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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)

APPELLANT'S OPENING BRIEF

(Oral Argument Requested)

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Glossary

ALJ	Administrative Law Judge
APA	Administrative Procedure Act, A.R.S. §§ 41-1001–41-1093.07
CMIS	Case Management Information System, *see* A.R.S. § 8-804.01(A)
DCS	Department of Child Safety
ER	Excerpt of the Record
JRAD	Judicial Review of Administrative Decisions
OAH	Office of Administrative Hearings
SEC	Securities and Exchange Commission

Introduction

This case is fundamentally about a parent's liberty to raise her child as she sees fit and the state's burden before it can burden that right. Sarra allowed her seven-year-old son Ryan (pseudonym) to play with his friend at a residential park while she went to buy groceries at a nearby store. ER16–17. Sarra does not believe in "helicopter parenting," but believes that her son's developmental growth and needs are best served by allowing him to play independently in safe places—exactly as occurred here. ER19. Sarra knew the area to be safe—which it is in fact; she lives in the area and is familiar with the park, where she herself played as a child. When she dropped Ryan and his friend at the park, she saw her friend teaching a tai chi class nearby and believed the children would go to her friend if they needed help. ER17.

But a Department of Child Safety (DCS) caseworker alleged that Sarra's reasonable decision constitutes "neglect" under Arizona law (ER18; ER1–2, ER4–5), and an Administrative Law Judge (ALJ) employed by the Office of Administrative Hearings (OAH) concluded there was "probable cause," A.R.S. § 8-811(K), to conclude that Sarra "neglected" Ryan. ER22; A.R.S. § 8-201(25). Then a secretary certified the ALJ's decision as final. ER24–25. Three business days later, based only on the ALJ's finding of "probable cause," DCS entered Sarra's name in the Central Registry. ER33:7.

A person whose name is placed in the Central Registry suffers a wide variety of injuries. Among other things, that person is barred for 25 years from working in fields that involve children or vulnerable adults—or even volunteer to work on projects to assist such people. Being placed in the Central Registry thus imposes "stigmatization plus the loss of present or future" employment, which is a significant constitutional interest. *Cavarretta v. Dep't of Child. & Fam. Servs.*, 660 N.E.2d 250, 254 (Ill. App. 1996).

DCS inflicted these injuries on Sarra. And it did so through a triple whammy of constitutional violations: (1) an impermissibly low standard of proof, (2) with no prospect of a jury trial, (3) in an agency adjudication that fails to provide the protections granted the accused in actual courts. This proceeding violated, among other things, Sarra's due process rights. *Id.* Sarra therefore asks this Court to vindicate her constitutional rights and declare that due process requires: (1) the preponderance of the evidence burden of proof, with (2) jury trials in (3) an Article 6 court of record.

Facts and Statement of the Case

Only the statement of the case and facts relevant to decide the questions of law are provided here. JRAD Rule 7(a)(2)–(3). Excerpt of the record is attached for the Court's convenience.

DCS maintains a "central registry of reports of child abuse and neglect that are substantiated." A.R.S. § 8-804(A). There are two ways to substantiate a report: (1) by DCS based on administrative investigation and adjudication, A.R.S. §§ 8-804, 8-811; or (2) by Arizona state juvenile court, A.R.S. § 8-844(C). At DCS's sole discretion, it pursued Sarra through the administrative process. So Sarra's case is of the first type—administrative investigation and adjudication.

In DCS-substantiated cases, DCS acts as the investigator, prosecutor, judge, jury, and executor:

(1) DCS investigates child-neglect allegations, A.R.S. §§ 8-804, 8-811, 8-804.01(B)(1);

(2) DCS acts as the judge and grand jury when it makes the initial decision to propose substantiation, which decision is final if the person against whom the decision is made does not request an OAH hearing, A.R.S. §§ 8-811(A), (C), (E);

(3) DCS prosecutes the matter against the accused in front of an ALJ (who then acts as the petit jury) if the accused does request a hearing, A.R.S. §§ 8-811(I), (J);

(4) DCS acts as the judge and petit jury if the OAH decision is appealed, A.R.S. §§ 41-1092.08(B), (F);

(5) DCS acts as the enforcer in all scenarios by entering names in the Central Registry, A.R.S. § 8-804(A).

DCS investigated child-neglect allegations against Sarra, ER11:2–4, prosecuted the case against Sarra in an OAH hearing, ER12:19–24, and a legal secretary then certified the ALJ's decision as DCS's final decision. ER24–25.

Both court- and DCS-substantiated child-neglect allegations are recorded in DCS's Central Registry. A.R.S. § 8-804(A). The statute lists at least *26 ways* in which a Central Registry entry is used against Sarra. A.R.S. §§ 8-804(B)–(E), (K), (L), (O). These include a prohibition against her being employed in, or volunteering for, work assisting children in need or vulnerable adults. A person's name remains in the Central Registry for 25 years unless a court orders otherwise. A.R.S. § 8-804(G).

"All reports of child abuse and neglect and related records"—even those that are *not* substantiated—are "maintained in the department's case management information system" (CMIS) for a statutorily indeterminate period. A.R.S. § 8-804.01(A). The statute lists *seven ways* a CMIS entry, which is separate from the Central Registry entry, is used against Sarra. A.R.S. §§ 8-804.01(B)–(C).

Copies of Central Registry and CMIS entries quickly proliferate into dozens if not hundreds of other government databases of local, state, and federal agencies and officials who have access to, or who query, the Central Registry or the CMIS. A.R.S. §§ 8-807(B), (H)–(I), 8-811(D). Central Registry and CMIS entries that make their way into these other government databases presumably stay in those databases for months or years, based on each governmental entity's records-retention statutes, rules, or unwritten practices. And those agencies or officials can use this information against Sarra—or otherwise further distribute it—under their respective statutes, rules, or policies. Purging a particular Central Registry entry does *not* delete the information from these other databases, nor does DCS communicate the deletion of a particular Central Registry entry, if and when it occurs, to those other databases. As a result, a person whose name has been removed from the Central Registry may still appear—erroneously—as a child abuser in these other databases.

While a person's name is not entered in the registry without a "substantiated finding," that term is not defined in the statute. DCS, using its generic rulemaking authority, A.R.S. § 8-453(A)(5), has defined it at A.A.C. § R21-1-501(17). But since it is an agency rule, DCS can delete or amend it at any time, using the rulemaking procedures set forth in the Administrative Procedure Act.

Further, in an administrative adjudication, an ALJ can "sustain" a child-neglect allegation under a "probable cause" burden of proof. A.R.S. § 8-811(K). In contrast, in a court of record, a judge must apply the "preponderance of the evidence" standard. A.R.S. § 8-844(C)(1). But DCS records both the ALJ and a juvenile court's findings in the same Central Registry. A.R.S. §§ 8-804(A), 8-811(H). The statute requires the ALJ to use probable cause as the standard of proof, which she did in Sarra's case.[1]

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[1] In Sarra's case, ALJ Tammy L. Eigenheer did not use the DCS-created probable-cause standard. She instead relied on three cases that discussed the probable-cause standard as an investigatory standard, not as a standard of proof. ER21 (quoting *State v. Emery*, 131 Ariz. 493, 506 (1982) ("strong suspicion"); *State v. Superior Court*, 149 Ariz. 269, 275 (1986); *Brinegar v. United States*,

"Probable cause," like "substantiated finding," is not defined in the statute. DCS has defined it under its generic rulemaking authority at A.A.C. § R21-1-501(13): "'Probable Cause' means some credible evidence that abuse or neglect occurred." Being an agency rule, DCS can amend it at any time.

ALJ Eigenheer concluded that "probable cause exists to sustain the department's finding that [Sarra] … neglected the child." ER20.[2] DCS—as is routine[3]—affirmed the ALJ's decision with no evidentiary hearing or review by DCS's Director. ER24; A.R.S. § 41-1092.08(D). The affirmance was via the no-action route. ER24. That is, because DCS's Director took no action within the statutory 30-day timeframe, a legal secretary (Miranda Alvarez) "certified" the ALJ decision as the final, appealable administrative decision. ER24–25.

Sarra appealed the administrative decision well within the 35-day appeal window by filing a notice of appeal under A.R.S. § 12-904. ER27–31. Sarra also simultaneously moved for a stay of the agency's decision. But, as it revealed eventually, DCS entered Sarra's name in the Central Registry a mere three business days after issuing its decision (ER33:7)—before Sarra could appeal to this Court.

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338 U.S. 160, 175 (1949) ("dea[l] with probabilities")). *Emery,* 131 Ariz. at 505–06, and *State v. Superior Court,* 149 Ariz. at 273–76, addressed the use of probable cause as a standard for an arrest warrant under the Fourth Amendment. *Brinegar* discussed the probable-cause standard in the context of an investigatory search and seizure. 338 U.S. at 164–65, 173–75.

[2] The ALJ ordered DCS to enter Sarra's name in the Central Registry, not under the second sentence of A.R.S. § 8-811(K) as she should have, but "in accordance with" A.R.S. § 8-804(E). ER22. Although the ALJ's incorrect citation of § 8-804(E) is, like several other citations throughout the decision, likely inadvertent, it reveals the inadequacy of OAH decisionmaking.

[3] DCS typically converts OAH losses into wins by asserting power to re-write credibility, factual, and legal determinations without ever taking live-witness testimony. *See*, *e.g.*, *Phillip B. v. DCS*, 253 Ariz. 295 (App. 2022); *Joseph V. v. McKay*, No. 1 CA-CV 17-0052, 2018 WL 4208988, at *5–6 ¶¶34–35 (Ariz. App. Sept. 4, 2018) (Perkins, J., specially concurring) ("[N]either [A.R.S. § 41-1092.08] nor [A.R.S. § 8-811] allows for the Director to modify or reject an ALJ's order. … [T]he Legislature did not textually authorize the DCS Director to approve, modify, or reject the independent ALJ's order."). Because Sarra's case does not arise in the context of DCS rejecting or modifying an ALJ decision or order, the Court need not address the question, left open by *Phillip B.* and *Joseph V.*, whether A.R.S. §§ 41-1092.08(B), (F), or A.A.C. § R21-1-501(17)(a) permit such actions.

The Court granted Sarra's stay motion and ordered DCS to remove Sarra's name from the Central Registry until further order of the Court. ER37–38. Counsel for Appellees (Director Faust and DCS) confirmed via email to counsel for Appellant Sarra L. that DCS removed Sarra's entry from the Central Registry on August 24, 2022. DCS did not file a notice of compliance with the Court informing the Court it had done so.

Granting Sarra's scheduling motion, the Court set a briefing schedule for the three questions of law presented below. ER39–41.

Issues

1. Are A.R.S. §§ 8-804, 8-811, and A.A.C. §§ R21-1-501(13), R21-1-501(17), which authorize entry of people's names in the Central Registry based on the "probable cause" standard of proof, unconstitutional under the state and federal constitutions' Due Process Clauses and/or the state constitution's Separation of Powers and Vesting Clauses, and, if so, what is the remedy (i.e., should the matter be remanded to the agency for a new hearing under a different standard of proof, or should the matter proceed to a hearing in Superior Court under a different standard of proof)?

2. Was Sarra L. denied her constitutional right to a jury trial?

3. Was Sarra L. denied her right to an independent judgment by a court of record?

Argument

The Court should hold that DCS's proceedings were unconstitutional. First, DCS must meet at least the preponderance of the evidence burden of proof to place a person's name in the Central Registry. DCS currently substantiates these allegations under the mere probable-cause standard established by A.R.S. §§ 8-804, 8-811, A.A.C. §§ R21-1-501(13), R21-1-501(17). Given the significance of the accused's liberty interests and the risk of wrongful deprivation, this standard is impermissibly low. Ariz. Const. art. 2, § 4; U.S. Const. amend. XIV, § 1.

Second, the Court should hold that a jury trial in an Article 6 court of record is required before a person's name can be placed in the Central Registry. Currently, these adversarial proceedings are decided by an OAH employee, without a jury, without the benefit of rules of pretrial discovery or depositions, and without the benefit of rules of evidence. This juryless factfinding denied Sarra the right to a jury trial under the Arizona Constitution's Jury Clauses. Ariz. Const. art. 2, § 23; art. 6, § 17.

Third, the Court should hold Sarra has a constitutional right to an independent judgment by an Article 6 court of record. Ariz. Const. art. 6, § 30. That right includes the right to have facts found in an Article 6 court of record, and the right to have conclusions of law reached independently by Article 6 courts. There is at present no statutory mechanism available for OAH, an executive-branch agency, to empanel juries. Rather, the Arizona Constitution vests that power in the Superior Court. Ariz. Const. art. 6, § 17. Remanding this matter to the agency for further factfinding would thus violate the Separation of Powers and the Vesting Clauses of the Arizona Constitution. Ariz. Const. art. 3; art. 4, pt. 1, § 1; art. 6, § 1.

I. The Due Process Clauses Require Proof by at Least a Preponderance of the Evidence

The federal and Arizona Due Process Clauses require at minimum a preponderance of the evidence burden of proof before depriving a person of their fundamental rights and substantial private interests. Ariz. Const. art. 2, § 4; U.S. Const. amend. XIV, § 1. As courts in Illinois, Missouri, and other states—and the federal Second Circuit—have held, the mere probable-cause standard of proof flunks the *Mathews* test. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Like those other states, Arizona courts use the *Mathews* test when adjudicating challenges brought under the federal Due Process Clause. *See, e.g.*, *Horne v. Polk*, 242 Ariz. 226, 230 ¶15 (2017). But Arizona's Due Process Clause provides even stronger protections than the *Mathews* test. The probable-cause standard of proof is thus impermissibly low under either the federal or state constitution.

A. Fourteenth Amendment's Due Process Clause

Mathews requires a balance of three factors to determine whether the government has violated one's right to due process: (1) the private interests affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail. 424 U.S. at 335. The Supreme Court thus requires "a straight-forward consideration of the factors identified in [*Mathews*] to determine whether a particular standard of proof in a particular proceeding satisfies due process." *Santosky v. Kramer*, 455 U.S. 745, 754 (1982).

1. Sarra's private interests are substantial.

Under the Fourteenth Amendment's Due Process Clause, the "function of a standard of proof … is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (simplified). The "minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, 455 U.S. at 755.

In a civil dispute between private parties, "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." *Id.* at 755 (simplified). That is not the case when, as here, a "government-initiated proceedin[g]" threatens to impose on the accused a "significant deprivation of liberty or stigma." *Id.* at 756 (simplified).

The process of placing a person's name in the Central Registry is obviously a government-initiated proceeding that threatens to impose a significant deprivation on that person. The *Mathews* test therefore requires the Court to determine whether the "grav[ity]" of this deprivation "warrant[s] more than average certainty on the part of the factfinder." *Santosky*, 455 U.S. at 758. This balancing cannot be "an ad hoc weighing," *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 562 (1985) (Rehnquist, J., dissenting), but instead should be done to treat individuals fairly when making important decisions about their lives, and to prevent erroneous decisions against the innocent. For example, in *Cavarretta*, *Valmonte, Jamison,* and other cases, courts employing the *Mathews* test found that the placement of a person's name in a central registry like Arizona's imposes a significant deprivation on that person in the form of stigma and the loss of employment opportunities. *See Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170, 1185–92 (9th Cir. 2009), *rev'd on other grounds*, 562 U.S. 29 (2010)[4]; *Cavarretta*, 660 N.E.2d at 254; *Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994); *Jamison*

[4] *Humphries* was reversed on the question of government immunity; the Supreme Court did not address the Ninth Circuit's *Mathews* analysis.

v. State, Dep't of Soc. Servs., Div. of Fam. Servs., 218 S.W.3d 399, 407 (Mo. 2007); *Petition of Preisendorfer*, 719 A.2d 590, 592 (N.H. 1998); *Lee TT. v. Dowling*, 664 N.E.2d 1243, 1249–52 (N.Y. App. 1996).

So too here. Sarra "possesses a fundamental liberty interest in the care, custody, and management of [her] children," *Kent K. v. Bobby M.*, 210 Ariz. 279, 284 ¶24 (2005), and she has other weighty private interests that would be taken away if her name were kept in the Central Registry. Her "good name, reputation, honor, [and] integrity" are all protected private interests, *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), and the stigma of being placed in the list of child abusers would profoundly affect her interest in "privacy and autonomy of familial relationships." *Bohn v. Dakota County*, 772 F.2d 1433, 1435 (8th Cir. 1985). Having her name in the Central Registry would also significantly limit—if not entirely prevent—her ability to volunteer with her synagogue to help children. ER15.

Sarra also 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." *Horne*, 242 Ariz. at 230 ¶14. Relatedly, she has an interest in obtaining "meaningful" judicial review. *Mathews*, 424 U.S. at 333; *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (recognizing "meaningful judicial review" as a private interest); *Cook v. State*, 230 Ariz. 185, 190 ¶19 (App. 2012) (same). The first *Mathews* factor thus favors Sarra.

2. Proof by probable cause creates a high risk of erroneous deprivation.

The risk of erroneously depriving Sarra of these private interests through the probable-cause standard of proof is high, and there are no additional or substitute procedural safeguards other than the preponderance-of-the-evidence standard. In *Cavarretta*, *Valmonte*, *Jamison*, and the other cases cited above, courts found that use of a standard higher than probable cause was the proper way to protect people from suffering wrongful deprivations via the erroneous placement of their names in a central registry. As the Missouri Supreme Court observed, mere probable cause "does not require a fact finder to balance conflicting evidence," and because "the determination of whether an individual has abused or neglected a child … frequently involves private conduct for which there is no supporting evidence or objective eyewitness," using such a standard "magnif[ies] the risk of erroneous fact finding." *Jamison*, 218 S.W.3d at 411. The probable cause standard was therefore "unacceptable." *Id.*;

accord Valmonte, 18 F.3d at 1003–05; *Cavarretta*, 660 N.E.2d at 258–59; *Preisendorfer*, 719 A.2d at 593–95; *Dowling*, 664 N.E.2d at 1250–52.

Names once placed in the Central Registry remain there for 25 years unless a court orders otherwise. A.R.S. § 8-804(G). The Registry is designed, in 26 ways, A.R.S. §§ 8-804(B)–(E), (K), (L), (O), to "disqualify an individual from obtaining or maintaining various licenses, certifications, or employment in working with children." *Phillip B.*, 512 P.3d at 1044 ¶1.

Accordingly, the second *Mathews* factor favors Sarra.

3. The government's interest does not outweigh Sarra's fundamental rights.

The government's interest does not outweigh Sarra's fundamental parental rights and private interests. The state certainly has an interest in protecting children from abuse and neglect. But using the probable-cause standard instead of a higher standard fails to balance that interest against the high risk of error here. Indeed, as *Dowling* observed, using the probable-cause standard "results in a disturbingly high number of false positive findings of abuse," *Dowling*, 664 N.E.2d at 1252, which undermines the state's interest by distracting the state from *actual* incidents of abuse and wasting resources on the ill-founded prosecutions. Given that "the margin of error" under the probable-cause standard "results in substantial injury to constitutionally protected private interests," *id.*, the substantial prospect of diminishing Sarra's fundamental parental rights and of depriving her of her good name, reputation, privacy, employment, and volunteering opportunities, and meaningful judicial review, is many orders of magnitude worse in comparison. The third *Mathews* factor therefore also favors Sarra.

In sum, the *Mathews* analysis shows that a higher standard of proof by a preponderance of the evidence is constitutionally necessary under the Fourteenth Amendment's Due Process Clause. The Court should so hold.

B. Arizona Constitution's Due Process Clause

Arizona's Due Process Clause, Ariz. Const. art. 2, § 4, provides greater protections to Sarra than does the federal Constitution. Thus *a fortiori* DCS's use of the probable-cause standard of proof violates the Arizona constitution. While the federal Constitution "sets a floor for the protection of individual rights," the state "possess[es] authority to safeguard individual rights above and beyond

the rights secured by the U.S. Constitution." *American Legion v. American Humanist Ass'n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring); *see also* 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) ("[N]either the delegates who created our constitution in 1910, the citizens who adopted it, nor the Congress and president who finally approved its implementation in 1912 could have intended that *federal* constitutional law would protect the rights and liberties of Arizona's populace.") (emphasis added). That is because at the time of Arizona's statehood, the federal Bill of Rights was not incorporated against the states. Feldman, *Double Security*, at 116 ("The doctrine of incorporation was virtually unknown in 1910. The framers could not have believed the doctrine afforded significant rights to the state's citizens.").

The stronger protection for individual due process rights afforded by Arizona's Constitution is shown by Arizona courts' use of a stronger test than *Mathews* to adjudicate cases under the state's Due Process Clause. *State v. Wagner*, 194 Ariz. 310, 313 ¶15 (1999). Arizona courts use a more protective test that disregards the third *Mathews* factor. They give "dispositive" weight to the second *Mathews* factor; that is, "the dispositive question … turns on the extent to which the procedure presents the risk of erroneous deprivation of … rights." *James S. v. DCS*, No. 1 CA-JV 18-0150, 2019 WL 613219, at *8 (Ariz. App. Feb. 14, 2019) (Perkins, J., dissenting).

The Arizona formulation makes sense given that the countervailing interest in government efficiency is often nebulous and insufficient to overcome the private interests at stake in cases applying *Mathews*. *See, e.g.*, *Trisha A. v. DCS*, 247 Ariz. 84, 98 ¶67 (2019) (Bolick, J., dissenting) (government's interest in "administrative efficiency" does not outweigh the individual's interest) (quoting *Lassiter v. Dep't of Soc. Services of Durham County*, 452 U.S. 18, 28 (1981)).

At bottom, both the federal and state Due Process Clauses require at least the preponderance-of-the-evidence standard of proof.

C. This Court Should Reject the Probable Cause Standard as Other Courts Have

As noted above, several federal and state courts have held it unconstitutional to place a person's name in the Central Registry based on mere probable cause. In contrast, DCS is expected to offer a single case in opposition: *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005). But *Dupuy* did not

hold that the probable-cause standard of proof is constitutional under either the federal or state Due Process Clauses in a case like Sarra's.

Instead, *Dupuy* involved the use of the "credible evidence" standard "at the *pre-indication stage*." *Id.* at 505 (emphasis added). The Illinois pre-indication stage is equivalent to Arizona's *proposed* substantiated finding prerequisite needed to advance a case to the ALJ. A.R.S. §§ 8-811(A), (C), (E). Moreover, Illinois defines "credible evidence" as quite close to preponderance of the evidence. *Dupuy*, 397 F.3d at 504 ("the available facts, when viewed in light of surrounding circumstances, would cause a reasonable person to believe that a child was abused or neglected."). The court found that this "more rigorous" standard—i.e., more rigorous than probable cause—was constitutional because it "requires that the investigator not simply identify some evidence that supports an indicated finding," but "also requires that the investigator take into account *all* of the available evidence that tends to show that abuse or neglect did *or* did not occur." *Id.* at 505–06. The court also found it important that even this finding was subject to an appellate process that provided "de novo review under a heightened standard of proof within a very short period of time." *Id.* at 509.

Dupuy therefore involves a question materially different than the one at hand. It ascertained the validity of the Illinois "credible evidence" standard as used by caseworkers to *investigate* allegations; not as a *standard of proof*, which is the issue in Sarra's case. *See, e.g.*, *In re Y.W.-B.*, 265 A.3d 602 (Pa. 2021) (caseworker investigations of child-neglect allegations must occur under the probable-cause standard as is required by traditional principles of federal and state constitutions' due process and unreasonable-search-and-seizure clauses). The plain weight of caselaw goes in favor of rejecting the probable-cause standard of proof and requiring at least the preponderance-of-the-evidence standard, if not the clear-and-convincing-evidence standard. *Santosky*, 455 U.S. at 756.

Courts that have addressed cases like Sarra's have rejected the probable-cause standard of proof. "Probable cause" falls below "preponderance of the evidence" and amounts to a form of substantiated suspicion. *See In re Twenty-Four Thousand Dollars ($24,000) in U.S. Currency*, 217 Ariz. 199, 202 ¶13 (App. 2007); *Gonzales v. City of Phoenix*, 203 Ariz. 152, 155 ¶13 (2002). According to DCS, it turns entirely on the "credibil[ity]" of witnesses testifying in front of the ALJ. A.A.C. § R21-1-501(13). And the administrative process here not only deprives Sarra of the "de novo review under a

heightened standard of proof" that the *Dupuy* court found crucial, 397 F.3d at 509, but it also entitles her accuser, DCS, to override any ALJ decision adverse to it. A.R.S. §§ 41-1092.08(B), (F); A.A.C. § R21-1-501(17)(a).

The better rule is that adopted by cases such as *Jamison*, *supra*. In that case, the state sought to put two nurses' names in Missouri's Central Registry based on probable cause to substantiate an accusation of neglect. 218 S.W.3d at 403. Applying *Mathews*, the court found that the probable cause standard "does not require a fact finder to balance conflicting evidence" and "places the brunt of the risk of error, if not the entire risk of error, on the alleged perpetrator." *Id.* at 411 (simplified). This violated "both the federal and state constitutions," *id.* at 405, because "[d]ue process requires an impartial decision maker" to "substantiate a report of child abuse or neglect by a preponderance of the evidence before an individual's name can be included in and disseminated from the Central Registry." *Id.* at 412–13.

Just as *Jamison* involved the Missouri Constitution, so *Preisendorfer* evaluated the probable-cause standard of proof under the New Hampshire Constitution's Due Process Clause. 719 A.2d at 592. New Hampshire uses a "two-part test," *id.* at 592: "whether the challenged procedures concern a legally protected interest," and "whether the procedures afford the appropriate procedural safeguards." *Id.* "Because the probable cause standard is easily met," the court concluded that "the risk of erroneously depriving the petitioner of his interest is great." *Id.* at 594–95. In contrast, "the additional burden placed on the State by using a preponderance of the evidence standard is small in comparison to the risk of harm to the petitioner." *Id.* at 595. The court held that "due process requires that the preponderance of the evidence standard apply in any hearing to determine whether an individual's name should be added to the central registry." *Id.*

Valmonte rejected the "some credible evidence"[5] burden of proof under the federal Due Process Clause and required a preponderance standard. 18 F.3d at 1004. Entry of names in the registry, it said, carries an "unacceptably high risk of error" that is "attributable to the standard of proof." *Id.* at 1004. "The 'some credible evidence' standard does not require the factfinder to weigh

[5] DCS defines "probable cause" as "some credible evidence." A.A.C. § R21-1-501(13).

conflicting evidence"; instead, it merely requires DCS "to present the bare minimum of material credible evidence to support the allegations against the subject." *Id.* "The 'some credible evidence' standard is especially dubious in the context of determining whether an individual has abused or neglected a child" because "[s]uch determinations are inherently inflammatory, and usually open to the subjective values of the factfinder." *Id.* at 1004 (simplified).

Humphries comprehensively rejected the government's arguments in favor of a probable-cause standard, using the federal Due Process Clause. "Being labeled a child abuser," it said, "is indisputably more stigmatizing than being labeled an excessive drinker or a shoplifter. Indeed, to be accused of child abuse may be our generation's contribution to defamation per se, a kind of moral leprosy." 554 F.3d at 1186. Such a stigma cannot be imposed based on a mere probable-cause finding, given the substantial risk of error. *See id.* at 1195 ("[T]he low threshold for putting names on the [Registry] and the tendency to overinclude" make the probable-cause standard inappropriate.) The stigma of being listed in the government index *cannot* be overcome by any competing governmental interest. "Indeed, with the same passion that California condemns the child abuser for his atrocious acts, it has an interest in protecting its citizens against such calumny." *Id.* at 1194. Any governmental burdens that result from concluding in favor of the individual "are precisely the sort of administrative costs that we expect our government to shoulder." *Id.*

Cavarretta involved an Illinois teacher who was wrongly placed in the state register of suspected child abusers. 660 N.E.2d 250 (1996). Although the court declined to say which standard of proof would suffice, it concluded that the probable-cause standard "deprives a subject of due process." *Id.* at 258. After *Cavaretta* was decided, the Illinois Department of Child and Family Services amended its rules to require the agency to "prove its case by a preponderance of the evidence." *Dupuy*, 397 F.3d at 508 (citing Ill. Admin. Code tit. 89 § 336.120(b)(15)).[6]

[6] Ill. Admin. Code tit. 89 § 336.120(b)(15) ("The Administrative Law Judge shall … present a written opinion and recommendation to the Director … [which] shall include a recommended decision on whether there is a preponderance of evidence of abuse or neglect based on information in the administrative record.").

That is the context in which the Seventh Circuit's *Dupuy* (2005) decision arose. The agency took it upon itself to implement *Cavarretta* by making sure that the ALJ applies preponderance of the evidence standard of proof to conclude that child abuse or neglect occurred. By contrast, Arizona—both by statute and implementing rules—forces ALJs to apply the less robust probable-cause standard of proof. That is unconstitutional, and that alone requires reversal.

In sum, the federal and state Due Process Clauses require DCS to prove that Sarra neglected Ryan at least under the preponderance-of-the-evidence standard of proof. Because DCS employed only the probable-cause standard, the agency decision should be reversed, and this Court's stay ordering DCS to remove Sarra's name from the Central Registry should be converted into a permanent injunction.

II. Sarra Has a Constitutional Right to a Jury Trial

A question separate, but directly related to, the constitutionally required burden of proof is: Who decides questions of fact? For centuries, the answer was the jury—an arm of the judicial branch. But under the statute at issue here, that power is given to executive-branch officials. As a result, the agency acts as investigator, judge, and jury.

What's more, even when an accused individual appeals an adverse agency decision and finally reaches an independent Article 6 court of record, the Article 6 judge confines the inquiry, or so DCS would argue, to whether the agency's findings are supported by substantial evidence. A.R.S. § 12-910(F).[7] The substantial-evidence standard of review may be appropriate when an Article 6 court considers jury-found facts. But agency adjudication effectively neutralizes independent judicial review because the fact-finding is done by the ALJ or DCS itself. The deferential substantial-evidence standard therefore should not apply in this context. *See, e.g.*, A.R.S. § 12-910(F) ("In a proceeding brought by or against the regulated party, the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency.").

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[7] The constitutionality of the substantial-evidence standard of review is not currently before the Court. That is because, although Sarra presents that question of law to this Court for eventual determination (*see* ER29 at ¶5(f)), per the Court's order setting the briefing schedule, Sarra's brief covers questions encompassed only within the Notice of Appeal ¶¶5(e), (g), (h). ER40.

A. Background

The U.S. Constitution's Seventh Amendment requires a civil jury "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars." Courts have found that the federal jury right applies in cases where administrative agencies seek enforcement for violations of a statute. For example, the Seventh Amendment jury-trial right applies in Securities and Exchange Commission (SEC) administrative adjudications. *Jarkesy v. SEC*, 34 F.4th 446, 454 (5th Cir. 2022). *Jarkesy* concluded that the Seventh Amendment applies to fraud cases brought by the SEC seeking civil penalties. *Jarkesy* follows up on *Granfinanciera* in which the Supreme Court held that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989).

The Arizona Constitution's Jury Clauses are broader still. Article 2, § 23 of the Arizona Constitution contains neither a twenty-dollar prerequisite nor a law-versus-equity distinction. It states, simply, "The right to trial by jury shall remain inviolate." To make sure the message is heard loud and clear, Article 6, § 17 says, "The right of jury trial as provided by this constitution shall remain inviolate."[8] Together, these Clauses mandate a jury trial for Sarra.

As is well known, the drafters of the federal and state constitutions emphasized the right to a jury in order to ensure community oversight of government officials and to allow average citizens to participate in democratic government—in part by monitoring how public officials and prosecutors discharged their duties. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 81–136 (1998). *See also* 3 William Blackstone, *Commentaries on the Laws of England* *380, *381 (Juries are "the best investigators of truth, and the surest guardians of public justice." "Every new tribunal, erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates) is a step toward establishing aristocracy, the most oppressive of absolute governments."). In crafting their own governments, state after state reaffirmed this deep commitment to trial by jury. Sheldon

[8] *See also* Ariz. Const. art. 2, § 24; art. 18, § 5 (providing additional jury trial rights).

Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 Wm. & Mary L. Rev. 1241, 1248–49 (2014) (explaining importance of juries in state constitutions).[9]

By allowing the community to supervise their public officials, particularly judges and prosecutors, "civil jury trials ensur[e] that parties are not forced to suffer the biases that might develop among judges." Whitehouse, *Restoring*, 55 Wm. & Mary L. Rev. at 1266–67. Framers and citizens alike recognized "the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." Joseph Story, 2 *Commentaries on the Constitution of the United States* 574.

Trial by jury, a "fundamental" component of our legal system, "remains one of our most vital barriers to government arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9–10 (1957). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

The jury was no mere afterthought. But today, hordes of executive-branch officials adjudicate cases and issue binding judgments. They do so without a jury. It gets worse. Not only do juryless ALJs in executive agencies adjudicate rights, but they also allow in-house appellate panels (or, as here, a single agency Director) to set aside and determine their own facts—without ever hearing a witness testify or viewing the evidence presented at trial. *See* A.R.S. § 41-1092.08(B), (F). Then, when a court reviews the agency's determination, it applies—or so DCS would argue—"substantial evidence" deference to the agency's fact-finding. A.R.S. § 12-910(F). Courts no longer guard against the lack of a jury—they acquiesce in it by deferring to the governmental litigant's factual finding.

Cursory substantial-evidence review by this Court shoves the jury aside. It allows the executive branch to make up facts. When the facts aren't on its side, the executive agency can simply speculate

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[9] Jury rights date back to the Magna Carta. *United States v. Booker*, 543 U.S. 220, 239 (2005). Longer, really. But in any event, they were well established by the time men took up arms at Lexington and Concord. A century before the Revolution William Penn wrote that among the great English rights was "[a]n influence upon, and a real share in, that judicatory power that must apply every such law; which is the ancient, necessary and laudable use of juries." William Penn, *England's Present Interest Considered, With Honour to the Prince, and Safety to the People* (1675), https://bit.ly/3UIpsdd.

and conjecture, based on opinions of non-eyewitnesses, ER13:24–ER14:24, to make "credib[ility]" determinations, A.A.C. § R21-1-501(13), all to fit the result it wants. The executive adjudicator does not follow rules of evidence or court-style rules of civil procedure—rules designed to be fair, impartial, and objective for all parties. *See, e.g.*, A.R.S. §§ 8-811(J) (hearsay freely allowed), 41-1062 ("A hearing may be conducted in an informal manner and without adherence to the rules of evidence required in judicial proceedings."), 41-1092.07(F) (adherence to rules of evidence not required); ER10:20–21 ("The Arizona Rules of Evidence do not apply; so any relevant testimony and evidence may be admitted."). And courts defer to it all. This is precisely what the jury guards against. Decisions based on juryless facts are simply incompatible with our Founders' vision, the state constitution's text, and centuries of the Anglo-American legal tradition. If the substantial-evidence standard has any vitality, it is because of the strength of the right to trial by jury—judges owe considerable deference to *jury-found* facts.

The jury right's fundamental role in preserving freedom and justice is why Arizona's Constitution provides for a trial by jury in "all" cases, Ariz. Const. art. 2, § 23, and A.R.S. § 12-910(F) retains both the substantial-evidence standard (to review jury-found facts) and a command (relating to juryless facts) that "the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency." Arizona's Jury Clauses draw no criminal–civil–administrative, law–equity, petty–major-offense, or public-rights–private-rights distinctions. The two-step framework federal courts have devised under the Seventh Amendment is therefore inapposite to evaluating Sarra's jury-trial right under the Arizona Constitution. *Jarkesy*, 34 F.4th at 453 ("First, a court must determine whether an action's claims arise at common law under the Seventh Amendment. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial.") (simplified).

Sarra received neither a grand jury charge nor a petit jury verdict. Instead of a grand jury, a DCS caseworker proposed that the child-neglect allegation against Sarra be substantiated. ER1–2, ER4–5. Instead of a trial jury, an executive-branch employee (the ALJ) found facts, based on that lone caseworker's opinion testimony, speculation, and conjecture. ER16–23. A secretary then

accepted those juryless facts without question. ER24–26. That amounts to a wholesale denial of trial by jury. The Court should rectify this constitutional violation by concluding that the Jury Clauses of Arizona's Constitution require a jury trial where DCS must prove by at least a preponderance of the evidence that Sarra neglected her son.

B. Analysis Under the Federal Framework

Even if the Seventh Amendment's two-step framework were to apply, Sarra easily meets that test. DCS's claim arises "at common law," and the case involves no public rights. *Jarkesy*, 34 F.4th at 453, 456. DCS's enforcement action is not of the sort that is "uniquely suited for agency adjudication" under the public-rights doctrine. *Id.* at 456.

The closest analogue in common law to the statutes at issue here were the common-law duties parents owed to children, described by Blackstone as "their maintenance, their protection, and their education." 1 W. Blackstone, *Commentaries* *434. "The municipal laws of all well-regulated states have taken care to enforce this duty. … The civil law obliges the parent to provide maintenance for his child." *Id.* at *435 (citations omitted). At common law, a parent who abandoned his children was liable to have his property seized by "the churchwardens and overseers of the parish" who could "dispose of [it] towards [the child's] relief." *Id.* at *436. Being creatures of *municipal* and *civil law*, such maintenance suits went to the "courts of *law*," *id.* at *436 (emphasis added), not courts of equity, and were therefore subject to the jury-trial right. Since the federal jury-trial right applies to matters that were subject to jury trial at the time the Constitution was written, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020), cases such as this one—which seek to put a parent's name in the Central Registry for neglecting her child—are ones where the accused has the right to a trial by jury.

As to the *Jarkesy* test's second step, where the legislature does not limit an agency's ability to bring enforcement actions in the courts of record, the case is not "one focused on public rights." 34 F.4th at 456. DCS, for example, can enter names in the Central Registry as a consequence of proving its case in an A.R.S. § 8-844(C) proceeding. As relevant, DCS's enforcement action against Sarra is first and foremost designed to protect Sarra's son Ryan, not the general public. Indeed, even if DCS could argue that its action is "designed to protect the public at large" from Sarra, that "do[es] not convert [DCS's] action into one focused on public rights." *Id.* The legislature "cannot convert any

sort of action into a 'public right' simply by finding a public purpose for it and codifying it in [statutes]." *Id.* at 456–57 (citing *Granfinanciera*, 492 U.S. at 61). Actions seeking Central Registry listings are "nothing new and nothing foreign to Article [6] tribunals and juries." *Id.* at 457.

C. Analysis Under the State Constitution

Because the state jury-trial right extends to "those matters in which [the jury trial right] existed anciently under the common law," *State v. Cousins*, 97 Ariz. 105, 107 (1964), and because, as explained above, this is the type of case to which the jury right would have applied at common law, Sarra is entitled to a jury trial as a matter of the *state* Constitution, as well.

As Arizona Constitution scholar John Leshy has explained, the Arizona Jury Clauses, "[u]nlike the Seventh Amendment … d[o] not speak of the right to trial by jury in cases of 'law or equity.'" John D. Leshy, *The Arizona State Constitution* 87 (2011). That is because "the concepts of 'law' and 'equity' are today largely anachronistic." *Id.* As for the "right to trial by jury in equity actions," "a 1901 statute of the Arizona territory created such a right on factual issues in 'all cases, both at law and in equity' (Rev. Stat. Ariz. 1901, para. 1389)." *Id.* at 87–88. And in *Brown v. Greer*, 16 Ariz. 215, 218–220 (1914), the Arizona Supreme Court, in an opinion written by a former constitutional convention delegate, Chief Justice Franklin, said this pre-statehood statute means that there is no law/equity distinction in construing the scope of the jury trial right in Arizona.

Article 2, § 23 was amended in 1972. Leshy, *supra*, at 87. Originally, it "consisted of what is now the first sentence, and went on to allow provision to be made 'by law' for a jury of less than twelve in 'courts not of record; for a 'verdict by nine or more jurors in civil cases in any court of record'; and for waiver of a jury in civil cases upon consent of the parties." *Id.* The original Constitution thus preserved jury trials even in "courts not of record"—i.e., in non-Article 6 tribunals like the OAH. The 1972 amendment did not eliminate that. Article 2, § 23 today is simply silent about the distinction between "courts of record" and "courts not of record"; it simply refers to "all other cases" (other than "criminal"), whether or not they are in courts of record or courts not of record.

Arizona's unique development of the Jury Clauses shows there is no law/equity or public-versus-private-rights, or court/administrative-tribunal distinction in construing and applying the Jury

Clauses.[10] Instead, the right "remain[s] inviolate." Ariz. Const. art. 2, § 23; art. 6, § 17. The federal jury-right caselaw does not limit the Arizona Constitution's Jury Clauses; it only sets the floor. Even under the federal formulation, Sarra has a jury-trial right. It follows that because the statutory scheme deprives her of that right, the Court should conclude that it is illegal for DCS to place Sarra's name in the Central Registry without the benefit of jury-found facts. Consequently, the Court's interim order removing Sarra's name from the Central Registry should be made permanent.

III. Sarra Has a Constitutional Right to an Independent Judgment by a Court of Record

Besides questions of the appropriate standard of proof used to prove facts in front of a jury, there is a related, but separate, third question: whether DCS should have proven its case against Sarra in an Article 6 court as opposed to the OAH, which is not a court of record.

Arizona Constitution article 6, § 30 distinguishes "courts of record" from courts not of record. That distinction has important consequences. Arizona's "judicial power," which is vested in the "judicial department," Ariz. Const. art. 6, § 1, is divided among judges and two types of juries—grand juries and petit juries. In contrast, the OAH is a creature of statute that only has the powers granted to it by the legislature. *See* A.R.S. § 41-1092.01 (establishing the Office of Administrative Hearings and enumerating the powers of the OAH director); *Roberts v. State*, 512 P.3d 1007, 1018 ¶44 (2022).

One obvious difference between an Article 6 court and OAH is that the latter cannot convene a jury. Only courts of record, that is, the "supreme court, the court of appeals and the superior court" can do so. Ariz. Const. art. 6, §§ 30(A), 17. Indeed, it would violate the Separation of Powers and the Vesting Clauses if the power to empanel trial juries were delegated to executive-branch officials such

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[10] Many states have addressed the jury issue without having looked to the public-rights doctrine as a dispositive factor. For example, Kansas has protected the right to civil juries under the Kansas Bill of Rights § 5 ("The right of trial by jury shall be inviolable.") without engaging in a Seventh-Amendment-style analysis but analyzing whether analogous suits at common law existed. *State v. Arnett*, 496 P.3d 928 (Kan. 2021). Indiana courts, analyzing Ind. Const. art. I, § 20 ("In all civil cases, the right of trial by jury shall remain inviolable."), have done the same. *Jordan ex rel. Jordan v. Deery*, 778 N.E.2d 1264 (Ind. 2002) (collecting cases from New York, Florida, Connecticut, Oklahoma, Missouri, South Dakota, among others).

as the DCS or OAH directors.[11] There is no mechanism whereby OAH can empanel a trial jury. That, in turn, means that Sarra is entitled to have her jury trial *in Superior Court*, and that the relegation of this case to OAH is unconstitutional. OAH is simply not a constitutionally adequate substitute for a trial in an Article 6 court. *See Enterprise Life Ins. Co. v. Dep't of Insurance*, 248 Ariz. 625, 629 ¶22 (App. 2020) (Investing the power properly belonging to a "major branch of government" in a state agency is "an usurpation of constitutional powers vested only in the major branch of government.").

Jarkesy concluded that the Seventh Amendment jury-trial right applied to SEC enforcement actions and that such actions are not of the sort that could be "properly assigned to agency adjudication." 34 F.4th at 454–55. *Jarkesy* did not remedy juryless agency factfinding by ordering the factfinding agency to empanel a jury. It instead said that the agencies must establish facts in Article III courts that already have the judicial power to summon civil juries. *Id.* at 455, 459 ("[S]uch actions are commonly considered by federal courts"; they cannot be "properly assigned to agency adjudication.").

The Arizona Supreme Court has concluded that the superior court is always "free to grant a trial de novo" in appeals taken from justice courts. *Palmer v. Superior Court*, 114 Ariz. 279, 281 (1977). Superior courts thus have "complete power to insure that an appeal from a nonrecord court is heard on a legally adequate record and that the record supports the conviction with evidence which has been received in conformity with the requirements of constitutional and statutory standards. Such a system satisfies the requirements of due process." *Id.*

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[11] The legislature did not impliedly carve out part of the judicial power to call juries and outsourced it to an executive agency. *See* John Gibbons, *Why Judicial Deference to Administrative Fact-Finding Is Unconstitutional*, 2016 B.Y.U.L. Rev. 1487 (2016); Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Georgetown J.L. & Pub. Pol'y 27 (2018). Arizona's Constitution has adjudged that Article 6 principal officers appointed in compliance with the complicated judicial selection and retention process of Article 6 should be in charge of juries. Ariz. Const. art. 6, § 17. The Constitution does not vest other principal officers appointed by the Governor or inferior officers hired by those principal officers to be in charge of juries. *See* A.R.S. §§ 41-1092.01(B) (Governor appoints OAH director); 41-1092.01(C)(4) (OAH director hires ALJs); 8-452(A) (Governor appoints DCS director); 38-211 (process for obtaining Senate consent for appointing the DCS director).

The same should be true of JRAD appeals. In fact, a more forceful argument to apply *Palmer* to agency adjudication can be made because administrative agencies are *non-courts* unlike the "justice courts," which are still "courts" within the judicial department (Ariz. Const. art. 6, § 1), just not "courts of record" (Ariz. Const. art. 6, § 30(A)). This Court is "free to grant a trial de novo" in JRAD appeals arising from agency fact-finding. *Id.* This Court has "complete power to insure" the "lega[l] adequa[cy]" of the record. *Id.* With juryless facts, the record cannot be "legally adequate" because the "evidence" has not been received "in conformity with" the jury-trial requirements of the Constitution. *Id.* Jury trial in this Court is thus necessary to "satisf[y] the requirements of due process." *Id.* To exercise the Superior Court's "complete power" to summon trial juries and "insure" that "evidence" is received "in conformity with" the jury-trial requirements of the Constitution, the Court should conclude that Sarra has the right to have facts established in Superior Court.

Such a ruling would also faithfully implement A.R.S. § 12-910(F)'s command that "the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency." "Notwithstanding any other law," this command "applies in any action for judicial review of any agency action that is authorized by law." *Id.*

Under Section 12-910(F), Arizona agencies receive no judicial deference for "questions of law" and no judicial deference for "questions of fact" that are determined by the agencies. That is what it takes to truly give force and effect to Sarra's right to independent judgment in Article 6 courts of record.

In sum, Sarra has the right to an independent judgment in this Court. That right includes the right to have independent factfinders empaneled in this Court. The Court should so conclude. Because DCS's decision to list Sarra in the Central Registry was based on facts established without a jury in a non-court, this Court should order DCS to permanently remove Sarra's name from DCS's lists.

IV. The Remedy Does Not Include a Remand to DCS or OAH for Further Proceedings

This Court can "decide all questions of fact," and "all questions of law" de novo. A.R.S. § 12-910(F) also lists the remedies available. "[T]he court may affirm, reverse, modify or vacate and remand the agency action." One reading of the statute is that the scope of the "remand" depends on whether

the Court affirms and remands, reverses and remands, modifies and remands, or vacates and remands. But it is unclear whether a remand must always follow affirmance, reversal, or modification due to the missing commas in that sentence of A.R.S. § 12-910(F).

For example, federal courts do not always remand; they can reverse and vacate instead. *Community Financial Services Ass'n v. Consumer Financial Protection Bureau*, 51 F.4th 616, 644 (5th Cir. 2022) (analyzing the judicial-remedies discussion in, *inter alia*, *Collins v. Yellen*, 141 S. Ct. 1761 (2021)). *Collins* discussed the remedy of "set[ting] aside" agency action, which derives from the text of 5 U.S.C. § 706(2)—the federal counterpart of A.R.S. § 12-910(F).

In Arizona, "legally deficient" ALJ decisions "must be set aside." *Aguirre v. Industrial Commission*, 247 Ariz. 75, 75 ¶1 (2019). And unconstitutional statutes or rules, or rules not authorized by statute, are declared to be "not legally binding." *Roberts*, at 512 P.3d at 1011 ¶1, 1012 ¶7, 1018 ¶44. Whatever the differences may be in these various formulations, the proper remedy is to return the parties to the situation that existed before the complained-of agency action occurred.

Therefore, the remedy for any one or all of the three questions presented here—standard of proof, jury trial, independent judgment in a court of record—is for the Court to order permanent removal of Sarra's name from the Central Registry and any other database in DCS's control relating to this case. This has the simple effect of making the interim stay order (ER38) permanent. This remedy does not require the Court or any party to go through a second round of factfinding. Instead, it satisfies the principle that "[t]he essential elements of rectification are to undo the injurious effects of the wrong," which is accomplished "by creating the situation that would have existed had the wrong not occurred." James M. Fischer, *Understanding Remedies* § 1.0 at 2 (3d ed. 2014). The situation that would have existed had DCS decided not to prosecute Sarra is that Sarra's name would not have been placed in the Central Registry. The Court should return the parties to that *status quo ante* by ordering DCS to permanently keep Sarra's name off its lists in relation to this case.

Phillip B. ordered that very remedy. 512 P.3d at 1044 ¶1. The Court of Appeals "direct[ed] DCS to remove Phillip B.'s name from the Registry for the alleged conduct giving rise to this appeal." *Id.* The court did not command DCS to re-do the whole case, because that would have given DCS a windfall second bite at the apple. In other words, to correct the wrong, awarding DCS a do-over is

not a proper remedy. Nor has DCS (which has the burden of proof) asked for a trial de novo in this Court. DCS's time to request one has long since expired. *See* A.R.S. § 12-910(A), JRAD Rules 10(c), 11(c) (deadlines for appellees to request trial de novo). And it did not file any motion to extend those deadlines before those deadlines expired.

Therefore, ordering removal of Sarra's name from DCS's lists for reasons declared in the Court's decision comports with the notion of awarding the narrowest remedy that rectifies the wrong. *See* Fischer, *supra* § 2.6 at 6 (discussing the effect of declaratory and injunctive relief, including the precedential and collateral estoppel effect of such orders). Therefore, the matter should not be "remanded to the agency for a new hearing under a different standard of proof." ER40. Because the wrong standard of proof was applied in this case, among other things, the agency action that followed (placement of Sarra's name in the Central Registry) should be undone.

In the alternative, the Court should order a jury trial for the reasons explained above. A remand to the ALJ for further factfinding would deny Sarra the right to a jury trial in an Article 6 court of record. To give effect to that right, "the matter should proceed to a hearing in Superior Court under a different standard of proof." ER40.[12] A remand would also violate the Separation of Powers and Vesting Clauses, and Section 12-910(F)'s remedial scheme, as explained.

Conclusion

The Court should conclude as follows:

(1) The probable-cause standard of proof provided for in A.R.S. §§ 8-804, 8-811, A.A.C. §§ R21-1-501(13), R21-1-501(17) is unconstitutional; the preponderance-of-the-evidence standard of proof applies instead.

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[12] The state of Georgia "dissolved" its Central Registry in 2020. Maya T. Prabhu, The Atlanta Journal-Constitution, *Georgia ends child abuse registry, saying database undermined intent* (Sept. 1, 2020), https://bit.ly/3E8ZzMM; Ga. Laws 2020, Act 410, § 7 (eff. July 1, 2020) (repealing Ga. Code tit. 49, ch. 5, art. 8 (Ga. Code Ann. §§ 49-5-180–49-5-187)). Georgia's experience with the Central Registry shows that perhaps a full dissolution of the Central Registry is necessary to re-tether Arizona's child-welfare agency to the state's Constitution. It is questionable, however, whether this Court can order such a remedy. In comparison, the remedial options Sarra proposes are by far straightforward, modest, tailored, and appropriate actions this Court can take.

(2) Sarra L. was denied her constitutional right to a trial by jury.

(3) Sarra L. has a right to independent judgment by an Article 6 court of record.

(4) Because the wrong standard of proof was applied based on juryless findings of fact determined outside an Article 6 court of record, DCS is ordered to permanently remove Sarra L.'s entry from the Central Registry and any other database in DCS's control relating to this case.

Sarra L. requests attorney fees and costs incurred pursuant to A.R.S. §§ 41-1001.01, 12-348, and the private attorney general doctrine. *Arnold v. Ariz. Dep't of Health Services*, 160 Ariz. 593, 609 (1989); *Ansley v. Banner Health Network*, 248 Ariz. 143, 153 ¶40 (2020). *See* JRAD Rule 7(a)(6).

Sarra requests in-person oral argument given the gravity of the questions presented.

Dated this 30th day of November 2022.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the Court's Order dated October 17, 2022, in which the Court stated that "the briefing shall comply with JRAD Rules 7 and 8."

JRAD Rule 8(a) sets a 14,000-word limit for the opening brief. This brief contains **9,973** words.

This brief's formatting and typesetting complies with Rule 5.2 of the Arizona Rules of Civil Procedure.

Dated this 30th day of November 2022.

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

Respectfully submitted,

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