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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. C2022-000221-001 Office of Administrative Hearings No. 21C-1159943-DCS **MOTION FOR STAY OF AGENCY DECISION** **(ORAL ARGUMENT REQUESTED)**

Appellant Sarra L. respectfully requests a stay of the agency decision pending the final

disposition of this appeal under A.R.S. § 12-911 and JRAD[1] Rule 3. The ALJ erroneously found probable cause to substantiate DCS's allegation of neglect against Sarra L. Exh1:7 (ALJ decision); Exh2:1 (certifying ALJ's decision as final).[2] Several statutory-construction and constitutional principles support a stay here. Staying the decision means that DCS cannot place Sarra L.'s name in the Central Registry while this case remains pending in Arizona's courts—or that DCS must remove her name from the list if already placed there. Sarra L. is filing and serving this motion simultaneously with the Notice of Appeal according to JRAD Rules 2(c), 4(e), and ARCP Rule 4.

Legal and Factual Background[3]

During the Thanksgiving 2020 shopping season, when Covid-19 raged and grocery stores encouraged shoppers to avoid family shopping trips (to prevent the gathering of large crowds and reduce in-store time), Sarra L. let her seven-year-old son Ryan (pseudonym) and his five-year-old friend play at a park while she went to buy groceries. Exh1:1–2. Sarra knew the area to be safe; she had played at the same park as a child, and she saw a friend teaching a tai chi class at the park. Exh1:2. She believed the children, if the need arose, would consult with that friend. Sarra does not believe in helicopter parenting, but instead believes that children's developmental growth and needs are best served by allowing them to play independently in safe places as occurred here. Exh1:4.

While Sarra was at the grocery store, the tai chi teacher called and told Sarra that a police officer was talking with her children. *Id.* She rushed back; the officer charged her with two counts of contributing to the delinquency of a minor. *Id.* The children were never suspected of

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[1] Glossary of abbreviations: ALJ (Administrative Law Judge of the Office of Administrative Hearings), ARCAP (Arizona Rules of Civil Appellate Procedure), ARCP (Arizona Rules of Civil Procedure), DCS (Department of Child Safety), JRAD (Arizona Rules of Procedure for Judicial Review of Administrative Decisions), OAH (Office of Administrative Hearings), PSRT (Protective Services Review Team).

[2] Exhibit 1 (ALJ Decision); Exhibit 2 (DCS Decision).

[3] The ALJ trial transcript is not currently available. Per A.R.S. § 12-904(B)(5), and A.A.C. § R2-19-122(B), OAH makes an audio copy available, which Sarra L. then must get transcribed and deliver to OAH before OAH can certify it as part of the record. Sarra, through her attorneys, has requested but has not yet received the audio copy of the ALJ hearing.

being in any danger, so the county prosecutors dropped the charges in exchange for Sarra taking a life-skills class. *Id.*

Despite the charges being dismissed, DCS conducted its own investigation and concluded there was probable cause that Sarra neglected her son Ryan. *Id.* at 3. Sarra requested an OAH hearing, which occurred in March 2022. *Id.* The ALJ concluded that there was "probable cause," A.R.S. § 8-811(K), to conclude that Sarra "neglected" Ryan as that term is defined in A.R.S. § 8-201(25), and recommended that Sarra's name be entered in the Central Registry under A.R.S. § 8-804(E). Exh1:7.

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 under A.R.S. §§ 8-800–819, or (2) by Arizona state courts under A.R.S. § 8-844(C). Sarra's case falls under the first category. Both court- and DCS-substantiated child-neglect allegations are recorded in DCS's Central Registry. A.R.S. § 8-804(A). A.R.S. § 8-804 lists at least *20 ways* in which a Central Registry entry can and will be used against Sarra.

"Substantiated finding" is not defined in the statute. DCS, using its generic rulemaking authority under A.R.S. § 8-453(A)(5), has defined it as, among other things, "a proposed substantiated finding that ... [t]he alleged perpetrator did not timely appeal." A.A.C. § R21-1-501(17). A timely appeal to Superior Court renders DCS's decision provisional until the Superior Court affirms it.

DCS had until June 3, 2022, to accept, reject, or modify the ALJ decision. A.R.S. §§ 1-243, 41-1092.08. Having taken "[n]o action" by that date, Exh2:1, DCS certified the ALJ decision as final on June 16, 2022. Exh2:1; A.R.S. § 41-1092.08(D).

Sarra L. had 35 days from the June 16 DCS decision to appeal to the Superior Court under A.R.S. §§ 12-904(A), 41-1092.08(H). Sarra L. has timely filed a notice of appeal with this Court on July 15, *i.e.*, within 35 days.

Standard for Granting a Stay Pending Appeal

A.R.S. § 12-911(A)(1) authorizes this Court to stay an administrative agency's decision

"for good cause shown." The Court can grant a stay "[w]ith or without bond, ... and before or after the [appellees'] filing of the notice of appearance." *Id.*

JRAD Rule 3(b) states the stay standard: "1. A colorable claim demonstrating, as regards substantive merit, a seemingly valid, genuine, or plausible claim under the circumstances of the case; and 2. That the balance of harm favors granting the stay."

In 2020, the Arizona Supreme Court amended JRAD Rule 3 to reject the preliminary-injunction-style standard in favor of the lenient stay standard quoted above.[4] Thus, instead of a strong likelihood of success on the merits, courts stay agency action if there is a "colorable," "plausible" claim. And instead of irreparable injury, outweighing harm, or a showing of which side public policy favors, the Court stays agency action if the "balance of harm favors granting the stay." JRAD Rule 3(b); *see also P&P Mehta LLC v. Jones*, 211 Ariz. 505, 507–10 ¶¶6–25 (App. 2005) (explaining reasons for the "colorable claim" and "balance of harm" factors for granting JRAD stays, and why the preliminary-injunction factors "d[o] not provide an appropriate template by which to judge whether a stay of an administrative agency's decision should be granted").

The "colorable claim" factor does not require "a showing that the petitioner is reasonably likely to prevail on appeal," but "something less": "an assertion that is seemingly valid, genuine, or plausible, under the circumstances of the case." *P&P*, 211 Ariz. at 510 ¶21 (simplified); JRAD Rule 3(b)(1). To be "plausible" means less than "a probability requirement." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

The "balance of harm" factor does not require "irreparable harm"; it only requires the Court to weigh "the petitioner's harm ... against the harm that would accrue to the agency or other parties to the proceedings." *P&P*, 211 Ariz. at 510 ¶23; JRAD Rule 3(b)(2). And if "the balance of harm tips in favor of the petitioner" then the petitioner has shown "the 'harm' necessary to constitute 'good cause.'" *P&P*, 211 Ariz. at 510 ¶23; JRAD Rule 3(b)(2). To

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[4] *See* Ariz. Supreme Ct., Rule Amendments from Recent Rules Agenda(s), R-20-0008 (Aug. 31, 2020), https://bit.ly/3ajOduD; *see also* Arizona Rules Forum, R-20-0008, https://bit.ly/3Ayi2m5 (providing the history and context for the current standard).

balance harms, the Court can employ "tools ... to mitigate potential harm to the agency's interest" such as requiring a "bond" "if monetary or performance considerations are involved." *P&P*, 211 Ariz. at 510 ¶24; JRAD Rule 3(c). Requiring a bond "may allay the harm" sufficiently for the Court to "find that the balance of harm favors the petitioner." *Id.* at 510 ¶24.

Reasons for Staying Agency Action

I. Sarra L.'s Claims Are Colorable

DCS can place in the Central Registry only "substantiated" "reports of child abuse and neglect." A.R.S. § 8-804(A). An abuse or neglect finding becomes "substantiated" only if, as relevant here, "[t]he alleged perpetrator did not timely appeal." A.A.C. § R21-1-501(17)(b). Sarra L. timely appealed the DCS decision to Superior Court, so there is no "substantiated finding" that DCS can enter in the Central Registry while this timely-filed appeal remains pending. Even in the absence of the regulation, it would violate the state and federal constitutions' Due Process Clauses and the state constitution's Separation of Powers Clause, to place people's names in the Central Registry while a timely-filed appeal remains pending in state courts. Sarra, therefore, presents a colorable claim that DCS should be stopped from entering her name in the Central Registry while her state-court appeal remains pending, or that DCS should be ordered to remove her name from the Central Registry if DCS has already entered it there while this case remains pending in state courts.

A. DCS Can Place Only Substantiated Findings in the Central Registry

Traditional tools of construction resolve this case in Sarra's favor. A "substantiated finding" is a finding that:

> a. An administrative law judge found to be true by a probable cause standard of proof after notice and an administrative hearing and the Department Director accepted the decision;
>
> b. The alleged perpetrator did not timely appeal; or
>
> c. The alleged perpetrator was not entitled to an administrative hearing because the alleged perpetrator was legally excluded as defined in subsection (11).

A.A.C. § R21-1-501(17).[5] *See also Phillip B. v. DCS*, __ Ariz. __, 2022 WL 2128078, at ¶16 (App. June 14, 2022) (same).

Subsections (17)(a) and (17)(b) must be read together because there is no "or" after (17)(a). When drafters omit an "and" or an "or" between two enumerated items, "it is generally considered to convey the same meaning ... as though *and* were inserted between the items." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 119 (2012). *Reading Law* gives the example of a Wyoming statute that has the *semi-colon–or* formulation in some but not all subsections. *Reading Law* 123 ((a); or (b); or (c); (d)) (discussing *Voss v. Ralston (In re Voss's Adoption)*, 550 P.2d 481 (Wyo. 1976); 1957 Wyo. Sess. Laws § 1-710.2). The Wyoming Supreme Court construed the statute to require both (c) *and* (d). *Id.* at 124. Scalia and Garner say that that reading "was correct" because "asyndeton (absence of conjunction) is normally equivalent to syndeton (use of the conjunction *and*)." *Id.* The court's reading, *Reading Law* explained, also "compli[es] with ... the omitted-case canon ... [and] the presumption of consistent usage." *Id.*

So too here. The absent conjunction between (17)(a) and (17)(b) should be read as an "and." Thus, the ALJ must find probable cause and the DCS Director must accept that decision and the defendant must fail to timely appeal for there to be a "substantiated finding" that DCS can enter in the Central Registry.

In *Phillip B.*, for example, the ALJ found no probable cause, DCS's Director rejected the ALJ's decision, and Phillip timely appealed; the Court of Appeals then ordered DCS to remove Mr. Phillip B.'s name from the Central Registry. 2022 WL 2128078, at ¶¶16–17. This Court should do the same in Sarra's case because, although the ALJ found probable cause and the DCS Director accepted that decision, Sarra did timely appeal to this Court. As explained below, this reading of A.A.C. § R21-1-501(17) is also necessitated by the constitutional-doubt canon. *Reading Law* 247–251.

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[5] Subsection (17)(c) refers to A.A.C. § R21-1-501(10), which talks about a previous substantiated finding made by an ALJ or a court based on "the same allegations." Since neither exists here, (17)(c) is not in play in this case.

B. Given Sarra's Timely Appeal, the Finding Is Not "Substantiated," and Therefore Her Name Cannot Be Placed in the Central Registry

The plain meaning of Subsection (17)(b) resolves the matter in Sarra's favor. The word "appeal" in (17)(b) refers to a timely appeal to a Superior Court. Sarra timely appealed the DCS decision to the Superior Court. Therefore, the ALJ's finding that she neglected Ryan is not a "substantiated finding." That means DCS cannot place her name in the Central Registry while this case remains pending in state courts—and DCS must remove it if DCS has already entered her name in the Registry.

The word "appeal" in (17)(b) plainly refers to an appeal to a Superior Court. First, *Trisha A. v. DCS* explained that "a word or phrase is presumed to bear the same meaning throughout a text." 247 Ariz. 84, 88 ¶17 (2019) (simplified) (quoting *Reading Law* 170). And "a material variation in terms suggests a variation in meaning." *Reading Law* 170 (presumption of consistent usage canon). The law consistently uses the word "appeal" to mean something different from "hearing." The statute, A.R.S. § 8-811, consistently uses the word "hearing" *21 times* to denote an OAH hearing. And the corresponding regulations, A.A.C. §§ R21-1-501 *et seq.*, consistently use the word "hearing" *18 times* to denote an OAH hearing.[6] DCS's regulations, by contrast, use the word "appeal" six times in four separate sections, plainly referring to a *judicial* appeal after an OAH decision.[7] Simply put, "hearing" means the OAH hearing, and an "appeal" is the review process in Superior Court. Consequently, a finding is not substantiated under A.A.C. § R21-1-501(17) while a timely *appeal* is pending in Superior Court.

Second, the absurdity doctrine, *Reading Law* 234–239, states that courts read the words as written to avoid "absurd," "untenable" or "irrational" results. *State v. Estrada*, 201 Ariz. 247, 251 (2001). As a practical matter, it is absurd to think of the first-ever hearing a person gets (the OAH hearing) as an "appeal." Thus, the use of "appeal" in the phrase "[t]he alleged perpetrator did not timely appeal," A.A.C. § R21-1-501(17)(b), refers to an appeal to Superior

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[6] Five sections use the word "hearing" a total of 18 times, all to denote an OAH hearing. A.A.C. §§ R21-1-501 (six times), R21-1-502 (one time), R21-1-503 (two times), R21-1-504 (five times), R21-1-505 (four times).

[7] A.A.C. §§ R21-1-501 (three times), R21-1-505 (one time), R21-1-507 (one time), R21-1-508 (one time).

Court, not to an OAH hearing. That is, the finding against Sarra is not a "substantiated finding" because she "timely appeal[ed]" to the Superior Court. The Court should so conclude and stay the agency decision.

Third, other contextual clues support reading the word "appeal" in (17)(b) to mean an appeal to Superior Court. For example, A.A.C. § R21-1-508(A) states, "[i]f the perpetrator does not appeal the proposed substantiation, PSRT shall enter the perpetrator's name and the substantiated finding in the Central Registry." Even if Section 508(A)'s "appeal" could be read to mean a hearing before the OAH, Section 508 states that if an appeal is taken, no entry in the Central Registry can be made.

The interpretive-direction canon also shows that subsections (17)(a), (17)(b), and (17)(c) capture the entire universe of situations that give rise to a "substantiated finding." When a "definitional section says that a word 'means' something, the clear import is that that is its *only* meaning." *Reading Law* 226. For example, if a statute defines "domestic animal" as "any equine animal, bovine animal, sheep, goat, and pig," the definition, correctly understood, excludes cats. *Id.* at 227 (explaining *Commonwealth v. Massini*, 188 A.2d 816, 817 (Pa. Super. Ct. 1963)). Because A.A.C. § R21-1-501(17) (emphasis added), which is the definition section, starts, "'Substantiated Finding' *means*," the definition given in its three subsections is its *only* meaning; anything that does not meet that definition cannot be a "substantiated finding."

But even if the word "appeal" were construed to refer to the OAH hearing, the outcome would be the same. Sarra "timely appeal[ed]" DCS's initial substantiation decision finding neglect by requesting an OAH hearing within 20 days of receiving DCS's letter. *See* A.R.S. §§ 8-811(A), (C) (giving the 20-day deadline to "request ... a hearing"); Exh1:3 at ¶7 (noting that DCS's "letter dated January 22, 2021 ... notified [Sarra] of a proposed substantiated finding of neglect"); Exh1:3 at ¶9 (noting that Sarra "submitted an appeal ... on or about February 11, 2021"). January 22 to February 11 is 20 days.

For these reasons, Sarra has presented a "colorable claim," JRAD Rule 3(b)(1), that there is no "substantiated finding" here. A stay should thus be issued to stop DCS from

entering her name in the Central Registry, or to order its removal if DCS has already placed her name there.

C. The State and Federal Due Process Clauses Require a Final Resolution of the Merits by State Courts Before DCS can Place a Person's Name in the Central Registry

Even assuming A.A.C. § R21-1-501(17)(b) does not require a stay, the Court should still stay DCS's decision because Sarra states a "colorable claim" under the Due Process Clauses of the state and federal constitutions. Ariz. Const. art. 2, § 4; U.S. Const. amend. XIV, § 1. Indeed, if A.A.C. § R21-1-501(17) is construed to allow DCS to place Sarra's name in the Central Registry before she exhausts her state court appeal, then it is unconstitutional.

The constitutional-doubt canon requires courts to "avoid constitutional doubt by interpreting a rule in a manner that does no violence to its text." *Jones v. Sterling*, 210 Ariz. 308, 315 ¶27 (2005); *State v. Arevalo*, 249 Ariz. 370, 373 ¶9 (2020) (same) (quoting *Reading Law* 247–251). To avoid infringing on vital due process rights, the Court should grant the stay and bar placement of Sarra's name in the Central Registry.

The Due Process Clauses require that DCS not execute its adjudicative decision against a person if that person timely files an action in state court challenging that agency decision. That is because the statutory scheme enables DCS to act as the investigator, prosecutor, judge, jury, and executor in DCS-substantiation cases:

- DCS investigates child-neglect allegations. A.R.S. §§ 8-804, 8-811, 8-804.01(B)(1).
- DCS makes the initial decision, which 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).
- DCS then prosecutes the matter during the OAH hearing against the alleged perpetrator. A.R.S. §§ 8-811(I), (J).
- If the OAH decision is challenged, DCS acts as the reviewing adjudicator. A.R.S. § 41-1092.08(B), (F).
- And in all scenarios, DCS acts as the enforcer by entering names in the Central Registry. A.R.S. § 8-804(A).

Sarra presents a colorable claim that entering her name in the Central Registry under this scheme while her timely-filed state-court case remains pending flunks the test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Arizona Supreme Court has instructed state courts to

analyze the challenged statutory scheme and the government's actions under *Mathews* in challenges brought under the federal Due Process Clause. *Horne v. Polk*, 242 Ariz. 226, 230 ¶15 (2017). And as explained below, Arizona's Due Process Clause provides more robust protections to Sarra than the federal Constitution. Sarra wins under either the state or the federal Due Process Clause.

1. Fourteenth Amendment's Due Process Clause

Mathews requires a balance of three factors: (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 the additional or substitute procedural requirements would entail. 424 U.S. at 335.

First, Sarra has weighty private interests. Her "good name, reputation, honor, [and] integrity" are all protected private interests. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). There is a "protectable interest" in "reputation" where, as here, the stigma of being placed on the list of child abusers is "tied to" Sarra's interest in "privacy and autonomy of family relationships." *Bohn v. Dakota County*, 772 F.2d 1433, 1435 (8th Cir. 1985).

The *Mathews* "private interests" are broader in scope than the life/liberty/property interests or fundamental rights necessary to satisfy the substantive aspects of the Due Process Clause. *Mathews* itself is a testament to that. The "private interest" in preventing termination of social-security benefits triggered the *Mathews* test even though there is no recognized fundamental right to social-security benefits.

Sarra 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. PCAOB*, 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.

Second, the risk of erroneously depriving Sarra of these private interests through DCS's administrative-adjudication procedure is high, and there are no additional or substitute procedural safeguards except this Court's stay of the agency decision. Names once placed in the Central Registry remain there for 25 years unless a court orders otherwise. A.R.S. § 8-804(G); *Phillip B.*, 2022 WL 2128078, at ¶1. A rule like A.A.C. § R21-1-501(17)(b), which prevents DCS from automatically placing a person's name in the Central Registry if the person "timely appeal[s]," is constitutionally necessary to prevent erroneous deprivation of the person's private interests. The rule is workable because it requires no further action from DCS if the person timely appeals DCS's decision.

A JRAD Rule 3 stay motion is a substitute procedural safeguard, but not an adequate one. A.A.C. § R21-1-501(17)(b) does not condition nonplacement in the Central Registry on the showing of a "colorable claim" or "balance of harm" on appeal. It simply states: if there is a "timely appeal," there is no "substantiated finding." In other words, a timely appeal renders DCS's decision provisional until the Superior Court affirms it. A rule that prevents the investigating, prosecuting, and adjudicating agency from also executing its decision against a private party—*i.e.*, maintaining the status quo ante—should be Due Process 101. In contrast, a rule that frees the agency's hand to also execute its unilateral, in-house decision against the private party while the Superior Court evaluates the decision's merits flunks *Mathews*. The second *Mathews* factor thus also favors Sarra.

And third, the government has little to no interest in placing Sarra's name in the Central Registry before she exhausts her state court appeal. *Mathews* determined that there would be a negative fiscal effect on the government if individuals received social-security funds while they exhausted appeals. 424 U.S. at 347. The third factor favored the government in *Mathews*. Not so here. Making a Central Registry entry takes a few keystrokes' worth of a DCS employee's time. Even if minuscule, the rule Sarra proposes saves DCS a few cents—a fiscal benefit for the government. In contrast, the prospect of depriving Sarra of her good name, reputation, privacy, and meaningful judicial review, is many orders of magnitude worse in comparison. The third *Mathews* factor thus also favors Sarra.

In sum, the *Mathews* analysis shows that a rule like A.A.C. § R21-1-501(17)(b) is constitutionally necessary under the Fourteenth Amendment's Due Process Clause. The Court should so hold.

2. Arizona Constitution's Due Process Clause

Arizona's Due Process Clause, Ariz. Const. art. 2, § 4, provides greater protections to Sarra. The federal Constitution "sets a floor for the protection of individual rights. ... Other federal, state, and local government entities generally possess 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.").

Arizona courts have not adopted *Mathews* under Arizona's Due Process Clause. *State v. Wagner*, 194 Ariz. 310, 313 ¶15 (1999). Arizona has probably rejected the third *Mathews* factor, and Arizona gives "dispositive" weight to the second *Mathews* factor. *James S. v. DCS*, No. 1 CA-JV 18-0150, 2019 WL 613219, at *8 (App. Feb. 14, 2019) (Perkins, J., dissenting) ("The dispositive question for us under [*Mathews*] turns on the extent to which the procedure presents the risk of erroneous deprivation of ... rights."); *see also* Philip Hamburger, *The Inversion of Rights and Power*, 63 Buff. L. Rev. 731 (2015) (government interests cannot become lazy substitutes for careful definition of rights).

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.*, 247 Ariz. at 98 ¶67 (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)). All three *Mathews* factors already go in Sarra's favor. She is protected to a greater extent under the

state constitution's Due Process Clause—which considers the second factor dispositive. She has therefore shown a colorable claim exists that a rule like Subsection (17)(b) is constitutionally necessary.

Relying on the *Mathews* test, courts in many other states have held it unconstitutional to place a person's name in the Central Registry on the basis of mere probable cause, rather than an evidentiary standard such as preponderance of the evidence. *See, e.g., Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994); *Jamison v. State, Dep't of Soc. Servs., Div. of Fam. Servs.*, 218 S.W.3d 399, 406 (Mo. 2007); *Petition of Preisendorfer*, 719 A.2d 590, 593 (N.H. 1998); *Cavarretta v. Dep't of Child. & Fam. Servs.*, 660 N.E.2d 250, 258 (Ill. 1996); *Lee TT. v. Dowling*, 664 N.E.2d 1243, 1251–52 (N.Y. App. 1996). "Probable cause," of course, falls below "preponderance of the evidence," and is equivalent to a form of substantiated suspicion. *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). Consequently, courts that have addressed the issue have concluded that it is unconstitutional to place a person in a Central Registry on the basis of mere probable cause.

In *Jamison*, the court found it unconstitutional to place two nurses' names in Missouri's Central Registry based on accusations of neglect. 218 S.W.3d at 402. The investigator issued a report finding probable cause to substantiate the accusation, whereupon the agency placed their names in the Registry after substantiating a probable-cause finding. *Id.* at 403. The state supreme court found this improper under *Mathews*. The risk of an erroneous conclusion, the court said, meant the penalty of placing names in the Central Registry could only be imposed based on the preponderance of the evidence; the probable cause standard "is ill suited to the determination of whether an individual has abused or neglected a child," the court said, because it "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). Thus "[d]ue process requires [an agency] 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. The other cited cases reached similar conclusions. For

this reason alone, the placement of Sarra's name in the Registry is unconstitutional under either or both Due Process Clauses—and, again, constitutional avoidance counsels in favor of granting the stay requested, pending final adjudication of this and other issues noted in the Notice of Appeal.

Under either Arizona's or the Fourteenth Amendment's Due Process Clause, a rule like A.A.C. § R21-1-501(17)(b)—as properly interpreted—is constitutionally necessary. Sarra has stated a colorable, plausible claim under both Clauses. The Court should so announce and stop DCS from placing Sarra's name in the Central Registry while this case remains pending, or order it removed from the Central Registry if DCS has already placed it there.

D. The Separation of Powers Clause Requires Staying Agency Execution of an Adjudicative Decision Rendered by the Same Agency to Allow Independent State Courts to Decide the Merits

Arizona's Separation of Powers Clause divides the powers of the government "into three separate departments," and prohibits any one department from exercising the powers "properly belonging" to other departments. Ariz. Const. art. 3. Sarra states a colorable claim that it violates the Separation of Powers Clause for the investigating, prosecuting, and adjudicating agency to execute its decision against the private party before the Superior Court reviews the decision's merits. DCS's hasty placement of a person's name in the Central Registry ill serves both the due-process and separation-of-powers guarantees of the Arizona Constitution. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672 (2012) (discussing due process as a particular instantiation of separation of powers).

There is no question that DCS and OAH are both executive-branch agencies. There is no question that DCS investigated, prosecuted, and decided Sarra's case. Deciding cases is not an "executive" function; it is a judicial function. Not even James Landis, the leading expositor and defender of administrative power during the twentieth century, believed the fiction that the executive is "executing" the law whenever an executive agency adjudicates cases in performance of delegated adjudicative power. James M. Landis, *The Administrative Process* 15 (1966) ("It is obvious that the resort to administrative process is not, as some suppose, simply

an extension of executive power. ... Confused observers have sought to liken this development to a pervasive use of executive power.").

Landis is right. The notion that DCS is merely "executing" the law is a transparent fiction because DCS also investigated, prosecuted, *and adjudicated* the child-neglect allegation against Sarra. The notion that DCS can then execute its own decision against a private party before waiting for judicial review conflicts with the Arizona Constitution's guarantee that the judicial department's function properly belongs to the judicial department, so no self-help execution by DCS can be constitutionally permissible before such judicial merits-review occurs. Arizona courts have repeatedly and robustly applied the Separation of Powers Clause by evaluating which department is performing which function and deciding whether that function properly belongs to another department. *J.W. Hancock Enterprises, Inc. v. Registrar of Contractors*, 142 Ariz. 400, 405 (App. 1984); *State ex rel. Woods v. Block*, 189 Ariz. 269 (1997); *Brnovich*, 242 Ariz. 588; *Enterprise Life*, 248 Ariz. 625 (App. 2020); *Roberts v. Arizona*, __ Ariz. __, 2022 WL 2560002 (July 8, 2022).

Thus, a rule like A.A.C. § R21-1-501(17)(b), which, properly interpreted, bars a person's name from being placed in the Central Registry if the person timely appeals, and while judicial review is underway, is necessary to make the DCS-substantiation statutory scheme satisfy the Separation of Powers Clause. The Court should conclude that Sarra has presented a colorable, plausible claim and stay DCS's decision.

In sum, the first JRAD Rule 3(b) factor (colorable claim) goes in Sarra's favor. Either under Arizona's or the Fourteenth Amendment's Due Process Clause, or Arizona's Separation of Powers Clause, or as a matter of applying A.A.C. § R21-1-501(17)(b)'s plain words to avoid addressing constitutional issues, this Court should stop DCS from placing Sarra's name in the Central Registry while this case remains pending, or order it removed from the Central Registry if DCS has already placed it there.

II. The Harm to Sarra Outweighs Any Conceivable Harm to DCS

The second JRAD Rule 3(b) factor (balance of harm) also goes in Sarra's favor. While this factor does not require the showing of "irreparable harm," *P&P*, 211 Ariz. at 510 ¶23,

Sarra is nonetheless irreparably harmed if DCS enters her name in the Central Registry without waiting for this Court to decide the merits. If entered, her name will remain in the Central Registry for 25 years, absent an order directing DCS to remove it. A.R.S. § 8-804(G). Even when a court orders DCS to remove names wrongfully entered in the Central Registry, DCS claims that it does not have to remove the name until after it seeks *further* appellate review, and such review is denied. *Cf.* ARCAP 24.

A.R.S. § 8-804 lists at least *20 ways* in which a Central Registry entry can and will be used against Sarra, including but not limited to:

- Determining her qualifications for any job where she would be near a child;
- Determining her eligibility for employment with the state, a child welfare agency, or positions that provide direct service to children or vulnerable adults;
- And informing any governmental or nongovernmental employer where she seeks a job to provide direct services to children.

These are comprehensive and devastating harms. *Cf. Jamison*, 218 S.W.3d at 406. Sarra works with refugees, some of them children. Exh1:4. Placement in the Central Registry will have a ruinous effect on her work helping refugees.

In contrast, no harm "would accrue to the agency or other parties to the proceeding." *P&P*, 211 Ariz. at 510 ¶23. The balance of harm, therefore, tips in Sarra's favor. She satisfies the JRAD Rule 3 standard for granting stays. The Court should stay DCS's decision.

III. The Court Should Waive the Bond, or Require Only a Nominal-Value Bond

A.R.S. § 12-911(A)(1) authorizes this Court to waive the bond when it stays agency decisions. JRAD Rule 3(c) echoes the same. There is no DCS-related statute that states otherwise. *See* A.R.S. § 12-911(A)(1) ("unless required by the statute under authority of which the administrative decision was entered"); JRAD Rule 3(c) ("except as otherwise provided by statute"). There is no relevant "bond" requirement in A.R.S. Title 8.

This is not the type of case in which a bond is typically required. Sarra is not asking the Court to stay the payment of monies. *See, e.g., Kresock v. Gordon*, 239 Ariz. 251, 254 ¶11 (App. 2016) (finding a bond is typically required when "damages [are] awarded"; attorney-fee awards are not to be included in calculating the amount of bond). She is only asking to stay the DCS

decision so that her name is not prematurely placed in the Central Registry. Because the "potential harm to the agency's interest or that of another party" is not monetary, there is no potential harm that can be "mitigate[d]" by requiring a bond. *P&P*, 211 Ariz. at 510 ¶24. There are no "monetary or performance considerations ... involved," meaning that "a security or performance bond" is not required from Sarra. *Id.*

In the alternative, if in the Court's view a bond would sufficiently "allay the harm" under the balance-of-harm factor, *id.* at ¶24, the Court should require the posting of only a nominal-value bond of $1.

Conclusion

The Court should (1) stop DCS from placing Sarra L.'s name in the Central Registry while the case remains pending in Arizona's courts, or order DCS to remove her name from the Central Registry if DCS has already placed it there, and (2) waive the bond, or require only a nominal-value bond of $1.

DATED this 15th day of July, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

ARCP 7.1(a)(2) states that a motion should "not exceed 17 pages, exclusive of attachments and any required statement of facts."

This Motion for Stay of Agency Decision complies with ARCP 7.1(a)(2), Maricopa County Local Rule 3.2(f), and JRAD Rule 1(c), because it does "not exceed 17 pages, exclusive of attachments and any required statement of facts."

/s/ Aditya Dynar
Aditya Dynar
Attorney 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 Office of Administrative Hearings No. 21C-1159943-DCS **(PROPOSED) ORDER STAYING AGENCY DECISION**

On the motion of Appellant Sarra L., and good cause having been shown,

IT IS ORDERED that the decision of the Arizona Department of Child Safety in *In the Matter of Sarra L.*, No. 21C-1159943-DCS (June 16, 2022), is stayed until further order of the Court.

IT IS FURTHER ORDERED that the Department of Child Safety remove Sarra L.'s name from the Central Registry if the Department has already placed it there.

IT IS FURTHER ORDERED that the Department of Child Safety refrain from placing Sarra L.'s name in the Central Registry until further order of the Court.

IT IS FURTHER ORDERED that Appellant Sarra L. is not required to post a bond.

DATED: _____

_____
Judge of the Superior Court