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SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

SARRA L., Appellant, v. **MIKE FAUST**, Director, Arizona Department of Child Safety; **ARIZONA DEPARTMENT OF CHILD SAFETY**, Appellees.	Case No. LC 2022-000221-001 OAH No. 21C-1159943-DCS (Assigned to Hon. Daniel J. Kiley) **REPLY IN SUPPORT OF MOTION FOR STAY OF AGENCY DECISION** **Oral Argument Scheduled: August 24, 2022, at 10:00 am**

Sarra L. filed a timely notice of appeal ("NOA") in this Court and a motion for stay of agency decision ("Mot."), both on July 15, 2022. DCS obtained an extension of time to file a response ("Resp.") to the stay motion and filed it on August 8, 2022. Sarra's reply follows.

Introduction

Sarra L.'s stay motion asks for a narrow, interim, status quo remedy during the pendency of this suit. The motion is based on one narrow question of law: the timing of entering names in the Central Registry. Sarra has stated a colorable claim on that point and has shown that the balance of harm favors her, not DCS.[1] A.R.S. § 12-911(A)(1); JRAD Rule 3(b). The Court should order DCS to (1) remove Sarra's name from the Central Registry and (2) desist from placing it there until further order of the Court.

[1] *See* Mot.2 n.1 for a glossary of abbreviations.

DCS has failed to oppose Sarra's due-process and separation-of-powers arguments as to the timing of entering people's names in the Central Registry, which is the *only* basis for the stay motion. DCS has thus waived any argument it could make on those points. *State v. Thomas*, 130 Ariz. 432, 435 (1981) (discussed below).

To be sure, this case presents other weighty questions. *Compare* NOA ¶5(a)[2] *with* ¶¶5(b)–(h).[3] But the Court does not have to decide those yet. The current motion pertains only to whether Sarra has stated a colorable, plausible claim that her name should not be placed in the Central Registry because she timely appealed DCS's decision to this Court. *See* NOA ¶5(a); *P&P Mehta LLC v. Jones*, 211 Ariz. 505, 510 ¶22 (App. 2005). That is the *only* issue now before the Court. Deciding that issue does not require the Court to prejudge any merits issues.

Argument

I. DCS Highlights How Its Rule Writers Manufactured a Conflict Among Several Statutes and Regulations, Thus Showing Why Sarra's Claims Are Colorable

DCS relies (Resp.2) on A.R.S. § 8-811(K) to say that if the ALJ determines that probable cause exists to sustain DCS's finding of neglect, then "the sustained finding shall be entered into the central registry as a substantiated report." But Section 8-811(K) only says that the Central Registry entry must be made after the ALJ finds probable cause. It does not say *when* such an entry should be made (*contra* Resp.6:4–5). Nor does it address the basic due process principle that a person's name should not be placed in the Registry during the pendency of a timely-filed state-court proceeding.

The sole rule DCS cites (Resp.2) regarding the timing of the entry, is A.A.C. § R21-1-508(B), via which DCS gave itself a 20-day cooldown period from the date that the DCS Director accepts an ALJ's decision. But DCS ignores:

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[2] Due-process and separation-of-powers problems with the timing of Central Registry entries.

[3] Statutory construction, void for vagueness, lack of evidence, due-process and separation-of-powers problems with the probable-cause standard of proof and the substantial-evidence standard of review, right to an independent judgment by an Article 6 court of record, right to a jury trial.

- the statute, A.R.S. § 8-804(A), which says only *substantiated* findings can be entered into the Registry;
- Section 12-904(A), which sets a 35-day deadline to take an appeal to Superior Court;
- DCS's own definition of "substantiated finding," A.A.C. § R21-1-501(17), which renders DCS's decision *provisional* if there is a "timely appeal."

Ignoring these laws, DCS effectively says it can give itself a 20-day window to list people's names in the Central Registry, regardless of operative statutes.[4] The conflict between A.A.C. §§ R21-1-501(17) and -508(B) is of DCS's own making, for if Section 508(B) is to be given effect (placing names in the Central Registry regardless of a timely appeal), it renders Section 501(17)(b)— which states a finding is not a substantiated finding if the person timely appeals— surplusage. That, of course, means it cannot be a correct reading of the law. *See State v. Carter*, 249 Ariz. 312, 319–20 ¶26 (2020) (applying the surplusage canon; quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)). DCS's argument would read A.A.C. § R21-1-501(17) into oblivion, which the surplusage canon forbids.

DCS maintains (Resp.4) that "the mere filing of the JRAD would achieve the effect of a stay without any need for the Court to consider good cause." That misses the point. The issue here is: has Sarra stated a colorable, plausible claim that a person's name cannot be entered in the Central Registry if the person timely appeals? She has. *See* Mot.9–12. A rule like A.A.C. § R21-1-501(17)(b) is constitutionally necessary. Due process and routine statutory construction give ample good cause to apply Section (17)(b) as written. And doing so would not prevent DCS from filing, where appropriate, a motion whereby it might show a Superior

[4] A.A.C. § R21-1-508 was adopted in 2015. 21 A.A.R. 2554–2571, https://bit.ly/3AakoH0. A.R.S. § 12-904(A)'s 35-day appeal deadline was adopted in 1998. Laws 1998, Ch. 57, § 5. In adopting Section 508, it appears that DCS accepted a commenter's "recommendation that a shorter timeframe" be adopted. 21 A.A.R. 2556; *see also* Resp.2:10–11. That recommendation was not in compliance with the 35-day appeal deadline set by Section 12-904(A). DCS cannot make A.A.C. § R21-1-508 constitutional by *ipse dixit*. That rule conflicts with Sections 8-804, 12-904, and A.A.C. § R21-1-501(17). If this Court is inclined to give effect to A.A.C. § R21-1-508(B), it must first evaluate whether that rule violates the state and federal Due Process Clauses and the state Separation of Powers Clause. It does. *Cf.* Mot.9–15 (explaining why a rule like Section 501(17)(b) is constitutionally necessary).

Court "good cause" to depart from that rule and place a person's name in the Central Registry during the pendency of the state-court lawsuit. Here, however, no such good cause exists.

DCS draws attention (Resp.7–8) to *Arizona Rulemaking Manual*, https://bit.ly/3vUpsg4, at pdf pages 20–21 (emphasis added): "If the introductory language for the list is an incomplete sentence: … Write 'and' or 'or,' *as appropriate*, after the comma or semicolon in the next-to-last item in the list." But the *Manual* only instructs the rule writer to insert an "and" or "or" *as appropriate*; it does not say *when* inserting one or the other—or not inserting either—is appropriate or how such insertion or omission would change the meaning of the sentence. For the latter issue, one must look to cases like *In re Voss's Adoption*, 550 P.2d 481 (Wyo. 1976), that adhere to English grammar, logic, and traditional tools for construing written words. *See* Mot.5–6.

DCS next points (Resp.8–9) to *Phillip B. v. DCS*, 512 P.3d 1043 (Ariz. App. 2022) in support of its position that A.A.C. §§ R21-1-501(17)(a)–(c) are "separate and independent ways that a proposed substantiated finding can become a substantiated finding." But *Phillip* says nothing about whether A.A.C. § R21-1-508(B) is consistent with A.A.C. § R21-1-501(17)(b) or the constitution; it only says that Section 508(B) "is consistent with" Section 501(17)(a), in that "both conditions" in (17)(a) must be met—(1) an ALJ finding of probable cause and (2) the Director's acceptance of the ALJ's finding of probable cause. *Id.* at ¶¶14, 16. *Phillip*, at ¶¶14–15, *did not* decide whether Sections 501(17)(a) and 501(17)(b) are to be read together because DCS failed one of the two conditions set forth in (17)(a), so that case never reached the question presented here. An "argument no[t] discussed in the opinion of the Court … is not a binding precedent," *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), so *Phillip* does not decide the question presented in Sarra's stay motion.

Sarra has stated a colorable claim based on which the Court should order her name removed from the Central Registry during the pendency of this case.

II. DCS Presents No Argument in Opposition to Sarra's Due Process Argument, So DCS Has Waived Any Argument It Could Present on that Point

The entirety of DCS's briefing (Resp.9–15) on the due-process issue is beside the point.

The due-process issue here is the timing of Central Registry entries when a timely appeal to Superior Court has been taken. Mot.9–14. DCS's briefing is devoid of argument in opposition to that point. Therefore, any argument it could have made in opposition is waived. *Thomas*, 130 Ariz. at 435 ("failure to object to … arguments" waives those objections).

DCS needed to "state distinctly the matter to which [DCS] objects and the grounds for [DCS's] objections." *Id.* It did not do so with respect to Sarra's argument (Mot.9–14) that a rule like A.A.C. § R21-1-501(17)(b)—which prohibits DCS from placing people's names in the Central Registry until the timely appeal and service window closes, and thereafter until further order of the Court—is "constitutionally necessary" under either the state or federal Due Process Clauses. Mot.14. DCS has therefore waived any objection pertaining to this argument.[5]

III. The Separation-of-Powers Clause Necessitates a Rule that Prohibits DCS from Executing Its Decision When the Party DCS Investigated, Prosecuted, and Adjudged, Timely Appeals DCS's Decision to State Court

DCS tries to distinguish "quasi-judicial power" from "constitutional judicial power," Resp.15, but that semantic distinction finds no support in Arizona Constitution's Article 3, which refers to "judicial" power without any modifying adjectives. DCS cites old cases that

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[5] DCS spends many pages (Resp.9–15) distinguishing cases that have criticized the probable cause standard when used as a standard of proof. That is simply irrelevant to this motion.

Sarra's briefing on the constitutionality of the probable-cause standard when it is used as a standard of proof offers a preview of arguments to come. That previewed argument is an additional reason why "placement of Sarra's name in the Registry is unconstitutional under either or both Due Process Clauses." Mot.14. And the stay motion does not ask the Court to decide whether Sarra has stated a colorable claim that the probable-cause standard is unconstitutional when used as a standard of proof. That issue can be addressed and resolved during the JRAD Rule 6 briefing. *This* motion is only about the timing of Central Registry entries.

That said, DCS's own citation of authority (Resp.11:8–11) recommended *against* creating a national child-abuse registry, in part based on the fact that 27 states use the preponderance-of-the-evidence standard in Central Registry cases, and 22 "use weaker legal standards for making substantiation decisions." HHS Office of the Assistant Secretary for Planning & Evaluation, *Interim Report to the Congress on the Feasibility of a National Child Abuse Registry*, https://bit.ly/3bI9fE8, at 1–3, 28 (May 2009). Were the Court inclined to evaluate whether Sarra has stated a colorable, plausible challenge to the constitutionality of the probable-cause standard of proof, DCS's own citation shows she has done so.

have no current sway in Arizona; the more recent and binding precedents strictly apply Article 3. *See, e.g.*, *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588 (2017) (Article 3 prohibits concentration, usurpation, or commingling of functions that properly belong in one of the three separate departments: legislative, executive, judicial); *Horne v. Polk*, 242 Ariz. 226 (2017) (applying same procedural-due-process requirements to all judicial proceedings, regardless of whether they are styled quasi-judicial); *Roberts v. State*, 512 P.3d 1007 (Ariz. 2022) (explaining that a unilateral exercise of one department's power by another department violates the separation-of-powers provision of Article 3). Self-help execution by the investigator-prosecutor-adjudicator is repugnant under the Separation of Powers Clause.

DCS says—without developing the argument, Resp.15—that the mere availability of judicial review, however cursory, checks DCS's administrative power. It cites *Cactus Wren Partners v. Ariz. Dep't of Building & Fire Safety*, 177 Ariz. 559, 563 (App. 1993), in support. But *Cactus Wren* had no occasion to decide the question presented here: does "it violat[e] the Separation of Powers Clause for the investigating, prosecuting, and adjudicating agency to execute its decision against the private party before the Superior Court reviews the decision's merits." Mot.14. *Cactus Wren* was decided before the legislature created OAH and the present-day JRAD statutory scheme. At issue was the constitutionality of the administrative hearing officer function within the Building and Fire Safety agency. Two years after *Cactus Wren* was decided, the legislature transferred the Building and Fire Safety agency's "hearing officers," as well as the hearing officers housed within other executive agencies, to the new OAH it created. Laws 1995, Ch. 251, § 18(A)(2) (not codified). A year later, the legislature allowed the heads of agencies that prosecute cases in front of the OAH ALJs to accept, reject, or modify the ALJs' decisions. Laws 1996, Ch. 102, § 47 (adding A.R.S. §§ 41-1092.03–1092.11). These 1995 and 1996 enactments show that *Cactus Wren* could not have addressed the constitutionality of aspects of the re-written administrative-adjudication scheme that came into existence three years after it was decided.

Put differently, the conclusion Sarra asks the Court to reach—that DCS cannot place a person's name in the Central Registry if that person timely appeals to Superior Court, and until

further order of the Court—is necessary to avoid violating the Separation of Powers Clause. DCS, again, offers no opposition on this point and has therefore waived any objection pertaining to this argument. *Thomas*, 130 Ariz. at 435.

In the end, DCS ignores its enabling statute, A.R.S. § 8-804(A) (stating that only substantiated findings can be entered in the Central Registry), the state and federal Due Process Clauses, and Arizona Constitution's Separation of Powers Clause, and its own rule, A.A.C. § R21-1-501(17), which says a proposed substantiated finding is not substantiated if the private party timely appeals.

And it does so all to resist simply maintaining the status quo pending the outcome of this appeal, which is governed by the lenient, stay-favoring JRAD Rule 3(b) standard.

Other Arizona executive agencies routinely stipulate to stays pending judicial review, instead of wasting the Court's scarce resources on subsidiary motion practice. *See, e.g.*, *Amanda Ashley Nelson v. Ariz. Bd. of Dental Examiners*, LC2022-000097 (assigned to Hon. Daniel J. Kiley) (joint stipulation to stay the agency decision filed Apr. 28, 2022; Court's order staying the agency decision entered May 2, 2022). DCS chose not to. This Court should grant the stay.

IV. DCS's Other Miscellaneous Arguments Show Why a Stay Is Warranted

Sarra's stay motion and the status-quo relief she seeks do not require the Court to prejudge the merits. Sarra is only asking for interim status-quo relief: an order requiring DCS to remove her name from the Central Registry until this appeal is resolved.

DCS's argument as to what constitutes neglect, Resp.4, is premature. That is not currently before the Court, and all parties will have ample time to flesh out that and other arguments in the JRAD Rule 10 and 11 motions and the Rule 6 briefs that, by joint stipulation and subsequent order (entered August 3, 2022), are not due for some time. **The only question before the Court now is whether to stay the DCS's effort to place Sarra's name in the Central Registry pending the outcome of this appeal.** The Court should disregard DCS's attempt to distract the Court from what Sarra's stay motion actually argues and asks for.

The Court should also disregard DCS's premature attempt to pre-litigate other merits issues at this early stage by stating (falsely) (Resp.4:8; Resp.5:6; Resp.5:20; Resp.10:3) that there is no fact dispute in this case.[6] The parties will have an opportunity to litigate whether there are disputed facts that should be presented to the jury, after JRAD Rule 10 and 11 filings that will occur in due course. But none of these disputed facts have any bearing on this motion. With respect to the sole issue before the Court, one fact is not in dispute: DCS, through its counsel, has confirmed that Sarra's name was already entered in the Central Registry on June 21, 2022. *See* Notice Regarding Central Registry Entry (filed Aug. 1, 2022).[7]

Regarding balance of harm, DCS posits (Resp.5) that this JRAD Rule 3(b) factor tips in favor of "children and vulnerable adults." But under the balance-of-harm factor, "the petitioner's [Sarra's] harm must be weighed against the harm that would accrue *to the agency* [DCS] or other *parties* [Mike Faust] to the proceedings." *P&P*, 211 Ariz. at 510 ¶23 (emphasis

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[6] Some of the disputed facts are as follows: whether Sarra left her son Ryan (pseudonym) "alone" at the park (*contra* Resp.3); whether Sarra placed Ryan at an "unreasonable" risk of harm and how much risk is "unreasonable" risk (*contra* Resp.3); whether, when the standard of proof is "probable cause," it could be said as a factual matter that Sarra is "known to have committed child neglect" (*contra* Resp.5:20); whether a reasonable fact-finder could conclude under the preponderance-of-the-evidence standard that Sarra's conduct does not meet the statutory definition of neglect (*contra* Resp.10:3). This is a non-exhaustive list. The Court and the parties will have the opportunity to evaluate these and other disputed facts after everyone receives the actual administrative record.

[7] DCS has a stray line in its response (Resp.14:13–14) regarding the fingerprint exception. Perhaps DCS offers it as a substitute procedural safeguard under *Mathews v. Eldridge*, 424 U.S. 319 (1976). The fingerprint exception cannot be a substitute to removing Sarra's name from the Central Registry because the fingerprint-clearance process does not take people's names off the Central Registry. A.R.S. § 41-619.57, which DCS cites (Resp.14:14), states in subsection G that "[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." And A.R.S. § 8-804(L) says that the grant of a fingerprint exception does not allay the harm that results from entry into the Central Registry. The process for obtaining the fingerprint exception is not a reputation-restoring appeal like this one. Thus, DCS's suggestion that a fingerprint clearance is sufficient to allay the harm, despite it being statutorily incapable of remedying the injury, is meritless. Pointing out *a* procedural safeguard that can possibly be obtained, *not from DCS but from the Board of Fingerprinting*—one that would leave Sarra's name on the Registry for 25 years—does nothing to disprove why a stay pending review should not be granted.

added). It does not require a weighing of the harm to Sarra against hypothetical, speculative harms to hypothetical third parties.

Laying aside its irrelevant and distracting arguments, DCS offers no reasoned opposition to points made under either of the stay factors. The stay should therefore be granted.

Conclusion

The Court should stay DCS's decision and order DCS to remove Sarra's name from the Central Registry and forbid DCS from placing her name in the Central Registry until further order of the Court. DCS does "not seek a monetary bond" (Resp.16:12–13), so the Court should waive the bond.

DATED this 15th day of August, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

There are no applicable length requirements for replies in support of motions in the JRAD rules other than JRAD Rule 1(c), which states that "the Local Rules of Practice for the superior court in the county in which the action for judicial review of an administrative decision is filed apply to proceedings brought pursuant to A.R.S. §§ 12-901 to -914."

Maricopa County Local Rule 3.2(f) states that the "length of motions, responses, replies and memoranda are governed by the Arizona Rules of Civil Procedure."

ARCP 7.1(a)(3) states that a reply in support of a motion should "not exceed 11 pages, exclusive of attachments."

This Reply in Support of the Motion for Stay of Agency Decision complies with ARCP 7.1(a)(3), Maricopa County Local Rule 3.2(f), and JRAD Rule 1(c), because it does "not exceed 11 pages, exclusive of attachments."

DATED this 15th day of August, 2022.

/s/ Aditya Dynar
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ORIGINAL transmitted via courier service for filing this 15th day of August, 2022, with:

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CONFORMED COPY of the foregoing will be delivered to Judge Daniel J. Kiley's chambers via Federal Express.

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