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8 **SUPERIOR COURT OF ARIZONA**
9 **MARICOPA COUNTY**

10 **Phillip B.,**
11 *Appellant*

12 vs.

13 **Mike Faust;**
14 **Arizona Department of Child Safety,**
15 *Appellees*

16 Case No. LC2019-000306-001
17 (Assigned to Hon. Douglas Gerlach)

18 **APPELLANT’S REPLY**
19 **IN SUPPORT OF MOTION FOR**
20 **STAY OF AGENCY DECISION**
21 **(ORAL ARGUMENT REQUESTED)**

22 Appellant’s Motion and this Reply confirm that the requested stay is not only warranted but a
23 necessity for protecting Phillip B.’s constitutional rights.

24 **I. FACTS IN THE RECORD SHOW WHY A STAY IS UNQUESTIONABLY NECESSARY**

25 Appellees misstate facts throughout their response. *Compare* Resp.5-6, 9-10, 11-17 *with* Tr.1,
26 Tr.2.¹ Some facts to keep in mind:

- 27 • Liana V., DCS’s only witness, offered her opinion—*not* fact testimony—based on her review
28 of DCS reports that someone else had prepared after interviewing the children and adults;
29 *neither the DCS investigator nor the children* offered live testimony subject to cross examination.
30 Tr.1.7:27-28; Tr.1.29:22-30:18.
- 31 • Mr. L., an eyewitness to the entire incident between Mr. B. and G.C., and who was “three
32 feet” away from G.C. and Mr. B. when this incident occurred, Tr.2.41:2, testified as follows:
 - 33 ○ G.C.’s shirt was “worn” and “old.” Tr.2.37:11.

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35 ¹ Tr.1 is the Transcript of the March 26, 2019 hearing, and Tr.2 of the June 10, 2019 hearing,
36 both attached as Exhibits for the Court’s convenience.

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- Mr. B. *did not* place “any part of his body—his arms, hands, forearm—on [G.C.’s] neck.” Tr.2.37:19-21.
- Mr. L. narrated the same particulars to the DCS social worker as he narrated in open court during the OAH hearing as his sworn testimony. Tr.2.41:5-23.
- Mr. L. heard G.C. tell other children in the group home that “he was going to get Mr. [B.] in trouble.” Tr.2.43:8-11 (“I’m going to get Mr. [B.] fired.”).
- When asked if G.C.’s statement that “[Mr. B.] grabbed my shirt and tried to pick me up, and I sat back down and he grabbed my shirt again and didn’t mean to press on my neck” were true, Mr. L. emphatically said “No.” Tr.2.56:8-13.
- Mr. B. *did not* “gra[b G.C.] by the shirt collar” or “pres[s] on his neck with his forearm,” and did not “mak[e] it hard for [G.C.] to breathe.” Mr. B. *did not* “gra[b G.C.] at the neck,” did not have “his hands around [G.C.’s] neck,” and G.C.’s face *did not* “turn red.” Mr. B. *did not* “gra[b G.C.] by the neck and appl[y] pressure to the point that [G.C.] ... could not breathe.” Tr.2.58:1-14; Tr.2.59:8-11.
- Mr. B. “put ... his open hand” on G.C.’s shoulder and “then as soon as he started touching [G.C.], [G.C.] started to move and jerk away.” Tr.2.59:20-24. Mr. B. ended up “grabbing his shirt” to stop G.C. from becoming “physically” “violen[t]” with Mr. B. Tr.2.60:7-21.
- Mr. B. *did not* “yan[k] at the shirt” to cause the tear; it was “[G.C.’s] shaking or pulling [that] caused the shirt to tear.” Tr.2.61:10-13.
- Mr. B. testified as follows:
 - Immediately before he placed his open hand on G.C.’s shoulder, G.C. was “[f]ull kicking” the chairs, which “sli[d] right across the floor.” Tr.2.68:24.
 - He “put [his] hand on [G.C.’s] shoulder [to] tr[y] to calm him down.” Tr.2.69:10.
 - G.C. “has a history of AWOL,” so Mr. B. “[did]n’t want him to run.” Tr.2.69:27-28.

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- Mr. B. placed an “[o]pen hand on [G.C.’s] shoulder” without “gripping” his shoulder. Tr.2.70:4.
- When Mr. B. placed his hand on G.C.’s shoulder, G.C. threatened that he would “spit on” and “hit” Mr. B. Tr.2.70:6. That’s when Mr. B. “fully extended” his arm because he did not “want to get spit on.” Tr.2.71:1-2.
- G.C. tried to “forcefully remove himself by turning his shoulder”; his t-shirt tore as a result. Tr.2.71:22-23.
- While his hand was on G.C.’s shoulder, G.C. “was moving the whole time” saying “you guys get the F away from me” and using other profanities. Tr.2.72:3-6.
- Mr. B. did not “[a]t any point put [his] forearm across [G.C.’s] neck.”; did not “put [his] hands around [G.C.’s] neck”; his “breathing” was never “impeded”; he did not “in any way apply pressure on [G.C.’s] neck.” Tr.2.72:20-73:18.
- What DCS wished to put in the record was not a “reflection of what happened”; if Mr. B.’s name is placed on the Central Registry, his “job is threatened.” Tr.2.78:18-27. He has been “teaching for 27 years” and is also the “athletic director,” “football, basketball, and girls’ basketball coach” at the “Peoria Unified School District.” Tr.2.62:23-28.
- Placing a “hand on their shoulder to calm them down” is a routine tactic that Mr. B. had used with G.C. “on several occasions” without incident. Tr.2.87:10-11.
- When asked if DCS’s report that Mr. B. “held [G.C.] with [his] forearm against his neck, causing him to stop or not being able to breathe while [he was] holding [G.C.]” was “incorrect,” Mr. B. emphatically said, “Very much incorrect.” Tr.2.88:6-9.
- The mere possibility that his name might be placed on the Central Registry was enough for his employer to “remov[e]” Mr. B. from work. He has not worked at the group home “since September 1 [of 2018].” Tr.2.89:19.

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- Mr. B. confirmed: his “forearm [did not] ever touch [G.C.’s] neck on 6/23” or “[a]t any other time”; at no point during the physical contact between G.C. and Mr. B. “did [G.C.] have to struggle to breathe”; G.C.’s breathing was not “impeded in any way”; G.C.’s “back [was not] against a solid, hard surface where he couldn’t back up.” Tr.2.91:21-92:5.
- RJ, Mr. B.’s supervisor, provided the following uncontradicted testimony:
 - G.C. “had over 30 incident reports” with the group home showing that “when things would happen with [G.C.], it was due to [G.C.’s] action.” G.C. would “star[t] fights, b[e] very disruptive in the home, AWOLing. ... he literally came from school, got off the van, normally he walks to the door, he just ran.” Tr.1.43:13; Tr.1.44:7-16.
 - G.C. was “verbally aggressive” toward Mr. B.; G.C. “flailed and began acting out”; however, G.C. was not “restrained around the neck.” Tr.1.46:23-47:2.
 - G.C.’s t-shirt that’s at issue here was “worn down,” not “new.” Tr.1.49:12-14.
 - DCS did *not* contact him about this incident or regarding Mr. B. Tr.1.54:14-24; 55:1-11; 66:2-4; Tr.2.28:17-21; Tr.2.29:28-30:8.
 - The “type of hold” depends on the position of the staff and the child, depends on “how violent this kid can get. With [G.C.’s] history of violence was high. Let’s say you may intervene different.” Tr.1.67:14-19. Thus, holds can be of “so many different ways depending on if the kid’s sitting, standing, running, about to hit himself.” Tr.1.68:2-3.
 - DCS’s report falsely stated that Mr. B “placed his arm, or placed pressure on [G.C.’s] neck.” Tr.1.69:6-10. Mr. B. did not “put his forearm or elbow or any other part of [Mr. B.’s] body on [G.C.’s] neck,,” G.C. *did not* “express any kind of inability to breathe or that his breathing or otherwise his bodily respiration was restricted.” Tr.2.8:28-9:5. G.C. was not “choked,” and Mr. B. did not place “any kind of a restriction or anything like that around his neck.” Tr.2.9:9-13. Mr. B., instead, held G.C. “around the arms and shoulders so as to minimize him being able to reach out or lash out with his

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hands.” Tr.2.13:3-5. What “led to the rip was [G.C.] escalating.” Tr.2.14:13. Mr. B. only placed his hand on G.C.’s “shoulder, so like calm down, so like when someone is getting upset you calm them down.” Tr.2.14:15-16.

- Mr. B. placing his open hand on G.C.’s shoulder does not even rise to the level of a “hold.” Tr.2.5:9-11; *see also* Tr.2.83:9-10 (Mr. B.’s testimony). That’s why the group home management changed the “incident report” that Mr. B. submitted on June 23, 2018 to a “behavior incident report” (B.I.R.). Tr.2.15:13-22. “All” information that was initially in the “incident report” (I.R.) “is just transferred” to the B.I.R. Tr.2.16:17-21. That is, the contemporaneous description of the incident that Mr. B. supplied, which is now contained in the B.I.R., is “the exact same text” that he had submitted on the I.R. Tr.2.75:22-24.
- There was “no other ... incident” between G.C. and Mr. B. Tr.2.11:24-26.
- G.C. has been known to “try to hurt himself.” Tr.2.12:15.
- RJ had to place G.C. in “several holds ... because he’s struggled with behavior modification.” Tr.2.12:26-28.
- In RJ’s opinion, a traditional therapeutic hold² should not be used against G.C. because he has in the past “hit himself like on the ground with his head several times before.” Tr.2.13:27-28.
- Finally, Lynnwood P. testified that the statement that Mr. B. “put his elbow against a [child’s] throat and used physical force with that [child]” was “a blatant lie.” Tr.2.95:18-22.

The actual testimony, in other words, shows that the hyperbole that permeates Appellees’ Response is simply untrue. Action verbs and nouns matter in this case. “Push on the neck” is very different from “place a hand on the shoulder.”

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

1 Mr. B. was *not* “yelling at” G.C., “pushing on G.C.’s neck,” “using profane language” at G.C.,
2 “poking him in the chest,” “grab[bing] G.C. by the neck,” “lash[ing] out in frustration and anger,”
3 “pick[ing] the boy up and put[ting] him in a chair,” or “impair[ing] G.C.’s breathing.” Resp.5, 9, 11.
4 Therefore, the numerous and gross misstatements in DCS’s initial report that the Director copy-pasted
5 in his decision, thereby ruining Mr. B.’s life, are that much more noteworthy. The only way Director
6 McKay could have reached the decision he did was to either “delet[e]” (his word, not Appellant’s) or
7 ignore the actual witness testimony, and disregard the credibility determinations made by the ALJ who
8 observed live witness testimony.

9 The OAH hearing transcripts confirm that this Court must reverse this travesty and remedy
10 the immediate harm to Mr. B. by staying the DCS Director’s decision while the case proceeds through
11 the state courts.³

12 **II. APPELLEES MISREPRESENT HOW THE CENTRAL REGISTRY WORKS**

13 Appellees downplay the consequences of one’s name appearing on the Central Registry. They
14 disingenuously suggest that A.R.S. § 8-804(M) does not deem the substantiated report against Mr. B.
15 as “disqualifying” for DCS purposes. Resp.2; *see, e.g.*, ADES Disqualifying Acts,
16 <https://bit.ly/36IoYM6>. That argument makes no sense because the report *is* deemed disqualifying
17 by group homes and public schools—Mr. B.’s employers. Mr. B. *was already* placed on administrative
18 leave by the Peoria Unified School District. He was fired from the group home even before the alle-
19 gation was “substantiated,” A.R.S. § 8-804(A), by the DCS Director. *See* Tr.2.89:19 (Mr. B. fired on
20 September 1, 2018; DCS Director’s decision issued July 28, 2019). Mr. B. will continue to face real,
21 concrete, far-reaching harms absent a stay—all based on a false DCS report.

22 Appellees also obfuscate the matter by suggesting a “potential employer” may choose to ig-
23 nore the Central Registry listing. Resp.3, 11-12. Mr. B.’s immediate harm is that his *existing* and *past*
24 employers have already decided that the listing disqualifies him from having direct contact with

25 ³ Appellees also have the option of confessing error and voluntarily removing Mr. B.’s name
26 from the Central Registry. Undersigned counsel has asked, but Appellees’ counsel has thus far refused
to explore that option.

1 children, and that he is *required* to self-report to every potential employer for the next quarter century.
2 In fact A.A.C. § R9-3-202(G)(6) specifies that child-care group homes “shall not allow” an adult who
3 is “currently under investigation ... or has a substantiated allegation” on the Central Registry to be a
4 staff member if they want to keep their state-issued group-home license.

5 Moreover, Appellees’ suggestion, Resp.4, that Mr. B. should get a fingerprint exception from
6 the Board of Fingerprinting shows precisely the conspicuous and considerable harm to Mr. B. of
7 having to go through yet another protracted administrative proceeding costing him thousands of dol-
8 lars—all based on a false report. Obtaining a fingerprint exception *does not* take Mr. B.’s name off the
9 Central Registry.

10 Appellees’ half-hearted suggestions, Resp.16-17, that the Central Registry is confidential also
11 fail to tip the balance of harm against Mr. B. In ways that matter most—to Mr. B.’s livelihood and
12 reputation—the “information” is spread far and wide to “those who employ people to work directly
13 with children” to maximize the punishing impact. Resp.17. That’s *all* of Mr. B.’s past, present, and
14 future employers, given that his entire professional life has been devoted to looking after the welfare
15 of children. Tr.2.62:23-26.

16 Appellees’ arguments do not comport with reality. They only strengthen Mr. B.’s case for a
17 stay pending resolution on the merits.

18 **III. STATUTES TRUMP COURT RULES**

19 The legislature established a burden of proof—“good cause,” A.R.S. § 12-911(A)(1)—for eval-
20 uating stays of agency decisions. *P&P Mehta LLC v. Jones*, 211 Ariz. 505 (App. 2005), conclusively
21 supplies the analysis required under that statutory good-cause standard—an analysis that rejects the
22 *Shoen* four-factor test. That statutorily-set “burden of proof [i]s a matter of substantive law” which
23 “prevails over ... court rules adopting a different standard.” *Seisinger v. Siebel*, 220 Ariz. 85, 93 ¶ 30
24 (2009).

25 Even if “good cause” were a procedural standard, as Appellees allege, Resp.9, a statute that
26 “provides for a certain method of procedure ... prevails over a rule by the court which is in conflict

1 therewith.” *DeCamp v. Central Ariz. Light & Power Co.*, 47 Ariz. 517, 522 (1936). This settled rule comes
2 from the Article III Separation-of-Powers Clause of the Arizona Constitution. *Id.* at 521-22. *P&P* has
3 already determined that the *Shoen* test conflicts with the statute and should not be used to determine
4 stays of agency decisions. In short, statutes that require two branches of government to concur over-
5 ride court rules that are endorsed only by a single branch of government.

6 **IV. APPELLEES’ MERITS ARGUMENTS ARE FUNDAMENTALLY FLAWED**

7 Appellees assert that this case is “not novel.” Resp.2. Indeed. This case exposes Arizona’s
8 fundamentally unfair administrative process—a process that has ruined Mr. B and others in a similar
9 predicament—a process that deprives individuals of fundamental procedural, substantive, and struc-
10 tural constitutional rights.

11 Appellees fail to distinguish key constitutional precedent. Resp.11-16. A “superior officer
12 overruling a lower-level officer,” Resp.12, is an altogether different situation than one administrative
13 agency acting as the investigator, prosecutor, jury and appellate judge who “deletes” facts, rejects
14 credibility determinations, and overrides the conclusions of law of an independent fact-finder em-
15 ployed by an independent state agency.

16 Moreover, the entire thrust of Appellees’ argument is that Mr. B. “has not established any
17 basis for reversing the [DCS Director’s] Decision.” Resp.15; *see also* Resp.11-16. Full success on the
18 merits, however, is *not* the standard for staying agency decisions—neither under *P&P*/§ 12-911(A)(1)
19 nor under *Shoen*/JRAD Rule 3(b). The applicable standards are “a colorable claim,” “probable suc-
20 cess,” or “presence of serious questions.” There will be time enough for all parties to flesh out the
21 constitutional arguments in their principal briefs.

22 In short, Appellees’ counterarguments and factual admissions confirm the strength of Mr. B.’s
23 merits arguments. Whichever stay factors the Court applies, a stay of DCS’s decision is unquestionably
24 warranted here.

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CONCLUSION

The Court should stay DCS’s decision in *In the Matter of Phillip B.*, Cause No. 19C-1028237-DCS (July 28, 2019), and order removal of his name from the Central Registry while this case proceeds.

Respectfully submitted this 8th day of November 2019.

For Phillip B., *Appellant*


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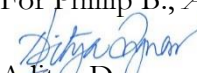
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CERTIFICATE OF SERVICE

Copies of the foregoing mailed, and courtesy copies emailed, this 8th day of November 2019, to:

Honorable Douglas Gerlach

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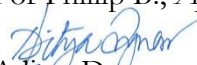
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CERTIFICATE OF COMPLIANCE

The attached brief complies with the word limit established by separate court order and contains **2,471** words.

For Phillip B., *Appellant*


Aditya Dynar
Attorney for Appellant