STATE OF ARIZONA
COURT OF APPEALS
DIVISION ONE

PHILLIP B., *Appellant*, vs. **ARIZONA DEPARTMENT OF CHILD SAFETY**; **MIKE FAUST**, AS DIRECTOR OF ARIZONA DEPARTMENT OF CHILD SAFETY, *Appellees*.	Court of Appeals, Division One No. 1 CA-CV 20-0569 Maricopa County Superior Court No. LC2019-000306-001 Office of Administrative Hearings No. 19C-1028237-DCS

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Appellant Mr. Phillip B. placed his hand on a teenager's shoulder to calm him down. For that innocuous action, DCS now labels him a child abuser and intends to label him so for 25 years.

The Department of Child Safety's (DCS) administrative scheme relating to DCS-substantiated child-abuse allegations deprives an accused Mr. Phillip B. of due process and violates the separation-of-powers doctrine. Mr. B. asks this Court to reverse the Superior Court's decision and order his name removed from the Central Registry, consistent with the ALJ decision below.

Both due process and separation-of-powers principles are at issue here:

- the DCS Director rejected or modified the Administrative Law Judge's (ALJ) factual and credibility assessments—findings that the ALJ made based on rules of evidence and live witness testimony subjected to an oath and thorough cross-examination[1];
- DCS placed Mr. B.'s name on the Central Registry while he was exhausting his state court appeals[2];
- DCS did not produce competing competent evidence via, *inter alia*, testimony of witnesses with firsthand knowledge.[3]

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1 A.R.S. §§ 41-1092.08(B), (F) (agency heads can "reject or modify" ALJ's findings, credibility assessments, and conclusions of law).

2 A.R.S. § 8-804(A) (the Central Registry must maintain only those child-abuse reports that "are substantiated"); A.A.C. § R21-1-501(17) (DCS regulation defining "Substantiated Finding").

3 A.R.S. § 8-811(J) (witnesses with firsthand knowledge not required to testify).

Due process and separation-of-powers issues are further implicated should this Court defer to the DCS Director's factual and credibility assessments,[4] and if this Court were to permit DCS to impose this sort of stigma and reputational harm, which is an occupational death sentence on Mr. B., based on the flimsy statutory standard of probable cause.[5]

The ALJ of the Office of Administrative Hearings (OAH) presided over a two-day trial to determine whether DCS's allegation of child abuse leveled against Mr. B. was supported by facts. During the trial, the ALJ took sworn, live testimony from witnesses with firsthand knowledge. Those witnesses were cross-examined. She assessed their credibility. They supported Mr. B. On DCS's side were the notes of a caseworker, which were triple hearsay by the time they reached the ALJ. The ALJ followed rules of procedure and evidence and assigned appropriate weight and credibility to in-court, cross-examined sworn statements over out-of-court statements. She then concluded that DCS failed to prove there was probable cause that Mr. B. abused a teenager in his care by placing his hand on the boy's shoulder to calm him down.

Dissatisfied with the outcome of the proceeding before a neutral arbiter, DCS appealed that decision to DCS's then-Director, Gregory McKay. Mr. McKay proceeded to "delete" those ALJ findings of fact and credibility assessments that were contrary to

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[4] A.R.S. § 12-910(E) (the substantial-evidence standard of review).

[5] A.R.S. § 8-811(K) (substantiation using the probable-cause standard of proof); A.A.C. § R21-1-501(13) (DCS regulation defining "probable cause" contrary to the court-defined probable-cause standard); A.A.C. § R21-1-501(17) (using the regulatory definition of "probable cause" to define "substantiated finding").

and inconvenient for DCS's theory of the case. IR.63 (Appx11–Appx15).[6] The Director "add[ed]" his own credibility determinations without ever taking live witness testimony. *Id.* He replaced the ALJ's findings with DCS's own unsupported and unproven version of what had happened between Mr. B. and the teenager. *Id.* Based on that one-sided record, the Director concluded that there was probable cause to "substantiate" the allegation of child abuse. He ordered entry of Mr. B.'s name on Arizona's Central Registry for 25 years. *Id.*; A.R.S. § 8-804(G). The Superior Court affirmed.

This Court should order Mr. B.'s name removed from the Central Registry because DCS's decision, which the court below affirmed, departs from the operative statutes and violates both the state and federal constitutions where it adheres to the statutes.

[6] "IR" means the electronic "Index of Record" including the revised Index of Record filed by the Clerk of the Maricopa County Superior Court in this Court. *See* Court of Appeals Docket Nos. 1 (Index of Record), 2 (eRecord on Appeal), 10 (Supplemented e-Record with Revised Index of Record).

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." IR.62 (Appx10) (ALJ Decision).

On July 28, 2019, then-Director of DCS Gregory McKay "REJECTED and MODIFIED" the ALJ's decision, rewrote facts and legal conclusions by selectively "accept[ing]" some of the ALJ's findings and conclusions, "delet[ing]" others, "ADD[ing]" some findings, 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." IR.63 (Appx11–Appx13) (DCS Decision).

On August 30, 2019, Phillip B. filed a timely Judicial Review of Administrative Decisions (JRAD) appeal in Superior Court and served notices of claim of unconstitutionality as required by A.R.S. § 12-1841. IR.1, IR.16–IR.18. The Superior Court had jurisdiction pursuant to Arizona's JRAD Act, A.R.S. §§ 12-901–914.

On October 10, 2019, Judge Douglas Gerlach rejected Mr. B.'s Motion for Stay of Agency Decision without prejudice to refile if it does not exceed 4,500 words. IR.23 (Appx19–Appx21).

On December 4, 2019, Judge Gerlach denied a request to present oral argument and denied on the merits Mr. B.'s renewed Motion for Stay of Agency Decision. IR.69 (Appx22–Appx28).

After initially granting a timely-filed extension of time to file a motion to introduce exhibits or testimony or both not offered during the administrative hearing,

on January 8, 2020, Judge Gerlach denied Mr. B.'s Motion to Introduce Exhibits or Testimony (or Both) Not Offered During the Administrative Hearing. IR.71 (Appx29).

Thereafter, upon full briefing and oral argument, on September 9, 2020, Judge Gerlach affirmed DCS's decision in a final, appealable order. IR.79 (Appx30–55).

Mr. B., to preserve all possible claims, timely appealed to this Court the three interlocutory orders (IR.23, IR.69, IR.71) along with the final order (IR.79). The Court of Appeals has jurisdiction under A.R.S. §§ 12-2101(A)(1), 12-2101(A)(4), 12-913, and Rules of Procedure for Judicial Review of Administrative Decisions (JRAD Rule) 13.

STATEMENT OF FACTS

Mr. B. has been teaching for 27 years. IR.64 (Appx3:23–28).[7] He has served as the "athletic director," "football, basketball, and girls' basketball coach" in an Arizona school district. *Id.*

Mr. B. also worked as a caregiver at New Horizons, a group home housing male children. IR.62 (Appx5). 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. IR.62 (Appx15).

Given the mere possibility that Mr. B.'s name might be placed on the Arizona Central Registry, New Horizons fired him to maintain its group home license. IR.64 (Appx4:19); 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.*, and will not be able to work at any group home for 25 years by operation of A.A.C. § R9-3-202(G)(6) because his name currently appears on the Central Registry.

During the OAH trial, Mr. Lam L., who saw the entire incident between Mr. B. and G.C. while standing "three feet" away from them, testified and was cross-examined. IR.64 (Appx1:19–21, Appx2:2). Mr. Lam L. stated that "[G.C.] did not have trouble

[7] The Appendix contains excerpts of the transcript of the ALJ hearing held on March 26, 2019 and June 10, 2019.

breathing and that Appellant did not put his forearm on [G.C.'s] neck." IR.62 (Appx8 ¶ 20).

At trial a New Horizons Program Coordinator named RJ testified that "[G.C.] never told [RJ] that he could not breathe or that [Mr. B.] put his body on him." IR.62 (Appx8 ¶ 19).

At trial, Mr. B. testified that "on the day of the incident, [G.C.] was cursing because he did not want to do his chores" and "[G.C.] kicked furniture chairs." IR.62 (Appx8 ¶ 21). Mr. B. "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 [Mr. B.] did not want to be 'nose to nose' to [G.C.] … [Mr. B.] and Mr. [L.] moved [G.C.] to a chair." *Id.* ALJ Moses-Thompson "f[ound] the testimony of RJ, Mr. [L.], and [Mr. B.] to be credible." *Id.* ¶ 22.

At trial, DCS needed to prove that Mr. B.'s conduct toward G.C. met the statutory definition of "abuse." A.R.S. § 8-201(2). DCS's entire theory of the case rested on proving that "impairment of bodily function" occurred because Mr. B. allegedly "plac[ed] his forearm against the child's neck, during which time the child's face turned red and he was unable to breath [*sic*]." IR.62 (Appx7 ¶ 13).

But DCS "presented no eyewitness testimony that [Mr. B.] placed his forearm against [G.C.'s] neck and that [G.C.] was unable to breathe." IR.62 (Appx9 ¶ 5). DCS's "case notes" stated that G.C. and Z.V., a 15-year-old resident of New Horizons at the time of the alleged incident, alleged that Mr. B. placed his "arm on" G.C.'s "neck." *Id.* The case notes had noted that E.M., a 12-year-old New Horizons resident at the time

of the alleged incident, had reported that "it appeared as if" Mr. B. had his "hands around" G.C.'s "neck." *Id.*

The ALJ found the "children's account of the incident [wa]s inconsistent" (arm-on-neck versus hands-around-neck versus forearm-against-neck). *Id.* The ALJ, applying the child-abuse definition to the facts, concluded that DCS "failed to demonstrate that probable cause exists to substantiate its proposed finding that [Mr. B.] abused [G.C.] This incident does not meet the above-noted statutory definition of abuse." IR.62 (Appx9–Appx10 ¶ 5). The ALJ therefore "order[ed] that the report of alleged abuse by [Mr. B.] in this case be unsubstantiated." IR.62 (Appx10).

DCS appealed the ALJ's decision to DCS's then-Director McKay. McKay "delete[d]" ALJ's findings of fact and credibility assessments that were contrary to and inconvenient for DCS's theory of the case. IR.63 (Appx11–Appx12) (deleting IR.62 ¶¶ 19, 22 and revising IR.62 ¶¶ 20–21). He "ADD[ed]" his own factual and credibility determinations without ever taking live witness testimony. IR.63 (Appx12).[8] He replaced the ALJ's findings of fact with DCS's own unsupported and unproven version of what had happened between Mr. B. and the teenager. *Id.*

Based on his revised factual and credibility findings, McKay concluded that DCS "has met its burden in substantiating the allegation in this case" under A.A.C. §§ R21-1-501(13) (defining "probable cause"), R21-1-501(17) (defining "substantiated finding" as proven under the "probable cause" standard of proof). IR.63 (Appx12–Appx13)

[8] "[DCS] presented credible evidence that [Mr. B.] abused child [G.C.]. … [Mr. B.] abused [G.C.] when he grabbed the child by the neck and restricted his breathing with either his hand or his forearm." IR.63 (Appx12).

(citing specifically and relying on A.A.C. §§ R21-1-501(13), (17)). He ordered "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 "that the report in this matter shall remain 'substantiated.'" IR.63 (Appx13).

The Superior Court affirmed. IR.79 (Appx54).

STATEMENT OF ISSUES

(1) Whether DCS erred in placing Mr. B.'s name on, and the Superior Court erred in not removing Mr. B.'s name from, the Central Registry under A.R.S. § 8-804(A) and A.A.C. § R21-1-501(17);

(2) Whether the Superior Court erred in prohibiting Mr. B. from introducing facts in the Superior Court as permitted by A.R.S. § 12-910(C);

(3) Whether A.R.S. §§ 8-804, 8-811(J)–(K), 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, under the Due Process Clauses of the state and federal constitutions (Ariz. Const. art. II, § 4; U.S. Const. amend. XIV), and/or the Distribution-of-Powers and Vesting Clauses of the Arizona Constitution (Ariz. Const. arts. III; IV, pt. 1, § 1; VI, § 1). In other words:

(a) Whether the statutory standards of proof, substantiation, and review violate the Due Process Clauses of the state and federal constitutions.

(b) Whether the statutory standards of substantiation and review violate the separation-of-powers doctrine.

ARGUMENT

DCS erred in placing Mr. B.'s name on the Central Registry, and the Superior Court erred in not removing Mr. B.'s name from the Central Registry. The Superior Court erred in prohibiting Mr. B. from introducing facts in the Superior Court as permitted by A.R.S. § 12-910(C).

The Court must confront the question whether A.R.S. §§ 8-804, 8-811(J)–(K), 12-910(E), 41-1092.08(B), 41-1092.08(F), and A.A.C. §§ R21-1-501(13), R21-1-501(17) deprive Mr. B. of due process and/or violate the separation-of-powers doctrine.

Appellate review standards are governed by A.R.S. § 12-910(E) ("[T]he court shall decide all questions of law, including interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency."). The Court of Appeals reviews all "questions of law" "*de novo*." *Simpson v. Miller*, 241 Ariz. 341, 344 ¶ 7 (2017). A "question of statutory interpretation" is "review[ed] *de novo*." *Nicaise v. Sundaram*, 245 Ariz. 566, 567 ¶ 6 (2019). As explained throughout the brief, Mr. B. challenges the substantial-evidence standard of review given in A.R.S. § 12-910(E).

Vacatur of the challenged decision is the appropriate remedy for a due-process violation. *In re MH2006-000023*, 214 Ariz. 246, 248–49 ¶¶ 10–12 (App. 2007). Vacatur of the agency decision is the appropriate remedy for a separation-of-powers violation. *Enterprise Life Ins. Co. v. ADOI*, 248 Ariz. 625, 629 ¶¶ 23–24 (App. 2020). Also, "the court may affirm, reverse, modify or vacate and remand the agency action." A.R.S. § 12-910(E).

I. MR. B.'S NAME SHOULD BE ORDERED REMOVED FROM THE CENTRAL REGISTRY

DCS can place on the Central Registry only those child-abuse allegations that "are substantiated." A.R.S. § 8-804(A).

> '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[.]

A.A.C. § R21-1-501(17) (emphasis added).

Under A.A.C. §§ R21-1-501(17)(a) or (17)(b) (subsection (17)(c) is inapplicable here), the finding of child abuse against Mr. B. is not a "substantiated finding" because the ALJ *did not* find the proposed finding "to be true by a probable cause standard of proof … and the Department Director" *did not* "accep[t] the decision." *Id.* Also, Mr. B. "timely appeal[ed]." *Id.*

Departing from the plain meaning and operation of statutes and its own rules, DCS Director's decision here ordered "that the report in this matter shall remain 'substantiated.'" IR.63 (Appx13). A substantiated finding is one in which the ALJ finds probable cause *and* the Director accepts that decision. A.A.C. § R21-1-501(17)(a). Where the ALJ finds *no* probable cause and the Director *rejects* that decision, by definition, the Director's decision is *not* a substantiated finding. Also, if the "alleged perpetrator … timely appeal[s]," then it is not a substantiated finding. A.A.C. § R21-1-501(17)(b). DCS must wait until the appeal period has expired and DCS has confirmed that the accused has not timely appealed before it places a person's name on the Central Registry. That course of action also comports with logic and the judicially well-

developed understanding of the doctrine of exhaustion of available procedures before the penalty is executed.

Here, however, DCS did not wait for the 35-day appeal window of A.R.S. § 12-904(A) to close. Mr. B. filed the notice of appeal in Superior Court within the 35-day statutory appeal period. IR.1 (Aug. 30, 2019 (filing date of Notice of Appeal filed in Superior Court)); IR.63 (July 28, 2019 (date of DCS Director's decision)). The allegation of child abuse against Mr. B., according to A.A.C. § R21-1-501(17), should therefore have remained *not substantiated* throughout the pending appeal. He is innocent until proven guilty. Yet DCS has already placed Mr. B.'s name on the Central Registry.[9]

In other words, DCS has misinterpreted A.R.S. § 8-804(A) and A.A.C. § R21-1-501(17) to permit it to place a person's name on the Central Registry as soon as the DCS Director orders it. This Court interprets the statutes and DCS regulations without deference to DCS under A.R.S. § 12-910(E). As a matter of *de novo* interpretation of a question of law under A.R.S. § 12-910(E), DCS's interpretation is untenable. Mr. B.'s name should be removed from the Central Registry until the case is fully and finally resolved.

[9] Undersigned counsel first learned that DCS had placed Mr. B.'s name on the Central Registry on September 10, 2019, after Mr. B. had filed a stay motion, which the Superior Court eventually denied. IR.3 (Stay Motion filed August 30, 2019); IR.23 (Order rejecting stay motion); IR.69 (Order denying renewed stay motion). Mr. B. has appealed those interlocutory orders.

II. THIS COURT SHOULD ENGAGE IN *DE NOVO* STATUTORY CONSTRUCTION AND ADDRESS THE CONSTITUTIONALITY OF SEVERAL DISCRETE STEPS IN THE DCS-CENTRAL-REGISTRY-SUBSTANTIATION AND JRAD STATUTORY SCHEME

The statutory scheme, which DCS and the court below applied to Mr. B., contains at least nine steps, of which five run afoul of the state and federal constitutions, and one fails as a matter of statutory construction.

DCS and other public and private bodies dealing with children use the Central Registry to determine if a person is qualified to be an adoptive or foster parent or work at, *inter alia*, licensed foster homes, child welfare agencies, childcare homes, group homes, 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 the state in positions that provide direct services to children or vulnerable adults." A.R.S. § 8-804(B)(2). This sweeping list presumably includes public schools because schools provide "direct services to children."

Any person like Mr. B. who "provide[s] direct services to children" is informed of DCS's intention to substantiate a child-abuse allegation against them. That person must report, under penalty of perjury, to employers described in A.R.S. § 8-804 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).[10]

[10] The terms "abuse" and "neglect" are defined in statute, and DCS regulations adopt those definitions without modification. A.R.S. §§ 8-201(2), (25); A.A.C. §§ R21-1-501(1), (11).

Step 1: Statutes Impose the Low Probable-Cause Standard in DCS-Substantiation Cases

The Legislature has tasked DCS with maintaining 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 courts under A.R.S. § 8-844(C) in dependency cases. A.R.S. § 8-804(A). This case only relates to and challenges aspects of the substantiation-by-DCS administrative scheme.

While the court can only substantiate an allegation of child abuse in a dependency case "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 court- and DCS-substantiated child-abuse allegations are recorded on DCS's Central Registry. A.R.S. § 8-804(A).

"Probable cause" is not defined in statute. DCS, using its generic rulemaking authority, A.R.S. § 8-453 (A)(5), has defined it as "some credible evidence that abuse or neglect occurred." A.A.C. § R21-1-501(13).

Mr. B. does not challenge the initial probable-cause determination made by the DCS caseworker under A.R.S. § 8-811(E) in order to open an investigation. He does challenge the use of the statutory probable-cause standard by the adjudicators involved in this case—the ALJ, DCS Director, and state courts under A.R.S. § 8-811(K). The ALJ found no probable cause, DCS Director McKay found probable cause, and the Superior Court affirmed DCS's decision. IR.62 (Appx10), IR.63 (Appx13), IR.79 (Appx54).

As explained below, the state and federal constitutions require a standard of proof higher than probable cause at trial—and therefore the statute that requires adjudicators to use the probable-cause standard is facially unconstitutional.

Step 2: DCS Caseworker Investigates Allegations of Child Abuse or Neglect and Creates an Initial Report

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 engaged in the alleged conduct." A.R.S. § 8-811(E). But if DCS does not amend the proposed finding, OAH holds a hearing under Arizona's Administrative Hearings Act (A.R.S. §§ 41-1092–1092.12). A.R.S. §§ 8-811(I), (J).

Mr. B. does not challenge the constitutionality of this step. Step 2, however, provides important context to understanding the other errors and constitutional infirmities inherent in DCS-substantiated JRAD proceedings.

Step 3: DCS Reviews DCS Caseworker's Initial Report and Makes an Initial Probable-Cause Recommendation

The parties do not dispute, and Mr. B. does not challenge, DCS's review and use of the lower probable-cause standard at this early stage of DCS's investigation into the alleged incident. Like Step 2, Step 3 is important to understanding the problems inherent in DCS-substantiated JRAD cases. Steps 2 and 3 show the admixture of the investigatory, prosecutorial and adjudicatory roles performed by DCS.

Step 4: DCS Prosecutes the OAH Trial

DCS prosecuted the matter against Mr. B. before the OAH ALJ. Trials before the ALJ take place, as it did in Mr. B.'s case, under the Rules of Evidence and Civil Procedure, except that A.R.S. § 8-811(J) does not require DCS to produce witnesses with firsthand knowledge. *See also* A.A.C. §§ R2-19-102 (OAH regulation regarding use of Arizona Rules of Civil Procedure and related local rules); R2-19-116 (OAH regulation regarding conduct of hearings).

The burden to prove that Mr. B abused G.C. rests on DCS. *See also* A.A.C. § R2-19-119 (allocating burden of proof in OAH trials). Relying on A.R.S. § 8-811(J), DCS did not produce the children or the DCS caseworker who created the initial report to testify. The statute's permitting hearsay and denying the accused any opportunity to confront and cross-examine his accusers violates the state and federal constitutions. *See Crawford v. Washington*, 541 U.S. 36 (2004). The child "victim" or "witness" to alleged abuse or neglect "is not required to testify," but the child's hearsay statement is admissible only if "the time, content and circumstances of that statement are sufficiently indicative of its reliability." A.R.S. § 8-811(J). The "reporting source" is also "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). DCS's entire case, therefore, relied on the caseworker's case notes. DCS, however, neither provided any sufficient indication of the case notes' reliability, nor showed how its contents, the children's statements contained therein, and the circumstances when they were made were sufficiently reliable and trustworthy.

The ALJ appropriately found the caseworker's report "inconsistent" and concluded that DCS "failed to demonstrate that probable cause exists to substantiate its proposed finding that [Mr. B.] abused [G.C.]" IR.62 (Appx9–Appx10).

Step 5: The ALJ Orders DCS to Not Enter the Accused's Name on the Central Registry

The OAH ALJ enters findings of fact, conclusions of law, and makes credibility determinations about witnesses appearing in the OAH hearing. "On completion of the presentation of evidence," ALJ Moses-Thompson "determine[d] that probable cause d[id] not exist to sustain the department's finding," and consequently, she "order[ed] the department to amend the information or finding in the report." A.R.S. § 8-811(K); IR.62 (Appx10).

Step 6: DCS, Dissatisfied with the ALJ's Decision, Appeals It to DCS's Own Director

DCS can appeal the ALJ's decision to its own Director. A.R.S. §§ 41-1092.08(B), (F). Within 30 days of receiving the ALJ's decision, the DCS Director "may review the decision and accept, reject or modify it." A.R.S. § 41-1092.08(B). DCS can also acquiesce in the ALJ's decision by not appealing to DCS's own agency head. Here, DCS appealed to then-Director McKay.

Step 7: DCS's Director Rejects and Modifies the ALJ's Factual and Credibility Determinations and Conclusions of Law

DCS's Director may "reject or modify" by providing "a written justification," "the administrative law judge's decision," A.R.S. § 41-1092.08(B), which "contain[s] a concise explanation of the reasons supporting the decision, including the findings of fact and conclusions of law." A.R.S. § 41-1092.08(A). Director McKay rejected the

ALJ's factual and credibility assessments and conclusions of law and replaced them with his own one-sided findings based on no competing, competent testimony. This aspect of the administrative process violates the state and federal constitutions.

Step 8: DCS Executes and Enforces the Director's Decision

DCS enforced Director McKay's decision against Mr. B. (by placing his name on the Central Registry). What is surprising is that DCS did so prematurely, by ignoring the relevant state statute and DCS's own regulation defining when a finding is "substantiated." A.R.S. § 8-804(A); A.A.C. § R21-1-501(17). DCS's interpretation denies Mr. B. due process by placing his name on the Central Registry before allowing exhaustion of state-court appeals.

Step 9: On Appeal the Superior Court Defers to the DCS Director's Findings of Fact and Credibility Determinations

A party "may appeal a final administrative decision" under the JRAD Act. A.R.S. §§ 12-901–914; 41-1092.08(H). The filing of a motion for rehearing or review with DCS is not necessary under A.R.S. §§ 41-1092.08(H), 41-1092.09(B).

Under A.R.S. § 12-910(E), the Superior Court deferred to the DCS Director's factual and credibility determinations. According to the Superior Court, the statute makes state court judges acquiesce in the Director's refusal to accept the ALJ's findings of fact and credibility assessments. IR.79. Such a statutory reading renders an appeal pointless. Mr. B. challenges this aspect of the administrative scheme as violating both the state and federal constitutions.

A.R.S. § 12-910(C) allows appellants like Mr. B. to "deman[d] in the notice of appeal" a "trial *de novo*." Mr. B. demanded trial *de novo* in his notice of appeal filed in

Superior Court, IR.1, and to be doubly sure, he followed up that demand with a "Motion to Introduce Exhibits or Testimony (or Both) Not Offered During the Administrative Hearing," IR.67. The court below denied that motion, IR.71, and prohibited any trial from taking place. Mr. B. challenges Step 9, *i.e.*, the Superior Court's deficient review, as unconstitutional.

* * *

In sum, Mr. B. asks this Court to rule that (1) DCS erred in placing his name on, and the Superior Court erred in not removing his name from, the Central Registry because Step 8 (the plain meaning of A.R.S. § 8-804(A) and A.A.C. § R21-1-501(17)) prohibits DCS from placing a person's name on the Central Registry until the accused exhausts state-court appeals; (2) the Superior Court erred in prohibiting Mr. B. from introducing facts in the Superior Court as permitted by A.R.S. § 12-910(C); and (3) Steps 1, 4, 6, 7, and 9 are unconstitutional. The Court should accordingly reverse and vacate the DCS Director's and the Superior Court's decisions, and order Mr. B.'s name removed from the Central Registry.

III. THE CHALLENGED STATUTES DEPRIVE MR. B. OF DUE PROCESS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS

A. The Federal *Mathews* Three-Factor Test Favors Mr. B.

All challenged statutes fail to meet the *Mathews* test articulated under the Fourteenth Amendment's Due Process Clause. *Mathews v. Eldridge*, 424 U.S. 319 (1976). According to *Horne v. Polk*, this Court is required to analyze the challenged statutory scheme and the government's actions under the *Mathews* test pursuant to the federal Due Process Clause. 242 Ariz. 226, 230 ¶15 (2017). *Mathews* articulated three factors that this Court balances. 424 U.S. at 335.

1. The First *Mathews* Factor: "Private Interests that Will Be Affected by the Official Action"

(a) Steps 6, 7: The Reject-or-Modify Standard

A person's reputation is a protected liberty interest. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (holding: 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"); *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").

The "private interests" to be considered under *Mathews* are much broader in scope than the narrow life/liberty/property interests or fundamental rights necessary to satisfy, for example, the substantive aspects of the Due Process Clause. *Mathews* itself is testament to that. The "private interest" in preventing termination of social-security benefits triggers the *Mathews* test even when there is no recognized liberty or property

interest or a fundamental right to social-security benefits. So too, here. That Mr. B. has a protected liberty interest in his reputation and privacy only makes his argument for the *Mathews* "private interests" stronger. Also, New Horizons fired Mr. B. IR.64 (Appx4:19). The stigma coupled with loss of employment fortifies Mr. B.'s showing of an adversely affected private interest under the first *Mathews* factor. *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).

Additionally, the litigant has a "private interest" in "neutral adjudication in appearance and reality," and that private interest is "magnified where the agency's final determination is subject only to deferential review." *Horne*, 242 Ariz. at ¶14. Here, the Director, under A.R.S. § 41-1092.08, revised the ALJ's factual and credibility assessments without ever taking live witness testimony or making firsthand observations of witnesses' credibility.[11] The Arizona statute therefore facially nullifies "[o]ne of the most important principles of our judicial system": "deference is given to the finder of fact who hears the live testimony of witnesses … [and] judge[s] the credibility of those witnesses." *Matter of Pima County Juvenile Action No. 63212-2*, 129 Ariz. 371, 375 (1981) (applying *Mathews*). Such "personal observation of witnesses is crucial to accurate fact-finding when the outcome," as here, "depends on an assessment of the credibility of

[11] The DCS-defined probable-cause standard hinges entirely on credibility. A.A.C. § R21-1-501(13) ("'Probable Cause' means some credible evidence that abuse or neglect occurred."). The ALJ found RJ's, Mr. L.'s and Mr. B.'s testimony "to be credible." IR.62 (Appx8). Director McKay "delete[d]" that credibility determination. IR.63 (Appx12).

the witnesses." *Id.* That is true of a federal judge reviewing the report and recommendations of a federal magistrate judge, *id.* at 374, or an Arizona juvenile-court judge reviewing the referee's decision, or the DCS Director reviewing the OAH ALJ's decision. When such reviewers "revers[e]" "factual finding[s]" and "rejec[t] the [fact-finder's] credibility assessments without having personally heard the disputed testimony," they "violat[e] the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 375.

(b) Step 1: The Probable-Cause Standard

This Court should hold that "probable cause" is an impermissibly—and unconstitutionally—low standard of proof when used by adjudicators to "substantiate" allegations of abuse or neglect. 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). The Arizona Supreme Court also "appl[ies] the *Mathews* test to determine the standard of proof required." *Kent K. v. Bobby M.*, 210 Ariz. 279, 286 (2005).

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). The 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).

Arizona courts already apply the statutory preponderance-of-the-evidence standard in substantiation-by-court cases. A.R.S. § 8-844(C)(1). Substantiation by DCS is a government-initiated proceeding against an individual. "The 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.

For the first *Mathews* factor, therefore, Mr. B.'s private interest is weighty. The 25-year loss or deprivation of a liberty interest, A.R.S. § 8-804(G), and a near-permanent stigma associated with being labeled a child abuser, are sufficiently grave to warrant a standard of proof higher than probable cause. Also, Mr. B. was fired from New Horizons. 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 under this definition when all he did was place his hand on a teenager's shoulder to calm him down. IR.62 (Appx8).

(c) Steps 4, 9: Nature of the OAH Trial and of the Superior Court's Appellate Review

Under A.R.S. § 8-811(J), DCS did not produce as witnesses at trial either the children or the caseworker who interviewed them. It instead relied on their hearsay statements. There were no corresponding guarantees of trustworthiness contained within the triple hearsay; DCS's evidence was inherently contradictory, and DCS failed to provide any evidence to meet the statutory definition of "child abuse" under any standard of proof.

Mr. B. has a private interest in confronting his accusers and cross-examining the witnesses against him—a private interest under the first *Mathews* factor. *See Matter of Maricopa County Juvenile Action No. JD-561*, 131 Ariz. 25, 28 (1981) (adults have the right to cross-examination, including cross-examining "minor[s]" in "civil administrative

matters"); A.R.S. § 41-1062 (right to cross-examination in OAH proceedings); *In re Lewkowitz*, 70 Ariz. 325, 334 (1950) (discussing right to cross-examination as the cornerstone of Arizona's "administrative due process"); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) (accused is deprived of due process where under statute, regulation, or policy or practice the accused is not given "an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder"). As in *Doe* and *Crawford*, this Court should focus on the statute that permits DCS to omit accusers' live, cross-examined, sworn testimony in the neutral ALJ's presence and how that omission affects the asserted private interests of Mr. B.

In ruling against Mr. B., Director McKay accepted the hearsay and double hearsay while "delet[ing]" the testimony of witnesses with firsthand knowledge and who were subject to full cross-examination. Any deference granted by this Court under A.R.S. §12-910(E) (Step 9) to the DCS Director only insulates such errors from meaningful judicial review. Mr. B. has a private interest in obtaining "meaningful" judicial review. *Mathews*, 424 U.S. at 333; *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 489 (2010) (recognizing "meaningful judicial review" as a private interest); *Cook v. State*, 230 Ariz. 185, 190 ¶19 (App. 2012) (same).

2. The Challenged Statutes Fail the Second *Mathews* Factor: "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"

As stated above, Mr. B. has several "private interests": a protected liberty interest in his good name, reputation, honor, integrity, and in pursuing his chosen profession; a private interest in obtaining neutral adjudication in appearance and reality; a private

interest in factfinders who take live witness testimony in the factfinders' presence so that they can judge the credibility of those witnesses; a private and liberty interest in preserving fundamental fairness in government-initiated proceedings that threaten the individual involved with significant stigma or deprivation of liberty; a private and liberty interest in confronting accusers and cross-examining the witnesses (including minors) against him in civil administrative proceedings in the presence of a neutral factfinder; a private and liberty interest in obtaining meaningful judicial review. The second *Mathews* factor looks at the "risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335.

(a) Steps 6, 7: The Reject-or-Modify Standard

Under the second *Mathews* factor, 424 U.S. at 335, DCS Director's revision of the ALJ's factual and credibility findings deprived Mr. B. of due process of law. The risk is high of erroneously depriving the accused of his private interests under the reject-or-modify standard of A.R.S. §§ 41-1092.08(B), (F). Mr. B.'s name is currently listed on the Central Registry for *25 years*. A.R.S. § 8-804(G). There are no corresponding safeguards to ensure the constitutionality of the process used to put his name on the list. Names should be put on the list only where child abuse or neglect is proven to have occurred under an administrative scheme and standards of proof and review that are constitutional. A.R.S. § 8-804(G); A.R.S. §§ 8-201(2), (25) (statutory definition of child abuse and neglect).

The additional or substitute procedural safeguards Mr. B. offers mitigate, if not eliminate, the risk of depriving someone of due process. Placing names on the Central

Registry only after the accused timely exhausts state-court appeals, and elevating the standards of proof and review, either as a matter of statutory construction, or by declaring portion of statutes unconstitutional would return the statutory scheme back to the "essentials of due process and fair treatment." *Pima County*, 129 Ariz. at 374.

There is no dispute that the DCS Director deleted findings of fact and credibility assessments of the ALJ and replaced them with his own. IR.63. DCS does not dispute that the ALJ was the only adjudicator who saw and heard live witnesses testify. DCS's Director was *not* the adjudicator who took live witness testimony. The Director's alternative facts came from a caseworker's case notes prepared by one of his subordinates who did not testify in front of the ALJ and therefore could neither be seen nor heard by the ALJ nor be cross-examined by Mr. B. The ALJ had already found that caseworker's "case notes" to be "inconsistent" and in-court, cross-examined, sworn testimony of three individuals (that Mr. B. "did not place his forearm on [G.C.'s] neck and that [G.C.'s] breathing was not restricted") as "credible." IR.62 (Appx9 ¶ 5). *See State v. Fritz*, 157 Ariz. 139, 141 (App. 1988) ("The [trier-of-fact] is the sole arbitrator of the credibility of witnesses."); *Bailey v. Interradiology, Inc.*, No. 2 CA-CV 2016-0058, 2016 WL 5874824 ¶ 9 (Ariz. App. Oct. 7, 2016) ("[I]t is the trial court's function, as the trier of fact at a bench trial, to assess the credibility of witnesses.") (citing *In re U.S. Currency in Amount of $26,980.00*, 199 Ariz. 291, 295 ¶ 10 (App. 2000)); *State v. Gonzales*, 111 Ariz. 38, 40 (1974) ("[W]hen the trial judge is the trier of facts, the presumption is that such trial judge disregards all inadmissible evidence in reaching his decision."); *Pitts v. Industrial Commission of Arizona*, 246 Ariz. 334, 336 ¶ 14 (App. 2019) ("As the trier of fact, the ALJ reviews the evidence presented. … On appeal, this court limits its review to

whether the record supports the ALJ's finding."); *Thompson v. Sullivan*, 987 F.2d 1482, 1490 (10th Cir. 1993) ("[T]his court ordinarily defers to the ALJ as trier of fact on credibility.").

Prohibiting DCS's Director from adjudicating substantiation-by-DCS cases, *i.e.*, to make DCS-substantiation cases go from the ALJ directly to Superior Court, would be one way to satisfy the *Mathews* test. At the very least, so long as the DCS Director conducts a *de novo* review of the ALJ's conclusions of law without rejecting or modifying the ALJ's factual and credibility findings as he did here, the same Due Process concerns do not arise in such Director review *if* the state courts, as neutral arbiters then review the Director's conclusions of law *de novo* under A.R.S. § 12-910(E), and/or freely grant leave for trials *de novo* under A.R.S. § 12-910(C) in cases involving factual disputes. The Court, therefore, needs to resolve the question of what standards of review should courts employ to ensure a neutral arbiter, in appearance and reality, oversees factfinding and reaching legal conclusions. DCS's Director acting as a judge and a jury in its case against an individual violates the Due Process Clause.

(b) Steps 1, 4, 9: Standards of Proof and Review

Judicial review in the Superior Court under A.R.S. § 12-910(E)'s substantial-evidence standard coupled with the probable-cause standard of proof used in DCS-substantiation cases under A.R.S. § 8-811(K) creates a high risk of erroneous deprivation of Mr. B.'s private and liberty interests. Additional or substitute procedural safeguards are available: a higher standard of proof and a stricter standard of review are possible and appropriate. Factfinding deference given by Arizona state courts to the DCS Director is inappropriate. Within the unique context of Arizona's administrative scheme,

the ALJ is the only neutral factfinder prior to the Superior Court stage of proceedings. To preserve the due process rights of litigants like Mr. B., the Superior Court must not defer to the DCS Director, and must freely permit a trial *de novo* in Superior Court under A.R.S. § 12-910(C) if the accused demands it.

To be sure, DCS should be able to appeal an adverse ALJ ruling contending there is no substantial evidence to support the ALJ's decision. If and only if the Superior Court agrees with DCS would a new trial *de novo* ensue at DCS's behest, assuming no double-jeopardy problems exist. The only *de novo* trials in Superior Court would be at the behest of the accused after an adverse administrative decision.

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." IR.62 (Appx8). Far from wrong, his actions are admirable in terms of attempting to deal with a highly agitated and troubled teen. More importantly, the actions comprised neither child abuse nor child neglect as defined at A.R.S. §§ 8-201(2), (25). Yet his name has 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." To exacerbate the risk to Mr. B.'s private interests, the substantial-evidence standard if applied in the manner the Superior Court did (by deferring to the fact and credibility findings of the Director) deprives Mr. B. of due process.

First, consider the high risk of erroneously depriving Mr. B. of his private interests under the probable-cause standard of proof and the substitute safeguards that will

mitigate or eliminate that risk.[12] The preponderance standard is statutorily mandated in court-substantiation cases. A.R.S. § 8-844(C)(1). That is, when Arizona juvenile courts, which follow rules of juvenile civil procedure and rules of evidence, are asked to substantiate an allegation of child abuse, they do so under the preponderance standard. The rules of procedure and evidence are designed to protect the due process rights of *all* litigants.

In contrast, in DCS-substantiation cases, DCS's Director does not follow any rules of civil procedure or evidence; the OAH ALJ, however, follows most rules of civil procedure and evidence. In this context, when DCS-substantiation cases use the lower probable-cause standard, A.R.S. § 8-811(K), it increases the risk manifold of erroneously depriving the accused of due process.

In other words, looking at court-substantiation cases highlights the problems inherent in DCS-substantiation cases. If the statute (A.R.S. §§ 8-811(J)–(K)) had required the ALJ and DCS Director to use the preponderance standard *and* to follow state-court rules of procedure and evidence, there would be less concern. But the reality is that the operative statutes require the use of the lower probable-cause standard *and* require DCS's Director to follow neither the rules of procedure nor the rules of evidence in rejecting or modifying (A.R.S. §§ 41-1092.08(B), (F)) the ALJ's factual and credibility assessments. Hence, the court may have no choice but to confront the unconstitutionality of the statutes here.

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[12] Mr. B. does not challenge the probable-cause standard used in the DCS-investigation and DCS-caseworker review stages (Steps 2, 3); he challenges the use of probable cause by the adjudicators in this case, *i.e.*, the ALJ, DCS Director, and state courts. A.R.S. § 8-811(E), (K), (M)(2).

Another point of comparison is helpful to evaluating the second *Mathews* factor: court-substantiation cases typically involve disputes between private parties (for example, one parent alleging the other abused or neglected their child), and occasionally also involve child-abuse cases brought by DCS to the juvenile courts. In such situations, the "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." *Santosky*, 455 U.S. at 755 (1982) (cleaned up). In DCS-substantiation cases, however, which are "government-initiated proceedings," the Supreme Court has "mandated" the "clear and convincing evidence" standard as achieving the appropriate balance under the *Mathews* test. *Id.* at 756.

The lower preponderance standard in DCS-substantiation cases might conceivably satisfy *Mathews*, other things being equal: *i.e.*, that the preponderance standard be applied by a neutral trier of fact who follows rules of evidence and procedure. Other things, however, are *not* equal. Thus, either the clear-and-convincing standard or the preponderance standard could satisfy the *Mathews* test if that standard of proof is coupled with a robust standard of review. Use of the current probable-cause standard of proof, coupled with *no* standard informing DCS Director's review, followed by the Superior Court's lax substantial-evidence standard of review, plainly fails the *Mathews* test.

Second, the standard of review applicable here—substantial evidence, A.R.S. § 12-910(E)—only exacerbates the risk of erroneously depriving Mr. B. of his private interests.

If this Court does not check DCS's limitless rejection or modification of the ALJ's factual and credibility findings, then it would be abandoning its judicial

responsibility. Such 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. Under the Superior Court's reading, A.R.S. § 12-910(E) allows a non-judicial entity to usurp the trier-of-fact's power and then commands judges to defer to the factual pronouncements of the usurper who is entirely external to the judiciary. *See* John Gibbons, *Why Judicial Deference to Administrative Fact-Finding Is Unconstitutional*, 2016 BYU L. Rev. 1487 (2017); Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Georgetown J.L. & Pub. Pol'y 27 (2018).

According to the Superior Court, A.R.S. § 12-910(E) properly places a thumb on the scale in favor of DCS's preferred formulation of facts. What's more, the only time the standard becomes contentious is when the agency head's formulation of facts differs from the OAH ALJ's. Yet the substantial-evidence standard, properly applied, is not such a rubber-stamp standard.

Arizona Constitution's Article VI makes no allowance for state judges to abandon their duty of judicial review, let alone rely upon facts created by executive-agency heads. Even Section 910(E)'s command that courts should review legal arguments *de novo* is undermined by its supposed command that they defer to the skewed facts presented to courts by DCS—one of the litigants before the court—a litigant that had the burden of proof to begin with. Thus, the more serious problem with the Superior Court's interpretation of Section 910(E) is that it requires the judiciary to display systematic bias in favor of DCS whenever it appears as a litigant. The U.S. Supreme Court has held that even the *appearance* of potential bias toward a litigant violates the Due

Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1734 (2018) (Kagan. J., concurring) (same). Yet Section 910(E) institutionalizes a regime of systematic judicial bias by requiring courts to "defer" to agency litigants whenever agency heads re-write facts found by a trier of fact who followed court-style procedural and evidentiary rules. Indeed, in 2018 the legislature expressed its opposition to judicial deference to agencies when it amended A.R.S. § 12-910(E) to clarify that courts should give no deference to "any previous determination that may have been made on the question by the agency." The second sentence of that subsection ought to be read in light of the third.

A judge takes 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 and tilt the scales in favor of the government's position. The Superior Court's uncommon application of A.R.S. § 12-910(E)'s substantial-evidence standard, therefore, violates Mr. B.'s due process.

It should be apparent, therefore, that the danger of factfinding deference of A.R.S. § 12-910(E) to DCS Director's decision in this context is particularly acute. It violates the state and federal constitutions' Due Process Clauses. U.S. Const. amend. XIV; Ariz. Const. art. II, § 4. Factfinding deference to someone who is not the trier of fact compels judges to abandon their duty of independent judgment. Factfinding deference commands Arizona's Article VI judges to abandon their independence by giving controlling weight to a non-trier-of-fact's factfinding—not because of DCS's accuracy, impartiality, or persuasiveness, but rather based solely on the brute fact that Director

McKay has written alternative facts into 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 Court should check the fact-checker.

If the Court is reluctant to reject the substantial-evidence standard outright or freely permit trials *de novo* in Superior Court, the Court should at least focus on the plain words of the operative statute in evaluating its constitutionality under *Mathews*. A.R.S. § 12-910(E) says "the agency action." *Which* agency's action—OAH's or DCS's? The statute leaves the answer to that question open. If substantial-evidence or factfinding deference were given to OAH's neutral factfinding, then Mr. B.'s name would be removed from the Central Registry. If factfinding deference were instead given to DCS Director's one-sided revision of OAH's factfinding, then Mr. B.'s name would remain on the list for 25 years—and his due process rights would be denied.

The ALJ followed rules of evidence and procedure, for the most part. The ALJ appropriately weighted in-court statements over out-of-court statements and concluded that DCS failed to meet the probable-cause standard to prove that Mr. B. abused G.C. Substantial evidence, therefore, exists to uphold the ALJ's decision. Courts traditionally use the substantial-evidence standard to review an *ALJ's* factual and credibility determinations. *Pitts*, 246 Ariz. at 336 ¶ 14 ("On appeal, this court limits its review to whether the record supports the ALJ's finding."). The Superior Court concluded otherwise. This Court should clarify that Superior Courts should freely permit trials *de novo* to resolve factual disputes or limit their review to the record created by a neutral arbiter who follows rules of procedure and evidence in entering factual and credibility findings into

the record. In other words, when a state agency acts as the prosecutor, judge and jury in a case (like DCS did here), use of the substantial-evidence standard of review by state courts violates the non-governmental litigant's due process rights.

In contrast, what standard did the DCS Director apply in reviewing the ALJ's decision? He purportedly applied the reject-or-modify standard of A.R.S. §§ 41-1092.08(B), (F), which provides no limiting principle (such as contrary to law, substantial evidence, arbitrary and capricious, or abuse of discretion) to limit when the Director can reject or modify the ALJ's factual and credibility assessments.

When the case came to the Superior Court, the court applied the substantial evidence standard to the Director's decision, not to the OAH ALJ's. IR.79 (Appx48–Appx54); *but see Hahn v. Industrial Commission of Arizona*, 227 Ariz. 72, 74 ¶ 5 (App. 2011) ("[W]e defer to the *ALJ's factual findings* but review questions of law *de novo*." (emphasis added)). Such deference heightens, by at least two orders of magnitude, the risk of erroneously depriving Mr. B. of due process. Whether the substantial-evidence standard within the context of the DCS-substantiation administrative scheme is constitutional is a question of law that this Court reviews *de novo*. A.R.S. § 12-910(E).

Within the context of Arizona's administrative scheme, giving factfinding deference to the agency head's decision (who is not neutral and does not follow rules of evidence, procedure, or any particular limiting standard to review the ALJ's decision) deprives litigants of due process.

With respect to deference to DCS's conclusion of law (that Mr. B.'s placing of a hand on a teenager's shoulder to calm him down constitutes child abuse), the answer is easy. DCS interpreted A.R.S. § 8-201(2)'s statutory definition of child abuse and

extended it to cover Mr. B.'s conduct. That statutory interpretation by an agency head is a "question of law" that this Court reviews "without deference to any previous determination that may have been made on the question by the agency." A.R.S. § 12-910(E). This Court has ample basis to conclude, as a *de novo* matter of statutory construction, that Mr. B.'s conduct does not fall within the definition of child abuse given in A.R.S. § 8-201(2).

Yet the question remains: should state courts defer to DCS Director's factfinding? That is because the legal question (which is to be reviewed *de novo*) of whether a certain set of facts constitutes child abuse turns on the facts. If the Court defers to the Director's alternative facts (that Mr. B. "restricted [G.C.'s] breathing with either his hand or his forearm," IR.63 (Appx12)), then the Court could conclude that because "restricted … breathing" constitutes "impairment of bodily function," A.R.S. § 8-201(2), Mr. B. abused G.C. as a matter of law. But if the Court defers to the ALJ's findings of fact (that Mr. B. did not place his hand or forearm or any part of his body on G.C.'s neck and that G.C.'s breathing "was not restricted," IR.62 (Appx8 ¶¶ 19–21, Appx9–Appx10 ¶ 5), then the Court must conclude as a matter of law that Mr. B. did not abuse G.C.

Given the high risk of erroneously depriving Mr. B. of his private and liberty interests under these ill-suited standards of proof and review, "additional or substitute procedural safeguards" are readily available. *Mathews*, 424 U.S. at 335. They are:

- curb DCS Director's standardless authority to reject or modify the ALJ's factual and credibility determinations;

- elevate the standard of proof to preponderance of the evidence, or better yet clear and convincing evidence; and
- reject state-court deference to the factual and credibility assessments of an agency adjudicator who is not neutral.

3. The Third *Mathews* Factor: "the Government's Interest, Including the Function Involved and the Fiscal and Administrative Burdens that the Additional or Substitute Procedural Requirements Would Entail"

The third *Mathews* factor, 424 U.S. at 335, requires courts to look at two things: "the government's interest, including the function involved," and "the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

DCS offered two sentences on the third *Mathews* factor in the court below. IR.73:30:6–12. DCS identified no government interest in the reject-or-modify standard (A.R.S. §§ 41-1092.08(B), (F)), no government interest in maintaining child-abuse reports that are *not* substantiated (A.R.S. § 8-804(A); A.A.C.§ R21-1-501(17)), no government interest in suspending certain rules of evidence and civil procedure (A.R.S. § 8-811(J)), no government interest in not taking a nuanced look at the state-court's standard of review (A.R.S. § 12-910(E)), and no government interest in the continued use of the probable-cause standard of proof (A.R.S. § 8-811(K); A.A.C. §§ R21-1-501(13), (17)).

As to the function involved, this case looks at Arizona's scheme of administrative adjudication and the standards of proof and review used therein. In many respects Arizona's administrative-adjudication scheme departs from federal-agency adjudications.

Although there is some overlap, Arizona's scheme is unique in that the initial trial-type role of holding an evidentiary hearing is assigned to a separate and independent agency—the Office of Administrative Hearings. OAH ALJs hear cases that are investigated and prosecuted by DCS and almost all Title 32 boards (*see generally* A.R.S. tit. 32). An appeal from the OAH ALJ decision goes to the agency that originates the action. Each federal agency tasked with adjudicating disputes has its own cadre of administrative judges, and appeals from their decisions go to the agency heads, be they a single individual or a body of individuals. In other words, Arizona's legislature has long required that the trial-type administrative adjudicatory role be placed in a separate agency that could remain neutral and over time develop some expertise in court-style trial procedures and in applying rules of evidence. OAH has. The challenged statutes, however, dismantle that balance when they allow the agency head who adjudicates the appeal from the ALJ's decision to reject or modify the ALJ's factual and credibility findings—findings the neutral ALJ makes while adhering to rules of procedure and evidence.

Thus, to speculate about any government interest and to look at the governmental function involved at the OAH-stage and DCS-stage of agency adjudication is to realize that Titles 8, 12, 32, and 41 are sometimes at odds with each other and sometimes even work to violate Arizonans' right to the due process of law.

In contrast, the fiscal or administrative burdens of the substitute or additional procedural safeguards Mr. B. seeks are minimal, if not nonexistent. The fiscal burden on the government to litigate the case in front of the ALJ would remain unchanged. In *Mathews*, the plaintiff had asked the Court to conclude that the plaintiff should continue receiving Social Security benefits until the plaintiff exhausts all appeals. 424 U.S. at 347.

The Court concluded under the third *Mathews* factor that such a rule would impose substantial financial burdens on the government. Not so here because appellants like Mr. B. receive no monies from the government whether their name is on or off the Central Registry.

The plaintiff in *Mathews* had also asked the Court to *create* a pre-deprivation adversary hearing process where none existed before. The Court rejected that suggestion based on the third factor. By contrast, here, the agency administrative adjudication process already exists under A.R.S. § 8-811(I). DCS-substantiation cases, by statute, already go first to the OAH ALJ, next to the DCS Director, then to Superior Court where a *de novo* trial can be demanded, then to this Court and eventually to the Arizona Supreme Court. Mr. B. merely asks this Court to address whether the standards of proof and review used in this established administrative-adjudication process comport with the state and federal Due Process Clauses.

In sum, the three *Mathews* factors run in Mr. B.'s favor. The Court should so hold and order his name removed from the Central Registry.

B. The Arizona Constitution's Due Process Clause Protects Mr. B. to an Even Greater Extent

The Arizona Constitution protects Mr. B. to a greater extent than does the United States Constitution. The Arizona Constitution states, "No person shall be deprived of life, liberty, or property without due process of law." Ariz. Const. art. II, § 4. Under Arizona's Due Process Clause, Arizona courts likely do not give weight to the third *Mathews* factor and pay close attention to additional or substitute procedural

safeguards that would mitigate or eliminate the identified due-process violations—and this Court should so clarify.

The Arizona Supreme Court has rejected the lockstep approach. It does not interpret state constitutional provisions in lockstep with their respective federal counterparts. It has held that "the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law." *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984). For example, even though their words are very similar, *Pool* read Arizona's Double Jeopardy Clause as providing greater protections than the federal counterpart. That a state constitutional provision may very closely track the federal counterpart is simply not the main inquiry Arizona courts pursue.

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, 306 ¶ 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. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982). The federal constitution "sets the 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 language "of the state constitutional provision is *identical* or *similar* to its federal counterpart," Arizona courts "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." *Brush & Nib*, ¶ 172 (2019) (Bolick, J., concurring) (citing *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 10 (2010); *Moore v. Chilson*, 26 Ariz. 244, 255 (1924)). That inquiry, here, is straightforward.

Neither the Fifth nor the Fourteenth Amendment's Due Process Clauses were interpreted in 1912 to recognize the basic due-process protections we now take for granted. For example, there is ample cause to look in horror at what counted as procedural due process in Arizona under the Fourteenth Amendment before the Supreme Court reversed the Arizona Supreme Court's decision in *In re Gault*, 387 U.S. 1 (1967), *reversing* 99 Ariz. 181 (1965). The procedural due-process revolution at the federal level did not occur until the late 1960's in the Warren Court, and much of what we call federal administrative law saw little development, if any, until the federal-agency explosion after the New Deal and passage of the Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946). There was no fleshed-out procedural-due-process guaranty at the federal level until *Mathews* systematized it in 1976.

Given this history and context, it cannot be that the "Congress and president who finally approved [Arizona's Constitution] in 1912 could have intended that federal constitutional law would protect the rights and liberties of Arizona's populace." Stanley G. Feldman, V.C.J., & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 Ariz. St. L.J. 115, 116 (1988). This Court should, therefore, independently evaluate Arizona's Due Process Clause and

conclude that it provides Mr. B. greater protections, even if it concludes that the words of the state and federal Due Process Clauses are "identical or similar." *Brush & Nib*, ¶ 172.

The words of the federal and state Due Process Clauses differ, however. When they differ, "we must presume [the state provision] was intended to have a different meaning from its federal counterpart." *Brush & Nib*, ¶ 172. The words differ in one crucial respect. The Fourteenth Amendment's Due Process Clause (emphasis added) states that "nor shall *any State* deprive any person of life, liberty, or property, without due process of law." Arizona's (emphasis added) is in the passive voice, guaranteeing that "[*n*]*o person* shall be deprived of life, liberty, or property without due process of law." 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 due process. *Brush & Nib*, ¶ 45 (majority opinion).[13]

Arizona courts have had no occasion to decide just how much broader is Arizona's Due Process Clause. There is some indication that Arizona's provision is broader because Arizona courts have not adopted the *Mathews v. Eldridge* test. *State v. Wagner*, 194 Ariz. 310, 313 ¶ 15 (1999) (declining to apply the *Mathews* test). Other indicia are as follows: Arizona's provision protects "the most basic and essential due process

[13] While the words of the Fifth Amendment's Due Process Clause are identical to Arizona's, the Fifth Amendment, unlike the Fourteenth Amendment does not apply to the states. The Fourteenth Amendment's and Arizona's Due Process Clauses do apply to the states. The Fifth and Fourteenth Amendment's Due Process Clauses, to the extent they are in lockstep, are only due to the incorporation and reverse-incorporation doctrines. Those doctrines are inapposite to evaluating whether the Fourteenth Amendment's and Arizona's Due Process Clause should be interpreted in lockstep.

guarantee, the right to be heard at a meaningful time and in a meaningful manner." *Trisha A. v. DCS*, 247 Ariz. 84, 94 ¶ 45 (Bolick, J., dissenting); *id.* ¶ 47 ("due process requires determin[ation] … under the clear and convincing evidence 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 there are two reasons why a state court should adopt a stricter formulation of the *Mathews* test. First, as then-Justice Rehnquist suggested in 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, and perhaps for the first reason, modern application of *Mathews* 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); Philip Hamburger, *The Inversion of Rights and Power*, 63 Buff. L. Rev. 731 (2015) (government interests cannot become lazy substitutes for careful definitions of rights).

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 *Mathews*. *See, e.g.*, *Trisha A.*, 247 Ariz. at 98 ¶ 67 (Bolick, J., dissenting) (government's interest in "administrative efficiency" does not outweigh the individual's interest) (quoting *Lassiter v. Dep't of Soc. Services of Durham County*, 452 U.S. 18, 28 (1981)).

"Few 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. *Santosky*, 455

U.S. at 759. It is important to protect children from abuse, and no one would contest that the names of those proven to have sexually abused children should be placed on the Arizona Central Registry. Constitutionally adequate process, however, is due even—and perhaps especially so—in those situations. Surely it is due Mr. B. One of the very basic tenets of a constitutional and civilized system of adjudication is to assume the accused is innocent until proven guilty. A.A.C. § R21-1-501(17), which does not allow DCS to list someone on the Central Registry if that person timely knocked on the court-house doors and is exhausting state-court appeals, is one way to ensure adherence to that bedrock principle. *Polaris Intern. Metals Corp. v. Arizona Corporation Commission*, 133 Ariz. 500, 508 (1982) (appellants denied due process where agency took adverse action and undermined appellants' right to exhaust state-court appeals). DCS here, however, listed Mr. B. by ignoring its own regulation, the operative statutes, and a fundamental principle of civilized adjudication.

Precisely because the risk of error in placing people's names on the list is great, and the accompanying reputational harm, stigma, and guilt-by-association are virtually impossible to erase, this Court must take a close look at all available additional or substitute procedural safeguards. The Arizona Constitution, more so than the Fourteenth Amendment, requires such careful consideration.

In sum, under either Arizona's or the Fourteenth Amendment's Due Process Clause, or as a matter of statutory construction to avoid addressing constitutional issues, this Court has every reason to vacate the decision below and order Mr. B.'s name removed from the Central Registry.

IV. USURPING, DIVESTING, REALLOCATING, AND CONCENTRATING FUNCTIONS PROPERLY BELONGING IN SEPARATE DEPARTMENTS VIOLATES THE ARIZONA CONSTITUTION'S SEPARATION-OF-POWERS DOCTRINE

Arizona's Distribution-of-Powers Clause, Ariz. Const. art. III, along with the Legislature's Vesting Clause, Ariz. Const. art. IV, pt. 1, § 1, and the Judiciary's Vesting Clause, Ariz. Const. art. VI, § 1, taken together, comprise the doctrine of separation of powers that is expressly stated in the Arizona Constitution.

There are two principal separation-of-powers defects in the statutory scheme that Mr. B challenges: (1) usurpation of functions properly belonging to another department, and (2) reallocation and concentration of functions in DCS that properly belong to another department—the judiciary. Both defects are evaluated under the *Brnovich* four-factor test. *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588 (2017).

To determine 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." *Id.* at 593 ¶ 14.

At the outset, it is important to note what the *Brnovich* factors are and what they are not. While the language quoted above in the second and third factors says "*legislature's* … control … [and] objective," *id.* ¶ 14 (emphasis added), that emphasis on the legislature is misplaced because the test is and should be department neutral. Article III of the Arizona Constitution (emphasis added) states that "no one of such departments shall exercise the powers *properly belonging* to either of the others." The Court of Appeals in *Hancock* had "adopt[ed]" the "legislature's degree of control" language from the Kansas Supreme Court's formulation of a *non-exhaustive* list of four factors. *J.W. Hancock*

Enterprises, Inc. v. Registrar of Contractors, 142 Ariz. 400, 405 (App. 1984) (adopting the test articulated in *State ex rel. Schneider v. Bennett*, 547 P.2d 786 (Kan. 1976)). Eventually, the Arizona Supreme Court endorsed the *Hancock* test in *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997). In that *Game of Chinese Whispers*, https://en.wikipedia.org/wiki/Telephone_(game), some things went unstated while some others were taken for granted.

The Kansas case was a "usurpation" case, *Hancock*, 142 Ariz. at 405, where the question was whether the *legislature* had arrogated to *itself* a function "properly belonging to either of the othe[r]" two branches, Ariz. Const. art. III. That is why *Hancock* talked about the *legislature*'s degree of control and the *legislature*'s objective. *Woods* and *Brnovich*, also were "usurp[ation]" cases: the question was whether the legislature's objective was to "usurp executive or judicial authority," *Brnovich*, 242 Ariz. at 593 ¶ 16, whether the legislature wanted "to take over an executive function." *Woods*, 189 Ariz. at 277.

The separation-of-powers test, therefore, looks at which department performs which *function*. So, it is important to keep this rubric in mind and not mechanically apply *Brnovich*.

A *Hancock*/*Woods*/*Brnovich*-style "usurpation" is where the court is asked to evaluate whether the *legislature* has arrogated to *itself* a power or function "properly belonging" to one of the other departments. Ariz. Const. art. III. But "usurpation" can also occur where an executive-branch agency arrogates to itself a power or function "beyond what is granted by the legislature." *Enterprise Life*, 248 Ariz. at ¶ 22 (App. 2020).

A reallocation-and-concentration situation occurs where the legislature divests functions from a sister department (here, the judiciary) and gives them to another sister department (here, an executive-branch agency, DCS, which already has investigative,

prosecutorial, and executive functions allocated to it). Such divestiture and then reallocation and concentration of functions in a state agency or official is a distinct defect under the Arizona Constitution's separation-of-powers doctrine. The same *Brnovich* test applies in all separation-of-powers situations, and there are at least two situations present here: usurpation, and reallocation-and-concentration.

The Court should clarify what the separation-of-powers test truly is: a department-neutral functional analysis. The *Brnovich* test looks, first, to the nature of the function (*e.g.*, adjudicatory standards of proof and review) and which department or official (*e.g.*, DCS's Director) is performing that function. The second, or the degree-of-control, factor looks to what control the *department* to which the function "properly belongs" (*e.g.*, judiciary) has over the *function* (*e.g.*, adjudicatory standards of proof and review). *See Hancock*, 142 Ariz. at 406 (analyzing the degree-of-control factor); *Woods*, 189 Ariz. at 277 (explaining that the legislature, by "retain[ing] dominant control" over the Constitutional Defense Council, unconstitutionally usurped the executive's function and arrogated it to itself); *Brnovich* ¶ 15 (Senate Bill 1487 is constitutional because the legislature did not usurp, allocate to itself, or "contro[l] the 'exercise' of the executive branch's investigative and enforcement power"). The third, or the hegemony-in-practice factor, evaluates whether the *department* (*e.g.*, DCS) exercising another's (*e.g.*, judiciary's) function "establish[es]" DCS's "superiority over the [judicial department] in an area essentially [judicial] in nature." *Hancock*, 142 Ariz. at 405. The fourth or the practical-effect-of-blending-of-powers factor evaluates the "practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available" *Id.*

Here, to evaluate the four factors, *viz.*, nature of function, degree of control, hegemony in practice, practical effect of blending of powers, the Court should look at each challenged Step as well as the combined effect of those Steps to evaluate whether those violate Arizona's separation-of-powers doctrine.

For the first factor, the essential nature of the function exercised by DCS's Director, an *executive*-branch official, is adjudicatory, *i.e.*, *judicial* in nature. Under A.R.S. §§ 41-1092.08(B), (F), he rejected and modified the ALJ's factual and credibility determinations and engaged in a standardless revision of those facts when he was not in the ALJ's courtroom and did not take live witness testimony. Even if he had been in the ALJ's courtroom, he would have acted as the prosecutor, judge and jury in DCS's case against Mr. B.—*i.e.* the very opposite of a neutral arbiter. *See Horne v. Polk*, *supra*. The court below felt compelled to defer to the Director's alternative facts under A.R.S. § 12-910(E). The question on the first factor is not whether the legislature can allocate quasi-judicial functions to non-Article-VI judges—it can, and it has—to the independent OAH ALJs. The question is whether the non-neutral agency head can revise the ALJ's factual and credibility assessments while exercising other executive functions (such as investigating and prosecuting the allegation, enforcing the decision in self-help fashion against Mr. B. without waiting for a *judicial* determination under A.R.S. § 8-804(A) and A.A.C. § R21-1-501(17)) without violating the separation-of-powers doctrine. No case was found upholding such blended actions.

As to the second (degree-of-control) factor, the *judiciary* to which the adjudicatory function properly belongs exercises little to no control over DCS's performance of the adjudicatory function. The judicial department should retain ultimate control over the

adjudicatory fact-finding function. A.R.S. §§ 41-1092.08(B), (F), 12-910(E), however, unravel the fact-finding and judging roles and assign them to the executive. Arizona's "integrated judicial department," Ariz. Const. art. VI. § 1, which includes neither OAH nor DCS, has little, if any, degree of control over Steps 1, 4, 6, 7, 9. DCS defines what "probable cause," A.A.C. § R21-1-501(13), means (Step 1) even though defining standards of proof is a judicial function. DCS, which has the burden of proof, produces no accusers for confrontation and cross-examination (Step 4), A.R.S. § 8-811(J). State courts exert no control over the integrity of that adversarial fact-finding process. DCS acts as the judge in its own case (Step 6), A.R.S. §§ 41-1092.08(B), (F). DCS's Director rejects or modifies the factual and credibility assessments without taking live witness testimony (Step 7), A.R.S. §§ 41-1092.08(B), (F). Then, when the case finally gets to the Superior Court, that court reviews the Director's findings of fact under the deferential substantial-evidence standard (Step 9), A.R.S. § 12-910(E).

This scheme is textbook usurpation; it divests from the judiciary and gives to the executive—while also removing any meaningful degree of control that the judiciary could exert on the executive agency's exercise of those reallocated judicial functions. That reallocation is only made more egregious because DCS also already performs executive functions: investigatory, accusatory, prosecutorial, and enforcement functions. The degree-of-control factor requires "*meaningful* judicial review," not some cursory judicial review like what the Superior Court performed here. *Free Enterprise Fund*, 561 U.S. at 489 (provisions of the Sarbanes–Oxley Act contravened the federal separation-of-powers doctrine because they did not provide for meaningful judicial review) (emphasis

added); *Cook v. State*, 230 Ariz. at 190 ¶ 19 (App. 2012) (the separation-of-powers doctrine requires "meaningful judicial review").

Under the third (hegemony-in-practice) factor, the statutory scheme impermissibly establishes DCS's superiority over a function that is essentially judicial in nature. That also could not have been the legislature's objective. The administrative apparatus places too much control in the hands of DCS or its Director and too little in the hands of the judicial department.

For the fourth factor, the practical consequences of this usurpation, divestiture, reallocation and concentration of the judicial function in the hands of an executive agency are dire. The stigma of being labeled a child abuser is far-reaching and indelible. Yet the administrative adjudication 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 standards of proof and review.

In short, the analysis under the four factors readily leads to the conclusion that the challenged statutory scheme violates the Distribution-of-Powers and Vesting Clauses of the Arizona Constitution. On this basis, the Court should decide against DCS and order Mr. B.'s name removed from the Central Registry.

V. IF DEMANDED IN THE NOTICE OF APPEAL, SUPERIOR COURTS SHOULD CONDUCT A TRIAL *DE NOVO*

The Court should clarify that when a JRAD appellant demands trial *de novo*, then the Superior Court should conduct a trial *de novo* if allowing civil discovery leading to a summary-judgment decision does not resolve or narrow factual disputes.

A.R.S. § 12-910(C) allows appellants like Mr. B. to "deman[d] in the notice of appeal" a "trial *de novo*." Mr. B. demanded trial *de novo* in his notice of appeal filed in Superior Court, IR.1, and to be doubly sure, he followed up that demand with a "Motion to Introduce Exhibits or Testimony (or Both) Not Offered During the Administrative Hearing," IR.67. The court below denied that motion, IR.71, and it prohibited any trial from taking place.

Cognizant of the lack of institutional incentive to use rules of procedure or evidence in agency adjudications, the legislature specifically gave appellants the option of "deman[ding]" "trial *de novo* … in the notice of appeal" filed in the Superior Court. A.R.S. § 12-910(C). OAH follows rules of procedure and evidence only because it has promulgated regulations to that effect, not because the legislature commands it. The legislature chose to send appeals from agency adjudications to Superior Court and not this Court. That deliberate choice must mean something.

It likely means that state trial courts are well-positioned to conduct trials, adduce additional evidence, and apply rules of procedure and evidence that are designed to protect the due-process rights of *all* litigants. But the court below did not even do that; it denied outright Mr. B.'s motion to introduce additional testimony or exhibits or both, even though that motion only followed up, out of abundance of caution, on the

"demand" for trial *de novo* that Mr. B. made in the notice of appeal, which was his statutory right to have. IR.71; IR.67; IR.1.

In other words, the legislature expressly empowers Superior Courts to avoid tackling the fact-finding deference question by conducting a trial *de novo*. Mr. B. asked the court below to exercise that option. Had it done so, this Court would not have to address the constitutional problems with deference.

Short of a trial *de novo*, JRAD Rules also do not preclude the Superior Court from allowing parties to use civil-procedure devices such as discovery or depositions leading up to summary judgment motions. *See* JRAD Rules 1(b), 10, 11. The Superior Court could have taken this route to avoid reaching constitutional questions. In fact, the Superior Court first ruled on Mr. B.'s stay motion, IR.69, and it identified some facts which, if introduced into the record, could have changed the court's decision on the stay motion. Mr. B. had filed the motion to introduce testimony or exhibits *before* the Superior Court's ruling on the stay motion, IR.67. About four weeks after the court's ruling on the stay motion, IR.69, the court denied Mr. B.'s motion to introduce exhibits or testimony, IR.71.

The court below paid inadequate attention to A.R.S. § 12-910(C), which only requires the appellant to "deman[d]" "trial *de novo* … in the notice of appeal *or* motion." A follow-up motion is *not required* because the statute plainly allows a demand in the notice of appeal *or* via motion.

The Court should so hold as a matter of statutory construction. The Court should conclude as a matter of law that trial *de novo* when demanded in the notice of appeal should be conducted by the Superior Court if discovery and depositions leading

up to stipulated or uncontested facts would not aid in resolving or narrowing factual disputes.

RULE 21(a) NOTICE

The Court should award attorneys' fees and costs to Mr. B. pursuant to A.R.S. §§ 41-1001.01, 12-348, and the private attorney general doctrine.

CONCLUSION

This case is about standards of proof and review. DCS's administrative adjudication scheme is perfectible. The Court should reverse and vacate the DCS Director's and the Superior Court's decisions, and order Mr. B.'s name removed from the Central Registry.

Respectfully submitted, this 28th day of December, 2020.

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