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 REPLY BRIEF

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GLOSSARY

AB	Appellees' Answering Brief
AOB	Appellant's Opening Brief
ALJ	Administrative Law Judge of the Arizona Office of Administrative Hearings
Appx	Appendix, filed along with Appellant's Opening Brief, containing relevant excerpts from the Index of Record
ARCAP	Arizona Rules of Civil Appellate Procedure
ARCP	Arizona Rules of Civil Procedure
DCS	Department of Child Safety
IR	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 eRecord with Revised Index of Record)
JRAD	Judicial Review of Administrative Decisions
OAH	Office of Administrative Hearings

APPELLANT'S REPLY BRIEF

DCS's Answering Brief fails as a matter of fact and of law to prove why this Court should not reverse and vacate the decision below and order removal of Mr. Phillip B.'s name from the Central Registry.

DCS rehashes facts that were already introduced to and fully addressed by the ALJ. AB.17–27. After a two-day trial, the ALJ appropriately assigned weight and assessed credibility of those witnesses who appeared before her and provided their sworn, cross-examined testimony. She issued findings of fact and conclusions of law in favor of Mr. B. and against DCS. IR.62 (Appx5–Appx10). The DCS Director, despite acting in an "appellate" role, "rejected" and "modified" that decision, selectively "accept[ed]" some of the ALJ's findings and conclusions, "delet[ed]" others, and "add[ed]" a few of his own findings of fact and credibility assessments. IR.63 (Appx11–Appx13). DCS thereafter peddled its own set of facts—seeking the Arizona courts' acquiescence in its strategy to brush the ALJ's factfinding and credibility assessments aside, despite the fact that the ALJ is the only adjudicatory body in this saga thus far that has actually followed the rules of evidence and procedure.

DCS has throughout this process ignored that important guarantee of civil rights to citizens such as Mr. B. Exposing DCS's efforts to paper over and ignore basic civil liberties, including the right to due process, forms the foundation of this case, with Mr. B. having discussed in his many pleadings and in detail DCS's attempt to trivialize both these protections and the constitutionally limited role of relevant government actors. Mr. B. further rebuts DCS's arguments with respect to:

- the statutory-interpretation question regarding the timing of placing a person's name on the Central Registry (AB.28–39),
- the due-process and separation-of-powers merits questions (AB.39–95), and
- trials *de novo* in superior court (AB.96–98).

DCS has hoisted several "waiver" flags in its Brief. AB.27–28. As discussed in greater detail below, a party's arguments are not waived, however, merely because they are not developed to opposing party's liking.

DCS spends considerable effort in its overly long response brief addressing attorney fees and costs. AB.98–102. Because that discussion is entirely premature, there is simply no reason to rebut those arguments here, although Appellant fully preserves the fees-and-costs arguments for now. Arizona practice only requires Appellant to give "notice" in his opening brief his intention to seek fees and costs. ARCAP 13(a)(8), 21(a). Mr. B. has done so. AOB.55. This Court should continue the cost-and-fees request, as Mr. B. will file a motion explaining the reasons therefor, if appropriate, after this Court's merits decision. DCS will have full opportunity to respond to that motion at the appropriate time.

ARGUMENT

DCS's discussion of the standard of review is largely a recitation of several clichés: statutes are presumed constitutional, and unconstitutionality of statutes or regulations must be proved beyond a reasonable doubt. AB.48, 95. That rote recitation is inapplicable in this case for five separate reasons:

(1) This Court reviews the constitutionality of statutes *de novo*, and the Court does not "rewrite a statute to save it," *State v. Arevalo*, 249 Ariz. 370, 373 ¶ 9 (2020).

(2) The Court "disapprove[s] the use of the 'beyond a reasonable doubt' standard for making constitutionality determinations," because "it incorrectly states the standard," *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 8 (2014).

(3) The presumption of constitutionality itself has been heavily criticized in Arizona and elsewhere, and at least one sitting justice on the Arizona Supreme Court would reject the presumption, *see Arevalo* ¶¶ 29–46 (Bolick, J., joined by Pelander, J. (retired), concurring).

(4) There is no such presumption or beyond-reasonable-doubt adage when the constitutionality of a *regulation* is challenged (there are no cases applying DCS's two preferred platitudes to regulations); the Court reviews the constitutionality of regulations *de novo* without distorting that analysis by presuming the regulation is constitutional or requiring proof of the regulation's unconstitutionality beyond a reasonable doubt, *see* A.R.S. § 12-910(E).

(5) "[T]he distinction between facial and as-applied challenges … goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 331 (2010).

I. DCS DIRECTOR'S DECISION IS FACTUALLY BASELESS DESPITE DCS'S ATTEMPT TO REARGUE FACTS IN THIS COURT

DCS failed to prove that a teenaged G.C. was unable to breathe because of Mr. B.'s attempt to calm him down—even under the low probable-cause burden of proof. IR.64:16–18 (Appx1); IR.64:17–18 (Appx2); IR.62 (Appx7, Appx9–Appx10). As such, DCS failed to prove the elements of the "statutory definition of abuse": "the infliction or allowing of … impairment of bodily function." IR.62 (Appx10); A.R.S. § 8-201(2).

DCS's case against Mr. B. having collapsed for want of credible evidence, its Director chose to reset the playing board by simply excising those portions of the ALJ's factual and credibility determinations and conclusions of law with which he did not agree, similar to a Servpro advertisement: "Like it never even happened." IR.63 (Appx11–Appx15). DCS's newly constructed narrative, however, had neither foundation nor scaffolding to hold it in place.

DCS attempts to rehash three sets of facts that were all addressed in front of the ALJ. First, DCS tries to impugn R.J.'s testimony as impeached because he was confused about the difference between an "Incident Report" and a "Behavior Incident Report." AB.18. That mistake does not change the fact that a contemporaneous report about the alleged child-abuse incident was in fact prepared, admitted into evidence, and considered by the ALJ. IR.62 (Appx8 ¶ 19).

Second, DCS maintains that G.C.'s "shirt tore because of" Mr. B.'s hand on G.C.'s shoulder. AB.20. The ALJ, however, considered all of the evidence presented and issued a factual finding, *based on that evidence,* that G.C.'s "shirt tore after Appellant grabbed his shirt" (IR.62 Appx6 ¶ 11) not that Phillip B. tore the shirt. Whether Mr. B. or G.C.'s response tore the shirt, the shirt's tearing does not meet the A.R.S. § 8-201(2)'s

"abuse" definition of "impairment of bodily function"—the only theory DCS has proffered throughout this litigation.

Third, DCS attempts to conflate therapeutic holds with nontherapeutic holds. AB.23. While DCS does not distinguish a therapeutic hold (which brings almost the entire adult's body in contact with the child's) from a firm hand on the child's shoulder (a nontherapeutic hold), it insinuates (without support), that using the latter is indicative of child abuse. DCS, however, did not inform group homes and managers like Mr. B. that they should *only* use therapeutic holds on children. Understandably so, as such an approach would be absurd. Thus, the fact that Mr. B. apparently used a nontherapeutic hold (hand on the shoulder instead of incapacitating all of G.C.'s limbs) is beside the point.

II. THIS COURT SHOULD REJECT DCS'S ATEXTUAL INTERPRETATION OF A.A.C. § R21-1-501(17)

DCS counters Part I of Mr. B.'s argument (AOB.12–13) by arguing that A.A.C. § R21-1-501(17) "does not directly address the situation at issue here," *i.e.*, it is "silent," AB.30, or alternatively that it is "ambiguous," AB.31. Both of these arguments are "code" for seeking state-court deference to administrative interpretations despite the fact that A.R.S. § 12-910(E) forbids the use of deference.[1] *See also Stambaugh v. Killian*, 242 Ariz. 508, 512 ¶ 25 (2017) (Bolick, J., concurring) ("this Court has never expressly considered whether *Chevron* or its progeny establish standards for administrative deference under Arizona law") (precursor to Section 12-910(E)'s 2018 amendment rejecting deference to administrative interpretations). To support those two arguments—it is unclear which one—DCS digresses for eight pages through irrelevant provisions of the administrative code, AB.31–39, to suggest that the word "appeal" in R21-1-501(17)(b) means an OAH hearing, not a state-court hearing.

Both of those arguments (silence, ambiguity) are specious, as is DCS's tortured reading of "appeal." DCS continues to misinterpret A.R.S. § 8-804(A) and A.A.C. § R21-1-501(17). This court owes no deference to DCS's statutory or regulatory interpretations due to A.R.S. § 12-910(E). In order to confirm this fact we need to take Subsections (17)(a), (17)(b), and (17)(c)[2] in turn.

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[1] If relevant statutes and regulations are truly silent, then DCS is actually admitting that its only argument for affirmance is "we are making it up as we go along"—and therefore saying that this Court should defer to DCS's interpretations of relevant statutory/regulatory text, notwithstanding A.R.S. § 12-910(E).

[2] DCS correctly observes that the Subsection (17) definition is "disjunctive." AB.32. That is, either Subsection (17)(a) should be satisfied *or* Subsection (17)(b) *or* Subsection (17)(c). Mr. B. satisfies two subsections, with the third (Subsection (17)(c)) being inapposite to the procedural posture of his case and, therefore, irrelevant.

Subsection (17)(a): The answer lies in the plain meaning of Subsection (17)(a). Because DCS does not like that plain meaning, it posits a "necessary implication" canon, AB.32. The correct canon, however, is the *expressio unius* canon, also called the *negative*-implication canon, *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107–111 (Thompson/West 2012). Traditional canons of construction that rely on the text abhor implications.

The familiar *expressio unius* canon resolves the meaning. *City of Surprise v. Arizona Corporation Commission*, 246 Ariz. 206, 211 ¶¶ 13–14 (2019) (explaining and applying the canon). "When a car dealer promises a low financing rate to 'purchasers with good credit,' it is entirely clear that the rate is *not* available to purchasers with spotty credit." *Reading Law* 107. When Subsection (17)(a) (emphasis added) says a "substantiated finding" is one that "[a]n administrative law judge found to be true by a probable cause standard of proof … *and* the Department Director accepted the decision," it cannot be a substantiated finding when either one of those conditions is not met. Here, *neither* of those two conditions is met: (1) the ALJ *did not* find probable cause; (2) the Director *did not* accept that decision.

The conjunctive/disjunctive canon gives the same answer. *Reading Law* 116–125. "'The word 'and' is a 'conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first.'" *Bither v. Country Mutual Insurance Co.*, 226 Ariz. 198, 200 ¶ 10 (App. 2010). To be a "substantiated finding," both of two things stated in Subsection (17)(a) are required—ALJ must find probable cause *and* the Director must accept the ALJ's decision. Neither happened here.

The interpretive-direction canon is also apposite. *Reading Law* 226. When a "definitional section says that a word 'means' something, the clear import is that that is its *only* meaning." *Id.* (emphasis in original). If a statute defines "domestic animal" as "any equine animal, bovine animal, sheep, goat, and pig," the definition, correctly understood, excludes cats. *Id.* at 227 (explaining *Commonwealth v. Massini*, 188 A.2d 816, 818 (Pa. Super. Ct. 1963)). Because R21-1-501(17) (emphasis added), which is the definition section, starts, "'Substantiated Finding' *means*," the definition given in its three subsections is its *only* meaning; anything that does not meet that definition cannot be a "substantiated finding."

Hoyle v. Superior Court, 161 Ariz. 224 (App. 1989) is not to the contrary as DCS erroneously suggests. AB.32. *Hoyle* concludes that "in giving the defendant … the right to present certain evidence to the jury, the legislature, by necessary implication, also gave the defendant the right to a jury trial." 161 Ariz. at 227. *Hoyle* did not invent a necessary-implication canon; it simply read the words as written to avoid an absurd result. *See Reading Law* 234–239 (absurdity doctrine). If anything, *Hoyle* stands for the proposition that statutory or regulatory words are to be interpreted, by necessary implication, *against* the governmental-litigant drafter of those words. *By definition*, "a Director's decision that rejects an ALJ's determination that a proposed substantiated finding is not true and finds that it is true" (AB.32) is *not* a "substantiated finding" under R21-1-201(17).

Construing the definition per DCS's suggestion would make no sense and would lead to absurd results. *The statute* (A.R.S. § 8-811) assigns the factfinding role to "[a] *court* or *administrative law judge*," and states that the "office of administrative hearings *shall* hold

a hearing." A.R.S. §§ 8-811(F)(3), (J) (emphasis added). When the statute (like the one at issue in *Hoyle*) recognizes the person's "*right* … [t]o a hearing before the entry into the central registry," A.R.S. § 8-811(A)(1) (emphasis added), the legislature could not have permitted DCS to cancel both the outcome of a valid hearing and place the person's name on the Central Registry on the exclusive say-so of a Director who did not even conduct a hearing. If there is to be a "necessary implication," it is that the Director's finding of probable cause cannot be considered a "substantiated finding" when he arrived at that point by rejecting or modifying the ALJ's finding of no probable cause. Having no "substantiated finding," Mr. B., as the target of the action, cannot have his name placed on the Central Registry pursuant to the Director's unilateral edict.

DCS asks the Court to draw a "necessary implication" from A.A.C. § R21-1-508(C)(1), AB.32, to the effect that if the Director concludes by probable cause that abuse or neglect occurred, then DCS may place the person's name on the Central Registry.[3] Again, the negative-implication and conjunctive/disjunctive canons show DCS's strained interpretation is baseless. DCS would negate the unambiguous definition of "substantiated finding," and render the entire OAH hearing process surplusage. After all, if a person can be entered on the Central Registry solely on the basis of the Director's decision, why go through the sham OAH hearing process set up by statute? *See Reading Law* 176 (discussing surplusage canon; quoting *Fortec Constructors*

[3] DCS did not even state R21-1-508 as the basis for placing Mr. B. on the list, *see* IR.62 (Appx5–Appx10), nor did the superior court, *see* IR.79 (Appx30–Appx55). DCS brings it up for the first time now.

v. United States, 760 F.2d 1288, 1292 (Fed. Cir. 1985)); *State v. Carter*, 249 Ariz. 312, 319–20 ¶ 26 (2020) (applying the surplusage canon; quoting *Reading Law*).

Subsection (17)(b): DCS argues that the word "appeal" in Subsection (17)(b) refers to "the OAH hearing," not to a state-court appeal. AB.33–39. Four separately numbered regulatory sections use the undefined word "appeal" a total of six times—R21-1-501 (three times), R21-1-505 (one time), R21-1-507 (one time), and R21-1-508 (one time):

- Section 508(A)'s "appeal" (occurring in the phrase "[i]f the perpetrator does not appeal") could mean either an appeal to OAH or to state court, *i.e.*, the entry of the person's name on the Central Registry is predicated on not meeting the applicable appeal deadline, which means, if an appeal is taken, no entry on the Central Registry can be made;[4]
- Section 507(B)'s "appeal" plainly means an appeal to state superior court under A.R.S. § 12-901 *et seq.*;
- Section 505(B)'s "appeal" is a generic "ineligibility for an appeal" due to a pending court proceeding where child abuse or neglect is at issue (R21-1-505(C)); in any event, DCS cannot list such persons on the Central Registry for at least six months under R21-1-505(D), (E), *i.e.*, until the court proceeding comes to a

[4] The OAH hearing request must be received by DCS within 20 days of the mailing or personal service of DCS's intent to substantiate an abuse or neglect allegation. A.R.S. § 8-811(A), (C). An appeal to superior court must be taken within 35 days from the date of service of the final administrative decision. A.R.S. § 12-904(A). Section 508(A)'s plain words, therefore, mean at the very least that a person cannot be listed until that respective 20 or 35-day period expires.

close, and so long as DCS is kept informed within six months of the status of the court case;

- Section 501(9) talks of "appeal rights"; its express use of the plural "rights" denotes more than one "appeal" and cannot denote only the OAH hearing;
- Section 501(15) talks of PSRT "administer[ing] the process described in A.R.S. § 8-811 for review and appeal," which means the word "appeal" is used to describe the *entire* 8-811 process: from initial notification letter to appeal to superior court; and
- Finally, Section 501(17)(b) talks about the alleged perpetrator not timely appealing, which should be read in harmony and consistent with the statutory and regulatory scheme.

Further, the relevant statute, A.R.S. § 8-811, consistently uses the word "hearing" *21 times* to denote the OAH hearing. And R21-1-501 *et seq*. consistently use the word "hearing" *18 times* to denote the OAH hearing.[5] It cannot be that all of a sudden DCS would depart from this consistent usage and use the word "appeal" to denote an OAH hearing—and *only* an OAH hearing.

DCS's argument that "appeal" in R21-1-501(17)(b) means an OAH hearing ignores the presumption of consistent usage, a traditional canon of construction. *Trisha*

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[5] Five sections of the substantiation regulations use the word "hearing" a total of 18 times, all to denote an OAH hearing, as follows:

- Section 501—six times;
- Section 502—one time;
- Section 503—two times;
- Section 504—five times; and
- Section 505—four times.

A. v. DCS, 247 Ariz. 84, 88 ¶ 17 (2019) (explaining and applying the presumption-of-consistent-usage canon); *Reading Law* 170 ("A word or phrase is presumed to bear the same meaning throughout the text; a material variation in terms suggests a variation in meaning."); *see also*. The presumption of consistent usage dictates that "hearing" and "appeal" must each be read to have been used consistently, and that due to the material variation between the words "hearing" and "appeal," the word "appeal" used in Subsection (17)(b) cannot mean only an OAH hearing when the word "hearing" consistently means an OAH hearing. It is also odd to think of the first-ever hearing a person gets (the OAH hearing) as an "appeal." Yet that is what DCS wants this Court to conclude.

Contrary to these established rules for construing written words, DCS jumps to the relevant statutes' and regulations' supposed "spirit and purpose." AB.31. Before the Court turns to drafter's intent, however, it must first exhaust traditional tools of construction, including all relevant canons of construction. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (courts must first "empty" the "legal toolkit" before turning to "policy"; courts must "carefully consider the text, structure, history, and purpose of a regulation" in that order) (cleaned up).

Subsection (17)(c): This subsection, which invokes R21-1-501(10)'s definition[6] of "legally excluded," states that "substantiated finding" means "a court or administrative law judge has made a finding of abuse or neglect based on the same

[6] As written, Subsection (17)(c) contains an obvious scrivener's error. It refers to Subsection 501(11) but talks of "legally excluded as defined in subsection (11)." But "legally excluded" is actually defined at Subsection 501(10).

allegations." Subsection (17)(c) is consistent with R21-1-505's prohibition that DCS cannot list anyone on the Central Registry while a court proceeding is pending. Subsections (17)(a), (17)(b), and (17)(c) capture the entire universe of situations that give rise to a "substantiated finding." *See Reading Law* 226 (interpretive-direction canon).

Sandwiched between Subsection (17)(a) (stating one of two defining conditions for "substantiated finding" being that an *ALJ* finds probable cause that abuse or neglect occurred), and Subsection (17)(c) (stating that a *court* or *ALJ* must find abuse or neglect occurred), Subsection (17)(b)'s "appeal" cannot then abruptly define "substantiated finding" as one where neither a court nor an ALJ has concluded that abuse or neglect occurred. And given that only a "substantiated finding" can be entered on the Central Registry, A.R.S. § 8-804(A), because there is no "substantiated finding" against Mr. B., his name should not have been listed there—an error this Court should correct by ordering Mr. B.'s name removed.

Given provisions that expressly prohibit DCS from listing a person on the Central Registry for a set number of days (R21-1-505(B), -508(A); A.R.S. §§ 8-811(A), (C), 12-904(A)), DCS argues that R21-1-501(17)(b) *sub silentio* makes DCS posthaste list persons there at the Director's unilateral direction. DCS points to *no* statute or regulation that permits it to do that. Having evinced a purpose to stay DCS's hand, nothing in these statutes or regulations can be read to hasten entry of someone's name on the Central Registry. Every single relevant statutory and regulatory text weighs against DCS's nonsensical reading.

III. DCS Fails to Explain Why Mr. B. Should Not Win Under Either the State or the Federal Constitution's Due Process Clause

One day after Mr. B. filed the opening brief, this Court decided *Solorzano v. Jensen*, 250 Ariz. 348 (App. 2020). *Solorzano* held that the trial court deprived a father of due process when it assessed his credibility without hearing in-person testimony, and the father was prejudiced as a result, even if both parties agreed to file briefs, affidavits, and supporting documents in lieu of live testimony. 250 Ariz. 348 ¶¶ 11–13. DCS's Director, like the trial court in *Solorzano*, deprived Mr. B. of due process when he assessed credibility without hearing in-person testimony, and Mr. B. was prejudiced as a result.

Also, one day after Mr. B. filed the opening brief, this Court decided *Alyssa S. v. DCS*, 1 CA-JV 18-0442, 2020 WL 7706917 (Ariz. App. Dec. 29, 2020). Judge Perkins authored the Court's opinion, but also authored a separate concurrence to call out DCS's antics. DCS is a "means to an end, and the end is to protect the child today, not to punish a [caregiver] for yesterday"; DCS cannot punish Mr. B. "based on unsubstantiated … allegations." *Id.* ¶ 38 (Perkins, J., specially concurring).

A. Mr. B.'s Is Not an Actual-Bias Case

"DCS does not dispute" that Mr. B.'s "due-process rights [a]re implicated." AB.51. DCS, however, assumes that this case falls under the actual-bias line of cases. *Id.* DCS makes a strawman argument. Mr. B. does not argue actual bias. He argues that the Court should analyze the challenged steps under *Mathews v. Eldridge*, 424 U.S. 319 (1976), applicable under the Fourteenth Amendment's Due Process Clause, a stricter *Mathews* test that is likely applicable under Arizona's Due Process Clause, and Arizona's Separation-of-Powers Clause. Proof of actual bias is irrelevant under any of these tests.

To show there was no actual bias, DCS principally relies on two cases—*Berenter v. Gallinger*, 173 Ariz. 75 (App. 1992), and *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351 (App. 2006). These cases are both irrelevant and easily distinguished.

1. *Berenter*

Berenter concluded that "combining of investigatory and adjudicatory functions" in an "administrative hearing officer" "does not violate due process" "absent actual bias." 173 Ariz. at 82.[7] *Berenter* did not decide a due-process challenge where, as here, an agency head revised the hearing officer's factual findings and credibility assessments. There was no OAH when *Berenter* was decided (1992). The legislature created OAH three years after *Berenter*. *See* Laws 1995, Ch. 251, § 14 (eff. Oct. 1, 1995) ("establish[ing]" the "office of administrative hearings") (codified at A.R.S. § 41-1092.01); *id.* § 18 (transferring hearing officers from several agencies to the new OAH, including the hearing officers of the Department of Insurance that were at issue in *Berenter*) (not codified). *Berenter*'s "hearing officers" are now OAH's ALJs—and Mr. B. is not bringing a due-process claim against the ALJ deciding his case.

In short, *Berenter* stands for nothing more than that it does not violate due process when ALJs using well-established rules of procedure and evidence find facts and assess credibility. *Berenter* says nothing about the next procedural level: whether the *agency head*, who does not conduct any evidentiary hearing nor follow rules of procedure or

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[7] *Berenter* decided only the Fourteenth-Amendment due-process question; it did not decide the question under Arizona's Constitution. Whether "combining of investigatory and adjudicatory functions" in the prosecuting-and-executing agency's head (as opposed to an "administrative hearing officer") violates Arizona's Due Process or Separation-of-Powers Clauses remains an open question. Ariz. Const. art. II, § 4; art. III.

evidence, violates due process when he revises the ALJ's facts and credibility assessments.

When the legislature created OAH, it tasked ALJs with one task and one task only: adjudicate disputes "to ensure that the public receives fair and independent administrative hearings." Laws 1995, Ch. 251, § 16 (not codified). The legislature has already determined that it is difficult to have "independent administrative hearings" when the hearing officer is in the chain of command of the head of a prosecuting-and-executing agency. It therefore removed the ALJs from the chain of command of these agency heads and placed them in a separate agency—OAH.

When it created OAH, the legislature did not give the prosecuting agency's head the authority to reject or modify the OAH ALJs' decisions. In Section 18(G) (not codified), the legislature stated that "the transfer of duties and personnel under section 14 of this act [to OAH] does not affect the right of an agency head to reverse a decision of a hearing officer if the agency head has that authority pursuant to statute." Laws 1995, Ch. 251, § 18(G). That is, agency heads needed to point to some other statute to assert reversal authority—statutes that were agency specific. What are now A.R.S. §§ 41-1092.08(B), (F), did not exist in 1995. The blanket reject-or-modify authority of agency heads—which is broader than the reversal authority that is confined to reversing conclusions of law, not facts—was added a year later. *See* Laws 1996, Ch. 102, § 47 (adding A.R.S. §§ 41-1092.03–1092.11).

These 1995 and 1996 enactments show that *Berenter* could not have addressed the constitutionality of aspects of the rewritten administrative-adjudication scheme that came into existence three years after it was decided. *Berenter*'s central holding and

reasoning are irrelevant to deciding Mr. B.'s case, and the same goes for its holding regarding actual bias.

2. *Emmett*

Emmett concluded, among others, that Pima County did not violate the due-process "right to a fair and impartial hearing when [it] allowed … a Pima County employee to participate in the [Pima County Planning and Zoning] Commission's proceedings" because the challenging party failed to "show actual bias." 212 Ariz. at 356–57 ¶ 23 (cleaned up). *Emmett* has nothing to say about the OAH-to-DCS adjudication structure, nor the agency head's use of the reject-or-modify standard of A.R.S. §§ 41-1092.08(B), (F). A different statutory scheme and adjudicatory structure are at issue here.

The Pima County P&Z Commission is a multi-member body, and any bias-based arguments that could be raised would be different than bias-based arguments raised in the current context where a single individual heads the agency. Bias would conceivably need to affect the decision of a majority of the commissioners to sustain a due-process challenge, whereas in the single-director context, bias can be proven by showing it affected that lone decisionmaker's decision.

Emmett also involved the "passage of a zoning ordinance"—"a legislative function" which is "generally not subject to full constitutional due process requirements, including personal notice." *Emmett* ¶ 18. In contrast, it is the adjudicatory, not the legislative, function at issue here. *Emmett* provides no help for deciding Mr. B.'s case.

B. *Horne* Is Helpful but Insufficient to Decide this Case

DCS next tries to shoehorn this case into *Horne*'s circumstances. AB.51 (discussing *Horne v. Polk*, 242 Ariz. 226 (2017) ("agency head makes an initial determination … [and] participates materially in prosecuting the case")). Mr. B. presents a situation that *Horne* does not address—an agency head rewriting factual and credibility determinations of OAH's ALJ. Even though it lays out a helpful rubric, *Horne*, standing alone, is not sufficient. *Horne* involved a special prosecutor appointed to prosecute Arizona's elected Attorney General for campaign finance violations. That somewhat *ad hoc* adjudicatory structure is different than the statutory OAH-to-DCS administrative-adjudication structure at issue here.

C. ALJ's Decision and Order Is Not a Mere Recommendation

DCS suggests that ALJs merely issue a "recommended" decision that DCS's Director can accept, reject or modify. AB.52. That is contrary to A.R.S. § 8-811(K) which gives ALJs the authority to "order" DCS "to amend the information or finding in the report" if the ALJ, as ALJ Moses-Thompson did here, "determines that probable cause does not exist to sustain [DCS's] finding." The specific legislative enactment ("shall order") controls. Nothing in A.R.S. § 41-1092.08 suggests the ALJ's decision is a mere "recommendation," nor that DCS can simply not follow an order issued pursuant to A.R.S. § 8-811(K). IR.62 (Appx10).

D. *Ritland* Is Ill-Fitted to Resolve this Case

DCS relies on *Ritland v. Arizona State Board of Medical Examiners*, 213 Ariz. 187 (App. 2006), for the proposition that "the ultimate decision maker," *i.e.*, DCS Director,

"is not bound by the ALJ's credibility determinations." AB.52. There are several reasons why *Ritland* is neither necessary nor sufficient to decide this case.

The statutory scheme upheld in *Ritland* differs from the one at issue here. The Medical Board tasked with reviewing the OAH ALJ's decision is authorized to take additional testimony. *Ritland* ¶ 13 n.7 (citing A.A.C. § R4-16-103(E)). DCS's director cannot take additional testimony, and he did not do so here. *Compare* A.A.C. §§ R21-1-501 *et seq. with* R4-16-103(E); IR.63 (Appx11–Appx15).

Ritland rightly concludes that "deference is owed to an ALJ's credibility findings" because:

> [T]he predicate upon which our deference is given to the finder of fact is the assumption that he has indeed had the opportunity to look the witness in the eye and reach a conclusion with respect to his veracity or lack thereof. If this underpinning of judicial review is withdrawn, the appellate court has been deprived of the assistance which it demands in cases of conflicting evidence. *If the administrative decision-maker and this court are both reaching a decision upon the 'cold record' the integrity of the legal process not only falters, it fails.* In cases of conflicting evidence, meaningful appellate review requires that the conflict be resolved by something more personal than a sterile resort to pages of hearing transcripts.

Ritland ¶ 10 (quoting *Adams v. Industrial Commission*, 147 Ariz. 418, 421 (App. 1985)) (emphasis added). *Ritland* concludes that the "[Medical] Board need not afford greater weight to the ALJ's credibility findings with respect to the witnesses the Board personally observes" under R4-16-103(E). *Ritland* created only a narrow exception to the rule that deference is owed to the ALJ's credibility findings because the Medical Board has power to take live witness testimony—not otherwise. "Arizona

jurisprudence" remains "less than clear" regarding agency-head revision of ALJ-found facts and credibility determinations where the agency head holds no evidentiary hearing. *Ritland* ¶ 9.

Furthermore, this Court's recent decision in *Pitts* (as Mr. B. points out in the opening brief, *see* AOB.28, 29, 35) clarifies at least that the ALJ is the "trier of fact" and that this Court "limits its review to whether the record supports the ALJ's finding." *Pitts v. Industrial Commission*, 246 Ariz. 334, 336 ¶ 14 (App. 2019).

Neither *Ritland* nor *Pitts*, however, addresses the constitutionality of the substantial-evidence standard of review (*Ritland* ¶ 15), or any due-process or separation-of-powers arguments (*id.* ¶ 18 n.9); Mr. B. squarely presents that unanswered question here and now. *Ritland* and *Pitts* do not resolve issues or arguments presented in this case that were never raised or discussed in those cases. "Cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not … discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Legal Servcs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.").

The *Ritland* panel was aware of two out-of-state cases concluding that assessing witness credibility is the sole prerogative of the ALJ, not the reviewing board or agency head. *Ritland* ¶ 12 (citing *Gross v. Dep't of Health*, 819 So.2d 997, 1002–03 (Fla. Dist. Ct. App. 2002); *Blaine v. Moffat County School Dist.*, 748 P.2d 1280, 1288 (Colo. 1988)). Where the agency head cannot take live testimony, this Court should adopt the rule announced

in *Gross* and *Blaine* that assessing witness credibility is the role prerogative of the ALJ, not the reviewing board or agency head. If *Ritland* is relevant, it is for recognizing the important difference between the ALJ trier-of-fact and the agency head or board final-decisionmaker and the need to "reconcile" "deference" with that structure. *Ritland* ¶ 11. Mr. B. asks this Court to do just that.

E. Possibility of a Registry Exception and Third-Party Empathy Are Not Adequate Substitutes Under *Mathews*

DCS suggests Mr. B. could "pursue a Registry exception on an expedited basis" under A.R.S. § 41-619.57. AB.53–54. The Board of Fingerprinting process that DCS recommends, however, would *not* take Mr. B.'s name off the Central Registry. A.R.S. § 41-619.57(G) ("A person who is granted a central registry exception is not entitled to have the person's report and investigation outcome purged from the central registry."). That process is not a reputation-restoring appeal like this one. DCS's suggestion that a fingerprint clearance is sufficient, despite it being statutorily incapable of remedying the injury, is meritless. Pointing out *a* procedural safeguard that can possibly be obtained not from DCS but from the Board of Fingerprinting—one that ensures Mr. B.'s name remains on the list for 25 years—does nothing to disprove the errors and inadequacies of DCS's actions or inactions in this case.

DCS suggests that because Mr. B. can explain to any potential employer that only the probable-cause standard was used to place him on the Central Registry, he has not "suffered a deprivation of liberty." IR.61–62. That gratuitous suggestion only underscores the injury. The *Mathews* test does not look to the empathy or charity of a random future employer or non-governmental actor to absolve the government from

complying with basic due-process requirements. All parties agree the *Mathews* test applies under the Fourteenth Amendment (IR.48) to evaluate the constitutionality of Steps 1, 4, 6, 7, 9. The Court should apply it.

F. This Court Should Apply *Mathews* to Resolve the Confusion Surrounding Standards of Proof and Review

DCS submits that its Director actually used the preponderance-of-the-evidence standard of proof. AB.40, 55, 59–60, 65. In his decision, DCS's Director used *Matter of Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282 (1983). IR.63 (Appx12). That case stated: "Thus, we disagree with the court of appeals' definition of the preponderance of the evidence standard, and hold that that standard requires simply that the trier of fact find the existence of the contested fact to be more probable than not." 138 Ariz. at 283.

To be sure *J-84984* defines the preponderance standard in terms of probabilities, but in doing so it disserves both the preponderance standard and the probable-cause standard. The probable-cause standard compares *probabilities*; the preponderance standard turns on *likelihood*. Under the probable-cause standard, a court ascertains: (1) the probability that a fact is true, and (2) the probability that the fact is not true. If the probability that the fact is true is greater than the probability that a fact is not true, then there is probable cause to conclude that the fact is true. An example: If the probability that a fact is true is 20% and the probability that a fact is not true is 10%, then there is probable cause to conclude that the fact is true.

The preponderance standard deals with likelihood. When a fact is more likely to be true than not true, the probability that the fact is true exceeds 50%. To meet the

preponderance standard, therefore, the probability that the fact is true must be greater than 50%. But to meet the probable-cause standard, the probability that the fact is true can be orders of magnitude smaller. That is why probable cause is ordinarily used only as a preliminary or initial standard, say, before investigation commences. *See* U.S. Const. amend. IV. It is not used as a standard to prove guilt, culpability, or liability—except in DCS-substantiation cases like Mr. B.'s.

J-84984's formulation of the preponderance standard is not incorrect; it is confusing and muddled, as the foregoing explanation shows. Perhaps DCS's Director was confused by *J-84984*. Did he really intend to follow A.R.S. § 8-811 when he saw the word "probable" used in *J-84984*? Or is DCS offering only a post-hoc rationalization because that case also contains the word "preponderance"? Did he intend to follow A.R.S. §§ 41-1092.08(B), (F)'s reject-or-modify standard, which is not a standard of proof but a standard of review? One may never know. Mr. B. has been harmed by that that lack of clarity because it led to his name being placed on the Central Registry. This Court should, therefore, walk through the *Mathews* analysis to define which standards of proof and review should be used in DCS-substantiation cases.

DCS also ignores that standards of proof (such as probable-cause, preponderance-of-the-evidence, clear-and-convincing-evidence, beyond-reasonable-doubt) are meant to be used by the adjudicator who receives live evidence, not by the adjudicator who only reviews a cold record. *See Adams*, 147 Ariz. at 421. Adjudicators who review a cold record are meant to use standards of review (such as arbitrary-or-capricious, substantial-evidence, abuse-of-discretion, contrary-to-law). So, either DCS's

Director used a standard of *proof* without holding a hearing, or he used an impermissible standard of *review* (reject-or-modify). Either would violate due process under *Mathews*.

Mr. B. suggests that the clear-and-convincing-evidence standard is the appropriate standard for the adjudicator who receives live testimony to apply. AOB.24. The preponderance standard is appropriate at the ALJ stage only if that standard of proof is coupled with a robust standard of review in state court; the intervening reject-or-modify standard imposed on the Director erodes both the standard of proof applicable at the ALJ stage and the standard of review applicable at the state-court stage in a way that deprives Mr. B. of his civil liberties. AOB.32. DCS does not address this issue and does not dispute that Mr. B.'s solution would satisfy *Mathews*.

G. DCS's Purported Interests Under the Third *Mathews* Factor Do Not Match Reality

DCS speculates that hastily placing people on the Central Registry is warranted because waiting "until after the judicial appeal process is exhausted would do little to enhance accuracy, while potentially leaving children unprotected from persons who have abused or might abuse them for an extended period of time." AB.54. DCS already protects children from potential or suspected abusers by immediately removing the children from the relevant adult's care. The interest in protecting children does not explain the need to list people on the Central Registry under a short-circuited process. DCS has several other tools in hand to protect children—no-contact edicts, mandating supervised child-adult interactions, requiring group homes to sequester caregivers like Mr. B from particular children in group homes while the caregiver is under investigation or while their case proceeds, etc. Moreover, it is odd for DCS to invoke an interest in

"enhance[d] accuracy," when it is pursuing that alleged interest by supporting a process that yields the opposite. AB.54 Constitutionally appropriate court review under constitutionally appropriate standards of proof, substantiation, and review are what *enhance* accuracy of Central Registry listings. Listing people on the Central Registry with no court process *diminishes* accuracy.

H. Arizona's Due Process Clause Does Not Use the *Mathews* Third Factor

DCS wonders how Arizona's Due Process Clause could provide a different result than its federal counterpart. AB.73. Because Arizona has not adopted the *Mathews* interest-balancing approach, the due-process analysis in Arizona makes the third *Mathews* factor non-outcome-determinative. Should the Court feel the need to balance Mr. B.'s rights and interests against the nebulous interests DCS offers, that analysis would be absent under Arizona's clause. The lack of an interest-balancing approach is a meaningful difference between the two Due Process Clauses. Given the strength of Mr. B.'s case under the first and second *Mathews* factors, he could prevail under Arizona's clause even if he does not (for whatever reason) under the federal clause.

In sum, DCS offers no reason to rule against Mr. B. under the state or federal Due Process Clauses.

IV. THE CHALLENGED STATUTORY AND REGULATORY SCHEME VIOLATES ARIZONA'S SEPARATION-OF-POWERS PROVISION

A. First Factor

DCS's main argument regarding the first factor turns on its attempt at drawing a distinction between "quasi-judicial" and "constitutional judicial power." AB.79. That nomenclature and the distinction it implies finds no support in Article III, which refers to "judicial" power without any modifying adjectives.

According to DCS, there is no "essential" difference between the "quasi-judicial" "power that OAH ALJs exercise" and "the power the Director exercises." AB.80. The difference is this: ALJs have and exercise only adjudicatory power; the Director exercises other powers, and he exercises those other powers disproportionately more than he does adjudicatory power. By DCS's own statistics, of the thousands of children it protects, Mr. B.'s was only the fifth DCS-substantiation case the superior court reviewed in the past 13 months. AB.55; DCS Quarterly Benchmark Progress Report Q2SFY21 (Mar. 31, 2021), https://dcs.az.gov/news-reports/dcs-reports (As of December 2020, DCS had 6,290 open child-abuse-or-neglect reports, down from a peak of 33,245 open reports in April 2015). Five versus 6,290—that statistic shows that the Director's predominant role is investigating, prosecuting, and enforcing statutes (all executive functions), not adjudicating DCS-substantiation cases (a judicial function)). In contrast, for Title 32 Boards, the principal function of members of the respective boards is adjudication.[8] In comparison, DCS Director's adjudicatory role is a minor one,

[8] In the interest of full disclosure, undersigned counsel serves as a member of the Arizona State Board of Dental Examiners, https://dentalboard.az.gov/about/board, and the Arizona State Board of Psychologist Examiners, https://psychboard.az.gov/about/board-staff.

given all other functions he personally performs. That is why A.R.S. §§ 41-1092.08(B), (F)'s reject-or-modify standard in the hands of DCS's Director is impermissible under the Separation-of-Powers Provision in ways that it likely is not in the hands of Title 32 board members.

Also, by way of comparison, Title 32 boards, by virtue of Arizona's open meeting law (A.R.S. § 38-431 *et seq.*), engage in an open deliberative process, and take live witness testimony to adjudicate disputes. DCS does not. As this case shows, DCS's Director has a black-box opaque adjudication process that spits out a decision without any hearing. It is significant to note that DCS has mounted no defense to the separation-of-powers problems this blending of powers in the Director's office entails—even if the statistics were different.

In other words, DCS wishes this Court to evaluate the constitutionality of the "concentration of power" in the person of the DCS Director in a vacuum without looking at the particulars of the concentration "recipe" at DCS that materially differs from the recipe found at Title 32 boards. The two cases DCS cites, AB.82, also take into account the practical realities of the "commingling of functions." *Comeau v. Arizona St. Bd. of Dental Examiners*, 196 Ariz. 102, 108 ¶ 26 (App. 1999); *Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 373 (1987).[9]

DCS also discusses *Ritland* to support its separation-of-powers argument. AB.83. As previously discussed, *Ritland* is a due-process case. The use of *Ritland* in the separation-of-powers context actually proves Mr. B.'s point: none of the cases DCS

[9] *Comeau* and *Rouse* are Fourteenth Amendment *due-process* cases, not separation-of-powers or due-process cases under Arizona's constitution.

cites say that an adjudicator can make credibility determinations without observing witnesses. If that is how DCS construes the reject-or-modify or substantial-evidence standards of review, it is hard to imagine how that would survive scrutiny under either the due-process or the separation-of-powers clause. *See, e.g.*, *Sun City HOA v. Arizona Corp. Comm'n*, 248 Ariz. 291, 293 ¶¶ 35–36 (App. 2020) (Brown, J., dissenting) ("The majority errs by giving virtually absolute deference to the Commission's groundbreaking decision" under the "substantial evidence" standard).

DCS next restates (AB.84) its misinterpretation of A.A.C. § R21-1-501(17). It argues that no constitutional violation occurs when DCS's Director executes his decision (by listing an individual on the Central Registry after a mere 20-day cool-down period)—before a court even sees the case (under the 35-day appeal window). Neither the relevant statutes and regulations, nor Arizona's Constitution, nor the U.S. Constitution have authorized such star-chamber proceedings.

B. Second Factor

DCS does not dispute that the Article III four-factor test is department neutral (AB.76); instead, it maintains that Mr. B. "misconstrues the second factor." AB.77. According to DCS, "[i]n applying the second factor, the Court evaluated the degree of control that the Registrar's exercise of power exerted over the judiciary, not the other way around." *Id.* (citing *J.W. Hancock Enterprises, Inc. v. Registrar of Contractors*, 142 Ariz. 400, 406 (App. 1984); *Cactus Wren Partners v. Ariz. Dep't of Building & Fire Safety*, 177 Ariz. 559 (App. 1993); *Cook v. State*, 230 Ariz. 185 (App.2012)). Because Mr. B. has adequately addressed *J.W. Hancock* in the opening brief, he will not recreate that discussion in rebuttal. Instead, he focuses on *Cactus Wren* and *Cook*.

The Court should decline to muddle the second (degree-of-control) factor at DCS's behest. It must apply Article III as written: "no one of such departments shall exercise the powers *properly belonging* to either of the others." *See* AOB.48. DCS agrees the test is department neutral, which means this Court should evaluate which department is controlling which function to what degree.

Either way, DCS flunks the separation-of-powers test under DCS's alternative formulation of the test. Applying DCS's formulation of the degree-of-control factor, AB.77, DCS's exercise of adjudicatory power exerts an impermissibly coercive influence over the judiciary under the ill-fitting reject-or-modify and substantial-evidence standards of review. A.R.S. §§ 41-1092.08(B), (F), 12-910(E).

In the end, DCS maintains that because state courts have the "ultimate power to review the agency's final decision" there is no separation-of-powers problem. AB.85. The test requires "meaningful judicial review," however, and the substantial-evidence review that follows on the heels of the reject-or-modify review falls short. *Cook*, 230 Ariz. at 190 ¶ 19.

DCS argues that "reviewing courts are not permitted to independently review the evidence and make their own factual determinations" under the substantial-evidence standard. AB.88. By that logic, DCS's Director, who only reviews the ALJ's decision, must also be prohibited from doing so. DCS has no answer to that conundrum. In fact, Mr. B. asks this Court to salvage the substantial-evidence standard of review by using it to review ALJ decisions, not agency-head decisions. DCS invites this Court to say that Mr. B.'s "right to meaningful judicial review" is "not impinge[d]" because A.R.S. § 12-910(E)'s substantial-evidence standard "defines the scope of that

right." AB.69. DCS would be correct if this Court gives such deference to the ALJ's factual and credibility determinations, not to the Director's.

DCS uses *Crowell*—a Fourteenth-Amendment maritime-law case—for the rule that "due process does not *require* reviewing courts to make *de novo* findings." AB.89 (emphasis added) (citing *Crowell v. Benson*, 285 U.S. 22 (1932)). The question, however, is: does due process *prohibit* a reviewer like DCS's Director from making *de novo* factual/credibility determinations without conducting an evidentiary hearing? DCS supplies no answer. The answer should be "yes," for the same reason the Superior Court and this Court are prohibited from making *de novo* factual/credibility determinations in JRAD cases without conducting an evidentiary hearing. *See Adams*, 147 Ariz. at 421 (discussing the reasons for the reach and limit of the substantial-evidence standard of review). *Crowell* itself supports such a rule: "the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final" because the deputy commissioner presides over "public" "[h]earings" where parties "present evidence" and where appeal from the deputy commissioner's decision goes to federal court, not some federal-agency official. 285 U.S. at 36, 43, 46. DCS Director's review shares nothing in common with *Crowell*'s deputy-commissioner hearing procedure.

DCS tries to put some daylight between Mr. B.'s opening brief in this Court and his reply brief in the court below as to whether defining probable cause is a legislative or a judicial function (A.A.C. § R21-1-501(13)). AB.92. Mr. B. has consistently argued that defining probable cause is *not*—and cannot be—an executive function. According to *Enterprise Life Insurance Co. v. ADOI*, 248 Ariz. 625, 629 ¶ 22 (App. 2020), using generic rulemaking authority to define a term such as "probable cause" is a "usurpation" of the

legislative function that violates the separation-of-powers doctrine. Mr. B. made that argument below, and makes it here, AOB.47. Defining a standard of proof and determining which standard of proof satisfies due process are both judicial functions. *See Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (courts "determine whether a particular standard of proof in a particular proceeding satisfies due process"). Mr. B. made that argument below and makes it here. AOB.23, 50. The state legislature can "set burdens of proof as a matter of substantive law" and when it does so, the statute "prevails over common law or court rules adopting a different standard … subject to constitutional constraints," *Seisinger v. Siebel*, 220 Ariz. 483, 491 ¶ 30 (2009)—meaning that defining a standard of proof is either a judicial function ("common law or court rule") or a legislative function, and the courts get to decide whether a particular burden of proof in a particular proceeding is constitutional (per *Santosky*). Either way, defining a standard of proof is not an executive function.

1. *Cactus Wren*

DCS heavily relies on *Cactus Wren*, a case (like *Berenter*) that was decided before the legislature created OAH and the present-day JRAD statutory scheme. *Cactus Wren*, 177 Ariz. 559. *Cactus Wren* helps highlight the issues Mr. B. asks this Court to resolve.

Cactus Wren evaluated the constitutionality of the administrative hearing officer function within the Building and Fire Safety agency and concluded that "the hearing officer function," which is a "judicial" function, "does not usurp the authority of the judiciary" because it "is not such that it constitutes a 'coercive influence' upon the judiciary." 177 Ariz. at 563. *Cactus Wren* does not address, and the parties did not litigate

in that case,[10] the constitutionality of an agency head's review of the hearing officer's decisions—the issue presented here.

The legislature transferred the building and fire safety agency's "hearing officers" (like the insurance agency's "hearing officers" in *Berenter*) to the new OAH it created. Laws 1995, Ch. 251, § 18(A)(2) (not codified). Mr. B. challenges the DCS Director's decision, not the ALJ's decision. *Cactus Wren*'s hearing officers had one role—adjudication. Adjudication is not the only (nor main) function DCS's Director performs; he performs other executive, judicial, legislative functions. Precedent analyzing separation-of-powers problems with single-function officers is ill-framed to address separation-of-powers problems with multi-function officers like DCS's Director.

2. *Cook*

Cook dealt with the constitutionality of last-minute changes to lethal-injection protocols by the Department of Corrections to carry out the death penalty; it did not deal with the two-step ALJ-to-DCS adjudication scheme. 230 Ariz. 185. *Cook* concluded that it *would* violate the constitution's separation of powers if the agency were to "unreasonably limit or hamper the courts from exercising meaningful judicial review of its actions." *Id.* ¶ 19. A.R.S. §§ 41-1092.08(B), (F)'s reject-or-modify standard of review coupled with the substantial-evidence standard of review limits and hampers state

[10] In *Cactus Wren*, the department director had affirmed the hearing officer's decision against Cactus Wren Partners. 177 Ariz. at 561. Cactus Wren Partners had not challenged the constitutionality of that intervening agency-head review of the hearing officer's decision, apparently because the source of its aggrievement was the hearing officer's decision.

courts from exercising meaningful judicial review. AOB.26, 27, 50, 51. Per *Cook*, those two standards of review would violate Arizona's Article III.

3. *Prentiss*

DCS mentions *State v. Prentiss*, 163 Ariz. 81 (1989). AB.75. *Prentiss* helps Mr. B. *Prentiss* concluded under Arizona's separation-of-powers provision that "the legislature cannot, through an executive agent, restrict the judiciary from deciding what a sentence should be." 163 Ariz. at 85. By enacting the substantial-evidence standard of A.R.S. § 12-910(E), the legislature has done what *Prentiss* forbids. It has enabled an executive agent (DCS Director) to reweigh facts and credibility assessments of the hearing officer (under A.R.S. §§ 41-1092.08(B), (F)'s reject-or-modify standard), and thereby restrict the judiciary from deciding Mr. B.'s sentence (whether his name should be placed or removed from the Central Registry) by operation of the substantial-evidence standard.

DCS pivots to cases decided under the federal Administrative Procedure Act. AB.88. Mr. B. argues, however, that Arizona's substantial-evidence standard is suspect under Arizona's Constitution and the federal Due Process Clause; whether the federal Administrative Procedure Act's substantial-evidence standard is similarly suspect under the federal Constitution is unrelated to analyzing the state-law standard under the state constitution.

C. Third Factor

DCS argues that Mr. B. "misconstrues the third factor" because the third factor should look to the legislature's objective, according to DCS. AB.78. That argument conflicts with DCS's agreement that the Article III test is department neutral. Assuming DCS's formulation of the third factor is correct, the challenged statutory scheme still

fails to meet it. Even if this Court's task were to evaluate the legislature's objective in creating the challenged statutory scheme, it is apparent that the legislature created OAH with the express purpose of "ensur[ing] that the public receives fair and independent administrative hearings." Laws 1995, Ch. 251, § 16 (not codified) (enacting A.R.S. §§ 41-1092 *et seq.*).

The legislature's objective in enacting the reject-or-modify standard is not expressed. Assume for the sake of argument that the legislature's objective was to standardize the process of administrative adjudications (and judicial review thereof) across state agencies, which was, until then, different for different agencies. Laws 1996, Ch. 102, § 47 (creating A.R.S. §§ 41-1092.03–1092.11). If so, its objective was not to erode judicial review of administrative decisions. This assumption might find some support because the very bill that created A.R.S. § 41-1092.08's reject-or-modify standard, also amended A.R.S. § 12-910 as follows:

- Strengthened Section 12-910(A)'s language regarding freely permitting evidentiary hearings in state court, including expressly stating that the state court "may hear testimony from witnesses who testified at the administrative hearing and witnesses who were not called to testify at the administrative hearing."
- Adding Section 12-910(B)'s language regarding admitting "exhibits and testimony that were not offered during the administrative hearing."

Laws 1996, Ch. 102, § 16. At no time in 1995 or 1996 did the legislature manifest any objective to establish DCS's "superiority over the judicial function." AB.79.

Looking solely to the legislature's objective under the third factor would also ignore the text of what the legislature enacted. The Court's task is to look at the text of

the challenged statute before turning to the statute's purpose. *Cf. Kisor*, 139 S. Ct. at 2415 (courts must "carefully consider the text, structure, history, and purpose of a regulation" in that order) (cleaned up). The third factor looks to the text to evaluate superiority or hegemony in practice, AOB.51, not at some hortatory legislative objective. In practice, the challenged statutory scheme only erodes judicial review and establishes DCS's superiority over adjudications even if the original legislative objective might be viewed as wishing to have the opposite effect. In any event, the procedural history of this case—as demonstrated by the lower court's various rulings denying Mr. B.'s introduction of additional facts, employing superficial substantial-evidence review to the Director's revised facts, and so forth—firmly establishes DCS's superiority over the judiciary in a manner that fails the third factor as articulated by DCS.

In essence, DCS offers a magic-words solution: because the legislature either conferred "quasi-judicial powers on" DCS or "supplement[ed] [DCS's] mission as expressed in its governing statutes," there is no separation-of-powers violation. AB.90. DCS points to its executive functions—its "primary purpose … to protect children," "investigate child-abuse and neglect reports," "record findings," "maintain a Registry," "conduct Registry background checks," "use Registry information," AB.90—to say there is no problem if DCS also exercises "supplement[al]" "quasi-judicial" power to "substantiate the allegation." *Id.* That explanation surely betrays a dangerous and unconstitutional commingling of functions.

D. Fourth Factor

In explaining its vision for the fourth factor, DCS makes an astounding observation: "no [separation-of-powers] violation is suggested where the agency's

exercise of quasi-judicial powers furthers its statutory mission, its mission might not be as easily achieved if matters relating to it were left to the judicial process." AB.91. Can DCS honestly believe that it should *not* be subject to meaningful judicial review? Is DCS above the law? Mr. B. hopes the answer to both questions is "no."

V. THIS COURT MUST ADDRESS THE CONSTITUTIONALITY OF THE REJECT-OR-MODIFY AND SUBSTANTIAL-EVIDENCE STANDARDS BECAUSE THE COURT BELOW DID NOT PERMIT A TRIAL *DE NOVO*

DCS does not contest that a trial *de novo* is the rule and not the exception in JRAD cases. AB.96. Where, as here, "if a hearing was not held by the agency," a trial *de novo* is required under A.R.S. § 12-910(C); *see also* A.R.S. § 12-901(1) (defining "agency" as "every agency, board, commission, department or officer authorized by law … to adjudicate contested cases," which would make the DCS Director an "agency" for purposes of Section 12-910(C)). DCS's Director, without conducting a hearing, relied on Ms. Rochelle Olesky's report. No one examined or cross-examined Ms. Olesky, so no "stenographically reported or mechanically recorded … transcript" of her testimony is available. A.R.S. § 12-910(C). If the court below had allowed a trial *de novo*, it would not have had to deal with the constitutional problems with the reject-or-modify or substantial-evidence standards, for it would have obtained live testimony to decide for itself whether Mr. B. abused G.C. by placing a hand on his shoulder. Because the lower court did not do that, this Court now must confront the question of law—whether the reject-or-modify and substantial-evidence standards are unconstitutional.

VI. DCS'S WAIVER ARGUMENTS ARE EITHER WAIVED OR WITHOUT MERIT

In the main, DCS's waiver arguments rest on two grounds: "failing to raise them properly or by failing to support them with relevant authority." IR.17. Neither are valid bases for waiver.

Generally, this Court "will not consider issues not raised in the trial court." *Harris v. Cochise Health Systems*, 215 Ariz. 344, 349 ¶ 17 (App. 2007). Waiver does not hinge on whether the issues were "properly" raised or whether "authority" that opposing counsel or the trial court considers "relevant" was cited. Mr. B. raised and properly presented in the trial court all issues he presents to this Court. An "argument" is waived on appeal only when it is "not briefed at trial court level and trial court had no opportunity to consider it." *Id.* That the trial court found an argument unpersuasive or not developed to the trial-court's liking does not mean the argument is waived. Only when the argument presented to this Court is completely new, such that the presenter "never provided the trial court the opportunity to address its argument," is that particular argument considered "not … preserved for appellate review." *Id.* ¶ 18.

Mr. B. provided the trial court the opportunity to address all arguments he presents here—and the trial court did address those arguments. Appealing from the trial court's final, appealable order, as well as interlocutory orders, Mr. B. has preserved all arguments he presents in his opening brief in this Court.

DCS, via its waiver argument, wants to give this Court a massive reading assignment: read briefing in the lower court and compare it to briefing in this Court to see which arguments are preserved. Mr. B. of course will not discourage this Court from reading the entire record, but suggests that the better use of the Court's limited

resources would be to read the Appellant's Appendix (which contains relevant portions of the transcript and all orders appealed from), and all briefs filed in this Court. DCS's submission on waiver is no better than Ms. Aubuchon's was in the Supreme Court: The Court should put a stop to DCS's misuse of this Court's generosity in "grant[ing DCS's] request to [exceed] the briefing page limit." *In re Aubuchon*, 233 Ariz. 62, 64 ¶ 6 (2013). DCS "asks [this Court] to 'thoroughly review the record,' cites to lengthy documents without specificity, [and] broadly invites [this Court] to review [arguments made below] for 'details of [the parties'] argument." *Id.* Per *Aubuchon*, DCS's waiver arguments are both waived and meritless.

In making vague waiver arguments, both DCS and the lower court labor under the misguided notion of their respective roles in JRAD cases. JRAD cases are quite different from civil cases initiated in Arizona trial courts. Civil cases get initiated with a complaint, followed by a responsive pleading. If not dismissed, written discovery and depositions follow, followed by either summary judgment or trial. In JRAD cases, the Superior Court sees no complaint but a notice of appeal, followed by what looks like standard appellate practice—opening, answering and reply briefs. But the legislature deliberately determined that JRAD cases should go to Superior Court and not this Court because it correctly understood that further fact development might be needed in some cases, there might be difficulties in getting an informal record formalized and certified to the court, etc. *See* A.R.S. § 12-910. Both the JRAD Act and JRAD Rules contemplate that all the points that lead to the JRAD appellant's aggrievement will be addressed by the Superior Court.

The lower court contrived a theory of waiver, for example, regarding Mr. B.'s right to confrontation and cross-examination. IR.69 (Appx27). But Mr. B. was *not aggrieved* by the ALJ's decision—he won that round—which correctly gave less weight to hearsay than to in-court testimony. He, however, *was aggrieved* by the DCS Director's decision that relied solely on the caseworker's report—a caseworker Mr. B. had no opportunity to cross-examine or confront—while ignoring sworn, cross-examined testimony of eyewitnesses. The lower court's (and as a result, DCS's, AB.42) insistence that those arguments are waived is baffling. How could Mr. B. have waived his argument that he was not allowed to cross-examine and confront the only witness DCS relied on in its final agency decision when he presented that argument at the first opportunity he had in Superior Court and consistently thereafter? *See* IR.23 (interlocutory order rejecting Mr. B.'s stay motion); IR.69 (interlocutory order denying Mr. B.'s stay motion); IR.79 (final appealable order). DCS has no answer. True, there is no complaint that DCS, the lower court, or this Court can conveniently look at to see a list of all injuries caused by DCS for which Mr. B. seeks redress from state court. But fixating on this fuzzy waiver argument ignores the nature of this case—a JRAD appeal in which no complaint gets filed, only a notice of appeal—and it ignores that Mr. B. fleshed out all the reasons for vacating DCS's decision and for removing his name from the Central Registry at every possible stage in the lower court, and here.

Arguments presented in court briefing have some "power to persuade," as much by the force of their internal logic as by any relevant supporting authority the party can muster. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Such persuasion does not depend on whether a particular case uses any specific magic words to opposing party's

liking. Nothing precludes a judge, in her duty of exercising independent judgment, from being open to reason and persuasion. Concluding that arguments are waived simply because the opposing party or the lower court considered them unartfully presented or unpersuasive goes against the "principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (it is up to the party to "frame the issues for decision" as the party deems fit). Parties cannot make new arguments on appeal, but nothing prevents them from presenting better versions of the arguments made below.

A. Mr. B. Did Not Waive Arguments Regarding the Meaning of A.A.C. § R21-1-501(17)

DCS maintains that Mr. B. waived the argument regarding the meaning of A.A.C. § R21-1-501(17). AB.29. Not so. DCS agrees as it must that ascertaining the meaning of statutes and regulations is a matter of *de novo* interpretation for this Court as well as the court below. A.R.S. § 12-910(E). Mr. B. explained throughout his opening brief in the court below (IR.72:ix ("*passim*" page reference for R21-1-501(17), *i.e.*, explanation for that section appears on at least five separate pages)) that R21-1-501(17) should be read to withhold placing a person's name on the Central Registry until the person exhausts state-court appeals. The court below did not order Mr. B.'s name removed from the Central Registry. IR.79 (Appx30–Appx55). Having been aggrieved by the superior court's decision, Mr. B. properly makes that argument in the opening brief in this Court, and asks this Court to reverse the decision below and order Mr. B.'s name removed from the Central Registry. AOB.xi ("*passim*" page reference for R21-1-501(17)). Also, waiver cannot be the basis for affirming the lower court's decision as DCS erroneously suggests. *Gila River Indian Community v. DCS*, 242 Ariz. 277, 283 ¶ 27

(2017) ("[W]e decline to rely on waiver as a basis for affirming the [lower court's decision].").

"Alternatively," DCS claims that the argument regarding the meaning of R21-1-501(17) is waived for failure to sufficiently develop it or to support it with any authority. AB.29–30. That does not amount to waiver. *See Harris* ¶ 17.

B. Mr. B. Did Not Waive Arguments Relating to the Steps He Challenges

DCS next asserts that Mr. B.'s arguments relating to Steps 4, 6, 7, 8, 9 … are waived without giving any reason why that's so. AB.39, 41, 44, 46, 47, 48. For the following reasons Mr. B.'s arguments have been well preserved:

Step 4: DCS had the burden of proof, even if it suggests otherwise (AB.66). DCS tried to prove its entire case based on triple hearsay and notes of a caseworker who did not testify. Mr. B. argues that the ALJ correctly concluded that the caseworker's report was "inconsistent" and that DCS "failed to demonstrate that probable cause exists to substantiate its proposed finding that [Mr. B.] abused [G.C.]." AOB.17–18, IR.62 (Appx9–Appx10). In other words, the ALJ gave the appropriate weight to in-court, sworn, cross-examined statements and little, if any, to out-of-court statements submitted as true. On the contrary, *DCS's Director* apparently relied on A.R.S. § 8-811(J)-–(K) to give exclusive weight to his subordinate's report and none to live OAH testimony. IR.63 (Appx11–Appx15). Mr. B. challenges the constitutionality of A.R.S. § 8-811(J)–(K), and offers ways to avoid the constitutional question. AOB.10, 11, 17, 29, 31, 50. Even assuming the Director's role is that of a factfinder who can rewrite facts and reassess credibility when he takes no live witness testimony, Mr. B. argued

below and argues here, that such a role violates the state and federal constitutions. Assuming the Director-as-factfinder theory as true, Mr. B. had no opportunity to cross-examine in the Director's presence any witness, namely Ms. Rochelle Olesky, whom *the Director relied on*. DCS's argument that this aspect of the argument is waived, AB.66, AB.97, is incorrect because Mr. B. properly presents that argument as the reason why this Court should reverse, and conclude, among other things, that superior courts should freely permit trials *de novo* in JRAD cases where agency heads revise the ALJ's factual and credibility determinations, or alternatively, that it should have allowed Mr. B. to submit an affidavit. AOB.52–54.

Mr. B.'s arguments relating to Step 4 are not waived. Besides, on this point, as others, the court below concluded in DCS's favor. IR.69 (Appx24); IR.79 (Appx.31–34, 38, 51). Being aggrieved by that decision and appealing from it, Mr. B. presents that question in this Court and explains why the decision below should be reversed. AOB.17–18, 21–51. That is not waiver; it is ordinary party presentation of appellate arguments. *See Harris* ¶¶ 17–18.

Step 6: Mr. B. challenges the statutory structure under which an appeal from the ALJ's decision must be taken to the head of the same agency that investigates, prosecutes, and executes the decision against an individual. *See* A.R.S. §§ 41-1092.08(B), (F). He did so throughout the proceedings in the court below and does so here. No aspect of that argument is waived as DCS disingenuously suggests. AB.44. The court below having addressed this argument and ruled in DCS's favor, IR.79 (Appx42–Appx44, 51), Mr. B., as aggrieved by that decision, demonstrates in his opening brief in

this Court why reversal on that point is appropriate. AOB.18, 21–23, 27–29, 46–51. The argument, therefore, is properly presented to this Court.

Step 7: DCS concedes that Mr. B. "enlarges upon" (AB.46) the unconstitutionality of the reject-or-modify standard of A.R.S. §§ 41-1092.08(B), (F). Mr. B. has adequately preserved and presented that argument in this Court. AOB.x ("*passim*").

Step 8: As already explained, Mr. B.'s argument regarding the proper interpretation of A.A.C. § R21-1-501(17) is preserved and properly presented in this Court.

Step 9: DCS says that only "[a]ny additional argument that [Mr. B.] could have raised" regarding Step 9 (state-court fact deference to administrative decisions without the benefit of trials *de novo* where facts are disputed) is waived. AB.47, 48. DCS, therefore, does not say that the arguments with respect to Step 9 that Mr. B. *did* present are waived. Indeed, DCS cannot say that because those arguments are properly preserved and presented in this Court.

C. Mr. B. Did Not Waive Constitutional Arguments

DCS next argues that Mr. B. waived the argument that Arizona's Constitution provides greater due-process protection than the federal Constitution again under its dubious theory that it was not developed to DCS's or trial court's liking. AB.69–71. Mr. B. developed it thoroughly below, the court addressed it (IR.79 (Appx38)), and he develops it here. Mr. B. explained in the court below, and explains in this Court, that under Arizona's Due Process Clause, the *Mathews* analysis likely gives dispositive weight to the second factor and little, if any, to the third. AOB.44 (discussing *James S. v. DCS*,

1 CA-JV 18-0150, 2019 WL 613219, *8 (Ariz. App. Feb. 14, 2019) (Perkins, J., dissenting)). The Arizona Supreme Court has not adopted the *Mathews v. Eldridge* interest-balancing approach. *Cf.* Philip Hamburger, *The Inversion of Rights and Power*, 63 Buff. L. Rev. 731 (2015) (criticizing the *Mathews* interest-balancing approach).

DCS makes the same waiver argument relating to the second factor of the separation-of-powers test (AB.86–87) and the "probable-cause issue in his separation-of-powers argument in his opening brief below" (AB.92, 95). Because those arguments were also developed in the court below and addressed by it, they are not waived. *See Harris* ¶¶ 17–18.

In sum, Mr. B. properly preserved all arguments and presents them in this Court. DCS's protest to the contrary is without merit. Mr. B. appropriately gets to tell this Court all the ways in which he is aggrieved by the lower court's final and interlocutory decisions from which appeal is taken, just as he told the court below all the ways he is aggrieved by the Director's decision.

CONCLUSION

The Court should reverse and vacate the DCS Director's and the Superior Court's decisions, vindicate the ALJ's decision, and order Mr. B.'s name removed from the Central Registry.

Respectfully submitted, this 19th day of April, 2021.

/s/ Aditya Dynar
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