Aditya Dynar (031583)
Frank D. Garrison (P235816)*
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Ste. 1000
Arlington, VA 22201
(202) 807-4472
ADynar@pacificlegal.org
FGarrison@pacificlegal.org
*pro hac vice

Timothy Sandefur (033670)
Scharf–Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

Attorneys for Appellant

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. Joseph Mikitish) **APPELLANT'S OPPOSITION TO MOTION TO DISMISS** **(ORAL ARGUMENT REQUESTED)**

Table of Contents

Introduction

This case is about the Arizona Department of Child Safety's (DCS) attempt to persecute a mother for exercising her liberty to raise her child as she sees fit. DCS brought an administrative enforcement action against Sarra L. alleging that she had "neglected" her child because she allowed her seven-year-old son Ryan (pseudonym) to play with his friend in a local park while she went shopping for groceries at a nearby store. Sarra—who lives in the neighborhood and played in that park when herself a child—knew the park was safe and ensured that there was an adult friend in the vicinity whom Ryan could contact if any issues occurred. No harm came to Ryan or his friend, nor were they threatened with harm. DCS's enforcement proceeding nonetheless culminated in an Administrative Law Judge (ALJ) "substantiating" a finding that Sarra had "neglected" her child, as defined in A.R.S. § 8-201(25). It did so based on a "probable cause" standard, the standard specified in A.R.S. § 8-811(K)—and that finding was ultimately certified as the final agency decision by a career secretary. Five days later, DCS placed Sarra's name in the "Central Registry." The placement of her name in the Registry caused and continues to cause Sarra severe injuries.

Sarra appealed to this Court, alleging various constitutional infirmities with DCS's administrative enforcement action and the "probable cause" standard. She also immediately moved for a Court stay of the DCS's decision and asked the Court to compel DCS to remove her name from the Central Registry. This Court granted that Motion, finding that Sarra met the requirements for a stay because, among other things, she had a colorable claim that the "probable cause" standard violated the Arizona and federal constitutions' due process clauses and the balance of harm tipped in Sarra's favor.

The Court then set a briefing schedule under which Sarra filed an opening brief in November of 2022. DCS has not filed their principal Rule 6 brief. Instead, DCS has now filed a motion to dismiss Sarra's appeal in a blatant attempt to avoid judicial review of Sarra's claims.

DCS's motion to dismiss should be denied. While DCS has declared that it will "unsubstantiate" its finding of neglect, DCS has no statutory authority to do such a thing. Even if it did, that "unsubstantiation" does not moot this case, both because Sarra is still suffering injuries that DCS has not undone, and because DCS's voluntary cessation of its offending conduct fails to prove

that it will desist from the offending conduct in the future. Mootness requires DCS to "make it absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *State ex rel. Babbitt v. Goodyear Tire & Rubber Co.*, 128 Ariz. 483, 486 (App. 1981) (simplified), but DCS has not only failed to do this, it expressly *refuses* to do this. Finally, even if DCS's actions did render this case moot, this case easily fits within two long-standing exceptions to the mootness doctrine: it is a matter of extraordinary public importance, and Sarra's injuries are capable of repetition but evading review.

Argument

I. This Case Is Not Moot

A. DCS Has No Authority to "Unsubstantiate" a Child-Neglect Finding

DCS purports to have "unsubstantiated" its neglect finding respecting Sarra. But DCS has no authority to do that. DCS only has those powers conferred upon it by statute. *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488 ¶10 (2003). But no statute[1] allows DCS to "unsubstantiate" a probable cause finding at this stage of the proceedings. The rules DCS must follow are listed in A.R.S. §§ 8-804 and 8-811, and these do not let DCS revoke a substantiated finding after a hearing.

On the contrary, there are only two means by which DCS can undo a "substantiation." The first is under Section 41-1092.08(B), which lets the DCS Director "modify" the determination of an ALJ *within 30 days*. Here, DCS seeks to modify that determination *two hundred and seventy days* after it was rendered.

The second way is under Section 8-811, which permits DCS to "amend" a finding (which Section 8-811(N)(1) defines as including "chang[ing] the finding from substantiated to unsubstantiated"), but only *before* an administrative hearing is held. Section 8-811(E) also says DCS can change a finding to unsubstantiated during a "review before the hearing," and, of course, Section 8-811(K) says that if there is a hearing, the hearing officer can order DCS to change the finding to unsubstantiated. But neither this section, Section 8-804, nor any other law[2] lets DCS change a finding

---

[1] Neither in its unsubstantiation notice to Sarra nor in its notice to this Court does DCS cite any statutory authority.

[2] Nothing in DCS's regulations provide for "unsubstantiating" a finding after a hearing, either. On the contrary, A.A.C. § R21-1-507(A) only reiterates that DCS's Director can modify an ALJ's decision within 30 days. A.A.C. § R21-1-504 allows the Protective Services Review Team to amend a

to unsubstantiated *after* a hearing and *after* a hearing officer rules in DCS's favor. The simple *expressio unius est exclusio alterius* rule shows it cannot. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107–11 (2012).

On the contrary, Section 8-804(G) *requires* DCS to *maintain* its findings of substantiation. Using the mandatory "shall," it says that if DCS "determine[s] that [a] report [of neglect] was substantiated"—which it did here—it "shall maintain the report" for a period not exceeding 25 years. DCS can maintain reports for *less* time, but only if it does so under "rules [that] designate the length of times it must maintain those reports." No such rules exist. Therefore, DCS *must* maintain its report of neglect against Sarra. The only statutory means by which she can be vindicated at this point is by this Court's action.

Finally, even if the statutes did allow DCS to undo a finding of substantiation, DCS would have to do so in a reasoned fashion, not arbitrarily, without explanation, and in an attempt to evade adjudication. *See Mofrad v. I.N.S.*, 30 F.3d 139 (9th Cir. 1994) (agencies must provide a basis for their decisions and not act arbitrarily). DCS must provide at least some "explanation for its action including a 'rational connection between the facts found and the choice made'"; otherwise its purported "unsubstantiation" is arbitrary, capricious, and unlawful. *Compassionate Care Dispensary, Inc. v. Arizona Dep't of Health Servs.*, 244 Ariz. 205, 213 ¶25 (App. 2018) (simplified).

Yet DCS offers no such explanation. It certainly did not change its tune because it believes the substantiation to be either legally or factually incorrect—it stated in its notice to the Court that it "*make*[*s*] *no admissions* and *take*[*s*] *no position*" on those questions, and in its Motion it insists that Sarra's "legal arguments ... are without merit." MTD at 2 n.1. DCS's effort to "unsubstantiate" its findings is therefore arbitrary and capricious. *Compassionate Care Dispensary*, 244 Ariz. at 213 ¶25.

As the U.S. Supreme Court remarked in a recent case in which an agency likewise abruptly changed its tune to avoid adjudication, "[a]n agency must defend its actions based on the reasons it gave when it acted." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909–10

---

proposed substantiated finding to unsubstantiated, but, again, that must occur before a deadline that passed long ago.

(2020). DCS should not be able to "forc[e] both litigants and courts to chase a moving target" by arbitrarily changing its tactics for strategic reasons. *Id.* at 1909.

B. Only an Arizona Court Can Remedy Sarra's Injuries

Throughout its motion, DCS falsely claims that the adjudication here would not affect Sarra. *See, e.g.*, MTD at 6. On the contrary, DCS still maintains—and is legally required to maintain—its record of a finding of neglect. DCS may have temporarily withdrawn her name from its Central Registry due to this Court's preliminary order, but that only means it moved her name to another DCS database instead. Among other things, that means that if DCS were to initiate another enforcement action against her (a likelihood, as explained below), it would use the neglect finding at issue in this case against her in those proceedings. Until and unless the Court orders DCS to eliminate her name from its databases entirely, and inform all parties to whom it may have earlier passed on its substantiation finding that such finding is void *ab initio*, the prior finding remains on the books and remains a significant threat to Sarra. Even assuming DCS can "unsubstantiate" a finding at this stage, that does not remedy her injuries.

Absent full exoneration by this Court, DCS is not authorized to purge the dossier it has kept on Sarra—reports (even those that are not substantiated) that DCS is statutorily required to use against her in future investigations. *See* A.R.S. §§ 8-804.01, 8-807. Only this Court's order requiring DCS to delete its records can remedy Sarra's injuries. So the case is not moot.

C. DCS Makes "Absolutely Clear" that It Will Repeat the Offending Conduct

Even if DCS has authority to modify its finding of neglect at this point, and even if it did, that would still not moot the case, thanks to the "voluntary cessation" doctrine. That doctrine says that when a party to a lawsuit voluntarily ceases its offending conduct, that does *not* render the case moot unless the circumstances make it "absolutely clear" that the party will desist from that offending conduct in the future. *Goodyear Tire & Rubber*, 128 Ariz. at 486. Proving this is a "formidable burden" on the movant, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000), and courts require even more proof when, as here, the complained-of action is "discontinued subsequent, rather than prior, to commencement of the litigation." *Goodyear Tire & Rubber*, 128 Ariz. at 486. Yet DCS does not even *try* to offer this proof.

Mootness is simple: it only asks if the court can make the injured party whole. *See Mesa Mail Pub. Co. v. Bd. of Sup'rs of Maricopa Cnty.*, 26 Ariz. 521, 524 (1924). A case is moot if circumstances change in a way that makes that impossible. That, however, creates the risk that a party might try to avoid an adverse judgment by ceasing the offending conduct for however long it takes for the lawsuit to be dismissed, and then "'return to [its] old ways.'" *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1267 (11th Cir. 2020) (citations omitted). For that reason, courts require a strong showing that a party's cessation of conduct is a *true* assurance that it won't do the same thing again. Courts are especially skeptical of voluntary cessation that occurs "late in the game," because such lateness "suggest[s] that the [party] is 'attempting to manipulate the [c]ourt's jurisdiction.'" *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010) (citations omitted).

Such manipulation is obvious here.

First, DCS makes no effort to show that its attempted modification of the neglect finding will prevent it from committing the same unconstitutional acts in the future. Its motion offers no evidence and identifies no changes in policy that would prevent DCS from, e.g., placing a person's name in the Central Registry based on the unconstitutionally low "probable cause" standard, or denying a party her right to a jury trial, among other unconstitutional actions identified in Sarra's notice of appeal.

On the contrary, DCS "*make*[*s*] *no admissions* and *take*[*s*] *no position* on any of [those] issues," Notice of Jan. 25, 2023, at 2, maintains that Sarra's "legal arguments ... are without merit," and declines to "waiv[e] [its] legal arguments in opposition." MTD at 2 n.1. In other words, DCS affirmatively *refuses* to say it will not do the same thing again. Thus DCS not only makes no promises not to return to its old ways, but it also insists upon its right to do so.

In *State ex rel. Corbin v. Goodrich*, 151 Ariz. 118 (App. 1986), the court found that there was "no evidence of mootness" even though the party "promise[d]" not to violate Arizona law in the future, in part because that party had "fail[ed] to admit wrongdoing." *Id.* at 125–26. For the same reason, there is no evidence of mootness here.

Second, timing is an especially significant factor in assessing mootness when a party voluntarily ceases its offending conduct. When a party desists from its offending behavior "late in the game," courts are "more skeptical" that such a cessation renders a case moot. *Harrell*, 608 F.3d at

1266. Here, DCS's voluntary cessation of offending conduct comes *quite* late in the game. The ALJ of the Office of Administrative Hearings (OAH) found "probable cause" to place Sarra's name in the Central Registry in March 2022. DCS administratively affirmed the ALJ decision. When Sarra appealed to this Court, and sought a stay pending appeal, DCS opposed that stay in a brief which asserted, among other things, that Sarra's legal "argument ... is [not] remotely colorable," Opp. to Stay at 4, a position it now refuses to withdraw, in its "make no admissions" notice. DCS also acted with unusual celerity to put Sarra's name in the Central Registry within a week of the administrative hearing, which meant this Court had to order DCS to remove her name pending the outcome of the case—something that, again, DCS resisted. Then DCS's counsel vigorously opposed Sarra's request for a change in filing deadlines, arguing the merits of DCS's position on the constitutional issues—a position it still insists was right.

This all shows that DCS has vigorously prosecuted this case against Sarra—and still insists it was right to do so. Yet it has abruptly decided to withdraw this action, while nonetheless "mak[ing] no admissions" regarding the facts and insisting that her constitutional and statutory arguments are "meritless." If courts are "skeptical of voluntary changes that have been made long after litigation has commenced," then that skepticism is fully justified here. *Burns v. PA Dep't of Correction*, 544 F.3d 279, 284 (3d Cir. 2008). DCS's last-minute course change is as clear an example as one could imagine of a party "strategically alter[ing] its conduct in order to prevent or undo a ruling adverse to its interest." *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006).

DCS cites several cases about mootness, but none resemble this case. In *Mesa Mail,* the court could not "enter an order" in 1924 "directing the board of supervisors of Maricopa county to perform a duty that could be performed only in July and August, 1922." 26 Ariz. at 523–24. That's not analogous to this case, because Sarra seeks, *among other things*, this Court's determination that DCS's placement of her name in the Central Registry and other actions were unconstitutional, and an order requiring total removal of her name from it and other databases—relief this Court can still grant, and only this Court can grant.

In *Sedona Priv. Prop. Owners Ass'n v. City of Sedona*, 192 Ariz. 126 (App. 1998), the city repealed the ordinance *and the court enjoined the city from enforcing it*, which rendered the case moot. *Id.* at 127 ¶5.

Here, DCS has repealed nothing and the Court has not enjoined DCS. In *Hawes v. Cooper*, 14 Ariz. App. 88 (1971), the plaintiff was challenging the county's zoning authority concerning unincorporated land, when the land was annexed by a city—which then gained zoning authority, thereby rendering the case moot. Here, there has been no analogous change in government authority; DCS still retains all the power it had with respect to this and all other cases—indeed, it studiously insists on keeping that power. In *J.R. Francis Const. Co. v. Pima Cnty.*, 1 Ariz. App. 429 (1965), contractors were still disputing the award of a public contract when one company completed the project, rendering the case moot. That's disanalogous, because no change in circumstances has rendered this Court incapable of awarding Sarra judgment. All we have is DCS's (unlawful) attempt to modify its findings *without* admission of wrongdoing or unconstitutionality, and *without* promising, or even suggesting, that it's not "chang[ing] its behavior in the hope of avoiding a lawsuit but then, having done so, 'return[ing] to [its] old ways.'" *Keohane*, 952 F.3d at 1267 (citations omitted).

True, courts typically give government "more leeway" in rendering a case moot by voluntary cessation, but only when the government makes a "professed commitment" to not commit the same injury again, *Troiano v. Supervisor of Elections in Palm Beach Cnty., Fla.*, 382 F.3d 1276, 1283 (11th Cir. 2004), as, for example, by repealing an unconstitutional law. *Cf. City of Sedona*, 192 Ariz. at 127 ¶5. DCS has made no such commitment or change of rules, and explicitly refuses to do so. The bottom line is therefore simple: DCS has not established mootness *at all.* Its actions do not resolve this dispute or make it impossible for this Court to do so.

II. This Case Easily Qualifies for Established Exceptions to Mootness

Even if DCS's purported "unsubstantiation" did make this case moot, the Court should decide the case's merits anyway. Arizona courts will decide a moot case if it involves "a question of great public importance or one which is likely to recur even though the question is presented in a moot case." *Fraternal Ord. of Police Lodge 2 v. Phoenix Emp. Rels. Bd.*, 133 Ariz. 126, 127 (1982). They typically do so based on either (a) the "considerable public importance" of the questions presented, *State v. Superior Ct. of Pima Cnty.*, 104 Ariz. 440, 441 (1969), or (b) the risk that the plaintiff will suffer the same harm in the future, in circumstances that make it hard for courts to resolve the question—i.e., the

"capable of repetition, yet evading review" exception. *KPNX Broad. Co. v. Superior Ct. In & For Maricopa Cnty.*, 139 Ariz. 246, 250 (1984). This case meets both tests.

A. The Questions Presented Are of Considerable Public Importance

The "public importance" exception applies when a case raises an issue that "will have broad public impact beyond resolution of the specific case." *Cardoso v. Soldo*, 230 Ariz. 614, ¶6 (App. 2012). That means the case involves questions that are not confined to the circumstances of the particular dispute, but concerns broader constitutional or legal matters. *Id.* The "public importance" exception exists in part to "avoid a multiplicity of appeals," *Bd. of Exam'rs of Plumbers of Phoenix v. Marchese*, 49 Ariz. 350, 353 (1937), and provide "guidance [to] the bench and bar." *State v. Super. Ct.*, 86 Ariz. 231, 234 (1959).

In *Fraternal Order of Police Lodge 2*, the Supreme Court decided a moot case concerning elections for union representation for Phoenix city employees. Before the decision was rendered, a new election occurred, rendering the case moot. The Court resolved it anyway because it presented a question that is "of great public importance and one that is likely to recur." 133 Ariz. at 127. It was of great importance because there were "hundreds of thousands" of people represented by the union, who would be "affect[ed]" by the rules in question. *Id.* And it was "also likely to recur because it is probable that [the union] ... or [other] potential authorized representatives" would seek to enforce the challenged rule in the future. *Id.* Moreover, the parties "retain[ed] a sufficient adversarial interest in the litigation to vigorously present all sides of the question" to the court. *Id.*

This case easily meets that standard. It raises a question of exceptional importance: the constitutionality of statutes like A.R.S. § 8-811, which allow any Arizonan's name to be placed in the Central Registry—essentially, a "do not hire" list—based on mere "probable cause" that the person may have committed child neglect or endangerment. Federal and state courts across the country have already declared the "probable cause" standard unconstitutionally low,[3] yet there is no Arizona case on this subject.

---

[3] *See, e.g., Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005); *Humphries v. Cnty. of Los Angeles*, 554 F.3d 1170 (9th Cir. 2009); *Cavarretta v. Dep't of Child. & Fam. Servs.*, 660 N.E.2d 250 (Ill. App. 1996); *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Jamison v. State, Dep't of Soc. Servs., Div. of Fam. Servs.*, 218

This case also raises questions about the applicability of the jury trial right and whether enforcement proceedings under this statute may proceed in an administrative agency hearing at all, or whether parties are entitled to a hearing in a court of law. On these questions, too, there are no direct Arizona legal precedents.

These are obviously questions of exceptional importance, not just for Sarra, but for many people. It is not known exactly how many names are in the Central Registry, but five years ago, the *Arizona Republic* reported that 81,000 people's names were on the list. *See* Mary Jo Pitzl, *Am I On The Child-Protective Blacklist? How to Find Out*, Arizona Republic, Apr. 29, 2018, https://bit.ly/3ml0GUF. The *Republic*'s investigation revealed that many names are placed in the Registry even when they should not be, that many people are placed in the list without knowing it, and that few people appeal, in part because "even if an individual wins the appeal, DCS can overrule or amend the administrative judge's finding"—an outcome that occurred "in 28 percent of the cases in 2017," and "41 percent" of cases in 2016. Mary Jo Pitzl, *Child-Welfare Officials Keep a List of People They Say are a Danger to Kids. Even When They're Not*, Arizona Republic, Apr. 28, 2018, https://bit.ly/3ZD1EtP.

Indeed, DCS has placed people's names in the Registry even though administrative law judges found no basis for doing so. *See, e.g.*, *Phillip B. v. Arizona Dep't of Child Safety*, 512 P.3d 1043, 1045–46 ¶¶4–5 (App. 2022); *Ridgell v. Arizona Dep't of Child Safety*, 253 Ariz. 61, 508 P.3d 1143, 1145 ¶12–13 (App. 2022)—and even for legal and non-dangerous conduct. *Id.* at 1147 ¶22.

As the *Republic*'s investigative report observed, many people are unaware that their names have even been placed in the Registry. And few appeal a "probable cause" determination, partly because that is an expensive and time-consuming task, requiring costly legal representation. Pitzl, *Child-Welfare Officials, supra.* Thus the questions raised in this case are of great importance to tens, possibly hundreds of thousands of Arizonans. This Court should therefore reject DCS's opportunistic effort to avoid litigation, and resolve these questions, thereby providing guidance to the bench and bar, *State*, 86 Ariz. at 234, without requiring countless private parties—many without the means to do so—to appeal

---

S.W.3d 399 (Mo. 2007); *Petition of Preisendorfer*, 719 A.2d 590 (N.H. 1998); *Lee TT. v. Dowling*, 664 N.E.2d 1243 (N.Y. App. 1996).

their own cases in hopes of obtaining a final resolution of the same purely legal issues already presented here. *Marchese*, 49 Ariz. at 353.

Finally, DCS and Sarra still have "sufficient adversarial interest in the litigation" to present the argument fully to the Court. *Fraternal Ord. of Police Lodge 2*, 133 Ariz. at 127. DCS refuses to admit any wrongdoing or concede any argument related to the wrongfulness or unconstitutionality of placing Sarra's name in the Central Registry, and Sarra is prepared to argue all the constitutional and legal issues. The case therefore satisfies the "public importance" exception to mootness.

B. Sarra's Injury Is Capable of Repetition While Evading Review

This case also meets the standard of "capable of repetition, yet evading review," which occurs when a particular party runs the risk of experiencing the same type of harm again in the future. *Cent. Soya Co., Inc. v. Consol. Rail Corp.*, 614 F.2d 684, 688 (7th Cir. 1980). Sarra has good reason to believe she will face enforcement of the same laws in the same way in the future.

In *Wills v. U.S. Parole Comm'n*, 882 F.Supp.2d 60 (D.D.C. 2012), the plaintiff was a convict who challenged certain parole conditions imposed on him. *Id.* at 62. After he sued, the Parole Commission withdrew those conditions. *Id.* at 63. The court found that the "capable of repetition" exception to mootness applied. First, the government's withdrawal of the parole conditions did not give any reassurance that the complained-of conditions would not be imposed again. *See id.* at 71 ("Mere assurances that challenged conduct will not recur, however, have never been enough to sustain the 'heavy' burden borne by defendants in invoking the mootness doctrine."). Second, the conditions could indeed be reimposed upon him "at will" in the future. *Id.* And although the Parole Commission assured the court it would not do so, the court found that unpersuasive because the Commission had no authority to make such a promise. *Id.* at 72. "[N]one of the defendants' assurances persuade the Court that the defendants' rescission is anything other than an attempt to avoid judicial review." *Id.* at 73.

The same logic applies here—except that DCS has not even tried to make any "assurances."

DCS placed Sarra's name in the Registry because of her *parenting philosophy*. She allowed her son and his playmate to play in a public park outside of her presence (but within view of friends of hers) for 20 minutes because she rejects so-called "helicopter parenting," and believes instead that

children of her son's age should be encouraged to play independently within reasonable limits. *See* ALJ Decision.

In other words, as a result of her parenting choices, DCS accused her of "neglect"—a term Arizona law defines as "[t]he inability or unwillingness of a parent ... to provide that child with supervision ... if that inability or unwillingness causes substantial risk of harm to the child's health or welfare." A.R.S. §8-201(25)(a). But Sarra was neither *unable* nor *unwilling* to supervise Ryan; she instead made a *conscious decision* to permit him to play by himself at a safe, public playground with which she was familiar and which she found to be safe. Thus the charge against her represents DCS's determination that her parenting beliefs conflict with the law. DCS's purported modification of its neglect finding "make[s] no admissions and take[s] no position" regarding Sarra's arguments that DCS's determination was legally and factually erroneous. That means there is every reason to believe DCS will again accuse her of neglect the next time she follows her parenting philosophy and lets Ryan play by himself at a public playground under circumstances she considers safe—something she intends to do.

As in *Wills,* allowing DCS to avoid adjudication by opportunistically withdrawing its finding would allow Sarra's injury to evade review. *See also In re MH 2008-002393*, 223 Ariz. 240, 242 n.2 (App. 2009) (case challenging involuntary mental health treatment orders was not rendered moot by expiration of the order, because plaintiffs' personal circumstances made it likely that he would face a similar order in the future).

Thus the injury at issue here is capable of repetition while evading review.

Conclusion

The motion to dismiss should be *denied.* Appellees should be ordered to file their principal Rule 6 brief within ten business days of this Court's denial of the motion to dismiss.

Dated this 7th day of March 2023.

Respectfully submitted,

/s/ Timothy Sandefur
Aditya Dynar (031583)
Frank Garrison (P235816)*
PACIFIC LEGAL FOUNDATION
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
(202) 807-4472
ADynar@PacificLegal.org
FGarrison@PacificLegal.org
* *pro hac vice*

Timothy Sandefur (033670)
Scharf–Norton Center for
Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Appellant

Certificate of Service

ORIGINAL transmitted via courier service for filing this 7th day of March 2023, with:

Clerk of the Court
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, Arizona 85003

COPY of the foregoing transmitted via Email this 7th day of March 2023, to:

Dinita L. James, Assistant Attorney General
Arizona Attorney General's Office
2005 North Central Avenue
CFP/CLA – Mail Drop 1911
Phoenix, Arizona 85004
DCSPSRTMail@azag.gov
Dinita.James@azag.gov

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

Respectfully submitted,

/s/ Aditya Dynar
Aditya Dynar
Attorney for Appellant

Certificate of Compliance

There are no applicable length requirements for motions and responses thereto in the JRAD rules other than JRAD Rule 1(c), which states, "the Local Rules of Practice for the superior court … apply."

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

ARCP 7.1(a)(3) states that a response to a motion should "not exceed 17 pages, exclusive of attachments and any required statement of facts."

This Opposition to Motion to Dismiss complies with ARCP 7.1(a)(3), Maricopa County Local Rule 3.2(f), and JRAD Rule 1(c), because it does "not exceed 17 pages."

This Opposition to Motion to Dismiss also complies with the formatting and typesetting requirements of ARCP 5.2.

Dated this 7th day of March 2023.

/s/ Aditya Dynar
Aditya Dynar
Attorney for Appellant