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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Phillip B., *Appellant* vs. **Mike Faust**; **Arizona Department of Child Safety**, *Appellees*	Case No. LC2019-000306-001 (Assigned to Hon. Douglas Gerlach) OAH No. 19C-1028237-DCS

APPELLANT'S REPLY BRIEF
(ORAL ARGUMENT REQUESTED)

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ARGUMENT

Appellees (together, "DCS") fail to explain why or how the discrete administrative steps Appellant challenges survive under the state and federal constitutions. DCS has paraphrased and misstated facts. DCS has also admitted key points of law that further support Mr. Phillip B.'s arguments. The Court should therefore vacate the DCS Director's decision.

I. MR. B. CHALLENGES SEVERAL DISCRETE STEPS IN THE STATUTORY SCHEME THAT IMPERMISSIBLY STACK THE DECK IN DCS'S FAVOR

The statutory scheme contains at least nine steps, of which six stack the deck against Mr. B. and in favor of DCS, *viz.*, Steps 1, 4, 6, 7, 8, 9. Mr. B. challenges Steps 1, 4, 6, 7, 9 because they run afoul of the state and federal constitutions. He challenges Step 8 as a matter of statutory interpretation.

Step 1: DCS Defines "Probable Cause" Via Regulation, Rejecting the Objective Test as Articulated by Arizona Courts

"Probable cause" is not defined in statute. DCS, using its generic rulemaking authority, A.R.S. § 8-453(A)(5), has defined it in its regulations as "some credible evidence that abuse or neglect occurred." A.A.C. § R21-1-501(13). The Arizona courts, in contrast, have adopted a more appropriate definition:

> Probable cause is a reasonable ground for belief of guilt. And this means less than evidence which would justify condemnation or conviction. Probable cause exists where the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

State v. Coflin, 3 Ariz. App. 182, 184 (1966) (cleaned up). While the DCS definition assesses only whether the factfinder *subjectively* thinks there is "some credible evidence," the courts more appropriately rely upon *objective* reasonableness.

Mr. B. does not challenge the initial probable-cause determination made by the DCS caseworker. Because "probable cause means less than evidence which would justify" a finding against the accused at trial, *Coflin* at 184, he does challenge the use of the DCS-defined probable-cause standard by the factfinders involved in this case—such as the ALJ, the DCS Director in his adjudicatory capacity, and this Court under A.R.S. § 8-811(K)—to place Mr. B.'s name on the Central Registry. The state and federal constitutions mandate the use of a higher standard of proof at trial. The adjudicatory factfinders and reviewers must therefore use the constitutionally-required higher standard before they could punitively place a person's name on the Central Registry, A.R.S. §§ 8-804, 8-811.

Step 2: DCS Caseworkers Investigate Allegations of Child Abuse or Neglect and Create an Initial Report

The parties do not dispute that the caseworker in Mr. B.'s case did a shoddy job interviewing the children and adults with knowledge of the alleged child-abuse incident. At trial, Mr. B. successfully impeached the caseworker's report and Liana V.'s testimony based on that report.

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

The parties do not dispute, and Mr. B. does not challenge, DCS's review and use of the lower probable-cause standard at this early stage of DCS's investigation into the alleged incident. Here, too, DCS reviewer Liana V.'s testimony was impeached at trial.

Step 4: DCS Prosecutes the OAH Trial

DCS prosecuted the matter against Mr. B. before the OAH ALJ. Trials before the ALJ rely upon the Rules of Evidence and Civil Procedure, except that A.R.S. § 8-811(J) permits hearsay and prohibits the accused from cross-examining witnesses. Mr. B. challenges those aspects of the OAH trial that, under A.R.S. § 8-811(J) permit "hearsay" statements by children, and do not require the "reporting source" or the DCS caseworker who creates the initial report to testify. The statute permitting hearsay and giving the accused no opportunity to confront and cross-examine the accusers violates the state and federal constitutions. *See Crawford v. Washington*, 541 U.S. 36 (2004).

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

The OAH ALJ enters findings of fact, credibility determinations, and conclusions of law into the record "[o]n completion of the presentation of evidence." A.R.S. § 8-811(K). Here, the ALJ "determine[d] that probable cause d[id] not exist to sustain the department's finding," and consequently, the ALJ "order[ed] the department to amend the information or finding in the report." *Id.*

Step 6: If DCS Is Dissatisfied with the ALJ's Decision, It Appeals to DCS's Own Director, as DCS Did Here

DCS can appeal the decision to its own Director. A.R.S. §§ 41-1092.08(B), (F). Here, DCS took an appeal to then-Director McKay. DCS thereby acted as the judge in its own case. Mr. B. challenges this aspect of the administrative process as unconstitutional.

Step 7: DCS's Director Can Reject or Modify the ALJ's Findings of Fact, Credibility Determinations, and Conclusions of Law

DCS's Director may "reject or modify" "the administrative law judge's decision," A.R.S. § 41-1092.08(B), which "contain[s] a concise explanation of the reasons supporting the decision, including the findings of fact and conclusions of law." A.R.S. § 41-1092.08(A). The statute authorizes DCS's Director to reject or modify the ALJ's decision by providing "a written justification setting forth the reasons for the rejection or modification of each finding of fact or conclusion of law." A.R.S. § 41-1092.08(B). Director McKay rejected the ALJ's factual and credibility assessments and conclusions of law and replaced them with his own findings based on testimony that was thoroughly impeached during the ALJ proceeding. This aspect of the administrative process violates both state and federal constitutions.

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

Being an executive-branch agency, it is unsurprising that DCS enforced Director McKay's decision against Mr. B. by placing his name on the Central Registry. It did so, however, by ignoring DCS's own rules defining "substantiated finding." A.A.C. § R21-1-501(17). *See* OB.22:1-8 & n.9.

A substantiated finding is one in which the ALJ finds probable cause *and* the Director accepts that decision. A.A.C. § R21-1-501(17)(a). Where the ALJ finds *no* probable cause and the Director *rejects* that decision, by definition, the Director's decision is *not* a substantiated finding. Furthermore, as here, if the "alleged perpetrator … timely appeal[s]," then it is not a substantiated finding. A.A.C. § R21-1-501(17)(b). Per its own regulations then, DCS must wait until the appeal period has expired and DCS has confirmed that the accused has not timely appealed before it places a person's name on the Central Registry.

Here, however, DCS did not wait for the 35-day appeal window of A.R.S. § 12-904(A) to lapse. Mr. B. filed the notice of appeal in this Court within the 35-day statutory appeal period. The allegation of child abuse against Mr. B., according to DCS's rules, thus remained unsubstantiated. Yet DCS has already placed his name on the Central Registry. As a matter of *de novo* interpretation of a question of law under A.R.S. § 12-910(E), Mr. B.'s name should be removed from the Central Registry until the case is fully and finally resolved.

Step 9: On Appeal the Court Is Required to Defer to the DCS Director's Fact-Findings and Credibility Determinations

The Parties agree that A.R.S. § 12-910(E) incentivizes docket-clearing and requires this Court to defer to the Director's factual determinations. The statute thus would require this Court to acquiesce in the Director's refusal to accept the ALJ's fact-findings and credibility determinations. Mr. B. challenges this aspect of the administrative scheme as violating both the state and federal constitutions.

This Court should declare that Steps 1, 4, 6, 7, and 9 are unconstitutional. The Court should further hold that Step 8 prohibits DCS from placing a person's name on the Central Registry until the person exhausts his state-court appeals. The Court should vacate the DCS Director's decision and order DCS to remove Mr. B.'s name from the Central Registry.

II. DCS STRATEGICALLY PARAPHRASES AND MISSTATES FACTS

Appellees' Answering Brief (AB) paraphrases key testimony and misstates several facts. It also makes several important admissions and concessions that strengthen Mr. B.'s argument for vacating the Director's Decision.

Action verbs and nouns matter in this case. DCS paraphrases evidence in the record rather than quote what was actually proven during the OAH trial. Perhaps DCS hopes to bolster its theory of the case. The Court should, however, rely on the record. Mr. B.'s Opening Brief (OB) also directly quotes the record.

DCS offers the following key misstatements, overstatements, and paraphrases:

- "Credible evidence showed," AB.1:2, misstates the record; what DCS calls "credible" were statements from the caseworker's report containing the three children's hearsay, as recounted to the ALJ by Liana V., whose only knowledge came from reviewing the report. *See* AB.8:13. Ms. V.'s testimony was successfully and thoroughly impeached at trial. *See* OB.6:18-8:15; OB.10:1-12:11.
- The statements "elbow on GC's throat," AB.2:9, "pushing on GC's neck with Appellant's forearm," AB.5:6, "hands around GC's neck," AB.5:18, "poked him in the chest," AB.5:23, "pressure on … neck," AB.5:25, "physically picking him up," AB.19:18, all come from the impeached testimony of Liana V. *See* OB.7:1-8:15; Tr.2.8:28-9:5; Tr.1.18:6.
- DCS suggests that RJ's testimony was impeached. AB.4; AB.9-12; AB.15, AB.43. However, it was impeached only as to collateral matters, not as to

testimony bearing directly on the alleged abuse. DCS's distortion of the record should be rejected because the ALJ already determined RJ's testimony was credible and independently corroborated by other testimony—an assessment that the Director undid—and which this Court cannot reweigh. *Cf. Harris v. New York*, 401 U.S. 222 (1971) (the trier-of-fact, not the appellate reviewer, weighs whether portion of testimony impeached as to collateral matters has any bearing on unimpeached testimony that has direct bearing on the violations alleged).

- DCS does not distinguish a therapeutic hold (which brings almost the entire adult's body in contact with the child's) from a hand on the child's shoulder, but insinuates, without support, that using a non-therapeutic hold is indicative of child abuse. DCS never informed group homes and group-home managers like Mr. B. that they should *only* use therapeutic holds on children (which would be absurd). AB.12-13, AB.19.
- DCS says this entire case turns on GC's impaired breathing. AB.22. The ALJ weighed all documentary and testimonial evidence, and assessed consistency and credibility of all witnesses. She determined that G.C.'s "breathing was *not* restricted" by Mr. B. ALJDec.5 ¶5. The Director wrongfully deleted and replaced the ALJ's finding, thereby reaching the opposite conclusion.
- DCS says, at AB.51 and in other places, that Appellant has waived arguments. Not so. It is bizarre to spin Appellant's explanation and analysis as waiver

- The Director "rejected" but did not "vacat[e] the ALJ's order." *Compare* AB.1:15 *with* DCSDec.3.

III. THE CHALLENGED STATUTES DEPRIVE MR. B. OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS

A. DCS Fails to Show How the *Mathews* Three-Factor Test Is Satisfied Here

DCS only analyzes the probable-cause standard (Step 1) under the *Mathews* test. *Mathews v. Eldridge*, 424 U.S. 319 (1976). It does not analyze the other four challenged steps.

1. The Challenged Steps Do Not Satisfy the First *Mathews* Factor: "Private Interest that Will Be Affected by the Official Action"

(a) Steps 6, 7

DCS claims that DCS-Director review of the ALJ's factual and credibility assessments satisfies due-process requirements. AB.38:12. DCS neither addresses nor analyzes the statutory scheme under the *Mathews* test, which according to *Horne v. Polk*, 242 Ariz. 226, 230 ¶15(2017), this Court is required to do pursuant to the federal Due Process Clause. *See* AB.38-46.

Under the first *Mathews* factor, 424 U.S. at 335, the litigant has a private interest in "neutral adjudication in appearance and reality," and that interest is "magnified where the agency's final determination is subject only to deferential review." 242 Ariz. at ¶14. Here, the Director has the statutory authority under A.R.S. § 41-1092.08, to revise the ALJ's factual findings and credibility determinations. The Arizona statute therefore nullifies "[o]ne of the most important principles of our judicial system": "deference is given to the finder of fact who hears the live testimony of witnesses … [and] judge[s] the credibility of those witnesses" because such "personal observation of witnesses is

crucial to accurate fact-finding when the outcome," as here, "depends on an assessment of the credibility of the witnesses." *Matter of Pima County, Juvenile Action No. 63212-2*, 129 Ariz. 371, 375 (1981) (applying *Mathews*). Be it a federal judge reviewing the report and recommendations of a federal magistrate judge, *id.* at 374, or an Arizona juvenile-court judge reviewing the referee's decision, or the DCS Director reviewing the OAH ALJ's decision, when such reviewers "revers[e]" "factual finding[s]" and "rejec[t] the [fact-finder's] credibility assessments without having personally heard the disputed testimony," they "violat[e] the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 375.

(b) Step 1

DCS argues that the preliminary probable-cause standard also "satisfies the *Mathews* test" under the federal Due Process Clause. AB.24:20. DCS is wrong.

DCS relies (1) on this Court's refusal to grant a temporary stay pending judicial review of the administrative decision, AB.25:24, and (2) on its unrealistic and speculative proposition that it will not be "impossible" for Mr. B. to find employment because he is "free to explain to any potential employer that the abuse was substantiated based on a probable cause standard." AB.26:26-27:19.

The motion for stay and related decision denying the motion were temporary in nature for the purpose of evaluating whether the *status quo ante* should be maintained while the case is pending in Superior Court. In declining to grant the stay, this Court did not decide the merits questions now presented by Mr. B. The law-of-the-case doctrine is therefore inapposite here. *See Dancing Sunshines Lounge v. Industrial Comm'n of*

Arizona, 149 Ariz. 480, 483 (1986) (concluding that when a court's prior decision "is on its face not a determination on the merits, … [i]t [is] not the law of the case on the issue"); *Center Bay Gardens, LLC v. City of Tempe City Council*, 214 Ariz. 353, 357 ¶18 (App. 2007) (where "the issue … was not actually decided in the first decision," it "makes the law of the case doctrine inapplicable"). Put differently, the stay decision only evaluated whether Appellant had shown a "*probable* success on the merits," StayDec.2 (emphasis added), it *did not* decide whether Appellant's merits arguments, fully presented for the first time to this Court in the Opening Brief, *actually* succeeded or failed.

DCS's gratuitous suggestion that Mr. B. is free to explain the circumstances to a potential employer only exacerbates 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.

(c) Steps 4, 9

Pursuant to A.R.S. § 8-811(J), DCS did not produce at trial either the children or the caseworker who interviewed them. It instead relied on their hearsay statements, with no corresponding guarantees of trustworthiness. Mr. B. was thereby deprived of the opportunity to confront his accusers and cross-examine the witnesses against him—a right and private interest that must be protected and preserved to comply with the Due Process Clause, OB.9:16. *See Matter of Maricopa County Juvenile Action No. JD-561*, 131 Ariz. 25, 28 (1981) (adults have the right to cross-examination, including cross-examining "minor[s]," in "civil and administrative matters"); A.R.S. § 41-1062 (right to cross-examination in OAH proceedings); *In re Lewkowitz*, 70 Ariz. 325, 334 (1950)

(discussing right to cross-examination as the cornerstone of Arizona's "administrative due process"); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) (accused is deprived of due process where under statute, regulation, policy or practice the accused is not given "an opportunity to cross-examine the accuser and adverse witness in the presence of a neutral fact-finder"). As in *Doe* and *Crawford*, this Court must focus on the statute that permits DCS to omit accusers' live testimony in the ALJ's presence.

In ruling against Mr. B., Director McKay (with no testimony being taken in his "presence") accepted the hearsay, while "delet[ing]" the testimony of those witnesses with firsthand knowledge and who were subject to cross-examination. Any deference granted by this Court under A.R.S. § 12-910(E) (Step 9) would only insulate such errors from meaningful judicial review and would therefore itself constitute an unconstitutional deprivation of due process.

2. The Challenged Steps Fail the Second *Mathews* Factor: "the Risk of an Erroneous Deprivation of Such Interest Through the Procedures Used, and the Probable Value, If Any, of Additional or Substitute Procedural Safeguards"

(a) Steps 6, 7

Under the second *Mathews* factor, 424 U.S. at 335, DCS Director's revision of the ALJ's factual and credibility findings utterly deprived Mr. B. of his liberty and property interests. In contrast, the additional or substitute procedural safeguards would mitigate, if not eliminate, the risk of depriving someone of their constitutional rights. *See* OB.39:3-13. Providing the substitute procedural safeguard of prohibiting the Director from rejecting or modifying the factual and credibility findings of the ALJ by declaring

A.R.S. §§ 41-1092.08(B), (F) unconstitutional, would return the statutory scheme back to the "essentials of due process and fair treatment." *Pima County*, 129 Ariz. at 374.

DCS does not address the three *Mathews* factors for Steps 6, 7. DCS does not explain why or how the Director, who substituted his own factual and credibility assessments based on portion of the record that were successfully impeached, is a "neutral adjudicato[r]," AB.38:15 (*see also* AB.17:3; AB.30:7; AB.30:22), who has "the very appearance of complete fairness." *Horne*, at ¶28. *Pima County* and *Horne*, both of which conducted a *Mathews* analysis, instruct that Steps 6 and 7 are impermissible under the Due Process Clause. Appellant is not asking the Court to prohibit DCS's Director from adjudicating substantiation-by-DCS cases; Appellant is asking the Court to address whether his revision of the ALJ's factual and credibility determinations violates the Due Process Clause. It clearly does. DCS's evasion of the *Mathews* analysis is insufficient to show how Director review satisfies the federal Due Process Clause.

(b) Steps 1, 4, 9

With respect to Steps 1, 4, 9, DCS makes three arguments: (1) fingerprint clearance is a procedural safeguard, AB.27:20-28:19; (2) judicial review in this Court via the JRAD appeal process under the substantial-evidence standard of review is a sufficient procedural safeguard, AB.28:20-29:11; and (3) the Court should ignore the latter half of the *Mathews* factor-two analysis and Mr. B.'s description of the "additional or substitute procedural safeguards," AB.29:12-30:5.

i. Fingerprint Clearance Is an Insufficient Procedural Safeguard

DCS proposes that "pursu[ing] a Central Registry exception," *i.e.*, undergoing yet another "administrative hearing" and "judicial review" process as Mr. B. is undergoing here in this name-clearing appeal (albeit with the Board of Fingerprinting) "remediate[s] any risk that an individual may erroneously be added to the Central Registry." AB.27-28. Fingerprint clearance, however, *does not* take a person's name off the Central Registry: "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." A.R.S. § 41-619.57(G). That process is not a reputation-restoring appeal like this one.

Here, the ALJ "order[ed] that the report of alleged abuse by Appellant in this case be unsubstantiated." ALJDec.6. That is, the ALJ ordered that Mr. B.'s name should not be placed on the Central Registry. The Director then "ordered that DCS's proposed finding of abuse in this matter is substantiated and shall be placed on the DCS Central Registry." DCSDec.3.

If the Court vacates the Director's decision, Mr. B.'s name would be *removed* from the Central Registry as per the ALJ's order. DCS argues that a fingerprint clearance is sufficient, despite the fact that it is statutorily incapable of remedying the injury. *See* A.R.S. § 41-619.57(G). Pointing out that there is *a* procedural safeguard (one that ensures Mr. B.'s name remains on the Central Registry) does nothing to disprove that Steps 1, 4, 9 are inadequate under the Due Process Clause.

ii. Judicial Review with Fact-Finding Deference After DCS-Director Review Is an Insufficient Procedural Safeguard, but Substitute Procedural Safeguards that Appellant Offers Satisfy the *Mathews* Test

Under the second *Mathews* factor, DCS argues that an "evidentiary hearing" before the ALJ and "judicial review by this Court" under A.R.S. § 12-910(E) "are sufficient" safeguards. AB.28-29. In doing so, DCS hopes that this Court will engage in docket-clearing and forget to analyze the "probable value … of additional or substitute procedural safeguards" that Mr. B. has offered, *Mathews*, 424 U.S. at 335: the clear-and-convincing evidence standard, and/or removing the Director's ability to reject or modify the findings and conclusions of the neutral magistrate. Both options are discussed below.

DCS implies that the "preponderance of the evidence" standard may be an appropriate replacement for the probable-cause standard here. AB.29:27. The preponderance standard is statutorily mandated in substantiation-by-court cases under A.R.S. § 8-844(C)(1). That is, when Arizona juvenile courts, which follow rules of juvenile civil procedure and rules of evidence, are asked to substantiate an allegation of child abuse or neglect, they do so under the preponderance standard. But substantiation by DCS—which by DCS's own admission, does not have to follow the same rules of procedure or evidence as this Court or the juvenile court—occurs under the lower probable-cause standard. A.R.S. §§ 8-811(E), (K), (M)(2).

Under the second *Mathews* factor, this Court's job is to evaluate "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335. Given

that the same rules of evidence and procedure are *not* available in substantiation-by-DCS cases, DCS's preponderance analog ends up highlighting the fact that the "risk of erroneous deprivation" can and should be mitigated by using the clear-and-convincing-evidence standard.

Substantiation-by-court cases typically involve disputes between private parties (for example, one parent alleging the other abused or neglected their child), where the "application of a fair preponderance of the evidence standard indicates both society's minimal concern with the outcome, and a conclusion that the litigants should share the risk of error in roughly equal fashion." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (cleaned up). But in substantiation-by-DCS cases, which is a "government-initiated proceedin[g]," the Supreme Court has "mandated" the "clear and convincing evidence" standard as achieving the appropriate balance under the *Mathews* test in situations like Mr. B.'s. *Id.* at 756.

DCS does not even address *Santosky* and related cases. *See* OB.27-28, OB.34-35 (discussing *Santosky* and related cases). DCS thus fails to address the latter half of the second factor ("additional or substitute procedural safeguards," 424 U.S. at 335) with respect to the clear-and-convincing standard that Appellant has offered as a substitute.

DCS also ignores Appellant's second proposed "substitute procedural safeguard": removing DCS Director's ability to reject or modify the findings and conclusions of the ALJ. DCS-Director review is sandwiched between "evidentiary hearing before an administrative law judge followed by judicial review by this Court." AB.29:5. That intervening DCS-Director review undermines, if not nullifies, the due process

protections, such as they are, that are built into the OAH-review process. This is also the reason why merely heightening the standard to clear and convincing does little to satisfy the *Mathews* test if the Court does not also clarify that it is the trier-of-fact's (the ALJ's), not the appellate reviewer's (the Director's) task to apply it.

With respect to intervening Director review, DCS claims that the substantial-evidence standard applied by this Court under A.R.S. § 12-910(E) somehow ameliorates Mr. B.'s deprivation of due process. DCS confesses the breathtaking ramifications of factfinding deference, arguing that the record would support the Director's decision based on impeached sources. AB.19-22; AB. 39:26-41:19. Forgetting which portion of Liana V.'s testimony was successfully impeached, DCS then argues that because the "evidence" in the record "supports two conclusions," "a court must affirm the agency's final decision." AB.20:3-6. That argument is as sobering as it is misguided.

To understand the breadth of DCS's argument, consider the familiar formulation of fact-finding deference (or the substantial-evidence standard) in Arizona: "If an agency's decision *is supported by the record*, substantial evidence exists to support the decision even if the record also supports a different conclusion." AB.20 (quoting *Gaveck v. Ariz. State Bd. of Podiatry Examiners*, 222 Ariz. 433, 436 ¶11 (App. 2009)). The only "support" in the record for the Director's decision is the DCS caseworker's report and/or Liana V.'s testimony—both of which were successfully impeached. Logic would dictate that the specific portion of the testimony that is impeached cannot be used to "support" that specific conclusion.

The ALJ's findings of fact and conclusions of law, in contrast, *are* supported by substantial evidence—findings and conclusions that the Director *deleted* and replaced with specifics taken from portions that were impeached. This is, therefore, not a situation where the record "supports two conclusions," as DCS now argues. AB.20:3. The record supports only one conclusion: the ALJ's.

DCS is asking this Court to formulate a rule that replaces the substantial-evidence test with an "in-the-record" test. AB.21:20-22:13. In other words, so long as DCS can point to something "in the record" that it cherry picks—even if that something is impeached and proven to be fabricated—it would have this Court declare that substantial evidence exists to affirm the Director's decision.

DCS is thus asking this Court to permit not only wholesale revisions like the one DCS's Director made here, but to rule that there is no principle to limit such actions under their proposed in-the-record standard. Under DCS's reformulation of the substantial-evidence standard, so long as there is *some* authenticated document that is admitted into the record, or some non-eyewitness DCS employee testifies—even if the document or testimony is hearsay, impeached, or proven to be fabricated—the Court should always affirm the Director's decision under A.R.S. § 12-910(E). That is the exact opposite of the recognized fundamental due process guaranty: "meaningful" judicial review. *Mathews*, 424 U.S. at 333. If such a rule is indeed what A.R.S. § 12-910(E) requires, DCS has shown quite neatly why factfinding deference is unconstitutional.

DCS, perhaps to distract the Court from salient issues, pivots to saying that "determining credibility is exclusively the province of the agency whose decision is under

review." AB.21:5-6. The principal case DCS cites, AB.21:7, stated only the obvious proposition: "the trier-of-fact … assess[es] the credibility of witnesses." *Lathrop v. Ariz. Bd. of Chiropractic Examiners*, 182 Ariz. 172, 181 (App. 1995). The trier of fact here was the ALJ, *not* the DCS Director. Unlike *Lathrop*, this is a case where an appellate reviewer has rejected the ALJ's credibility determinations and made his own credibility determinations relying on cherry-picked and impeached testimony.

Likewise, DCS concedes that the Director "is not bound by the formal Rules of Evidence, and may base a decision solely on what would be inadmissible hearsay in court." AB.21:12-15. If that is indeed so, it only highlights the constitutional problems with Step 4 and the deferential standard of judicial review DCS urges the Court to preserve.

DCS attempts to support its argument by citing, AB.21:15, *Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557 (App. 1993) (involving the Arizona Court of Appeals reviewing the Superior Court's decision). *Callender* has nothing to do with DCS's proposition here—or this case. A.R.S. § 41-1062(A)(1), *Berenter v. Gallinger*, 173 Ariz. 75 (App. 1993), and *Begay v. Ariz. Dep't of Econ. Sec.*, 128 Ariz. 407 (App. 1981), DCS says, AB.21:16, allow the Director to ignore rules of evidence. That only highlight the constitutional problem in cases where, as here, (1) the ALJ applies ordinary Rules of Evidence (with the only modification as provided in A.R.S. § 8-811(J) (Step 4), which Mr. B. challenges in this case), and then (2) the Director then completely ignores the Rules of Evidence and the constitutional limits of his appellate review of the ALJ's decision. Moreover, those cases did not involve, and did not address, the precise

constitutional arguments Mr. B. makes here. They therefore cannot control this case. *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("Cases cannot be read as foreclosing an argument that they never dealt with.").[1]

That DCS urges the Court to defer to its Director's fact-finding highlights the inherent problems with the statutory scheme that permitted Director McKay to "reject or modify" the ALJ's findings of fact. A.R.S. § 41-1092.08(B). Like this Court, Director McKay did not observe witnesses testify. He was not present in the ALJ's courtroom. Even if he were, he could not, per *Horne*, act as a judge in DCS's case against Mr. B. In other words, if A.R.S. §§ 41-1092.08(B), (F) are declared unconstitutional, the Director would still be able to reject or modify the ALJ's conclusions of law (subject to *de novo* review by this Court). But he would not be able to reject or modify the ALJ's factual and credibility assessments. That would resolve the due process problems inherent in Director's review of the fact-findings and credibility determinations of an independent, neutral factfinder (the ALJ). Put differently, if the Court is reluctant to address the constitutionality of fact-finding deference, the Court has the option of declaring A.R.S. §§ 41-1092.08(B), (F) unconstitutional so that DCS-Director review is cabined only to reviewing the ALJ's legal conclusions, and/or so that JRAD appeals from ALJ decisions come directly to this Court.

[1] *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *United States v. L.A. Tucker Truck Lines*, Inc., 344 U.S. 33, 38 (1952); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting).

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

DCS offers two sentences on the third *Mathews* factor with respect to Step 1, and offers nothing with respect to Steps 4, 6, 7, 9. AB.30:6-12. The governmental function involved here is substantiating a child-abuse allegation under the probable-cause standard, and if substantiated, to place the accused's name on the Central Registry. DCS offers no suggestion why "the Government [is] interest[ed]" in the probable-cause standard of proof. While DCS might be protecting children from abuse or neglect in other contexts, sometimes admirably, DCS offers nothing to support its specific interest in having this Court uphold the six challenged Steps. The function involved is better served, more impartially, and independently, if the clear-and-convincing standard is used to substantiate such allegations. *Santosky* mandates the clear-and-convincing standard in government-initiated proceedings. The government's general "mandate to protect children" is insufficient under the Due Process Clause to "outweig[h]" Mr. B.'s liberty or property interest in not having his name placed on the Central Registry. AB.30. The *Santosky* rationale is especially important where there might be a tendency by DCS actors to blindside "any other interests" that DCS unilaterally thinks are outweighed by its "interest in protecting children from abuse." AB.30:21. The "fiscal and administrative burdens" here would be minimal. Mr. B. proposes two substitute procedural requirements—evaluation under the clear-and-convincing-evidence standard, and/or no agency-head revision of ALJ's factual and credibility determinations. *See, e.g.*, OB.29:8-14. The clear-and-convincing standard can be seamlessly applied in the

existing OAH-hearing process; eliminating or cabining Director review will only *reduce* the fiscal and administrative burden on DCS.

Ultimately, DCS's two-sentence explanation suggests that it does not rely on the third *Mathews* factor, and instead, relies on its briefing of the first two factors. This non-reliance on the third factor is telling because, under Arizona's Due Process Clause, Arizona courts likely do not give weight to the third *Mathews* factor. *See* OB.33-34.

B. Arizona's Due Process Clause, Which Protects Mr. B.'s Rights to a Greater Extent, Is an Independent Basis for the Court to Declare the Challenged Statutes and Regulations Unconstitutional

DCS argues that because the Arizona Due Process Clause, Ariz. Const. art. II, § 4, is "very similar to federal due process protections," "the *Mathews* analysis"—that "Arizona courts have previously recognized and applied"—"should therefore apply here as well." AB.31:11-15. That argument is only partially on point.

DCS maintains that Arizona's Due Process Clause "has exactly the same language as the … Fifth Amendment." AB.31:26. The Fifth Amendment's Due Process Clause, unlike the Fourteenth Amendment's, however, does not apply to the states. And analysis under the Fifth and Fourteenth Amendments' Due Process Clauses has been in lockstep historically due to the incorporation and reverse-incorporation doctrines.

Even if DCS's reasoning were accurate, however, Arizona has long rejected the lockstep approach that DCS proposes here. Arizona courts operate under the rule that "the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law." *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984). Even though their words are "very similar," AB.31:13, *Pool* read Arizona's Double Jeopardy Clause

as providing greater protections than the federal counterpart. That the state clause "very closely tracks" the federal counterpart is simply not the main inquiry Arizona courts pursue. AB.32:14.

Where the language "of the state constitutional provision is *identical* or *similar* to its federal counterpart," Arizona courts "should examine how the provision was interpreted by the federal courts at the time it was adopted by the State of Arizona to determine its meaning." *Brush & Nib Studio, LLC v. City of Phoenix*, 247 Ariz. 269, ___, 448 P.3d 890, 927 ¶172 (2019) (Bolick, J., concurring). Thus, even if the Court were to adopt DCS's Fifth Amendment equivalence theory, neither the Fifth nor the Fourteenth Amendments were interpreted in 1912 to recognize the basic due-process protections we now take for granted. For example, one looks in horror at what counted as procedural due process in Arizona under the Fourteenth Amendment before the Supreme Court reversed Arizona Supreme Court's decision in *In re Gault*, 387 U.S. 1 (1967), *reversing* 99 Ariz. 181 (1965). The procedural due process revolution at the federal level did not occur until the late 1960's in the Warren Court and much of what we call federal administrative law saw little development, if any, until the federal-agency explosion after the New Deal and passage of the Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237 (1946). There was no fleshed-out procedural-due-process guaranty at the federal level until *Mathews* systematized it in 1976.

Given this history and context, it is flimsy for DCS to argue that Arizonans and the "Congress and president who finally approved [Arizona's Constitution] in 1912 could have intended that federal constitutional law would protect the rights and liberties

of Arizona's populace." Stanley G. Feldman, V.C.J., & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 Ariz. St. L.J. 115, 116 (1988). This Court should, therefore, independently evaluate Arizona's Due Process Clause and conclude that it provides Mr. B. greater protections. Under Arizona's Clause, regardless of how it construes federal law, the Court should hold that Steps 1, 4, 6, 7, 9 deprive Mr. B. of liberty or property without due process of law.

In that regard, DCS concedes an important point: "it is true," DCS says, "that Arizona courts have not applied the *Mathews* test specifically under Arizona's due process provision, they have consistently applied it in interpreting the Fourteenth Amendment." AB.34:3. Therefore, DCS does not dispute that the question presented is one of first impression. The only explanation DCS has to the many Arizona appellate judges who have expressed the rule that Arizona's Due Process Clause provides greater protections is to say that those pronouncements come from "concurring or dissenting opinions." AB.34:23. Of course, that would hold true for all first-impression questions. DCS only strengthens the notion that this Court has the "duty and obligation" to exercise independent judgment to decide the state constitutional question. *The Double Security of Federalism*, at 146 (per Feldman, V.C.J.). Under the state's provision, the Court should reject the *Mathews* balancing approach and instead determine whether there is a due process right to have an independent factfinder determine facts.

In sum, the five steps, standing alone, or the "combination of functions" they bring about, *Horne*, 242 Ariz. at 230 ¶14, deprive Mr. B. of liberty or property without due process of law. The Court should declare A.R.S. §§ 8-804, 8-811, 12-910(E), 41-

1092.08(B), 41-1092.08(F), A.A.C. §§ R21-1-501(13), R21-1-501(17), facially and as applied, unconstitutional under the Due Process Clauses of the state and federal constitutions and thereby vacate the DCS Director's decision.[2]

[2] Vacatur is the appropriate remedy for a due-process violation. *In re MH2006-000023*, 214 Ariz. 246, 248-249 ¶¶10-12 (App. 2007).

IV. ARIZONA'S STATUTORY SCHEME, WHICH REALLOCATES AND CONCENTRATES FUNCTIONS IN DCS, VIOLATES THE ARIZONA CONSTITUTION'S SEPARATION-OF-POWERS DOCTRINE

DCS's briefing on this issue, AB.46-54, is permeated with two principal errors: (1) DCS characterizes the separation-of-powers question as merely a usurpation-of-functions issue, when (2) it is predominantly a reallocation-and-concentration-of-functions issue, which fact DCS neglects to address.

For example, "usurpation" is where an agency arrogates to itself a power or function "beyond what is granted by the legislature." *Enterprise Life Ins. Co. v. ADOI*, __ Ariz. __, 2020 WL 1467208, at ¶22 (App. Mar. 26, 2020).[3] The statutory scheme challenged here has a different problem. DCS has not arrogated functions to itself; the legislature has divested functions from the judiciary and given them to DCS, which already has several other functions allocated to it. Such divestiture and then reallocation and concentration of functions in a state agency or official is a distinct defect under the Distribution-of-Functions and Vesting Clauses of the Arizona Constitution.

To address the four *Brnovich* factors, AB.47:22-51:16, the Court should look at each challenged step as well as the combined effect of those steps to evaluate whether the reallocation and concentration of functions violates Arizona's separation-of-powers doctrine. *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 593 ¶14 (2017).

For the first factor, DCS tries to divert the focus of the inquiry. AB.48. The question is not whether the legislature can allocate quasi-judicial functions to non-

[3] Vacatur of the agency decision is the appropriate remedy for a separation-of-powers violation. *Enterprise* at ¶23.

Article-VI judges (AB.47-49)—it can, and it has—*i.e.*, to the OAH ALJs. The question is whether the agency head can revise the ALJ's factual and credibility assessments (and exercise other functions contained in the challenged steps), combined with its executive functions, without violating the separation-of-powers doctrine. DCS cites no case upholding such a process.

Next, on the second *Brnovich* factor, AB.49:10-51:5, DCS's attempt to put some daylight between the *judiciary*'s versus the *legislature*'s degree of control in the exercise of that power is misplaced. Article III of the Arizona Constitution (emphasis added) states that "no one of such departments shall exercise the powers *properly belonging* to either of the others." The Court of Appeals in *Hancock* "adopt[ed]" the "legislature's degree of control" language from the Kansas Supreme Court's formulation of a *non-exhaustive* list of four factors.[4] Eventually, the Arizona Supreme Court endorsed the *Hancock* test in *Woods*,[5] and *Brnovich*. The Kansas case was a "usurpation" case, *Hancock*, 142 Ariz. at 405, where the question was whether the legislature had arrogated to itself a function "properly belonging to either of the othe[r]" two branches, Ariz. Const. art. III. The same test applies in non-usurpation situations. In other words, the test looks, first, to the nature of the function (*e.g.*, appellate review), and second, which department or official (*e.g.*, DCS's Director) is exercising that function. The degree-of-control factor looks to what control the *department* to which the function "properly belongs" (judiciary)

[4] *J.W. Hancock Enters., Inc. v. Registrar of Contractors*, 142 Ariz. 400, 405 (App. 1984) (adopting the four-factor test from *State ex rel. Schneider v. Bennett*, 547 P.2d 786 (Kan. 1976)).

[5] *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997).

has over the *function* (appellate review). *See Hancock*, 142 Ariz. at 406 (analyzing the degree-of-control factor); *Woods*, 189 Ariz. at 277 (explaining that the legislature, by "retain[ing] dominant control" over the Constitutional Defense Council, unconstitutionally usurped the executive's function and arrogated it to itself); *Brnovich*, at ¶15 (SB1487 is constitutional because the legislature did not usurp, allocate to itself, or "contro[l] the 'exercise' of the executive branch's investigative and enforcement power").

The judiciary here, has little, if any, degree of control over Steps 1, 4, 6, 7, 9. DCS defines what "probable cause" means (Step 1),[6] DCS is statutorily permitted not to—and customarily does not—produce accusers for confrontation and cross-examination (Step 4), DCS acts as the judge in its own case (Step 6), DCS's Director rejects or modifies the factual and credibility assessments of the only neutral magistrate who actually takes live witness testimony (Step 7), and then this Court reviews the Director's decision under a deferential standard of review (Step 9). This scheme is well beyond usurpation; it takes from the judiciary and gives to the executive—while also removing any meaningful degree of control that the judiciary could exert on the executive's exercise of those reallocated functions. That reallocation is only made more egregious because DCS, an executive-branch agency, also already performs investigatory, accusatory, prosecutorial, and enforcement functions. The degree-of-control factor, *inter alia*, requires "*meaningful* judicial review," not some eventual cursory judicial review like the one statutorily prescribed here, AB.51:3. *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 489

[6] Per *Enterprise Life*, using generic rulemaking authority to define "probable cause" is a "usurpation" of the legislative function that violates the separation-of-powers doctrine. 2020 WL 1467208, at ¶22.

(2010) (provisions of the Sarbanes-Oxley Act contravened the federal separation-of-powers doctrine because they did not provide for meaningful judicial review) (emphasis added); *Cook v. State*, 230 Ariz. 185, 190 ¶19 (App. 2012) (the separation-of-powers doctrine requires "meaningful judicial review").

The third factor requires the Court to evaluate whether the *department* (DCS) exercising another's (judiciary's) function "establish[es]" DCS's "superiority over the [judicial] department in an area essentially [judicial] in nature." *Hancock*, 142 Ariz. at 405. The fourth factor requires the Court to evaluate the "practical result of the blending of powers as shown by actual experience over a period of time where such evidence is available." *Id.* DCS does not address, AB.51:6-16, the hegemony-in-practice and the practical-effect-of-blending-of-powers prongs of the four-factor separation-of-powers test.

In sum, the Court should vacate the Director's decision. The ALJ's decision ordering that Mr. B.'s name not be placed on the Central Registry should stand.

V. APPELLANT HAS PRESERVED THE COSTS-AND-FEES ISSUE UNDER USUAL ARIZONA PRACTICE

Appellant at this stage preserves, *contra* AB.54-56, the fees-and-costs argument for the Court to address at an appropriate stage of the case. Under usual Arizona practice, appellants, in the opening brief, must only notify their intention to seek fees and costs at the appropriate time via motion. *See* ARCP 54(g); ARCAP 13(a)(8) & 21(a); JRAD 7(a)(6). Appellant will do so.

CONCLUSION

The Court should vacate the DCS Director's decision, and order him to remove Mr. B.'s name from the Arizona Central Registry.

Respectfully submitted this 15th day of April, 2020.

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CERTIFICATE OF SERVICE

The original of the foregoing Appellant's Reply Brief filed with the Clerk of the Court this 15th day of April, 2020, with a copy emailed to the Honorable Douglas Gerlach, and a copy emailed the same day to:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the opening Brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains **6,994** words, which is within the 7,000-word limit given in JRAD Rule 8(b).

The document to which this Certificate is attached does not exceed the word limit that is set by JRAD Rule 8 as applicable.

The information provided in this Certificate is true and complete.

Dated this 15th day of April, 2020.

/s/ Aditya Dynar
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