Litigation Backgrounder
In re. Sarra L.

Executive Summary

It was just before Thanksgiving 2020 when Tucson mom Sarra L. headed to the grocery store to pick up the turkey. With her was her 7-year-old son—we'll call him Billy—and his 5-year-old friend, whom we'll call Bobby. The COVID-19 pandemic was still raging, and the store was asking people not to go inside unless they had business to transact. So Sarra dropped Billy and Bobby off at a nearby public park to play while she shopped. She knew the playground well—she had played there as a child, herself—and she saw a couple of friends at the park. If the boys had any trouble while she was shopping, they could ask those trustworthy adults for help.

What Sarra didn't count on was the Tucson police. Seeing the two boys playing on the playground, officers stopped and began interrogating them. One of Sarra's friends at the park called Sarra to tell her that the police were questioning the children, and she rushed back to the park to find that police were accusing her of child endangerment. Any child under the age of 18, officers claimed, must be accompanied by an adult supervisor at all times. Sarra was officially charged with child endangerment. A County Prosecutor later dropped those charges, but that wasn't enough for state officials, who insisted on placing Sarra's name on Arizona's Central Registry—essentially a "Do Not Hire" list that the state maintains for anyone accused of harming children. Placement in the Central Registry means a person cannot obtain licenses or certification work in jobs that involve children or "vulnerable adults," even as a volunteer.[1] Billy and Bobby were never harmed, and there's no evidence they were ever at risk. But Arizona law does not require that a person actually be convicted of any crime in order to be placed in the Central Registry—in fact, it only requires "probable cause" (that is, *suspicion*) that a person harmed a child.[2] What's more, "probable cause" is not determined by a judge following the rules of evidence and legal procedure, but by a bureaucrat in an administrative agency, who can make that decision without obeying the rules that apply in an actual courtroom.

In short, Arizona's Central Registry law gives unaccountable bureaucrats power to list their names as child-abusers—ruining their reputations and depriving them of work or even of opportunities to serve the community—based on unproven suspicion of wrongdoing.

The Goldwater Institute and Pacific Legal Foundation have joined forces to challenge the constitutionality of Arizona's arbitrary and unconstitutional Central Registry scheme—and to defend the rights of a mother who did nothing wrong.

Background

Sarra L. is a 55-year-old mother of two. In the fall of 2021, she allowed her child Billy to play with his friend Bobby on a Tucson playground for a half hour while she went to the grocery store. As a consequence, she was charged with child neglect, which state law defines as "the inability or unwillingness of a parent…to provide [a] child with supervision…if that inability or unwillingness causes unreasonable risk of harm."[3] The County Prosecutor agreed to drop those charges in exchange for Sarra taking a "life skills" class.

State officials, however, demanded more. They began proceedings to place Sarra on the state's Central Registry.

The Central Registry is a database of names of people who are legally barred from working in jobs that involve children or vulnerable adults. Someone whose name appears in the Central Registry may not be a foster parent, work in a residential treatment center, or even volunteer to work in a shelter. The consequences could be devastating for someone like Sarra, who often volunteers to help children in her community.

But placement on this "do not hire" list does *not* require that the person be convicted of a crime. In fact, the state can put someone's name on the list based on "probable cause," an evidentiary standard that falls below the "preponderance of the evidence" standard that governs civil lawsuits, and falls far short of the "beyond a reasonable doubt" rule that applies to criminal cases. The "probable cause" standard, in fact, is synonymous with *suspicion*[4]—which means the state can put someone's name on the list based merely on an official's belief that a person *may* have done something wrong.

Sarra did not, in fact, do anything wrong. Allowing Billy and Bobby to play by themselves on a playground for 30 minutes in a safe neighborhood park near their home did not present any "unreasonable risk of harm" to them. There appears to be no record of any abduction or murder ever happening in the park, and there were trustworthy adults nearby if an emergency arose. True, there is always some risk in all of everyday life, but Sarra rejects the idea of "helicopter parenting." "Children need to take risks and be trusted to be healthy," she says. "My son is a fairly precocious and intelligent young individual and he felt comfortable playing with his friend at a park for that brief period of time. He was not going to run out into the street, and was far from the street. He was prepared with a plan for safety and he felt comfortable and proud being able to be there."

The Law

The constitutional issues in Sarra's case involve what lawyers call a "burden of proof." For criminal law cases, the burden of proof is "beyond a reasonable doubt"—meaning that the state must prove the person guilty with such overwhelming evidence that the person's guilt is a moral certainty. Civil lawsuits are governed by the more relaxed standard of "preponderance of the evidence," which means enough evidence to make it more likely than not that the person did

what he or she is accused of. But Arizona's Central Registry law requires only that the state provide "probable cause" to believe the person did something wrong.[5] "Probable cause" is less than "preponderance of the evidence,"—in fact, it is a kind of substantiated "suspicion." This means that the state can put a person on the list—rendering her ineligible for work in a wide variety of business and volunteer activities—without conviction, without a trial, and without proving she did something wrong.

Most courts that have considered the issue have declared it unconstitutional to put someone's name in a Central Registry based on mere probable cause.[6] They've said that, given the severe consequences that result from putting someone's name in the Registry, the state must provide enough evidence to show that the person likely did something wrong. To do otherwise would violate the "due process of law" that the state and federal constitutions guarantee. We plan to argue that the same should be true in Arizona law: the state should be required to prove by a preponderance of the evidence that the person put a child at "unreasonable risk of harm" before placing that person in the Central Registry.

Arizona's Central Registry scheme is constitutionally suspect for another reason, too. The Department of Child Safety acts as the investigator, prosecutor, executor, and adjudicator against those it wishes to list in the Central Registry. This concentration of power in one agency deprives people like Sarra the due process of law[7] and violates the Separation of Powers Clause of the Arizona Constitution.[8] The statutory scheme not only gives free rein to the state agency to be the judge, jury, and prosecutor in these cases, it shackles state courts from meaningfully reviewing the agency's decision under the substantial-evidence standard of review.[9] By shunting these child-neglect cases to administrative agencies instead of deciding them in real courts, the Central Registry statutory scheme deprives people like Sarra of their constitutional right to an independent judgment by a court of record,[10] and their constitutional right to a jury.[11]

Case Logistics

The case is *Sarra L. v. Faust*, Cause No. 21C-1159943-DCS. The appeal was filed on July 15, 2022 in Maricopa County Superior Court.

The appellants are seeking an order vacating the decision of the Department of Child Safety.

The Legal Team

Sarra L. is represented by lawyers with Pacific Legal Foundation and the Goldwater Institute.

For Pacific Legal Foundation: Adi Dynar is an attorney with extensive experience protecting people's civil rights as a litigator, speaker, and activist. He has represented parties in state and federal courts across the nation in challenging the overreach of administrative agencies, and recently won an important case challenging the use of the Central Registry in *Phillip B. v. Arizona Dep't of Child Safety*, No. 1 CA-CV 20-0569, 2022 WL 2128078 (Ariz. Ct. App. June 14, 2022).

For the Goldwater Institute: Timothy Sandefur is Vice President for Litigation, who litigates important cases for economic liberty, private property rights, free speech, and other matters in states across the country. The author of several books and dozens of scholarly articles, Sandefur also holds the Institute's Duncan Chair in Constitutional Government.

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[1] A.R.S. § 8-804.

[2] The Supreme Court has defined probable cause as "a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the accused is guilty." *Clinton v. Rice*, 76 Ariz. 358, 367 (1953) (citations omitted); *see also Ornelas v. United States*, 517 U.S. 690, 696 (1996) (probable cause is "not [a] 'finely-tuned standard[],'" but a "fluid concept[]," and "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in [a] belief.")

[3] A.R.S. § 8-201(25)(a).

[4] *In re Twenty-Four Thousand Dollars ($24,000) in U.S. Currency,* 217 Ariz. 199, 202 ¶13 (Ct. App. 2007); *Gonzales v. City of Phoenix*, 203 Ariz. 152, 155 ¶13 (2002). Arizona courts have never defined "probable cause" precisely—on the contrary, they have said that it means not proof, but only "the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'" *State v. Sisco*, 239 Ariz. 532, 535 ¶ 8 (2016). But they have characterized it as "a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the accused is guilty." *Gonzales v. City of Phoenix*, 203 Ariz. 152, 155 ¶ 13 (2002).

[5] A.R.S. § 8-804.01(D).

[6] *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994); *Jamison v. State, Dep't of Soc. Servs., Div. of Fam. Servs*., 218 S.W.3d 399 (Mo. 2007); *Petition of Preisendorfer*, 719 A.2d 590 (N.H. 1998); *Cavarretta v. Dep't of Child. & Fam. Servs*., 660 N.E.2d 250 (Ill. 1996); *Lee TT. v. Dowling*, 664 N.E.2d 1243 (N.Y. App. 1996).

[7] Ariz. Const. art. 2, § 4; U.S. Const. amend XIV, § 1.

[8] *Id*. art. 3.

[9] A.R.S. § 12-910(F).

[10] Ariz. Const. art. 6, § 30.

[11] *Id*. art. 2, § 23; art. 6, § 17.