COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHILLIP B., Appellant, v. ARIZONA DEPARTMENT OF CHILD SAFETY; MIKE FAUST, as Director of Arizona Department of Child Safety, Appellees.	No. 1 CA-CV 20-0569 Maricopa County Superior Court No. LC2019-000306-001 Office of Administrative Hearings No. 19C-1028237-DCS

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF APPELLANT WITH CONSENT OF ALL PARTIES

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Table of Contents

Table of Authorities

Cases

Regulations

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute (GI) was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates cases and files amicus briefs when its or its clients' objectives are directly implicated, and it has appeared in this Court and other courts representing parties and as an amicus curiae. *See, e.g.*, *State v. McNeill*, No. 1 CA-CR 18-0911, 2019 WL 4793121 (Ariz. App., Oct. 1, 2019); *Legacy Educ. Grp. v. Ariz. State Bd. for Charter Schs.*, No. 1 CA-CV 17-0023, 2018 WL 2107482 (Ariz. App. May 8, 2018); *Energy & Env't Legal Inst. v. Ariz. Bd. of Regents*, No. 2 CA-CV 2017-0002, 2017 WL 4083127 (Ariz. App. Sep. 14, 2017).

Among GI's priorities is the defense of individual rights against administrative agencies, which often operate outside the boundaries of evidentiary and procedural protections, and combine the legislative, executive, and judicial powers. GI has therefore participated in many cases addressing the legal and constitutional problems arising from the operations of these agencies. *See, e.g.*, *Ghost Golf, Inc. v. Newsom*, No. F082357 (Cal. App. filed Feb. 4, 2021) (pending); *Goldwater Inst. v. U.S. Dep't of Health & Human Servs.*, 804 F. App'x 661 (9th Cir. 2020); *Vong v. Aune*, 235 Ariz. 116 (App. 2014). GI scholars have also

published important research on these questions. *See, e.g.,* Jon Riches & Timothy Sandefur, *Confronting the Administrative State: State-Based Solutions to Inject Accountability into an Unaccountable System* (Goldwater Institute, 2019); Timothy Sandefur, *The Permission Society* (2016).

Because it involves an agency's power to adjudicate disputes and without meaningful checks and balances, this case implicates matters central to GI's mission. Given its history and experience with regard to these issues, GI believes its perspective will aid this Court in considering the Plaintiffs' case and their motion for preliminary injunction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below committed the "continuum fallacy"—sometimes called the "fallacy of the beard," *Bennett v. Walton Cnty.*, 174 So.3d 386, 399 (Fla. Dist. Ct. App. 2015) (Makar, J., concurring)—which occurs when one concludes that because no single factor in isolation is by itself responsible for the problem, there must be no problem at all. In reality, the due process violation in this case is the result of several cumulative factors: the fact that the agency is not required to follow normal rules of evidence and procedure, the fact that the Director overrode the Administrative Law Judge (ALJ)'s factual findings and credibility determinations, and the application of deferential judicial review on appeal. Even if none of these violates due process on its own, their combination resulted in a

process whereby Phillip B. was deprived of constitutionally protected rights, without meaningful opportunity to dispute them before an impartial judge.

This is especially problematic given that placing a person's name on the Central Registry based on probable cause instead of a preponderance of evidence is itself a due process violation. *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Jamison v. State, Dep't of Soc. Servs., Div. of Fam. Servs.*, 218 S.W.3d 399 (Mo. 2007). The decision below, in substance, resulted in putting Phillip B.'s name on a no-hire list on the basis of mere probable cause.

In addition, although courts have allowed agencies to override an ALJ's factual findings, they have allowed this only with misgivings, and only on the assumption that meaningful scrutiny by an independent court will be available later on appeal. *Ritland v. Ariz. State Bd. of Med. Exam'rs*, 213 Ariz. 187, 191–92 ¶ 15 (App. 2006); *McEwen v. Tenn. Dep't of Safety*, 173 S.W.3d 815, 823 (Tenn. App. 2005); *Moore v. Ross*, 687 F.2d 604, 608–09 (2d Cir. 1982). But the Superior Court here did not apply that meaningful scrutiny; it applied the substantial evidence test, widely regarded as the most deferential of all standards of review, *State v. Orgain*, 847 P.2d 1377, 1381 (N.M. App. 1993), and expressly refused to apply independent review. As a result, the Department was effectively free to be the judge in its own case.

Properly resolving whether Phillip B. was given due process requires weighing the entirety of the proceedings to determine whether he had an adequate opportunity to challenge the accusations levied against him before a neutral judge, given that the agency was free to operate without the evidentiary and procedural safeguards of a trial, the Director overrode the ALJ's factual findings, and the reviewing court refused to apply the heightened scrutiny appropriate in such situations.

ARGUMENT

I. Placement on the Central Registry based on probable cause rather than preponderance of the evidence violates due process.

Several state and federal courts have addressed the question of whether states may place people's names into something like the Central Registry based on probable cause, instead of preponderance of the evidence. Applying the analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976), they have found this unconstitutional.

In *Jamison*, the Missouri Supreme Court found that the state's central registry system violated the due process rights of two nurses whose names were placed on that state's central registry based on accusations of child neglect. 218 S.W.3d at 402. The investigator issued a report finding probable cause to substantiate the accusation, whereupon the agency placed their names on the

registry before a final determination was made as to whether the accusations were true. *Id.* at 403. The agency administrator allowed the accused to submit written statements, which they did; he then affirmed the investigator's finding without further review. *Id.* The nurses appealed to an administrative hearing, where they were not allowed to cross-examine witnesses or to compel attendance of witnesses against them. *Id.* at 404. The administrative hearing resulted in an affirmance of the probable cause finding. *Id.*

On appeal, the state supreme court found the entire process improper. Placement in the central registry "creates a stigma that is damaging to the women's reputations" and "effectively precludes [them] from working in the child care profession." *Id.* at 406. Thus due process was required, and the court, applying the *Eldridge* test, emphasized that the risk of an erroneous conclusion meant such a penalty could only be imposed based on the preponderance of the evidence, not probable cause.[1]

The probable cause standard "is ill suited to the determination of whether an individual has abused or neglected a child," the court said, because it "does not require a fact finder to balance conflicting evidence" and "places the brunt of the

[1] The court also held that it separately violated due process to place the nurses' names on the central registry while the hearing was pending, because the risk of an erroneous deprivation of individual rights was simply too high. *Id.* at 408–10.

risk of error, if not the entire risk of error, on the alleged perpetrator." *Id.* at 411 (citations and quotation marks omitted). The court concluded that "[d]ue process requires [an agency] to substantiate a report of child abuse or neglect by a preponderance of the evidence before an individual's name can be included in and disseminated from the Central Registry." *Id.* at 412.

The court did reject the nurses' argument that the administrative proceeding violated due process due to its lack of procedural protections. *Id.* at 413. But it did so for reasons that are inapplicable here. The administrative proceeding in that case was before a neutral decision-maker who was *not* subject to after-the-fact reversal by the agency head, as in this case. *Id.* On the contrary, the court noted that the Missouri statute ensured the "impartiality of decision makers," and entitled the accused to "a *de novo* review" on appeal. *Id.* at 413–14. Here, by contrast, Phillip B. was not only denied a *de novo* review on appeal, but is not entitled to a meaningfully independent decision-maker in the first instance, since the director can simply override the fact-finding ALJ by fiat.

Jamison cited several other cases that concluded that a mere preponderance standard is insufficiently protective of the rights of the accused in cases involving something like the Central Registry. For instance, in *Valmonte*, the Second Circuit found that a virtually identical statutory scheme in New York violated the due process clause. There, a mother was placed on that state's Central Register after

she administered corporal punishment to her child. 18 F.3d at 997. The law allowed a person's name to be placed on the list based on "some credible evidence," *id.* at 1003, which "merely requir[ed] the [agency] to present the bare minimum of material credible evidence to support the allegations." *Id.* at 1004. The court noted that such a low evidentiary bar was "especially dubious" in cases involving allegations of harm to children, because such matters "are inherently inflammatory, and 'unusually open to the subjective values of' the factfinder," especially if the factfinder "is not required to weigh evidence and judge competing versions of events, and where one side has the greater ability to assemble its case." *Id.* (citations omitted). Given the significance of the interests at stake, the court ruled that it was "unacceptable" to apply such an extremely lenient standard to agencies that accuse people of harm and place them on no-hire lists. *Id.*

Likewise, in *Petition of Preisendorfer*, 719 A.2d 590, 593 (N.H. 1998), the New Hampshire Supreme Court found it unconstitutional for the state to place people's names in that state's central registry based only on probable cause. While the state could use a lower standard during an investigation, it could not "take remedial action" based on mere probable cause. *Id.* at 594. Given the risk of error, the court said, "the preponderance of the evidence standard [must] apply in any hearing to determine whether an individual's name should be added to the central registry." *Id.* at 595. *See also Cavarretta v. Dep't of Child. & Fam. Servs.*, 660

N.E.2d 250, 258 (Ill. 1996) ("credible evidence" unconstitutional in registry case); *Lee TT. v. Dowling*, 664 N.E.2d 1243, 1251–52 (N.Y. App. 1996) (same).

In *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005), the Court of Appeals found no constitutional violation in a situation where the state could place a person's name in the state's central register based on "credible evidence"—i.e., probable cause—but it did so because "any adverse determination is subject to *de novo review under a heightened standard of proof* [i.e., preponderance] within a very short period of time." *Id.* at 509 (emphasis added). In other words, the risk of error in the administrative proceeding was cured by the increased scrutiny applied on appeal. The court also emphasized that a proper due process analysis of the administrative procedure should view "the entire process" as a whole, rather than focusing on each element in isolation. *Id.* at 508.

Compare those cases to the process at issue here. The agency hearing was premised on the probable cause standard,[2] rather than the preponderance standard; then, after the neutral ALJ found *no* probable cause, based on a full review of the evidence, the agency head decided—*without* a similarly full evidentiary review—to reverse the ALJ and substantiate the initial allegations. Then, on appeal, the

[2] The agency itself purports to define probable cause by regulation as "some credible evidence that abuse or neglect occurred." Ariz. Admin. Code R21-1-501(13).

Superior Court applied what has been called "the most deferential type of review, the substantial evidence test," *Orgain*, 847 P.2d at 1381, with the result that Phillip B. was put on the no-hire list based essentially on the accusation itself.

The Superior Court asserted that the question of whether the probable cause standard is appropriate was effectively moot, because although the agency said it was following a probable cause standard, it actually used a preponderance standard. APPX45. The court's sole bases for this claim was that the decision was written in "unconditional[] and unqualified[]" terms, and the fact that the agency stated "[t]he record *clearly* supports a finding" of guilt. APPX45 n.17 (emphasis added by the court). These are merely semantic points, however, and insufficient to show that the agency actually used a preponderance standard. On the contrary, they represent just what the agency said they represent: the agency's "unqualified" conclusion that the accusations "clearly" reached a *probable cause* standard.

The Superior Court's conclusion that the use of the word "clearly" was, by itself, enough to raise those findings from the probable cause level to the preponderance level only shows that the Superior Court's deferential review, combined with the agency's rejection of the ALJ's factual findings, resulted in the deprivation of constitutionally protected rights without a meaningful weighing of the evidence by a neutral decisionmaker.

II. Combining the Director's power to override the ALJ with deferential review on appeal violates due process.

Due process is a flexible concept that should not be approached in a formalistic way, but with an eye to the realities of the case. *State v. Conn*, 137 Ariz. 148, 150 n.1 (1983). And even where each part of a legal process viewed in isolation may not violate due process, their cumulative effect can—for instance, if it violates the requirements of fundamental fairness. *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978); *DeWitt v. Ventetoulo*, 6 F.3d 32, 36 (1st Cir. 1993).

The procedure here failed to provide the required due process due to three overlapping elements of the adjudication: first, the agency resolved an allegation and prescribed punishment through a proceeding where normal rules of evidence and procedure do not apply. Second, the Director, who did not conduct the evidentiary determination, was allowed to substitute his own findings for the findings of the ALJ who did. Third, on appeal, the court applied the deferential substantial evidence test, thereby failing to exercise its independent judgment. The cumulative effect of these rules was that Phillip B. was deprived of rights in a process whereby the agency could substantiate its own allegations without meaningful checks or balances.

The Arizona Supreme Court has held that the "due process concerns" raised by allowing agencies to both investigate and adjudicate can be resolved by some

form of independent appellate review. *Horne v. Polk*, 242 Ariz. 226, 230 ¶ 14 (2017). *Horne*—in which the ALJ's factual findings were overridden by the agency head—said that the due process problem with such a procedure is "magnified" if "the agency's final determination is subject only to deferential review" on appeal. *Id.* While the court also said that due process does not necessarily prohibit an agency both investigating and adjudicating a case, there must be genuinely neutral and meaningful judicial scrutiny at *some* point to ensure due process. *Id.* at 232 ¶ 21. As an example, the *Horne* court cited *Nightlife Partners v. City of Beverly Hills*, 133 Cal. Rptr.2d 234 (Cal. App. 2003), which observed that where an agency determination is subject to "independent[] review [of] the evidence and assess[ment] [of] its weight and relevance," such review could ensure adequate due process notwithstanding the fact that the agency operates without normal evidentiary or procedural safeguards. *Id.* at 248.

But no such independent review was provided here. Instead, the Superior Court used the substantial evidence test, a test so deferential that it results in affirmance if "there [is] any evidence at all to sustain the decision of the inferior tribunal," *Farish v. Young*, 18 Ariz. 298, 307 (1916), "even if the record also supports a different conclusion," *Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 436 ¶ 11 (App. 2009), "even if substantial conflicting evidence exists," *Kocher v. Dep't of Revenue*, 206 Ariz. 480, 482 ¶ 9 (App. 2003), even if

the record contains "contradictions," *State v. Hughes*, 104 Ariz. 535, 538 (1969), and even if "reasonable persons" would "draw different conclusions." *State v. Ballinger*, 110 Ariz. 422, 425 (1974).

The result of this combination of agency power and deference deprived Phillip B. of constitutionally protected rights without affording him the protections of the preponderance of the evidence test, and without giving him a meaningful opportunity to challenge the allegations.

III. An agency's decision to disregard the ALJ's ruling *must* go along with skeptical review on appeal.

The Superior Court upheld this process by embracing the legal fiction that the agency Director, not the ALJ, was the true fact-finder, with the ALJ acting in an essentially advisory capacity. APPX34. Since "a trier-of-fact's credibility determinations will not be disturbed," the Superior Court refused to evaluate the Director's credibility determinations even though they were made without actually "observ[ing] any witnesses personally." APPX34–35.

But while it is true that under *Ritland*, 213 Ariz. 187, the agency, rather than the ALJ, is deemed the factfinder, this does not resolve the question of whether the proceedings here satisfied due process. On the contrary, *Ritland* expressly based its conclusion on the assumption that reviewing courts would apply a *non*-deferential review of agency conclusions in these circumstances.

That case involved a disciplinary proceeding against a doctor. It was referred to an ALJ, who found the complaining witnesses credible. 213 Ariz. at 188 ¶ 3. The accused then asked the Board of Medical Examiners to overturn that credibility finding, pointing out that the accusers had all been found guilty of unprofessional conduct. *Id.* at ¶ 4 n.3. The Board felt itself bound to follow the ALJ's credibility determination, however. *Id.* at 188–89 ¶ 5.

The Court of Appeals reversed. It acknowledged that whether the Board was free to second-guess the ALJ's credibility findings was a close question, *id.* at 190 ¶ 9, and concluded that "certain deference is owed" to such findings, because the ALJ "had the opportunity to look the witness in the eye and reach a conclusion with respect to his veracity." *Id.* at ¶ 10 (citation omitted). It "recognize[d] the importance of the ALJ's observation of the demeanor and attitude of the witnesses" and concluded that "those findings are entitled to greater weight than other findings of fact more objectively discernible from the record." *Id.* at 191 ¶ 13. So although it allowed the Board to overrule an ALJ decision, it also said that "a reviewing court should be *particularly inclined to scrutinize* the Board's disagreements with an ALJ's credibility findings." *Id.* at 191–92 ¶ 15 (emphasis added).

In other words, that case expressed qualms about letting an agency disregard an ALJ's findings, doubtless because it recognized the risk that an agency might

simply disregard findings of which it institutionally disapproved, without having a legitimate basis for doing so.[3] And the *Ritland* court was persuaded that heightened judicial scrutiny on appeal would counteract that danger. For instance, it cited *McEwen*, 173 S.W.3d at 823, in which the Tennessee Court of Appeals said an agency could disregard an ALJ finding of fact, "[h]owever, an agency should expect closer judicial scrutiny" by a reviewing court when it does so.

Similarly, in *Moore*, 687 F.2d at 608–09, the Second Circuit addressed the question of whether an agency could override an ALJ's factual findings and credibility determinations. It held that this was permissible *because* the parties would be entitled to meaningful judicial review on appeal. "[R]eviewing courts," it said, "give special weight to ALJs' credibility findings" on appeal, and accordingly "often [find] [agency] decisions unsupported by substantial evidence when they hinge on assessments of credibility contrary to those made by the ALJ who heard the witnesses." *Id.* at 609. Because it assumed that state courts would

[3] On this point, the Superior Court chastised the Appellants for failing to provide "proof of 'actual bias.'" APPX42. Yet the appellants in *Horne* also did not allege actual bias. 242 Ariz. at 230 ¶ 16. That did not prevent the court from finding that the process itself inherently violated due process. *See also Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 372 (App. 1987) ("In the present case, there is no contention that actual bias of the board members existed with respect to Rouse individually. Rather, the challenge is to the statutory process whereby the board, as an entity, reviews decisions it previously approved."). Moreover, given the "inherently inflammatory" nature of the questions at issue here, the risk of bias is itself unacceptable. *Valmonte*, 18 F.3d at 1004.

"adhere to these basic principles," and because it thought it unlikely that a reviewing court would affirm an agency decision to "reject[] the credibility findings of an ALJ without a further hearing," the court found that it was consistent with due process for the agency to override the ALJ. *Id.* Here, by contrast, the agency did precisely what the court said should not happen.

Commenting on *Moore*, the Indiana Court of Appeals explained in *Stanley v. Review Bd. of Dep't of Emp't & Training Servs.*, 528 N.E.2d 811, 814 (Ind. App. 1988), that federal courts allow agencies to override ALJs because they "[a]ssum[e] that unsupported credibility findings will be rectified on appeal," so that "the danger of due process violations is considered minimal." But that court expressed concern that "where demeanor credibility is the sole determinative factor and the review board reverses the [ALJ]'s findings, due process concerns cannot be brushed aside with the promise of rectifying any mistakes on appeal." *Id.* Although it was "well settled that the [agency] is the ultimate factfinder," it said, an agency's reversal of a credibility determination "in favor of its own groundless opinion of demeanor credibility" was a due process violation that required a new hearing before the agency. *Id.* at 814–15.

In other words, the more power an agency has to override the ALJ, the more important it is for a reviewing court to apply meaningful judicial scrutiny on appeal. Yet here, the Superior Court simply cited *Ritland* to justify applying the

most deferential standard of review to the Director's decision to override the ALJ and disregarded *Ritland*'s recognition that an agency's power to override an ALJ must go hand-in-hand with skeptical review on appeal. That represents the kind of formalism that is improper in due process analysis. *See Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975) (due process "is concerned with substance rather than … formalism. … [It] requires an analysis that looks to the 'operation and effect of the law as applied and enforced by the state,' and to the interests of both the State and the defendant as affected by the allocation of the burden of proof." (citation omitted)); *see also Anderson v. Valley Union High Sch., Dist. No. 22*, 229 Ariz. 52, 55 ¶ 4 (App. 2012) ("[S]ubstance controls over form. Courts are not bound by labels."). The Superior Court's assertion that "a trier-of-fact's credibility determinations [must] not be disturbed," APPX34, was therefore legal error.

Some courts have held that the substantial evidence test inherently *requires* such skeptical review in these circumstances. *See, e.g., Adams v. Indus. Comm'n of Ariz.*, 147 Ariz. 418, 421 n.* (App. 1985) ("the commissioners themselves need not personally observe the witnesses. Nevertheless, a hearing examiner's findings, where demeanor is important, is a factor to be considered in assessing whether there is substantial evidence to support the agency conclusion."). *See also Cook v. Heckler*, 750 F.2d 391, 393 (5th Cir. 1985) ("[substantial evidence] is not a rubber stamp … and involves more than a search for evidence supporting the [agency]'s

findings. We must scrutinize the record and take into account whatever fairly detracts from the substantiality of evidence supporting the [agency]'s findings.").

But whether characterized as a higher level of scrutiny or as the proper application of substantial review scrutiny, the bottom line is that a Superior Court must skeptically examine an agency's decision to override the factual findings of an ALJ. Indeed, it only makes sense to let an agency head disregard an ALJ's factual determinations and substitute his own *if* the accused is entitled to meaningful review on appeal. To do otherwise risks making the agency the judge in its own case: that is, it enables the agency to rubber-stamp its own assertions, and then impose punishment without meaningful checks and balances. *Cf. Horne*, 242 Ariz. at 231 ¶ 17 (warning of the danger of an administrative agency becoming the judge in its own case).

That is why courts have often expressed reluctance to defer to "abrupt and unexplained departure[s] from agency precedent," *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984), or to the "self-serving views that an agency might offer in a post hoc." *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987). They have also have found that, even under the substantial evidence test, a court should not "read only one side of the case and, if they find any evidence there, [conclude] the administrative action is to be sustained and the record to the

contrary is to be ignored." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 481 (1951).

The Superior Court here also brushed aside concerns about the combined layers of deference in this case by observing that the substantial evidence test has been used for more than 100 years,[4] and by noting that it is well-established that appellate courts do not make factual determinations. APPX48–49. These are

[4] The court below ungenerously characterized the Appellant as having claimed to "have unearthed a [due process] principle … that has escaped … Hugo Black, Louis Brandeis, William Brennan," and other famous judges. APPX49. But "longstanding history … does not demonstrate a statute's constitutionality." *United States v. Comstock*, 560 U.S. 126, 137 (2010).

Moreover, due process is a "flexible" concept that varies based on the interests at stake. *Conn*, 137 Ariz. at 150 n.1. The fact that the substantial evidence test was considered appropriate in a 1926 case between the Interstate Commerce Commission and one of the nation's largest chemical corporations (*W. Paper Makers' Chem. Co. v. United States*, 271 U.S. 268 (1926) (cited at APPX49 n. 21)) says little about whether it is properly applied today in a case in which a state agency places an individual citizen on a no-hire list without giving him a fair trial, or any meaningful review.

Notably, many of the judges referred to by the Superior Court endorsed *extremely* cramped views of due process—far below the standards that are considered acceptable today. *See, e.g., Korematsu v. United States,* 323 U.S. 214 (1944) (majority opinion by Justice Black); Alexander Bickel, *The Supreme Court and the Idea of Progress* 25–26 (1970) ("Frankfurter had exclaimed in the *New Republic:* 'The due process clauses ought to go.' And at about the same time … he and Brandeis drove each other to the conclusion that the Due Process Clauses should be repealed."); Jerome Frank, *Law and the Modern Mind* 228–29 n.8 (New York: Anchor Books, 1963) (1930) (characterizing "due process" as a "meaningless" term with only "emotional value."). More recently, some justices have expressed skepticism about the substantial evidence test. *See, e.g., Biestek v. Berryhill*, 139 S.Ct. 1148, 1158–59 (2019) (Gorsuch and Ginsburg, JJ., dissenting); *id.* at 1157–58 (Sotomayor, J., dissenting)

examples of how the court fallaciously viewed each element of this case in isolation, instead of considering their *cumulative effect*. That was improper because, as this Court has noted, due process "is not a technical conception" or "a mechanical instrument," but a "process of adjustment" that requires balancing "[t]he precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed," and other "various interests." *In re Maricopa Cnty. Juvenile Action No. JD-561*, 131 Ariz. 50, 53–54 (App. 1981) (citation omitted).

It is true, of course, that appellate courts do not ordinarily make factual determinations. But *Ritland,* 213 Ariz. at 191–92 ¶ 15; *McEwen*, 173 S.W.3d at 823; *Moore*, 687 F.2d at 608–09, and other cases establish that heightened review of an agency's findings *is* appropriate when the agency head overrides the factual conclusions and credibility determinations of the ALJ. This is necessary to ensure that due process is afforded to the accused and to prevent the agency from transforming a mere accusation into conviction and punishment.

In this case, the Superior Court lost sight of that forest by looking too closely at the trees. Even if an agency's authority to base its decisions on hearsay, or the Director's authority to override the ALJ's factual findings, or a reviewing court's application of extreme deference to an agency determination, do not violate due process by themselves, their combination, at least in this case, did.

CONCLUSION

A proper due process analysis would have evaluated whether the lack of evidentiary safeguards in the administrative process, *plus* the Director's substitution of his own findings for those of the ALJ, *plus* the Superior Court's use of the substantial evidence test, afforded Phillip B. a meaningful opportunity to challenge the allegations made against him. The decision of the Superior Court should therefore be *reversed*.

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Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Brief Amicus Curiae of Goldwater Institute in Support of Appellant with Consent of All Parties appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 4,827 words, excluding table of contents and table of authorities.

Respectfully submitted May 6, 2021, by:

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The undersigned certifies that on May 6, 2021, she caused the attached Brief Amicus Curiae of Goldwater Institute in Support of Appellant with Consent of All Parties to be filed via the Court's Electronic Filing System and electronically served a copy to:

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