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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Phillip B., *Appellant* vs. **Gregory McKay**; **Arizona Department of Child Safety**, *Appellees*	Case No. _____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPELLANT'S MOTION FOR STAY OF AGENCY DECISION

Appellant Phillip B. respectfully requests a stay of the agency decision pending appeal. The basis for such request is set forth below.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

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

On July 6, 2018, the Arizona Department of Child Safety (DCS) received a report from Z.V., a 15-year-old resident of New Horizons, alleging that Mr. B. "put his elbow on [G.C.]'s throat, and

[1] Facts are taken from the findings of fact entered into the record by Administrative Law Judge Velva Moses-Thompson. The ALJ's decision is attached as Exhibit 1.

that [G.C.] made a gasping sound." Ex.1:001 ¶ 6. DCS investigated the allegation. G.C. acknowledged that he was not following directions before the incident. Ex.1:002 ¶ 8. G.C. claimed that Mr. B. had grabbed his shirt at the neck and that Mr. L. witnessed the incident. *Id.* Thus, the same incident, as reported by G.C., was vastly different than what Z.V. had reported.

The DCS caseworker also interviewed two other children who were residing at New Horizons on June 23, 2018 (the day of the alleged incident)—Z.V. and E.M., a 12-year-old.

E.M. reported that G.C. "was told to sit in another chair but refused to move" and alleged that "[Mr. B.] grabbed [G.C.] by the neck and said, 'go sit in that chair.'" Ex.1:002 ¶ 9. E.M. further alleged that it "looked like [Mr. B.] had his hands around [G.C.]'s neck because [G.C.] could not breathe and his face was red." *Id.*

Two days later, the caseworker interviewed Z.V. (the resident who first reported the incident), who, at the time of the report, and at the time of the interview, was hospitalized at Banner Health Scottsdale because he had "thoughts of hurting himself and others." Ex.1:001–002 ¶¶ 6, 10. Z.V. alleged that Mr. B. "yelled in [G.C.]'s face and poked [G.C.] in the chest with his index finger." Ex.1:002 ¶ 10. G.C. "told [Mr. B.] to stop poking him, but [Mr. B.] did not stop." *Id.* Mr. B. "grabbed [G.C.] by the neck and put pressure on his neck" and that G.C. "could not breathe and that his face turned red." *Id.* He also alleged that Mr. B. "picked [G.C.] up by the shirt and moved him to his chair." *Id.* Thus, Z.V. and E.M.'s version of events did not match G.C.'s, there being important discrepancies between each of them. In particular, G.C. *did not* say Mr. B. did any of the other things that Z.V. and E.M. alleged. These three residents—G.C., E.M., and Z.V.—were the only minors who witnessed this alleged incident.

A few days later, the DCS caseworker interviewed Mr. L. and Mr. B. separately. They both denied that Mr. B. "placed his forearm on [G.C.]'s neck and restricted [G.C.]'s breathing." Ex.1:002 ¶ 11. Based on the investigation, the caseworker and her supervisor decided to "substantiate the report as presenting probable cause that an incident of abuse took place." Ex.1:003 ¶ 12. Consequently, DCS informed Mr. B. of its proposed finding of child abuse in the following words: "[Mr. B.]

placed [G.C.] in an inappropriate restraint by grabbing the child by the neck of his shirt and placing his forearm against the child's neck, during which time the child's face turned red and he was unable to breath [*sic*]." Ex.1:003 ¶ 13.

Mr. B. requested a hearing with the Office of Administrative Hearings (OAH). At the hearing, Mr. B. testified. He also presented the testimony of Mr. L, New Horizons Program Coordinator Reginald M. (RJ), and Lynwood P., a friend of Mr. B.'s.

RJ testified that G.C. "never told him that he could not breathe or that [Mr. B.] put his body on him." Ex.1:004 ¶ 19.

Mr. L., the only other adult eyewitness testified that Mr. B. "grabbed [G.C.]'s shirt around the shoulder or neck area," and "held [G.C.]'s shirt for 2 to 3 minutes and the shirt tore," and that "[G.C.] did not have trouble breathing." Ex.1:004 ¶ 20. Mr. L further testified that Mr. B. "did not put his forearm on [G.C.]'s neck." *Id.*

Mr. B. testified that on June 23, *i.e.*, on the day of the incident, "[G.C.] was cursing because he did not want to do his chores. … [G.C.] kicked furniture chairs." Ex.1:004 ¶ 21. Mr. B. "placed his hand on [G.C.]'s shoulder and admonished him to calm down. After [G.C.] did not calm down, [Mr. B.] tightened his grip on [G.C.]'s shirt but kept his arm extended because he did not want to be 'nose to nose' to [G.C.]" *Id.* He and Mr. L. moved G.C. to a chair. *Id.*

DCS did not present the testimony of the caseworker who interviewed the children, or the three children—G.C., E.M., Z.V.—for cross-examination. It instead presented the testimony of Liana V., who conducted only a document-based "statutory review" based on "information which DCS had gathered." Ex.1:003 ¶ 14. Liana V.'s testimony therefore was based on a document review of the DCS caseworker's report, which in turn recounted the three children's recollections of the incident, all of which was offered for the truth of the matter asserted.

The ALJ—the only factfinder in the proceeding—found the testimony of RJ, Mr. L., and Mr. B. to be credible. Based on the findings of fact entered after trial, the ALJ concluded that probable cause did not exist to support a finding of abuse under A.R.S. § 8-804. Because the incident

failed to meet the statutory definition of abuse, the ALJ ordered that the report of alleged abuse by Mr. B. be unsubstantiated. Ex.1:006.

DCS Director's Decision. The DCS Director amended both the ALJ's findings of fact and conclusions of law. Ex.2. Of note, Director McKay struck RJ's testimony from the record. Ex.2:007 ¶ 2. He also declined to accept the testimony of Mr. L. and Mr. B. (the only adult eyewitnesses). Ex.2:007 ¶ 3. Director McKay also "delete[d]," Ex.2:008 ¶ 4, the ALJ's finding that RJ's, Mr. L.'s and Mr. B.'s "testimony … [was] credible." Ex.1:004 ¶ 22. Finally, he "delete[d] Conclusion of Law number 5." Ex.2:008.

The ALJ, in Conclusion of Law number 5, had explained that DCS "presented no eyewitness testimony that [Mr. B.] placed his forearm against [G.C.]'s neck and that [G.C.] was unable to breathe," had noted that the "children's account of the incident [wa]s inconsistent," and that Mr. L. provided "credible testimony that [Mr. B.] did not place his forearm on [G.C.]'s neck and that [G.C.]'s breathing was not restricted." Ex.1:005. The ALJ then concluded that DCS "failed to demonstrate probable cause exists to substantiate its proposed finding that [Mr. B.] abused [G.C.]" Ex.1:006.

In reversing the ALJ's findings of fact, credibility determinations, and conclusions of law, Director McKay ordered that his Department's "proposed finding of abuse … is substantiated and shall be placed on the DCS Central Registry in accordance with A.R.S. § 8-804," and that "the report in this matter shall remain 'substantiated.'" Ex.2:009.

This appeal follows.

STANDARD FOR GRANTING A STAY PENDING APPEAL

A.R.S. § 12-911(A)(1) authorizes the Superior Court to "stay the decision" of the administrative agency "for good cause shown." The stay may be granted "[w]ith or without bond, … and before or after the [appellee's] filing of the notice of appearance." *Id.*

P&P Mehta LLC v. Jones formulated the standard courts use to determine "good cause" under A.R.S. § 12-911(A)(1). 211 Ariz. 505, 507 ¶ 5, 123 P.3d 1142 (App. 2005). The court in that case

was asked to adopt the same "stringent test" used for preliminary injunctions, but it instead adopted a "less exacting approach." *Id.* at ¶ 2. It concluded that in the context of A.R.S. § 12-911(A)(1), the four-factor test for granting stays articulated in *Shoen v. Shoen*, 167 Ariz. 58, 804 P.2d 787 (App. 1990), "does not provide an appropriate template by which to judge whether a stay of an administrative agency's decision should be granted." *P&P Mehta* at ¶ 15. Instead it adopted a two-factor test: the petitioner must show "a colorable claim and that the balance of harm favors granting the stay." *Id.* at ¶ 25.

Establishing a colorable claim of error "does not mean a showing that the petitioner is reasonably likely to prevail on appeal." *Id.* at ¶ 21 (cleaned up). Rather "it requires something less": "an assertion that is seemingly valid, genuine, or plausible, under the circumstances of the case." *Id.* (cleaned up). Thus, "a petitioner seeking a stay of an agency decision must demonstrate, as regards substantive merit, that his petition presents a seemingly valid, genuine, or plausible claim under the circumstances of the case." *Id.* at ¶ 22.

With regard to the "balance of harm" factor, *P&P Mehta* concluded that "[a] degree of harm such as 'irreparable,' is not required, but it is not enough for the petitioner simply to demonstrate some harm." *Id.* at ¶ 23. "[T]he petitioner's harm must be weighed against the harm that would accrue to the agency or other parties to the proceedings. Only if the court concludes that the balance of harm tips in favor of the petitioner has he shown the 'harm' necessary to constitute 'good cause.'" *Id.* Furthermore, the court can "mitigate potential harm to the agency's interest or that of another party" by employing other "tools at its disposal," such as JRAD Rule 3(c) which "permits the court to set appropriate conditions upon a stay request and, if monetary or performance considerations are involved, require a security or performance bond of the petitioner." *Id.* at ¶ 24. "Employing" such tools "may allay the harm to others sufficiently to permit the court to find that the balance of harm favors a petitioner." *Id.*

While the language and reasoning of *P&P Mehta* is clear, the text of JRAD Rule 3(b) related to requests for stay is in marked contrast:

> The superior court may grant the motion for stay pending appeal for good cause shown. The motion for stay must address the following:
> 1. The strong likelihood of success on the merits;
> 2. The irreparable harm if the stay is not granted;
> 3. The harm to the requesting party outweighs the harm to the party opposing the stay; and
> 4. Whether the public policy favors the granting of the stay.

As explained below, this mismatch between *P&P Mehta* and the language of this rule appears to be the result of a rather glaring misstatement in the State Bar's efforts to update JRAD. In January 2017, the State Bar of Arizona filed a rule-change petition (R-17-0013, attached as Exhibit 3) to overhaul JRAD. Ex.3. The petition, in explaining the proposed amendment to JRAD Rule 3, stated: "This language was developed to help guide litigants seeking to stay administrative decisions under the standard announced by the Supreme Court in *Smith v. Arizona Citizens Clean Elections Com'n*, 212 Ariz. 407[, 132 P.3d 1187] (2006)." Ex.3:015.[2]

But *Smith* expressly adopted the *Shoen* test for granting stays under Arizona Rules of Civil Appellate Procedure (ARCAP) Rule 7(c), 212 Ariz. at 410 ¶ 9, 132 P.3d at 1190—*not* under JRAD Rule 3. ARCAP, admittedly, "govern procedures in civil appeals to the Arizona Court of Appeals and the Arizona Supreme Court," ARCAP 1. ARCAP *does not* govern judicial review of administrative decisions in Arizona Superior Court under JRAD—what would otherwise be the point of having a separate JRAD Act (A.R.S. §§ 12-901–914) and separate JRAD rules?[3] *See also Campbell v. Chat-*

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[2] The State Bar's rule-change petition sailed through—it received no comments in support of or in opposition to the proposed rule changes (bit.ly/2UdJpdE); the Supreme Court, apparently trusting but not verifying the State Bar's bald assertion, adopted verbatim the State Bar's proposed changes. JRAD Rule 3(b), before this change, read: "A stay of an administrative decision may be conditioned upon the filing of a bond in superior court by the moving party or upon such other conditions as the court directs. A stay, if granted, shall be effective upon compliance with all conditions imposed by the court." This language was replaced with the four *Shoen* factors. Ex.3 p.12.

[3] JRAD Rule 1(a)–(b) (emphasis added) states, "These rules govern the procedure in all appeals from final administrative decisions brought to the superior court pursuant to A.R.S. §§ 12-901 to -914" and "[e]xcept as provided elsewhere in these rules, the Arizona Rules of Civil Procedure *do not* apply to proceedings held pursuant to A.R.S. §§ 12-910 to -914." JRAD Rule 13 further confirms, "The Arizona Rules of Civil Appellate Procedure apply to appeals from the final decision of the superior court in an action to review a final administrative decision. Such appeals must be to the court of appeals in the first instance." It follows from the usual application of the *expressio-unius-est-exclusio-alterius* principle that by expressly *not* incorporating ARCAP into JRAD, JRAD precludes ap-

win, 4 Ariz. App. 504, 509, 421 P.2d 937, 942 (1966), *reversed on other grounds*, 102 Ariz. 251, 428 P.2d 108 (1967) (The JRAD Act, specifically, A.R.S. § 12-911 "prevails over" Arizona Rules of Civil Procedure (ARCP)).

The State Bar's conclusory explanation for amending JRAD Rule 3 to incorporate *Smith/Shoen* made no sense, especially because there is an appellate case clearly on point providing the test for granting stays under JRAD Rule 3—*P&P Mehta*. Arizona superior courts are required to follow appellate precedent that is directly on point:

> The trial judge was clearly wrong in refusing to follow this court's decision in *Forino*. The superior court is bound by decisions of the court of appeals; its precedents furnish a proper guide to that court in making its decisions. … Under the doctrine of stare decisis, once a point of law has been established, it must be followed by all courts of lower rank in subsequent cases where *the same legal issue is raised*. … *Forino* became binding precedent when it was published. It remains so until this court, in a published opinion, refuses to follow it or it is *vacated by our supreme court*."

Francis v. Ariz. Dep't of Transp., 192 Ariz. 269, 271 ¶¶ 10–11, 963 P.2d 1092, 1094 (App. 1998) (emphasis added). The Supreme Court in *Smith* (which adopted the *Shoen* standard under ARCAP 7(c)) *did not vacate* the Court of Appeals' decision in *P&P Mehta* (which adopted the aforementioned two-factor test under JRAD Rule 3); they are not even decisions on "the same legal issue." Further, there is absolutely *no indication* in *Smith* that *Shoen* governs stay requests filed under JRAD Rule 3. In fact, ARCAP 7(c) governs only stays of proceedings "while an appeal is pending" in the Court of Appeals or in the Supreme Court and *Smith* applies only in that context.

This Court's task in the JRAD context is plain: *P&P Mehta* provides the test for evaluating stay requests under A.R.S. § 12-911(A)(1). *P&P Mehta* remains the definitive and directly on-point implementation of the "good cause" language enacted by the legislature in A.R.S. § 12-911(A)(1). Indeed, "[r]ules promulgated by the Arizona Supreme Court, such as [JRAD Rule 3(b)], can only affect procedural matters and cannot abridge, enlarge, or modify substantive rights created by stat-

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plying ARCAP in superior-court JRAD matters. If the Supreme Court intended otherwise, it would have said so; for example, JRAD Rules 2(a), 2(c), and 4(e) expressly state that ARCP 4, 5, and 6(a) apply in JRAD matters.

ute. … If a rule and a statute appear in conflict, the rule is construed in harmony with the statute." *Rosner v. Denim & Diamonds, Inc.*, 188 Ariz. 431, 433, 937 P.2d 353, 355 (App. 1996).

To harmonize the court rule and the statute, courts look to the "primary intent of the statute." *Id.* The *P&P Mehta* court did exactly that when it concluded that using the *Shoen* factors, restated in JRAD Rule 3(b), "would simply not be a plausible construction of legislative intent." 211 Ariz. at 507 ¶ 11, 123 P.3d at 1144. Worse still, applying the *Shoen* factors erroneously embedded in JRAD Rule 3(b) would "abridge, enlarge, or modify" Mr. B.'s "substantive rights created by statute," which is a no-no for mere rules of procedure. *Id.* Applying *Shoen* in the JRAD context "asks the near-impossible" of petitioners like Mr. B.; the legislature did not intend the "'good cause' standard to mirror *Shoen*'s 'traditional equitable criteria.'" *P&P Mehta* at ¶¶ 8, 10. The *Shoen* standard, which has been (perhaps inadvertently) embedded in JRAD Rule 3(b) due to the unfortunate misinformation sloppily supplied to the Supreme Court by the State Bar, is not apposite under A.R.S. § 12-911(A)(1).

In sum, the applicable standard under A.R.S. § 12-911(A)(1) is as articulated in *P&P Mehta*. Appellant explains below why a stay should be granted under that two-factor test, but Appellant also explains below why a stay of the agency decision is warranted under the *Shoen* standard.

REASONS FOR STAYING THE AGENCY DECISION

A stay of the agency decision is warranted and should be granted in this case under either the *P&P Mehta* two-factor test or the *Shoen*/JRAD Rule 3(b) four-factor test.

I. A STAY IS WARRANTED UNDER THE *P&P MEHTA* TWO-FACTOR TEST

To determine whether there is "good cause" to grant a stay under A.R.S. § 12-911(A)(1), Mr. B. must show "a colorable claim and that the balance of harm favors granting the stay." *P&P Mehta* at ¶ 25. Mr. B. can easily "demonstrate … a seemingly valid, genuine, or plausible claim under the circumstances of the case." *Id.* at ¶ 21. Moreover, "the balance of harm tips" decidedly "in favor of" Mr. B. here, such that he meets the good-cause standard for granting stays under A.R.S. § 12-911(A)(1).

A. A Colorable Claim Exists

Given the low standard of proof that "probable cause" entails, A.R.S. §§ 8-804, 8-811, A.A.C. §§ R21-1-501(13), (17), Phillip B. faced a scheme that was stacked against him from the start. All that Mr. B. did, within the full scope of his duties as a group-home manager, was place a firm hand on a child's shoulder, asking a 13-year-old to "calm down" when the child was "cursing," "did not want to do his chores," and was "kick[ing] furniture chairs." Ex.1:004 ¶ 21. Yet now he faces the prospect of his name being entered as a child abuser on the Arizona Central Registry for 25 years, A.R.S. § 8-804(G). Phillip B. has found that he has no choice but to challenge the constitutionality of these statutes and regulations under the state and federal constitutions, because subjecting anyone to these dire consequences under a mere "probable cause" standard of proof—and on the say-so of an agency official who vetoes an administrative law judge's findings—does not comport with due process of law.

There are at least two Arizona appellate decisions questioning whether probable cause is an impermissibly low—and unconstitutional—standard of proof when used in specific situations. *JV-111701 v. Superior Court*, 163 Ariz. 147, 786 P.2d 998 (App. 1989) (addressing whether probable cause is an impermissibly low standard of proof for determining whether a juvenile should be detained pending adjudication); *Joseph V. v. McKay*, No. 1 CA-CV 17-0052, 2018 WL 4208988 (Ariz. App. Sep. 4, 2018) (acknowledging and criticizing the probable-cause substantiation under A.R.S. § 8-811 because it is "such a low standard of proof," although not deciding the question because it was not properly raised).

It is undisputed that "probable cause" is a "low" standard of proof. *Kaley v. United States*, 571 U.S. 320, 354 (2014) (Roberts, C.J., dissenting, joined by Breyer, Sotomayor, JJ.); *see also Abufayad v. Holder*, 632 F.3d 623, 628 (9th Cir. 2011). In addition, the question whether probable cause is so low a standard as to be unconstitutional is more than a "seemingly valid, genuine, or plausible claim under the circumstances" of Mr. B.'s case. *P&P Mehta* at ¶ 21. *See*, *e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (addressing whether the probable-cause standard of proof is unconstitutional when applied in

the context of pretrial detention following arrest); *Santosky v. Kramer*, 455 U.S. 745 (1982) (concluding that due process requires a heightened standard of proof such as clear and convincing evidence in certain situations); *Smith v. Ryan*, 813 F.3d 1175, 1198 (9th Cir. 2016) (concluding that the standard of proof applied by Arizona courts in executing intellectually disabled convicts is unconstitutional). Mr. B., therefore, satisfies the colorable-claim factor based on this claim alone.

Mr. B. has also challenged another aspect of Arizona's stacked process (in addition to the low threshold of proof applicable here), which is the process set up by A.R.S. §§ 41-1092.08(B), (F). The only independent factfinder in the administrative process employed here was the Administrative Law Judge. The ALJ is an employee of an independent state agency—the Office of Administrative Hearings. The ALJ heard testimony, made credibility determinations, and entered findings of fact and conclusions of law into the record. *See generally*, Ex.1. Despite having to apply the extremely low "probable cause" standard, the ALJ concluded, based on the evidence and witnesses presented, that the agency had not proven its case, thereby fully exonerating Mr. B.

However, under A.R.S. § 41-1092.08, an appeal from the ALJ's decision goes back to the "head of the agency" (here, the governor-appointed Director of DCS)—the very same agency that investigated and prosecuted the charge against Mr. B. in the first place. Under this procedure DCS and Director McKay not only investigated and prosecuted the child-abuse charge against Mr. B., but also acted as the ultimate factfinder and judge. Note that Director McKay amended the findings of fact of the ALJ (thus acting as a one-man jury), "delete[d]" the ALJ's credibility determinations (thereby determining credibility without observing any witnesses), and overturned the ALJ's conclusions of law (hence acting as a judge). *See generally*, Ex.2. To say that this process is "bad" is a gross understatement.

For a reviewing *judge* to reject the credibility determinations of a trial judge who observed the witnesses firsthand is impermissible under the Due Process Clause. *Matter of Pima County Juvenile Action No. 63212-2*, 129 Ariz. 371, 631 P.2d 526 (1981) (reversal by juvenile judge of the referee's findings that juvenile had not committed delinquent act violated due process where the reviewing judge

rejected the referee's credibility determination without having personally heard disputed testimony and without giving valid reasons to support such rejection). *A fortiori*, a reviewing executive official's rejection of an ALJ's credibility determinations violates due process. More importantly, any procedure that allows the investigatory, prosecutorial, fact-finding by a jury, and judging functions to be concentrated in the same government official also violates both due process and the separation-of-powers guarantees of the state and federal constitutions. *Horne v. Polk*, 242 Ariz. 226, 394 P.3d 651 (2017) (due process does not permit the same department to issue an investigative report, prosecute the allegation, and then make a final agency decision). The process used here, in other words, is not only constitutionally suspect, but downright unfair. Mr. B. has thus presented a more than "seemingly valid, genuine, or plausible claim[,]" *P&P Mehta* at ¶ 21, and has met the colorable-claim factor based on this second claim alone.

Mr. B. further posits that he was not given any opportunity to confront and cross-examine witnesses. While the "child who is the victim of or a witness to abuse or neglect" or the "reporting source" (here, the DCS caseworker who interviewed the children and adults) are "not required to testify," A.R.S. § 8-811(J)(1), (J)(4), nothing in the statute *precludes* or *prohibits* such testimony.[4] If they would have been permitted to testify, and if Mr. B. would have been permitted to cross-examine them, he would have been able to clear up the vastly differing and conflicting factual accounts of the children, and the exaggerated allegations in the caseworker's report.[5]

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[4] Mr. B. is also requesting a trial *de novo* under A.R.S. § 12-910(C) and will be filing a motion to that effect under A.R.S. § 12-910(A) and JRAD Rule 11.

[5] The children reported to the DCS caseworker the following conflicting accounts of Mr. B.'s actions: "put his elbow on," Ex.1:001 ¶ 6, "grabbed his shirt at the neck," Ex.1:002 ¶ 8, "grabbed [him] by the neck," Ex.1:002 ¶ 9, "had his hands around [his] neck," *id.*, "yelled in [his] face," Ex.1:002 ¶ 10, "poked [him] in the chest with his index finger," *id.*, "grabbed [him] by the neck and put pressure on his neck," *id.*, "picked [him] up by the shirt and moved him to his chair," *id.*

The DCS caseworker over-generalized and summarized all of that into the following: "[Mr. B.] placed [G.C.] in an inappropriate restraint by grabbing the child by the neck of his shirt and placing his forearm against the child's neck, during which time the child's face turned red and he was unable to breath [*sic*]." Ex.1:003 ¶ 13.

In Arizona, "parties have a right to cross-examine the witnesses presented against them in *civil and administrative matters*." *Matter of Maricopa County Juvenile Action No. JD-561*, 131 Ariz. 25, 28, 638 P.2d 692, 695 (1981) (emphasis added) (citing *Interstate Commerce Commission v. Louisville & N. Railroad*, 227 U.S. 88 (1913); *Application of Levine*, 97 Ariz. 88, 397 P.2d 205 (1964); *Bennett v. Arizona State Board of Public Welfare*, 95 Ariz. 170, 388 P.2d 166 (1963); *Forman v. Creighton School District No. 14*, 87 Ariz. 329, 351 P.2d 165 (1960)). Adults have the right to cross-examine a minor especially when the child's testimony "is essential to establishing the … misconduct alleged." *Id.* What's more, Arizona's Administrative Process Bill of Rights provision unequivocally states that "[e]very person who is a party to" an OAH hearing "shall have the right to be represented by counsel, to submit evidence in open hearing and shall have the right to cross-examination." A.R.S. § 41-1062. The right to cross-examination has remained a cornerstone of Arizona's "administrative due process" for decades. *See In re Lewkowitz*, 70 Ariz. 325, 334, 220 P.2d 229, 234 (1950) (tracing Arizona's Administrative Process Bill of Rights provision as well-settled at least by 1939). As such, Mr. B. has plainly presented a "seemingly valid, genuine, or plausible claim[,]" *P&P Mehta* at ¶ 21, that he was deprived of this right during the OAH hearing. He thereby meets the colorable-claim factor based on this third claim alone.

In sum, Mr. B. meets the first factor of the *P&P Mehta* two-factor test for granting stays under A.R.S. § 12-911(A)(1).

B. The Balance of Harm Favors Mr. B.

Mr. B. will be irreparably harmed if his name is added to Arizona's Central Registry as a child abuser. His approximately 30-year-long career has been devoted to the well-being of children—about 12 of those years in Arizona.[6] He has been a youth counsellor, caseworker, school teacher, and football coach. His record is unblemished; there have been no child-abuse complaints against him—except this one. If the agency decision is not stayed, his name will be entered on the Arizona

[6] Mr. B. will be presenting these and other facts by motion or *de novo* trial as permitted by JRAD Rules 10 and 11, and to the extent they are not already in the record or the trial transcript that Mr. B. will be filing shortly under JRAD Rule 5(d).

Central Registry and remain there for 25 years. A.R.S. § 8-804(G). In effect, that outcome means a death sentence for his personal reputation and career, which he has spent so far exclusively caring for children. A.R.S. § 8-804 lists at least *twenty different ways* in which an entry on the Central Registry can and will be used against Mr. B.—to determine qualifications for any job where Mr. B. would be near a child, determining eligibility for employment with the state, a child welfare agency, positions that provide direct service to children or vulnerable adults, informing any governmental or non-governmental employer where Mr. B. seeks a job to provide direct services to children, etc. These are comprehensive and devastating harms.

Mr. B.'s name is not yet even on the Central Registry. He has, however, already been placed on administrative leave by the school district, removed from the football coach position by the school, and fired from the group home where the alleged incident occurred. Meanwhile, the only independent fact-finder who directly observed witnesses—the ALJ—concluded that there was *no* probable cause to substantiate the child-abuse allegation against Mr. B. Such irreparable harm to his livelihood and reputation plainly outweighs any harm that DCS might assert it will face.

On the other side of the balance, no harm "would accrue to the agency or other parties to the proceedings." *Pet&P Mehta* at ¶ 23. To reiterate, a "degree of harm such as 'irreparable,' is not required" to satisfy the second factor. *Id.* Mr. B. needs to show only that the "balance of harm tips in [his] favor." *Id.* He has plainly shown that here—and then some.

Mr. B. therefore satisfies both the colorable-claim and balance-of-harm factors. A stay of the agency decision—which will prevent his name from being entered on the Central Registry while this case proceeds through the state courts—is plainly warranted under A.R.S. § 12-911(A)(1).

II. A STAY IS ALSO WARRANTED UNDER JRAD RULE 3(b)/*SHOEN*, IF THAT TEST APPLIES

Mr. B.'s situation warrants a stay under the more stringent *Shoen*/JRAD Rule 3(b) factors should the court determine that they are applicable.

A. The *Shoen*/JRAD Rule 3(b) Factors

A party seeking a stay under the four-factor test must establish: "1. a strong likelihood of success on the merits; 2. irreparable harm if the stay is not granted; 3. that the harm to the requesting party outweighs the harm to the party opposing the stay; and 4. that public policy favors the granting of the stay." *Smith*, 212 Ariz. at 410 ¶ 10, 132 P.3d at 1190; JRAD Rule 3(b) (same). Courts apply these four factors as follows:

> The scale is not absolute, but sliding. Nor should the result turn on counting the factors that weigh on each side of the balance. Rather, the moving party may establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party. … The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need be. Conversely, if the likelihood of success on the merits is weak, the showing of irreparable harm must be stronger."

Id. at ¶ 10 (cleaned up) (quoting *Shoen*, 167 Ariz. at 63, 804 P.2d at 792).

B. Probable Success on the Merits and the Possibility of Irreparable Injury

The DCS decision against Mr. B. should be stayed because he can establish "probable success on the merits and the possibility of irreparable injury." *Smith* at ¶ 10. While the first *Shoen* factor mentions "strong likelihood of success on the merits," the *Shoen* Court carefully clarified the sliding-scale approach adopted in Arizona. Mr. B., therefore, needs to establish "probable success" not "strong likelihood of success" (so long as he can also show "the possibility of irreparable injury"). As explained above, Mr. B. will be presenting at least three merits arguments on which he will probably be successful: (1) constitutionality of the probable-cause standard of proof, (2) unconstitutional concentration of investigatory, prosecutorial, fact-finding, and judging powers in one agency or official, and (3) deprivation of his right to confront and cross-examine witnesses.[7]

As to the "possibility of irreparable injury," *id.*, the harm to Mr. B. is acutely irreparable. Such harm to is not a mere "possibility," *id.*, it has already been incurred and, absent the stay, will

[7] As ¶ 5 of the Notice of Appeal notes, Mr. B. has other broad claims that he has not presented in this motion but will present in his opening brief.

certainly continue well after the 25 years that his name will appear on the Central Registry, and thereafter. The question is really quite simple: how could he ever get his good reputation back after that type of state action? Mr. B., therefore, makes a strong showing on the first two *Shoen* factors. Moreover, the "irreparable injury" to Mr. B. is of such grave and consequential nature that it is "not remediable by damages if the requested relief is not granted." *Shoen*, 167 Ariz. at 63, 804 P.2d at 792. No amount of compensatory or punitive damages—Mr. B. does not ask for damages against Appellees—will enable Mr. B. to regain his reputation and career. Entering a stay to prevent his name from ever appearing on the Central Registry will mitigate some of the immediate harm to Mr. B. while this case proceeds through the state courts.

C. Presence of Serious Questions and the Balance of Hardships Tipping Sharply in Favor of Mr. B.

While the sliding-scale approach is an either-or test, a stay is also warranted because Mr. B. can "establish … the presence of serious questions and that the balance of hardships tips sharply in favor of the moving party." *Smith* at ¶ 10.

The three merits questions briefed in this memorandum are undoubtedly "serious questions," *id.*, that the U.S. Supreme Court, Arizona Supreme Court, and other state and federal appellate courts have thought sufficiently important to address, and several judges have thought consequential enough to flag in separate concurring or dissenting opinions. *See*, *e.g.*, *State v. Smith*, 158 Ariz. 219, 221, 762 P.2d 506, 508 (1986) (alleging that a "constitutional right … has been violated" is "a serious question"); *Arizona Corporation Commission v. Reliable Transp. Co.*, 86 Ariz. 363, 372, 346 P.2d 1091, 1097 (1959) ("questions of public policy as expressed in our Constitution and statutes" are "serious questions … [that are] appropriate to review … in greater detail than would otherwise be necessary to sustain the judgment below"); *United States v. Superior Court*, 144 Ariz. 265, 269, 697 P.2d 658, 662 (1985) (questions pertaining to "constitutionality of the procedure adopted by the legislature" are "serious questions").

As to the balance of hardships, it is hard to imagine what interest of DCS will be affected or what harm it could incur if the stay is granted. For example, protecting the public against recidivism or propensity can't be the harm, because the evidence in this case points decidedly in the opposite direction. Nor will DCS be harmed if the stay is granted. It may continue to use the same flawed, stacked process it used against Mr. B. in any existing and future cases while Mr. B.'s case proceeds through the state courts. Because the requested stay is narrowly tailored only to cover *this* case—staying the agency decision to place Mr. B.'s name on the Central Registry—it does not stop DCS from continuing with its current child-abuse administrative adjudications under the existing procedures. DCS faces no conceivable harm. Indeed, the balance between irreparable harm to Mr. B. and the dubious-or-non-existent harm to DCS "tips sharply in favor of" Mr. B. *Smith* at ¶ 10.

Furthermore, a stay is ideal in cases like this one given the sharply incongruous recollections of the incident by the three children and the imprecise paraphrasing in the DCS caseworker's report. Such facts are usually easily clarified by granting trials *de novo*. Mr. B. has the constitutional right to be viewed as innocent of child abuse until a neutral fact-finder such as this Court or a duly constituted jury says otherwise. He will not be so viewed, however, if he is branded a child abuser by placing his name on the Central Registry. Presuming innocence until proven otherwise is a bedrock feature of any civilized judicial system. That principle remains an important "public policy," *Smith* at ¶ 10, in Arizona and in the United States.

Mr. B. has established that the "harm to [him] outweighs the harm to [DCS]" and "that public policy favors the granting of the stay." *Id.* As such, Mr. B. has shown that a stay is warranted under either the *P&P Mehta* two-factor test or the *Shoen*/JRAD Rule 3(b) four-factor test.

III. THE COURT SHOULD WAIVE THE POSTING OF BOND OR, IN THE ALTERNATIVE, REQUIRE ONLY A NOMINAL-VALUE BOND

A.R.S. § 12-911(A)(1)'s "[w]ith or without bond" provision authorizes courts to waive the bond when it grants a stay of the agency decision pending final disposition of the case. JRAD Rule 3(c) echoes the same. Moreover, there is no DCS-related statute which states otherwise. *See* A.R.S.

§ 12-911(A)(1) ("unless required by the statute under authority of which the administrative decision was entered"); JRAD Rule 3(c) ("with or without bond, except as otherwise provided by statute"). There is no relevant "bond" requirement in A.R.S. Title 8.

Moreover, this is not the type of case in which a bond is typically required. Mr. B. is not asking the Court to stay the payment of monies he owes under the agency decision—nor do the relevant child-abuse administrative-adjudication statutes even mention anything with regard to the posting of bonds in JRAD proceedings. *See*, *e.g.*, *Kresock v. Gordon*, 239 Ariz. 251, 254 ¶ 11, 370 P.3d 120, 123 (App. 2016) (bond typically required when "damages [are] awarded"; attorneys'-fees awards are not to be included in calculating the amount of bond). Mr. B. is only asking to stay the agency decision so that his name is not entered on the Central Registry pending final disposition of the case. Because the "potential harm to the agency's interest or that of another party" is not monetary in nature, there is no potential harm that can be "mitigate[d]" by requiring posting of a bond. *P&P Mehta* at ¶ 24. There are no "monetary or performance considerations … involved," meaning that "a security or performance bond" is not required from Mr. B. *Id.* The Court should waive the posting of the bond altogether.

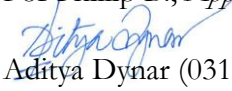
In the alternative, the Court should require the posting of only a nominal-value bond of $1.

CONCLUSION

The Court should (1) stay DCS's decision in *In the Matter of Phillip B.*, Cause No. 19C-1028237-DCS (July 28, 2019), while the case proceeds through the state courts, and (2) waive the bond, or require only a nominal-value bond of $1.

Respectfully submitted this 30th day of August 2019.

For Phillip B., *Appellant*



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