. of liberty without due process of law, Arizona courts have not coopted the *Mathews v. Eldridge* test under Arizona's Due Process Clause. *Cf. State v. Wagner*, 194 Ariz. 310, 313 ¶ 15 (1999) (declining to apply the *Mathews* test). That test, however, serves as the starting point of the inquiry because Arizona's Due Process Clause protects "the most basic and essential due process guarantee, the right to be heard 'at a meaningful time and in a meaningful manner.'" *Trisha A. v. DCS*, 247 Ariz. 84, __, 446 P.3d 380, 390 (2019) (Bolick, J., dissenting) (quoting *Mathews*, 424 U.S. at 333); *see also id.* at 390–91 ¶ 47 ("due process requires determin[ation] … under the clear and convincing evidentiary standard"); *James S. v. DCS*, No. 1 CA-JV 18-0150, 2019 WL 613219, *8 (App. Feb. 14, 2019) (Perkins, J., dissenting) ("The dispositive question for us under *Eldridge* turns on the extent to which the procedure presents the risk of erroneous deprivation of … rights.").

The relevant trend in Arizona decisions suggests that there are two reasons as to why a state court would likely adopt a stricter formulation of the *Mathews v. Eldridge* test.

First, as then-Justice Rehnquist suggested in his dissent, the *Mathews* test deserves a stricter formulation because it quickly devolves into a "subjectiv[e]" balancing of the "underlying interests at stake." *Loudermill*, 470 U.S. at 562. Second, perhaps for this reason, modern application of the *Mathews* test gives more weight to the first and second factors over the third. *See, e.g.*, *James S.*, *supra* (Perkins, J., dissenting) (giving "dispositive" weight to the second factor). This stricter formulation makes sense given that the countervailing interest in government efficiency is often nebulous and insufficient to overcome the private interests at stake in cases applying the *Mathews* test in evaluating the adequacy of the operative standard of proof. *See, e.g.*, *Trisha A.*, 446 P.3d at 394 (Bolick, J., dissenting) (government's interest in "administrative efficiency" does not outweigh the individual's interest; "although the state's interest in efficiency is 'legitimate, it is hardly significant enough to overcome private interests as important as those here.'") (quoting *Lassiter v. Dep't of Soc. Servcs. of Durham Cnty., NC*, 452 U.S. 18, 28 (1981)). Indeed, before depriving a person of a "fundamental right" as recognized by Arizona's Due Process Clause, the government must show it has a "compelling government interest of the highest order, that it is narrowly tailored to achieve a compelling government interest, and that the governmental interest cannot be adequately served by less restrictive means[.]" *Id.* at 395. This Court should adopt this stricter formulation of the *Mathews* test under Arizona's Due Process Clause.

Indeed, "[f]ew forms of state action are so severe and so irreversible" as one's name being placed for 25 years on the same list as those who sexually assault children, especially based upon the flimsy probable-cause finding at issue here. *Santosky*, 455 U.S.

at 759. It is important to protect children from abuse, and no one would contest that the names of those sexually abusing children should be placed on the Arizona Central Registry. But precisely because the risk of error in placing people's names on the list is great and the accompanying stigma and guilt by association virtually impossible to erase, a minimum standard of proof of clear and convincing evidence is essential to enable courts to not deprive people of their liberty or property without due process of law.

There is at least one Arizona appellate decision questioning whether probable cause is an impermissibly low—and unconstitutional—standard of proof when used in specific situations: *Matter of JV-111701 v. Superior Court*, 163 Ariz. 147 (App. 1989) (*Matter of JV*). *Matter of JV* addressed the question whether then-existing Juvenile Rule 3(b)—relating to juvenile detention on proving the child committed a delinquent act by "probable cause"—is "impermissibly low." 163 Ariz. at 152. The Court in *Matter of JV* concluded that the probable cause "standard complies with due process requirements." *Id.* That conclusion, however, was based on the finding in *Gerstein* that the probable cause standard represents "a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Id.* (quoting *Gerstein*, 420 U.S. at 112). *Matter of JV* had a neutral magistrate—a state superior court judge—whose decision the appellate court reviewed. Here, this Court is reviewing the decision of the DCS Director, thus heightening the due process concern. Neither *Gerstein* nor *Matter of JV* dealt with the permissibility of the probable-cause standard in a civil administrative context, especially where, as here, the risk of error is inherent in the nature of the administrative

scheme taken as a whole. Nor was *Matter of JV* decided under the Arizona Constitution's Due Process Clause.

In sum, under either the Arizona or the Fourteenth Amendment Due Process Clauses, this Court has every reason to reverse the DCS decision substantiating the child-abuse allegation against Mr. B. On this basis alone, the Court should order that Mr. B.'s name be removed from the Central Registry.

III. ARIZONA'S ADMINISTRATIVE LAW SCHEME IS UNCONSTITUTIONAL UNDER THE FEDERAL AND STATE CONSTITUTIONS

This Court should declare A.R.S. §§ 8-804, 8-811, 12-910(E), 41-1092.08(B), 41-1092.08(F), A.A.C. §§ R21-1-501(13), R21-1-501(17) as unconstitutional under the state and federal constitutions and thereby reverse DCS's decision and order Mr. B.'s name removed from the Arizona Central Registry.

The following is undisputed: DCS has defined the scope of and standard for proving child abuse or neglect in its own regulations. A.A.C. §§ R21-1-501(13) (defining the standard for proving child abuse as "probable cause," *i.e.*, "some credible evidence that abuse or neglect occurred"), R21-1-501(17) (defining the scope of child abuse or neglect as a "substantiated finding [that] … [a]n administrative law judge found to be true … and the Department Director accepted the decision"). DCS investigates child-abuse and child-neglect allegations. A.R.S. §§ 8-804, 8-811, 8-804.01(B)(1). DCS prosecutes such allegations before the OAH ALJ, as occurred here. *See* Tr.1.1:22–23. DCS has the authority to "reject" or "modify" on administrative appeal the ALJ's "finding[s] of fact," "conclusion[s] of law," and credibility determinations. A.R.S. § 41-

1092.08(B).[10] DCS then executes and enforces DCS's final decisions against accused parties by placing their names on the Arizona Central Registry. A.R.S. § 8-804(A). Then, on a JRAD appeal to Superior Court, even if DCS's conclusions on "questions of law" receive no "deference," DCS demands—and obtains—deference to its findings of fact, which this Court reviews under the deferential "substantial evidence" standard. A.R.S. § 12-910(E). This approach creates a goulash of powers that structurally and functionally ought to remain distributed in silos, with adjudicatory, lawmaking, and executive functions all being separate and distinct. In this case DCS exercised each and every one of these powers against Mr. B., thereby depriving him of liberty without due process of law under the state and federal constitutions, and in violation of the Arizona Constitution's Distribution of Powers and Vesting Clauses, Ariz. Const. art. III; art. IV, pt. 1, § 1; art. VI, § 1.

A. The Concentration of Authority in DCS Deprives Mr. B. of Liberty without Due Process of Law under the State and Federal Constitutions

As touched upon briefly, *supra*, the U.S. Supreme Court has held that a "neutral determination of probable cause" is "essential … to furnish meaningful protection from unfounded interference with liberty." *Gerstein*, 420 U.S. at 114. While the probable-cause standard of proof itself is impermissibly low (for reasons already discussed), three additional due-process violations occurred here: (1) depriving Mr. B. of structural due

[10] The ALJ, in Mr. B.'s case, for example, found RJ's, Mr. L.'s and Mr. B.'s testimony "to be credible," ALJDec.4, and Director McKay "delete[d]" that credibility determination, DCSDec.2. In fact, DCS's own regulations define the probable-cause inquiry as essentially a determination based entirely on credibility: "some credible evidence that abuse or neglect occurred," A.A.C. § R21-1-501(13).

process protections deprives him of his liberty without due process of law; (2) permitting a political gubernatorial-appointee executive-branch official to act in an appellate adjudicatory capacity to overrule the decisions of an independent administrative law judge, deprives Mr. B. of liberty without due process of law; and (3) this Court's deferring to the DCS director's findings of fact and credibility determinations when the independent ALJ, not the DCS Director, listened to and observed the live witness testimony, deprives Mr. B. of liberty without due process of law. All three of these questions highlight different aspects of essentially the same procedural due process problem. The brief addresses each of these in turn below.

The operative administrative adjudication process deprives Mr. B. of structural protections that would ensure he is not deprived of liberty without due process of law. The Court could reverse the DCS Director's decision on this basis alone.

This category of procedural due process cases is sometimes referred to as dealing with "structural due process." Structural due process involves structural considerations relevant to ensuring due process as laws are applied to individuals. Lawrence Tribe, *American Constitutional Law* 1137–46 (1978); *see also Rivers v. Schweiker*, 684 F.2d 1144, 1157 (5th Cir. 1982).

The structure, or the statutory scheme, of administrative proceedings is stacked against Mr. B. DCS here has acted as investigator, prosecutor, fact-finder, and judge, and would likely demand that this court defer to the DCS Director's rejection of the ALJ's findings of fact and credibility determinations. This entire structure strips the

structural protections that ensure those who are accused of child abuse are not deprived of their liberty without due process of law.

In contrast to what Mr. B. has undergone, a statutory scheme that comports with due process is as follows. An executive-branch official investigates and prosecutes a statutorily defined allegation of wrongdoing. An independent factfinder who actually listens to and observes live witnesses testify, and who does not serve at the pleasure of the Governor, makes credibility determinations and findings of fact. An independent judge who does not serve at the pleasure of the Governor decides legal questions. Then independent appellate judges who also do not serve at the pleasure of the Governor review legal conclusions of the trial judge *de novo*. *This* is the basic minimum adjudication structure that is necessary to satisfy the state and federal Due Process Clauses.

The structure under which Mr. B.'s matter was decided, in contrast, scrambles what ought to be independent functions and funnels all of them in a single agency or through one official—DCS. The statutory scheme has given the ultimate fact-finding authority to the DCS Director who can revise the facts and credibility determinations entered into the record by the only non-DCS official who is insulated from the political branches of government who actually observes live witnesses testify. That's not all. The statutory scheme restricts the state trial court's role to merely inquiring whether there was "substantial evidence" to support the DCS Director's decision. That, in turn, insulates glaring factual mistakes—such as Director McKay's adopting uncritically the DCS caseworker's error-filled report as gospel (which in turn was based on the falsified and exaggerated recounts by the three children, as proven during trial through eyewitness

testimony), and actually "deleting" the testimony of the only adult eyewitness —thereby undermining meaningful judicial review.

The Arizona Supreme Court has touched upon this issue in *Horne v. Polk*, 242 Ariz. 226 (2017). The Court concluded that "due process does not permit the same individual to issue the initial decision finding violations and ordering remedies, participate personally in the prosecution of the case before an administrative law judge ("ALJ"), and then make the final agency decision that will receive only deferential judicial review." *Id.* at 228.

In *Horne*, Special Attorney General Polk, appointed to investigate allegations of campaign-finance violations against the duly elected Attorney General, issued an initial decision, and also prosecuted the case in front of an independent ALJ. *Id.* at 229. The ALJ concluded that Polk had failed to prove the case against the AG. Pursuant to A.R.S. § 41-1092.08(B)—the same statute at issue here—Polk, now sitting in an appellate adjudicatory capacity, reversed the ALJ's decision and affirmed her prior compliance order. The Court correctly held that this was impermissible under the federal constitution.

To be sure, Mr. B.'s case is a bit different than *Horne* in that Director McKay himself did not issue the initial report expressing DCS's intent to substantiate the child-abuse allegation against Mr. B. based on probable cause. And there is no indication that Director McKay himself "assist[ed] with the preparation and strategy" of DCS's prosecution of Mr. B. in front of the OAH ALJ. 242 Ariz. at 229. The statutory scheme, however, gives the DCS director ultimate and exclusive supervisory control over all DCS agency officials, and case strategy in all cases where DCS is a litigant. *See generally*

A.R.S. §§ 8-453, 8-454. *Horne* in large part, therefore, dictates the reasoning to be employed in Mr. B.'s case because the statutory scheme at issue in *Horne* and here shows the concentration of authority—and the constitutional problem with such concentration—is the same.

Horne analyzed the structural due process problem under the *Mathews v. Eldridge* test. 242 Ariz. at 230. The Court applied *Mathews* in this structural context to conclude the following:

- "due process requires a neutral decisionmaker," *id.* at ¶ 16;
- the due-process inquiry "does not … preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high," *id.* at 231–32 ¶ 19;
- "due process may be satisfied by providing for a neutral adjudicator to conduct a *de novo* review of all factual and legal issues," *id.* at 232 ¶ 21;
- "if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclose[s] fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, [then] a substantial due process question would be raised," *id.*;
- "a quasi-judicial proceeding must be attended, not only with every element of fairness but with the very appearance of complete fairness," *id.* at 234 ¶ 28.

The Court's holdings in *Horne* are on all fours with the statutory structure in this case. Mr. B.'s administrative matter was not decided by a "neutral decisionmaker." A neutral adjudicator, such as this Court, by operation of statute, can conduct a *de novo*

review of legal issues but not a *de novo* review of facts. DCS's decision, that relies entirely on evidence derived from "nonadversarial processes" conducted by his own agency's officials, does not comport with the Due Process Clause. Finally, DCS Director's opaque final adjudication of the administrative matter does not have an appearance of "complete fairness." Thus, under *Horne*, this Court has every reason to reverse the DCS Decision against Mr. B.

Horne is also important for another reason. Because the parties in *Horne* "did not raise or argue a distinct state constitutional claim," the Court had "no occasion to determine whether the due process provision in Arizona's Declaration of Rights, Ariz. Const. art. II, § 4, provides greater protection in this context than the Fourteenth Amendment." 242 Ariz. at 230 n.2 (citing *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 511 S.E.2d 48, 54 (S.C. 1998) (holding that the state constitution provides greater procedural protections in administrative proceedings than federal due process)). That is to say, *Horne* analyzed the due process issues exclusively under the Fourteenth Amendment's Due Process Clause and expressly reserved the question of whether the analysis under Arizona's Due Process Clause would be different.

Mr. B. presents a distinct challenge to the statutory structure under Arizona's Due Process Clause. At the very least, as explained elsewhere in this brief, that clause protects Mr. B.'s liberty to a greater extent than does the Fourteenth Amendment. And the state provision will likely be satisfied if this Court were to hold that the DCS Director does not have the authority to reject or modify on administrative appeal the ALJ's findings of fact, credibility determinations, and legal conclusions, A.R.S. §§ 41-

1092.08(B), (F), and this Court has the authority and duty to conduct a "*de novo* review of all factual and legal issues," *Horne*, 242 Ariz. at 232 ¶ 21, notwithstanding the deferential standard of review given in A.R.S. § 12-910(E).

Finally, factfinding deference of A.R.S. § 12-910(E) violates the state and federal constitutions' Due Process Clauses. It requires judges to abandon their duty of independent judgment. That violates the Due Process Clauses by commanding judicial bias toward a litigant.

A.R.S. § 12-910(E)'s deferential standard to review administratively-determined facts compels judges to abandon their duty of independent judgment. Section 910(E) commands Arizona's Article VI judges to abandon their independence by giving controlling weight to an agency's fact-finding—not because of DCS's accuracy, impartiality, or persuasiveness, but rather based solely on the brute fact that the DCS Director has stated facts in the record. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("The judicial power … requires a court to exercise its independent judgment.") (quoting *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring)).

This abandonment of judicial responsibility has not been tolerated in any other context—and it should never be accepted by a truly independent judiciary. The state and federal constitutions' mandate of judicial independence cannot be so facilely displaced. Yet Section 910(E) allows a non-judicial entity to usurp the trial court's power, and then commands judges to defer to the factual pronouncements of a supposed expert body entirely external to the judiciary.

Section 910(E) places a thumb on the scale in favor of the executive's preferred formulation of facts. What's more, the only time Section 910(E) becomes contentious is when the agency head's formulation of facts differs from that of the OAH ALJ. Yet precisely when a court must carefully look at the facts to evaluate whether they lead to particular conclusions of law, Section 910(E) instructs courts to *not* look at the facts and instead "defer to the agency's factual findings if they are supported by substantial evidence, even if other evidence before the agency would support a different conclusion." *Waltz Healing Center, Inc. v. Ariz. DHS*, 245 Ariz. 610, 613 ¶ 9 (2018). It is no different in principle from an instruction that courts must assign weight and defer to facts announced by the *New York Times* editorial page even if the court's own review would lead it to conclude that those factual findings are not supported by the record.

Arizona Constitution's Article VI makes no allowance for trial judges to abandon their duty to exercise their own independent judgment, let alone rely upon the judgment of entities that are not judges and do not enjoy tenure or salary protection. To be clear, there is nothing wrong or constitutionally problematic about a trial court that considers an agency's selection of facts and gives it weight according to its persuasiveness after conducting its own independent review of the record. *Cf. Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them").

But Section 910(E)'s command that courts should exercise independent judgment by reviewing *de novo* the legal arguments presented by DCS is undermined by its

command that judges *not* act as neutral fact-finders and instead defer to the skewed facts presented to it by state administrative agencies.[11] Thus, the more serious problem with Section 910(E) is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. The U.S. Supreme Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Yet Section 910(E) institutionalizes a regime of systematic judicial bias, by requiring courts to "defer" to agency litigants whenever a disputed fact arises. Rather than exercise their own judgment about what that dispute entails, judges under Section 910(E) defer to the judgment of one of the litigants before them.

Judges take an oath to "faithfully and impartially discharge the duties of his office." Ariz. Const. art. VI, § 26. Nonetheless Section 910(E) makes judges who are otherwise scrupulous about the appearance of impropriety remove their judicial blindfolds

[11] The DCS Director's factual recount is especially skewed here. DCS did not present the testimony of the social worker who investigated the child-abuse allegation against Mr. B., nor the testimony of the three children. Mr. B., as noted, expressly preserved the right to cross examine these witnesses. What's more, Director McKay *deleted* the testimony of the only adult eyewitnesses who *did* testify at trial in front of the ALJ. Thus, the *only* facts the DCS Director's decision entered into the record were ones narrated in the DCS report, which itself was an unreliable and exaggerated account of the event. This Court's decision on Mr. B.'s stay motion erroneously states, StayDec.6, that Mr. B. did not preserve the right to cross-examine witnesses. In fact, as noted, he did. *See* Tr.1.3:18–4:25; Tr.1.19:6–12. The DCS Director did not have the transcript of the ALJ hearing in front of him when he rendered his decision. In fact, the parties did not receive the certified transcript from the OAH until after DCS's response to the stay motion was filed in this Court. Therefore, Mr. B.'s reply brief contained citations to the transcript of the OAH hearing while the stay motion did not. In any event, the full record being now before the Court, parties can point to the portion of the transcript where Mr. B. preserved his right to cross-examine witnesses against him.

and tilt the scales in favor of the government's position. A.R.S. § 12-910(E)'s deferential standard, therefore, violates the Due Process Clauses of the state and federal constitutions.

This Court should conclude for the foregoing reasons that DCS has deprived Mr. B. of liberty without due process of law, and therefore that A.R.S. §§ 8-804, 8-811, 12-910(E), 41-1092.08(B), 41-1092.08(F), A.A.C. §§ R21-1-501(13), R21-1-501(17) are unconstitutional under the state and federal Due Process Clauses.

B. The Concentration of Authority in DCS Violates the Distribution-of-Powers and Vesting Clauses of the Arizona Constitution

The statutory scheme gives adjudicatory functions to the DCS Director, an executive official, who also exercised rulemaking (*i.e.*, legislative), investigatory, prosecutorial, enforcement, and appellate authority over Mr. B.'s case. The Court should hold that this concentration of authority violates the Distribution-of-Powers and Vesting Clauses. Ariz. Const. art. III; art. IV, pt. 1, § 1; art. VI, § 1.

Arizona's Distribution-of-Powers Clause reads:

> The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

The Legislature's Vesting Clause, in turn, states, "The legislative authority of the state shall be vested in the legislature[.]" Ariz. Const. art. IV, pt. 1, § 1. The Judiciary's Vesting Clause states, "The judicial power shall be vested in an integrated judicial department[.]"

Ariz. Const. art. VI, § 1. These Clauses taken together comprise the doctrine of separation of powers that is expressly stated in the Arizona Constitution.

In determining whether a statutory scheme violates separation of powers, Arizona courts "examine: (1) the essential nature of the power being exercised; (2) the legislature's degree of control in the exercise of that power; (3) the legislature's objective; and (4) the practical consequences of the action." *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 593 ¶ 14 (2017).

The essential nature of the power exercised here by Director McKay is adjudicatory while he is an executive-branch official. He acts in an adjudicatory capacity and revises (rejects or modifies) the decisions and orders of the OAH ALJ. The first factor, therefore, suggests a separation-of-powers problem.

As to the second factor, the judicial department's degree of control over the executive's exercise of the judicial power is severely limited. Fact-finding deference given by the state courts to the DCS Director's final administrative decision in turn also clouds the legal conclusions that state courts draw by applying the law to the facts. To be sure, the fact-finding and judging roles are sometimes separated between a jury and a judge. But the state trial court retains ultimate control over the fact-finding function and the judging function in a manner that inextricably intertwines fact-finding and judging. The statutory scheme at issue here, however, unravels the fact-finding and judging roles and assigns the fact-finding role to the executive and the judging role to the judicial department. The second factor, therefore, also confirms a separation-of-powers problem.

As to the third and fourth factors—the legislature's objective and practical consequences—it is safe to assume that the legislature's objective is not to violate individual rights, but instead to provide an administrative apparatus that fully, fairly, and impartially adjudicates child-welfare issues. The practical consequences of the statutory scheme that the legislature in fact put in place, however, are quite the opposite. The stigma of being labeled a child abuser is far-reaching and indelible. The administrative process under which a person's name winds up on the Central Registry is perfunctory and does not adequately insulate the process from risk of error because of the operative probable-cause standard. The administrative apparatus places too much control in the hands of the DCS or its Director—*i.e.*, the executive department—and too little in the judicial department where the adjudicatory role traditionally belongs. The analysis under the four factors readily leads to the conclusion that the statutory scheme that is in place here violates the Distribution of Powers and Vesting Clauses of the Arizona Constitution. On that basis, the Court should reverse DCS's decision against Mr. B.

Another approach to taking the administrative scheme by the horns is by looking at the reasoning of *Hayburn's Case*, 2 U.S. 408 (1792) within the separation-of-powers scheme established by the Arizona Constitution. *Hayburn's Case* is a foundational principle that forms the basis for federal and state governments alike. Congress enacted the Pensions Act of 1792 creating a scheme for disabled veterans of the American Revolution to apply for pensions to federal courts. The decisions of the courts in such cases were subject to stay by the Secretary of War. Five of the six Justices of the Supreme Court declared the Pensions Act unconstitutional. *Hayburn's Case* stands for the

proposition that the head of an executive agency such as the Secretary of War cannot be authorized to revise or otherwise act in an adjudicatory capacity to review decisions of an independent judge. Put differently, an independent judge has no power to decide cases that will be subject to revision and review by a principal officer of an executive agency. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *cf. Burney v. Lee*, 59 Ariz. 360, 363 (1942) (adopting in part the propositions of law established by *Hayburn's Case*). At minimum, the separation-of-powers inquiry under the Arizona Constitution therefore involves looking carefully at which official or department is exercising which *function*.

To bring the functional analysis closer to home, it is an *adjudicatory* function to decide whether testimony or other evidence is credible, whether witnesses are credible, and what evidence should be admitted into the record. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347–48 ¶ 13 (App. 1998) (stating that it is a trial court's function to determine witnesses' credibility and the weight to give to conflicting evidence); *see also* StayDec.3 (citing *Gutierrez* for this proposition). Yet, it is undisputed that the DCS Director—an executive department official—exercised this adjudicatory function under the statutory scheme at issue here. Moreover, the DCS Director—an executive official—revised the decision and order of the OAH ALJ, which acted in an adjudicatory capacity. DCS, thus, acted in an adjudicatory capacity while also acting in a prosecutorial, executive, and enforcement capacity. That, on its face, is a blatant Distribution-of-Powers Clause

violation that can be remedied by declaring a portion of the statutory scheme unconstitutional.

The Court should conclude for the foregoing reasons that A.R.S. §§ 8-804, 8-811, 12-910(E), 41-1092.08(B), 41-1092.08(F), A.A.C. §§ R21-1-501(13), R21-1-501(17) are unconstitutional under the state constitution's Distribution of Powers and Vesting Clauses.

CONCLUSION

The Court should reverse the DCS Director's decision, order Mr. B.'s name removed from the Arizona Central Registry, and award attorneys' fees and costs to Appellant under A.R.S. §§ 41-1001.01, 12-348, and the private attorney general doctrine.

Respectfully submitted this 27th day of January, 2020.

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CERTIFICATE OF SERVICE

The original of the foregoing Appellant's Opening Brief filed with the Clerk of the Court this 27th day of January, 2020, with a copy mailed and emailed to the Honorable Douglas Gerlach, and a copy mailed and emailed the same day to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the opening Brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains **13,016** words, which is within the 14,000-word limit given in JRAD Rule 8(a).

The document to which this Certificate is attached does not exceed the word limit that is set by JRAD Rule 8 as applicable.

The information provided in this Certificate is true and complete.

Dated this 27th day of January, 2020.

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