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I Introduction.

In this appeal, the four respondents are individuals, two men and two women, who for two years were listed in Missouri's central registry system as persons against whom there were probable cause findings of child abuse and neglect. They were never charged with any crime associated with these findings. After being on the list for two years, the respondents won their *de novo* appeal in the Cole County Circuit Court that reversed the findings of probable cause against them, a ruling which is not being appealed.

The appeal here is from the portion of the trial court's judgment declaring that it is unconstitutional to maintain the names of persons in the child abuse and neglect central registry for purposes of dissemination to prospective employers, or to substantially inhibit such persons' ability to adopt or become licensed foster care parents, based upon a probable cause finding by a government investigator, without first affording such persons the opportunity of a full due process hearing. To the extent Missouri's Child Abuse Act (the "Act") is used this way, the trial court declared it to be unconstitutional under the due process guarantees of the Fourteenth Amendment to the U.S. Constitution and Article 1, §§ 2 and 10 of the Missouri Constitution, both facially and as applied. The trial court stayed these rulings pending appeal. Order and Judgment, Appellant's Appendix A14, A20-A23.[1]

[1] Also on appeal are three other rulings contained in the trial court's opinion. Appellant's Brief, Points III, IV and V.

The portion of the trial court's decree that the appellant, the Missouri Department of Social Services,[2] is not appealing was the decision on the merits that there was not probable cause to conclude that any of the petitioners physically abused or neglected BA and SD, the two alleged victims. Order and Judgment, Appellant's Appendix A15-A16, A23.

II How The Central Registry Typically Works: A Procedural Outline.

The division maintains a child abuse hotline and investigates child abuse and/or neglect allegations that are reported to them via the hotline. T. 488, 503. Normally, a single DFS investigator is assigned to investigate the hotline calls shortly after they are reported. T. 494, 496. At the conclusion of each investigation, the investigator makes a finding.[3] T. 502, 160. The finding is reviewed informally by a supervisor. T. 503, 517, 520. If the investigator makes a finding that child abuse or neglect occurred, and a supervisor approves the finding, that information is placed into the central registry via the division's information system, a statewide network. Jacobs-Kenner depo., pp. 69-70, Res. App. A20-21; T. 502-03. The division controls access to the registry.

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[2] Suit was originally brought against the Missouri Department of Social Services, Division of Family Services. The latter has since become the Children's Division. This party will be referred to as the "department," "division," "state," or "appellant."

[3] Prior to August 28, 2004, this finding would be based on a "probable cause" standard. Thereafter, it is to be based on a "preponderance of the evidence" standard. Mo. Rev. Stat. §210.110(2).

The investigator's finding goes directly into the central registry when it is entered into the information system. T. 503. The entry contains the name of the perpetrator of the abuse, the date of the hotline call, and a brief description of the severity of the abuse and/or neglect (*i.e.*, severe, moderate, *etc.*). Exhibits 7A, 7B, 7C, 7D, Res. App. A10-13. According to James Harrison, assistant deputy director of the division, this information must be entered into the central registry when it completes its investigation and renders its finding of abuse or neglect, before the alleged perpetrator has the right to challenge them. T. 502-04, 507. The division believes this process is mandated by Mo. Rev. Stat. Chapter 210 R.S.Mo. T. 503, 507, 516.

Typically, clerical personnel, who have access to the central registry for input and inquiry, make the entries into the central registry. T. 508-11. However, within the Out-of-Home Investigative Unit ("OHI unit"), which is assigned by the division to investigate school settings, OHI staff may make the central registry entries from their own laptop computers. T. 513. If the investigator finds that the allegations are "unsubstantiated," then no entry is placed in the central registry. T. 502-03. The information remains in the central registry during the appeals process–the initial administrative review, the review by the Child Abuse and Neglect Review Board ("CANRB"), and the judicial review–until the case is overturned. T. 505, 508. However, in cases that are being appealed, the central registry does not contain any notation to that effect. T. 505.

After the initial agency finding is made, the accused is notified by letter of the finding, as well as his or her right to a review. Mo. Rev. Stat. §210.152.2; 13 CSR 40-31.025(1); T. 504. The review process is three-tiered. T. 516-17. At the first level, upon the request of the accused, the division's county director shall review the decision of the local division office and determine whether to uphold or reverse. 13 CSR 40-31.025(2); T. 517, 520. At the second level, upon the request of the accused, the Child Abuse and Neglect Review Board shall review the decision of the division and shall sustain the division's determination if such determination is supported by probable cause (or, for cases originating after August 28, 2004, a "preponderance") and is not against the weight of such evidence. Mo. Rev. Stat. §210.152; 13 CSR 40-31.025(8). CANRB is composed of a group of citizens, appointed by the Governor. T. 518; Mo. Rev. Stat. §210.153. At CANRB hearings, the accused may be represented by counsel but has no right of cross-examination and no rules of evidence apply. Mo. Rev. Stat. §210.153; 13 CSR 40-31.025(8); T. 467-68. CANRB may rely on hearsay, and the alleged victim does not need to be present. T. 462-63, 467-68, 480. At the third level, the CANRB finding may be appealed to a circuit court. Mo. Rev. Stat. §210.152.5; T. 505.

While the review process is pending, the finding remains in the central registry. T. 505, 508. All names in the central registry are supposed to remain confidential from the general public. Mo. Rev. Stat. §210.150; T. 521-22. However, pursuant to Mo. Rev. Stat. §210.150.2, the division is required to disclose the names contained in the central registry to various individuals and entities. They are listed here, with the names of

persons and entities whose access to registry information may be limited by the trial court's decree highlighted in bold-face italics:

(1) Appropriate federal, state or local criminal justice agency personnel, or any agent of such entity, with a need for such information under the law to protect children from abuse or neglect;

(2) A physician or a designated agent who reasonably believes that the child being examined may be abused or neglected;

(3) Appropriate staff of the division and of its local offices ***;

(4) Any child named in the report as a victim, or a legal representative, or the parent, if not the alleged perpetrator, or guardian of such person ***;

(5) Any alleged perpetrator named in the report ***;

(6) A grand jury, juvenile officer, prosecuting attorney, law enforcement officer involved in the investigation of child abuse or neglect, juvenile court or other court conducting abuse or neglect or child protective proceedings or child custody proceedings, and other federal, state and local government entities, or any agent of such entity, with a need for such information in order to carry out its responsibilities under the law to protect children from abuse or neglect;

(7) ***Any person engaged in a bona fide research purpose***, with the permission of the director ***;

(8) ***Any child-care facility; child-placing agency; residential-care facility, including group homes***; juvenile courts; ***public or private elementary schools;***

public or private secondary schools; or any other public or private agency exercising temporary supervision over a child or providing or having care or custody of a child who may request an examination of the central registry from the division for all employees and volunteers or prospective employees and volunteers, who do or will provide services or care to children. Any agency or business recognized by the division or business which provides training and places or recommends people for employment or for volunteers in positions where they will provide services or care to children may request the division to provide an examination of the central registry. ***;

(9) ***Any parent or legal guardian who inquires about a child abuse or neglect report involving a specific person or child-care facility who does or may provide services or care to a child of the person requesting the information.*** ***;

(10) ***Any person who inquires about a child abuse or neglect report involving a specific child-care facility, child-placing agency, residential-care facility, public and private elementary schools, public and private secondary schools, juvenile court or other state agency.*****;**

(11) Any state agency acting pursuant to statutes regarding a license of any person, institution, or agency which provides care for or services to children;

(12) Any child fatality review panel***;

(13) ***Any person who is a tenure-track or full-time research faculty member at an accredited institution of higher education engaged in scholarly research, with the permission of the director***. ***.

Mo. Rev. Stat. §210.152.2 (emphasis added).

There is no statutory preclusion to disclosure of central registry information during the time that the accused is appealing a division finding, and the information disclosed does not include any mention that the finding is in the appeals process. T. 507.

In 2002, CANRB reversed about 39% of the division's probable cause determinations that were appealed to it. T. 519; Petitioners' Exhibit 20A. The division does not keep statistics on the percentage of cases that are reversed at the initial administrative review or at the judicial level, but cases are also overturned at each of these levels. T. 519-20. The total percentage of reversals of local division office probable cause determinations has been higher than 40%. T. 519-20.

III Contextual Background Regarding The Respondents And Exercise Of Discipline At The School Where They Worked.

Petitioner CS is the founder and director of Heartland, located near Bethel, Missouri. Heartland consists of a school, Heartland Christian Academy ("HCA"), and a faith-based recovery program for troubled youth. Joint Stip., ¶4, Res. App. A1; T. 252, 357. CS is currently the president of CNS Ministries, Inc., the umbrella organization that manages the youth recovery program and HCA. T. 216, 428, 554; Exhibit 2A, Res. App. A6. For the last 40 years, CS also has owned Ozark National Life Insurance Company,

of which he is chairman of the board. T. 365. CS's religious faith is a significant part of his life. He converted to Christianity at the age of 19 and became serious about his faith 11 years ago. T. 366. CS and his wife decided to build a place to take care of children who are in trouble and/or who have great needs. T. 368. As CS testified, Heartland is "about restoring kids, about getting them to know how to work, know how to live a decent life, know how to tell the truth, and just have some respect and dignity." T. 368.

CS started the Heartland program in 1995. T. 358, 366. The program receives no government aid. T. 368. CS and his wife finance Heartland; they have spent between $50 and $60 million of their own funds on Heartland. T. 426. Sixty-five percent of the children enrolled at Heartland pay nothing; for those who do contribute to the cost of the program, most pay only a few hundred dollars a month. T. 368. Heartland currently has about 100 staff members, which includes teachers and staff in the girls' and boys' dormitories. T. 367.

Most of the participants in the youth recovery program are placed at Heartland by their parents. T. 410. A few are placed by juvenile court judges. T. 410. Participants in the youth recovery program initially reside in a dormitory located on campus and eventually in group homes also located on campus. T. 253-54. They attend school at HCA. Youth from the community also attend HCA, but most of them do not participate in the recovery program. T. 435-36.

Heartland is an open campus with no lock-down facilities. T. 254, 367, 369. The program does not utilize medication as a form of restraint, handcuffs, or any other form

of physical restraints. T. 254, 369, 436. Instead, Heartland utilizes a "tally" system wherein students are penalized when they violate rules either at school or in the dormitories. T. 219-20, 255. This leads to a progressive system of punishment when a student reaches a certain tally level. T. 255-56. Heartland utilizes corporal discipline as a last resort when a student has either reached the highest level of tallies or engaged in a single course of conduct that bespeaks open defiance of staff. T. 256-57, 372. Corporal punishment is administered with paddles that are approximately one-half inch thick, three inches wide, and two to two-and-a-half feet in length. T. 223-224; Respondent's Exhibit F. Per policies and practices that were in place during the relevant time periods, the swats could not be given by a staff member who was angry or emotional at the time. T. 372. At least one witness is required to be present, and, although the number of swats depended upon the situation, no more than 10 swats could be given to any child during the course of a 24-hour time period. T. 229, 263, 334, 372.

Respondents MP, FA and AW were staff members at Heartland during the period in question. Joint Stip. ¶4, Res. App. A1. MP has been employed at Heartland for five years. T. 217. He is married and has children. T. 252. He is co-director of the boys' dormitory. T. 217, 252. FA was born in Kansas City, Missouri and resided there her entire life until her family moved to Heartland. T. 313-14. She was employed at Heartland from April 1999 to April 2003, with a break in service. T. 286, 314. While there, she worked primarily as the administrative assistant to the director of the children's homes. T. 286. In that position, she oversaw daily office duties, had contact with parents

of children, handled initial telephone calls from parents who were considering enrolling their children, and participated in interviews of children and parents. T. 286. Later, her duties included working with the children at Heartland. T. 314. AW was employed at Heartland from August 2000 to August 2002. T. 333. While at Heartland, she taught second-grade, worked with the girls who lived in her home for a period of time, and then helped manage the girls' dormitory. T. 333-34.

Tim Carter was the division's OHI unit investigator whose assigned geographical area covered Heartland. T. 109-10. Between 1996-2001, Heartland had periodic contacts with him. T. 370, 497. Heartland administrators talked occasionally with Mr. Carter about their corporal discipline policies, and Mr. Carter gave a seminar to Heartland employees concerning corporal discipline. T. 370-71. Mr. Carter advised Heartland that he did not consider their discipline policies to be unreasonable, and he acknowledged that corporal punishment may occasionally leave slight bruising or red marks but that did not render it unreasonable. T. 371-72.

In late Spring 2001, the previous good relationship that Heartland had enjoyed with the division became badly strained. Heartland's relationship with Mike Waddle, the Juvenile Officer for the Second Judicial Circuit, also became strained. Among other concerns, Heartland felt that Waddle's office and a new administration at the division was treating Heartland unfairly and was arbitrarily trying to redefine abuse to discourage Heartland from utilizing corporal punishment. T. 370-375, 415.

IV Facts Of This Case.[4]

SD and BA, the two alleged victims, were boarding students at HCA and involved in the youth recovery program at the time of the incidents. Joint Stip., ¶5, Res. App. A1. The allegations were that both were injured after they received corporal punishment allegedly administered by the individual respondents.

A Discipline Of SD.

On March 23, 2001, SD's mother, MS, admitted her into the youth recovery program at Heartland. Exhibit 3A, Res. App. A8. SD was from Pennsylvania and was a relative of Penny Hairston, the personal secretary of CS. T. 51, 316, 440; Petitioners' Exhibit 3B. On March 24, 2001, SD became physically combative and verbally abusive. T. 295. FA contacted CS so that the situation with SD would not escalate. T. 293, 295, 308-09, 315-16, 339, 377. While CS normally does not become involved in day-to-day discipline at Heartland, T. 369, he believed that his involvement in the SD situation was necessary because she was the niece of his personal secretary and because of his

[4] The individual respondents do not believe the facts regarding the specific incidents of corporal punishment in this case are relevant to this appeal, since the trial court's judgment on the merits was that there was no probable cause for any finding of abuse or neglect against anyone, and the division has not appealed that judgment. Nevertheless, in its brief, the division has made a point of describing the specifics of the allegations. Accordingly, the individual respondents include some reference to them in this statement of facts.

involvement with the intake of SD on the previous day. T. 376-78. After approximately 20 to 30 minutes of counseling efforts proved futile, CS administered corporal discipline to SD, utilizing on of Heartland's wooden paddles. Order and Judgment, Appellant's Appendix A9; T. 239, 300, 340-41, 378. In total, CS administered no more than 10 swats to SD during the entire incident. T. 261, 306, 329, 381, 388. SD never made any complaints of physical abuse or injury to any Heartland staff member, including her aunt and uncle, Penny and John Hairston. T. 251, 262, 320, 359, 362, 376, 383, 442-43. SD never made any complaints of injury or abuse to a full-time nurse who was on the staff at HCA at the time of the incident. T. 452, 456.

B Discipline Of B A.

BA was a girl who was placed at Heartland by her father, Mike A, in February 2001. T. 272-274. One of her counselors, a psychologist, recommended Heartland to her father. T. 273. BA's father and mother were divorced and were involved in some disputes over custody of BA. At the time of the February 2001 placement, her father had physical custody. T. 268-272.

On May 28, 2002, MP administered five swats to BA's buttocks because of excessive tallies she received at Heartland for misbehavior. Order and Judgment, Appellant's Appendix A9; T. 219-20, 287, 290; Respondent's Exhibit G. MP administered the swats with one hand using one of Heartland's wooden paddles. Other Heartland staff members, including FA and AW, were present as witnesses, per Heartland policy. CS was not present at the time the swats were received by BA, nor was

he aware that swats were being administered to her. Order and Judgment, Appellant's Appendix A9; T. 223-226, 323, 336, 384.

C Investigation Of The SD and BA Matters; Findings Of Probable Cause.

On June 1, 2001, BA's mother, Bonnie A, arrived in Knox County from New York, without any prior notice to Mike A, for the purpose of removing her daughter from Heartland. Joint Stip. ¶6, Res. App. A1; T. 166-70, 279-82. The mother had sought the assistance of a Knox County Sheriff's Deputy and the Knox County Deputy Juvenile Officer, Melissa McCauley. Joint Stip. ¶6, Res. App. A1; T. 165-66, 194.

Bonnie A, accompanied by Knox County Sheriff Kite and McCauley, then went to Heartland and proceeded to remove BA, who was placed in her mother's custody. Joint Stip. ¶6, Res. App. A1; T. 166-70. BA and her mother were then taken to the Knox County juvenile office where BA was interviewed by McCauley. T. 170, 214. McCauley also took a photograph of BA's buttocks which showed some very slight bruising and redness. T. 181. During the course of this interview, BA also alleged that SD, one of her roommates, had been subjected to physical abuse based upon the March 24 paddling incident. T. 173.

On June 4, 2001, McCauley made a call to the DFS hotline alleging abuse and/or neglect of BA and SD at Heartland, which started what proved to be a joint investigation of both cases. Joint Stip. ¶7, Res. App. A1; T. 86, 196, 198-99. In this call, McCauley alleged that BA had been subjected to abuse and/or neglect by swats, resulting in bruising, and by losing sixty pounds in three weeks from not eating. T. 25, 172-80, 210-

14. It was also alleged during this call that SD had been subjected to abuse from excessive corporal punishment. T. 25, 33, 120, 173, 214.

On or about June 6, 2001, a second hotline call was made by a different reporter that related only to SD. Joint Stip. ¶7, Res. App. A1; T. 120. In this call, the caller alleged that CS physically abused SD by administering 9-10 swats to SD with a board which caused bad bruises that were bleeding. T. 53,120. The allegations in the second hotline call regarding the number of swats were different than in the first hotline call. T. 120. SD did not make this second hotline call. T. 128.

After receiving these allegations, the division began investigating the four respondents concerning the discipline of BA and SD. Joint Stip. ¶8, Res. App. A1. The allegations were investigated by Richard Engelhardt of the OHI unit. *Id.* Engelhardt never interviewed SD's parents; moreover, he never even sought to interview SD's parents or her aunt. T. 128-29. On June 5, Engelhardt interviewed SD at Heartland. T. 26-27, 54, 119.

Engelhardt also testified that during his interview of SD she provided him with some photographs that allegedly depicted parts of her body after the corporal discipline at issue was administered. T. 42, 44, 49-51. As the trial court noted, the pictures do not appear to corroborate the graphic descriptions of SD's injuries (*i.e.*, bad bruises and bleeding) that were alleged in the hotline call. T. 51, 126-127.

With regards to BA, Engelhardt relied on the written report from McCauley and never sought to interview BA, her mother, or her father. T. 55, 79-80, 84, 117, 192-93, 268. Engelhardt did not seek to do a telephone interview of BA, who had left Heartland

before Engelhardt began investigating these cases. T. 55, 117. The only person that Engelhardt spoke to concerning his investigation of the BA matter was McCauley. T. 117.

During his investigation of the BA matter, Engelhardt learned that BA had alleged that she had not eaten for three weeks, that Heartland staff allowed her to make that decision, and that she had lost 60 pounds during this period. T. 118. Engelhardt found that this specific allegation was not credible, because not eating for three weeks and losing this amount of weight did not sound reasonable. T. 118.

On July 12, 2001, the division made entries into the Central Registry indicating probable cause findings of abuse and neglect against CS, MP, FA, and AW relating to the alleged abuse of BA and SD. Joint Stip. ¶9, Res. App. A1; Exhibits 7A, 7B, 7C, 7D, Res. App. A10-13. No one from the division has been able to identify who authorized the entries, who made the entries into the central registry, or how those entries were made. T. 65, 103-04, 152-53, 502-08, 510-15; Jacobs-Kenner depo., p. 70, Res. App. A21.

Also on July 12, 2001, a meeting occurred at Heartland between various division officials, Mike Waddle, juvenile officer for the 2nd Judicial Circuit, and Heartland. T. 414, 416, 489. CS and David Melton, General Counsel for Heartland, represented Heartland at the meeting. T. 489-90, 554-56, 564. The division was represented by Denise Cross, director, James Harrison, assistant deputy director, David Durbin, an attorney for the division, and Donna Rohrbach, then the head of OHI and also Engelhardt's supervisor. T. 58, 137, 482, 489, 556.

The purpose of the meeting was to try to resolve the various issues that had developed in late Spring 2001 between Heartland, the division, and Waddle's office. T. 373-74, 415. The primary issue discussed at the meeting was the corporal punishment policy at Heartland. T. 415-16. James Harrison, currently the assistant deputy director of the division, stated that Missouri law provides for corporal punishment that is conducted in a reasonable manner.[5] He further advised CS and Melton that there were differing opinions on when corporal discipline was being administered in a reasonable manner. T. 416, 418-19, 491, 495, 564. At that same meeting, Waddle was more definitive; he advised that he would not consider slight bruising or redness resulting from corporal punishment to necessarily be abuse. T. 418-19. None of the division personnel present at the meeting challenged Waddle on this point. T. 418-19.

During a break at the July 12th meeting, Melton was approached by Rohrbach and Durbin, both of the division. Rohrbach expressed her desire that the BA/SD investigation go forward and asked to set up an interview with CS and the alleged perpetrators. Rohrbach indicated that the investigation was still open and that the division needed to gather all of the information to make a fair determination. This discussion lasted about two minutes. T. 556, 559, 562. CS had felt that "he was playing in a rigged game," that "the process was unfair, and that the outcomes are predetermined." T. 562. Shortly

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[5] In July 2001, Mr. Harrison oversaw the out-of-home care policy, the residential licensing program, the child abuse and neglect hotline, and the central registry. T. 487-88, 500.

before the July 12th meeting, Melton and CS had a conversation where both were concerned that the investigations were not being conducted by neutral parties. T. 563. There was concern that a statement by CS would be used to obtain a criminal prosecution. T. 562-63. Because of the recent controversy between Heartland, the division and Waddle's office, CS was reluctant to submit to the interview on July 13th; he was concerned with the division's fairness and objectivity. T. 386. He believed that whatever he told DFS was going straight to prosecutors. T. 386, 562. However, Melton thought the meeting signaled the beginning of a better relationship with the division and, based upon Rohrbach's representations, he advised CS that he felt it would be safe for CS to give an interview to Rohrbach and agreed to arrange an interview for the next day. T. 385, 420, 560, 562, 564.

At no time, however, did Rohrbach tell Melton that a central registry entry had already been made against CS showing that he had physically abused SD, and Melton was not aware of this. T. 389, 420, 560. Indeed, when CS gave the interview to Rohrbach on July 13th, he was not aware that respondent had already placed his name in the central registry, as Rohrbach never disclosed this fact to CS. T. 389.

Despite CS's concerns, on July 13, 2001, Rohrbach appeared at Heartland and obtained a statement from CS in which he denied the abuse allegations. T. 58-61, 148-51, 385-89, 415, 419. During the interview, Rohrbach did not even ask CS about the BA case, about which he would have been glad to share that he had no involvement in that matter. T. 387. With regard to the SD matter, CS agreed that, during March of 2001, he had swatted her eight to nine times, but did not consider it to be abuse. T. 60, 381.

D The Four Respondents Are Notified; Administrative Review; CANRB Hearing; Filing In Circuit Court And Discovery.

In a letter dated August 1, 2001, Engelhardt notified each petitioner that he had determined that there was probable cause that BA and SD were physically abused and neglected by each of the four individual respondents. Joint Stip. ¶10, App. A1; T. 63-64, 68-69, 155, 504. Engelhardt based his conclusion upon the following: McCauley's report of the statement that BA made to McCauley, the statement he obtained from SD, the photos of BA and the photos that SD provided him, and the statement that Rohrbach obtained from CS on July 13, 2001. T. 55, 58-59, 79-80. Engelhardt testified at the hearing that he had, in his own mind, reached a conclusion on these cases in late July or early August. Tr. 86, 91, 149, 152. He also testified that when a determination is made in a case, the investigation is essentially complete. T. 112-13. In any event, Engelhardt could not have reached his conclusion until after July 13, 2001 because he did not have the summary of Rohrbach's interview with CS. Tr. 58, 84, 136, 148-49. Engelhardt did not know whether he made those entries or why he would have done so if he did. T. 153. Neither Engelhardt nor any of the division's witnesses were able to explain why the central registry entry was made on July 12th or who made it. T. 103-04, 152-53, 515.

On August 27, 2001, counsel for the four respondents requested an initial agency administrative review of Engelhardt's probable cause finding. Exhibit 10, Res. App. A14. Additionally, pursuant to Mo. Rev. Stat. §210.150, their counsel requested copies

of all records and reports in the possession of the division which it used in making a determination of probable cause. Exhibit 10, Res. App. A14.[6]

On or before October 1, 2001, Pamela McGowan, Mr. Engelhardt's immediate supervisor, provided all the case investigative documents to Mr. Bill Alberty, the Prosecuting Attorney for Knox County. Joint Stip. ¶11, Res. App. A1; Exhibit 12, Res. App. A15. Criminal charges were never filed against any of the four alleged perpetrators relating to BA or SD. Joint Stip. ¶11, Res. App. A1.

On October 18, 2001, Ms. Rohrbach, citing subsections "210.150.2(5) and 210.152.(3)," Mo. Rev. Stat., refused to grant the four respondents' requests for an administrative review and for release of the records because, according to Ms. Rohrbach, criminal charges were "pending." Exhibit 10, Res. App. A14. This was not accurate, as no criminal charges were ever filed by Alberty. Joint Stip. ¶11, Res. App. A1.

The four respondents properly requested an administrative review. On July 10, 2002, the CANRB hearing was held in Jefferson City, Missouri with all respondents present, both in person and by counsel. Joint Stip. ¶13, Res. App. A1; T. 461. At that hearing, all four respondents were precluded from either calling the alleged victims as witnesses or introducing a tape-recorded statement made by BA, one of the alleged

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[6] Mo. Rev. Stat. 210.150.2(5) provides that "investigation reports will not be released to any alleged perpetrator with pending criminal charges arising out of the facts and circumstances named in the investigation records until an indictment is returned or an information filed."

victims. T. 420-21, 466-67. The CANRB stated that they could not allow the testimony of a juvenile. T. 421. The four respondents would have liked for their attorneys to have been able to compel the attendance of BA and SD at the CANRB and judicial hearings and would have liked for BA and SD to have been required to state their allegations under oath before and at the CANRB hearing. T. 467, 540, 548-49.

On August 2, 2002, the CANRB "upheld the 'Probable Cause' finding as determined in the investigation" by the OHI unit of the division. The four respondents received this letter on or about August 9, 2002. Joint Stip., ¶14, Res. App. A1.

The four respondents each filed their petitions for *de novo* judicial review on October 1, 2002. Appellant's Appendix A13. During a deposition on April 7, 2003, Engelhardt admitted that he had possibly erred in some of his probable cause findings regarding BA. T. 92-96. When asked at this deposition what he intended to do to correct the mistake, he stated that he would bring this mistake to his supervisor's attention. T. 96. Mr. Engelhardt admitted during a second deposition on June 30, 2003 that he had not brought the mistake to his supervisor's attention. T. 96, 101. Mr. Engelhardt's reason for the delay was that he "got busy" with some other matters and "just lost track of it." T. 102. Mr. Engelhardt did bring the mistake to his supervisor's attention within one or two days after the second deposition. T. 102. At trial, Engelhardt was not aware of any changes, if any, that the division had made to the central registry entries concerning petitioners; he left this issue with his supervisor to do whatever needed to be done, if anything. T. 104. At the time of trial, CS's name remained in the central registry as having physically abused BA and SD, and AW and FA's names remained in the Central

Registry as having both physically abused and neglected BA and SD. T. 424, 462, 539, 550; Exhibits 7A, 7B, 7C, 7D, Res. App. A10-13. The division did not remove petitioners' names from the central registry until the trial court ordered it to do so in the Order and Judgment of January 8, 2004.

E The *De Novo* Trial In The Circuit Court.

On October 21-22, 2003, when the trial was held, the four respondents testified, and, as the trial court found, made credible denials of the allegations of abuse and neglect against each of them. Order and Judgment, Appellant's Appendix A13. Neither BA nor SD appeared at the trial. *Id*. The other witnesses were as follows: Richard Engelhardt, Melissa McCauley, James Harrison, Michael Armstrong, Rebecca Powell, Lena Bowen, and David Melton. Portions of video-taped depositions were played of Michael Waddle, Denise Cross, and Jerrie Jacobs-Kenner.

At trial, Engelhardt reiterated his deposition testimony that if he could he would "change the wording of [his] conclusions to more accurately reflect what it should be." T. 92. He would find probable cause of physical abuse of SD by only CS, neglect of SD by only MP, FA, and AW, and physical abuse of BA by only MP. T. 93-94.

The trial court found no credible evidence to support the allegations of abuse or neglect of BA and SD by any of the petitioners. Order and Judgment, Appellant's Appendix A13-14. Although the trial court did not consider the hearsay statements of the alleged victims to be admissible evidence, it did allow the presentation of same. *Id*. The hearsay statements at issue were as follows: (1) the oral and recorded statements of BA, as presented by McCauley; and (2) the oral statement of SD, as presented by Engelhardt.

Even assuming the admissibility of these statements, the trial court found the hearsay statements of the victims to be less credible than the testimony of the four respondents. Accordingly, the trial court held that it would reach the same result on the merits of the abuse allegations even with the hearsay statements of the alleged victims considered. *Id*.

F The Impact Of Being Listed In The Central Registry.

At the trial, each of the petitioners testified as to the individual impact of the central registry entries. Both FA and AW desire to get married and have children in the future. T. 470, 542. AW testified, "I've wanted to adopt my whole life." T. 470. Indeed, each of the petitioners desire to have the viable option of adopting children and being licensed foster care parents in the future. The central registry entries relating to these cases will substantially inhibit their ability to do so. Order and Judgment, Appellant's Appendix A14; T. 429-30, 470-71, 481, 543, 552-53.

The entries in the Central Registry have already impacted AW in her efforts to work with youth. AW left Heartland about one year ago and eventually began her current employment as a youth and children's pastor at her church, the Lighthouse Assembly of God, in Port Isabelle, Texas. T. 472-73. She has had to make some embarrassing disclosures to leaders of her church about the current central registry entries. T. 473-74. The pastor of that church knew AW before she went to Heartland and had sought to hire her at that time. T. 472. AW believes that long-standing relationship, that the pastor knew her personality and character, is why she was able to secure her current job despite the central registry entries against her. T. 472. Moreover, when AW had to come to Missouri for the instant trial, questions naturally arose as to why she was traveling to

Missouri for a week. T. 474. AW is pained that her parishioners now know that she had a record for child abuse. T. 475. If the probable cause findings were upheld, she testified, it would potentially devastate her ability to obtain future employment as a youth minister, which is her current profession and career choice. T. 477. AW's only professional jobs have been caring for children. T. 471. Her vocational plans are, "and forever . . . will be, to continue in the ministry," as a youth pastor, a children's pastor, or an associate pastor, all of which would "always be dealing with youth and children." T. 477. She has been unable to work as a substitute teacher. AW decided not to apply for a substitute teaching position because the application informed her that a background check would be completed. AW was concerned about the central registry entry being disclosed to people in her community. T. 475-76, 481. AW also testified that she desired that the CANRB hearing would have occurred closer to the time that her name was entered into the central registry. T. 469. She also desired an earlier judicial hearing. T. 470.

As to FA, the central registry has also impacted her in her efforts to work with youth. FA recently moved to Kansas City, Missouri and joined a church. T. 544. When she joined the church, she was expected to participate in the rotation of working with toddlers and the first and second-graders, which she wanted to do. T. 544. She was denied the opportunity to do voluntary youth ministry at her church because of her awareness that a background check would reveal the central registry entries. T. 285, 544-46. FA informed her pastor of the background problem, as the church requires such youth workers to submit to background checks. T. 544-47. FA desires to serve as a volunteer in youth ministry, and she wants to have the opportunity to work in child-care

facilities in the future. T. 543-44. FA testified that she understood that her name had been in the central registry since around the middle of 2001. T. 541. The CANRB hearing did not occur until July 2002, and the judicial review did not occur until October 2003. T. 541. FA testified that she wishes that the CANRB and judicial hearings had occurred earlier than they did. T. 542. She believes that earlier hearings would have shortened the time that her name was in the central registry. T. 542.

MP's profession and career choice is working with and ministering to youth. T. 551. He wants to pursue child-care and youth work for the rest of his life. T. 551. Although MP is currently employed at Heartland and has no immediate plans to leave, he may leave the employment of Heartland in the future. T. 550-51. He is an at-will employee, and, if he leaves, he wants the opportunity to work with kids in his employment. T. 551-52. The central registry entries relating to these cases will substantially inhibit his ability to do so. T. 551-53.

CS testified that "Heartland is my life. Whatever happens to Heartland, happens to me." T. 426. CS lives at Heartland with his wife, and fourteen youths in the Heartland recovery program live in their home. T. 426. Although the decision of the Court in this matter would not impact CS financially or his position with Ozark National Life Insurance Company, the decision would affect other aspects of CS's life and the ministry at Heartland. T. 425. CS has expended large amounts of time, money, and energy into developing the ministry to youth at Heartland. T. 426. Indeed, since about 1995 he has spent about 60 million dollars founding, building, and running Heartland but makes no pecuniary profit from Heartland. T. 426. CS has periodically received questions from

parents about CS's name being in the central registry. T. 426. To date, CS has mitigated the damage of these allegations and the central registry entries by being able to say that the allegations are under review. T. 426-27. The central registry entry against CS has "already affected us [HCA and the youth recovery program] considerably," and the entry "will continue" to have a negative effect. T. 427. In November 2001, the SD matter was publicized in the newspapers. T. 421. As CS testified, "[t]he founder of a ministry that's a child abuser, that's devastating." T. 427.

Both Denise Cross and James Harrison of the division also testified in this case concerning the impact of central registry entries. Although Harrison testified that a central registry entry would not automatically preclude someone from receiving approval to serve as a licensed foster home or adoptive resource in Missouri, he did testify that "[a]bsolutely ... [i]t would be looked at . . ." T. 529-30. Additionally, Ms. Cross testified that the registry serves to inform those who can access it under the law and to help them make better decisions. Cross depo., p. 71, Res. App. A26. Cross further testified that whether the division would hire someone with multiple substantiated abuse and neglect findings in the central registry would depend upon the position that person is seeking. Cross depo., p. 71, Res. App. A26. Cross then conceded that such a person would have difficulty obtaining employment with the division as a children's service worker who is responsible for investigating child abuse and neglect or as a person who cares for children who have been victims of abuse and neglect "or probably anyone in that capacity." Cross depo., p. 72, Res. App. A26.

ARGUMENT

In this case, the Court is asked to review whether a lower-level government investigator, exercising virtually unbridled discretion, unrestrained by rules of evidence, and using a standard of proof which until now has not even required him or her to believe that it is more likely than not that a citizen has committed child abuse or neglect, should be permitted to place that citizen's name in Missouri's central registry as a "substantiated" child abuser, prior to the citizen's right to be heard in a meaningful manner.

The four respondents were administrators or staff members at Heartland, a faith-based youth rehabilitation center and boarding school in northeast Missouri. Heartland enjoyed a good relationship with the division for a number of years. After disagreements developed between the division, the juvenile office and Heartland over its corporal discipline policy in the Spring of 2001, a juvenile officer made the hotline call in this matter in June of 2001. The division conducted an investigation, and unsuccessfully attempted to secure criminal prosecution of the respondents. By July 2001 respondents became convinced that the division had already predetermined an outcome and three of the four respondents asserted their Fifth Amendment privileges and refused to give statements. Respondents' worst suspicions turned out to be true: the division put all four names into the central registry on July 12, 2001, one day before obtaining a statement from CS, the sole respondent who submitted to an interview. For more than two years, respondent's names remained in the central registry, placed there on the word of a single government investigator who now admits that is initial conclusions, in substantial part, were wrong.

What is not at stake in this appeal is the protection of Missouri's abused or neglected children. No child *in extremis* is endangered by the trial court's opinion, nor does the central registry serve any function in regards to the emergency removal of children from an abusive or neglectful environment. Under Missouri law, emergency removals of children are accomplished by others—physicians, law enforcement officers and juvenile authorities—often with the help of the division. These emergency removals or other provisions are made weeks, if not months, before any determination has been made as to whether an individual should be included in the central registry.

The trial court's judgment does not impede maintenance of a central registry or sharing of information in it with law enforcement or child protection authorities.

Finally, the trial court decreed, all apart from the constitutional issues here, that there was no probable cause that any of the four respondents in this appeal were guilty of any abuse or neglect. The department is not appealing that portion of the judgment.

Standard of Review

Since this was a court-tried case, the trial court's judgment "will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). These are the standards applied in reviewing trial court judgments resulting from *de novo* appeals of findings of abuse or neglect by the division. *Petet v. State, Dept. of Social Services, Div. Of Family Services*, 32 S.W.3d 818, 822 (Mo.App. W.D.2000); *Lipic v. State*, 93 S.W.3d 839, 841 (Mo.App. E.D. 2002).

I-II[7] The Missouri Central Registry Scheme Is Unconstitutional Under The Due Process Clauses Of The United States And Missouri Constitutions Because It Satisfies The "Stigma Plus" Test In That It Causes Not Only Injury To Reputation But In Addition Places A Burden On Employment, Adoption And/Or Foster Parenting, Without First Providing The Procedural Due Process That Is Constitutionally Required.

When making a federal procedural due process claim, the parties advancing the claim must demonstrate that they possess a constitutionally protected interest in life, liberty or property, and that state action has deprived them of that interest. U.S. Const. Amend. XIV, §1. In evaluating a procedural due process claim, the courts typically use a two-step analysis: (a) whether parties advancing the claim were deprived of a constitutionally protected liberty or property interest; and (b) if so, what process was due. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)(quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972)).

A Is There A Constitutionally Protected Interest?

The Appellant's sweeping statement that "[t]he trial court declared facially unconstitutional the entirety of Chapter 210 RSMo" (Appellant's Br. 35) is of course incorrect. Indeed, the trial court did not even go so far as to rule that Missouri's maintenance of a central registry system was unconstitutional: "[T]he state's right in maintaining a Central Registry of individuals who have legally neglected or abused a

[7] Respondents' first section responds to both Brief Points I and II in appellant's brief.

child is not questioned." Order and Judgment, Appellant's Appendix A-20. The trial court rather found that the central registry system is unconstitutional to the extent that it burdens employment, adoption and/or foster parenting without requiring "sufficient safeguards to properly balance the individual and governmental interests with regard to the risk of error." *Id.*, Appellant's Appendix A-19 through A-22.

In determining whether there is a constitutionally protected interest, the parties agree that the point of departure is *Paul v. Davis*, 424 U.S. 693 (1976), a federal class action tort claim under 42 U.S.C. §1983 against police chiefs who had distributed flyers to 800 merchants identifying certain individuals as shoplifters. The Supreme Court, in its ongoing battle to thwart efforts to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States" (*Id.* at 701), held that "if a government official defames a person, **without more**, the procedural requirements of the Due Process Clause of the Fourteenth Amendment" are not brought into play (*Id.* at 708; emphasis added). "We have noted," the Court said, "the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law." *Id.* at 701. The Supreme Court noted that its case law did "not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.*

What began in *Paul v. Davis* as the Supreme Court's restriction against using the federal civil rights laws as a means to sue local officials for mere defamation later

became known by lower federal courts and state courts as the "stigma plus" requirement.[8] It is now "well established that damage to a person's reputation alone is not sufficient to implicate a Federal liberty interest." *See e.g., Cavarretta v. Department of Children and Family Services*, 660 N.E.2d 250, 254 (Ill.App. 2 Dist. 1996) *citing Paul v. Davis*, 424 U.S. 693, 701 (1976). However, loss of reputation coupled with some other tangible element can rise to the level of a protectible liberty interest, known as "stigma plus." *Valmonte v. Bane,* 18 F.3d 992, 999 (2d Cir. 1994).

1 The "Stigma" Element Of The "Stigma Plus" Requirement Is Satisfied By The Missouri Central Registry Scheme.

There is no dispute that persons whose names are placed on the child abuse registry suffer a stigma, *i.e.,* "public opprobrium" and a loss of reputation. *See e.g. Valmonte*, 18 F.3d at 999-1000; *Lee T.T. v. Dowling*, 664 N.E.2d 1243, 1250 (N.Y.App.

[8] While "stigma-plus" has thus become widely accepted as a test under the U.S. Constitution, individual respondents are unaware of any Missouri case holding that, in this particular area, interpretations of the due process provisions of the Missouri Constitution are coterminous with the U.S. Constitution. *Cf.* Appellant's carefully-worded suggestion that "Missouri's Due Process Clause is interpreted similarly to the federal Due Process Clause. *See, e.g., Moore v. Board of Educ.*, 836 S.W.2d 943 (Mo. banc 1992)." Appellant's Br. 29, 37. But *Moore v. Board of Educ.* is only an example of a similar interpretation. It does not announce any rule of general applicability.

1996)(branding an individual a child abuser certainly calls into question that individual's "good name, reputation, honor, or integrity").

In Missouri, access to information contained in the central registry is available to a wide range of persons and organizations, far exceeding what is necessary for law enforcement or child protection purposes. According to the statute, the following persons have access to investigative records contained in the central registry:

> (1) Appropriate federal, state or local criminal justice agency personnel, or any agent of such entity, with a need for such information under the law to protect children from abuse or neglect;
>
> (2) A physician or a designated agent who reasonably believes that the child being examined may be abused or neglected;
>
> (3) Appropriate staff of the division and of its local offices ***;
>
> (4) Any child named in the report as a victim, or a legal representative, or the parent, if not the alleged perpetrator, or guardian of such person ***;
>
> (5) Any alleged perpetrator named in the report ***;
>
> (6) A grand jury, juvenile officer, prosecuting attorney, law enforcement officer involved in the investigation of child abuse or neglect, juvenile court or other court conducting abuse or neglect or child protective proceedings or child custody proceedings, and other federal, state and local government entities, or any agent of such entity, with a need for such information in order to carry out its responsibilities under the law to protect children from abuse or neglect;

(7) ***Any person engaged in a bona fide research purpose***, with the permission of the director ***;

(8) ***Any child-care facility; child-placing agency; residential-care facility, including group homes***; juvenile courts; ***public or private elementary schools; public or private secondary schools; or any other public or private agency exercising temporary supervision over a child or providing or having care or custody of a child who may request an examination of the central registry from the division for all employees and volunteers or prospective employees and volunteers, who do or will provide services or care to children. Any agency or business recognized by the division or business which provides training and places or recommends people for employment or for volunteers in positions where they will provide services or care to children may request the division to provide an examination of the central registry.*** ***;

(9) ***Any parent or legal guardian who inquires about a child abuse or neglect report involving a specific person or child-care facility who does or may provide services or care to a child of the person requesting the information.*** ***;

(10) ***Any person who inquires about a child abuse or neglect report involving a specific child-care facility, child-placing agency, residential-care facility, public and private elementary schools, public and private secondary schools, juvenile court or other state agency.******;***

(11) Any state agency acting pursuant to statutes regarding a license of any person, institution, or agency which provides care for or services to children;

(12) Any child fatality review panel***;

(13) ***Any person who is a tenure-track or full-time research faculty member at an accredited institution of higher education engaged in scholarly research, with the permission of the director***. ***.

Mo. Rev. Stat. §210.152.2 (emphasis added). In addition, under Missouri's Family Care Safety Act, the inclusion of a person's name in the central registry will be disclosed to *anyone* screening or interviewing an individual for a position in child-care, elder-care or personal-care, as well as to anyone contemplating the placement of an individual in a child-care, elder-care or personal-care setting. Mo. Rev. Stat. §210.921.

The Family Care Safety Act also provides as follows: "For purposes of providing background information pursuant to sections 210.900 to 210.936, reports and related information pursuant to sections 198.070 and 198.090, RSMo, sections 210.109 to 210.183, section 630.170, RSMo, and sections 660.300 to 660.317, RSMo, **shall be deemed public records**." Mo. Rev. Stat. §210.936 (emphasis added).

2 The "Plus" Element Of The "Stigma Plus" Requirement Is Satisfied By The Missouri Central Registry Scheme.

The "plus" element of "stigma plus" does not require the existence of a separate, stand-alone constitutional right. If that were the case, the right to procedural due process would be premised on this stand-alone right, and there would be no need at all for the "stigma plus" doctrine. The cases have found the "plus" requirement to be satisfied in many different ways, but the common denominator is that the government must be found to have done something beyond mere defamation.

a The Accused Have A Constitutionally Protected Interest When The Government Goes Beyond Mere Defamation.

In *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994), the Second Circuit held that a constitutional deprivation occurred when employers in New York were required to consult the state's registry before hiring an individual and provide the state with a written explanation as to why they chose to hire that individual if his or her name was included.[9] *Id.* at 1002. While the court did not exclude the possibility that a lesser burden on employment prospects would have sufficed, its holding was simply that having to consult the registry, and submit an explanation as to why it hired someone named in it, constituted a burden sufficient to invoke the requirements of procedural due process under the Fourteenth Amendment.

At least one court has suggested that inclusion in a state registry identifying one as a child abuser "may well be viewed, in and of itself, as satisfying the stigma plus standard." *See Anonymous v. Peters*, 730 N.Y.S.2d 689, 209 (N.Y. 2001).

Various courts have also concluded that "stigma plus" exists because the inclusion of an individual on the state registry of suspected child abusers effectively precludes that

[9] In Part (b) *infra*, individual respondents discuss the Missouri requirement, when federal or state funds are at stake, that such an explanation not only be offered, but also accepted, by the State. Mo. Rev. Stat. §210.025. In *Valmonte,* there was no requirement that the State accept the explanation. In such cases, the burden imposed by the Missouri statute is more onerous than by the New York statute.

individual from working in any capacity in the child care profession. For example, in *Anonymous*, the plaintiff, who among other things was seeking to have his name expunged from the New York central registry, argued that "stigma plus" existed because a decision to seek employment in child care or another line of work involving children would essentially trigger statutory disclosure of his inclusion in the registry. *Id*. at 693. In the case at bar, this is precisely what already precluded A.W. from seeking employment as a public school substitute teacher and F.A. from working in her church's nursery. Tr. 471-76; 481, 543-547.

In *Cavarretta v. Department of Children and Family Services*, 660 N.E.2d 250 (Ill.App. 2 Dist. 1996), the Illinois Court of Appeals concluded that impairment to future employment prospects was sufficient to implicate a federal liberty interest. The court noted that an individual placed on the state's registry could be prohibited from working in professions such as child care and teaching. *Id*. at 254. As in Missouri (see Part (b) *infra*), under the Illinois Child Care Act of 1969, the Department of Children and Family Services could revoke or refuse to renew the license of any child care facility should the facility fail to discharge an employee or volunteer who had been the subject of an "indicated" report of child abuse. *Id. See also Dupuy v. McDonald*, 141 F.Supp.2d 1090 (N.D. Ill. 2001)(concluding that Illinois statutory scheme implicated liberty interest because enforcement of mandatory background checks and the sending of "notices of presumptive unsuitability" to current employers clearly effectuated an "indicated" perpetrator's exclusion from the child care profession).

In *Matter of Lee T.T. v. Dowling*, 664 N.E.2d 1243 (N.Y. 1996), New York's highest court held as follows:

> The potential loss of employment as either a child psychologist or a foster parent, or of the right to pursue adoption of a child are substantial interests. The government's characterization of petitioners as child abusers affects not only their present employment in the child care field or as foster parents; it effectively bars them from obtaining similar employment or benefits in the future.

Id. at 1250.

Outside the area of child abuse and neglect central registries, other courts have found that similar registries for sexual offenders trigger procedural due process, even after a criminal conviction. In *Brummer v. Iowa Dept. of Corrections*, 661 N.W.2d 167 (Ia. 2003), the Iowa Supreme Court held that "[a] liberty interest is at stake whenever a sex offender risk assessment is conducted in Iowa":

> [A]fter completing the assessment and notifying an offender of the results, and pending limited appellate procedures, the individual's status as a convicted sex offender *together with* an additional classification of his risk to reoffend, can be transmitted, in varying extent and degree, to different members of the public. This entire process clearly implicates a liberty interest in that it threatens the impairment and foreclosure of the associational or employment opportunities of persons who may not truly pose the risk to the public that an errant risk assessment would indicate. Ultimately, we believe the Oregon Supreme Court best explained

this concept in the course of its consideration of an issue similar to the one presented here:

> When a government agency focuses its machinery on the task of determining whether a person should be labeled publicly as having a certain undesirable characteristic or belonging to a certain undesirable group, and that agency must by law gather and synthesize evidence outside the public record in making that determination, the interest of the person to be labeled goes beyond mere reputation. The interest cannot be captured in a single word or phrase. It is an interest in knowing when the government is moving against you and why it has singled you out for special attention. It is an interest in avoiding the secret machinations of a Star Chamber. Finally, and most importantly, it is an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal and, perhaps, even physical harassment likely to follow from designation. In our view, that interest, when combined with the obvious reputational interest that is at stake, qualifies as a "liberty" interest within the meaning of the Due Process Clause.

Noble v. Bd. of Parole & Post-Prison Supervision, 327 Or. 485, 964 P.2d 990, 995-96 (1998).

Brummer v. Iowa Dept. of Corrections, 661 N.W.2d at 174-175. In *State v. Robinson*, 873 So.2d 1205, 1214 (Fla. 2004), the Florida Supreme Court noted that "designated sexual predators are subject to social ostracism, verbal (and sometimes physical) abuse,

and the constant surveillance of concerned neighbors. These additional limitations implicate more than merely a stigma to one's reputation." In *Gwinn v. Awmiller*, 354 F.3d 1211, 1224 (10th Cir. 2004), the court of appeals held that a "false statement" by the government plus being "required to register as a sex offender" satisfied the applicable "stigma-plus" standard.

b Missouri's Central Registry Scheme Goes Well Beyond Mere Defamation.

Under Mo. Rev. Stat. §210.025.3(1), "an applicant shall be denied state or federal funds for providing child care [in the home] if such applicant or any person over the age of eighteen who is living in the applicant's home . . . [h]as had a probable cause finding of child abuse or neglect pursuant to section 210.145." While applicants may offer extenuating or mitigating circumstances to the state, all the statute promises is that such an offer "may be considered." Mo. Rev. Stat. §210.025.4. In *Valmonte v. Bane*, 18 F.3d 992 (2nd Cir. 1994), the Second Circuit concluded that the "plus" element of "stigma plus" was satisfied by the fact that employers in New York were not only required to consult the registry before hiring an individual, but were also required to provide the state with a written explanation as to why they chose to hire that individual. *Id.* at 1002. It was not necessary in *Valmonte* for such an explanation to be acceptable to the state. In Missouri, for an employer to be eligible for state or federal funds, the explanation must be acceptable to the state. Accordingly, where state or federal funds are at issue, the burden on employment in Missouri is immeasurably greater than it was in *Valmonte.* Appellant is mistaken when it states that "Missouri law does not further order any

employer to take action with respect to any employee or applicant for employment if their name is found in the registry." Appellant's Br. 36.

In Missouri, even a child-care facility that is exempt from the licensing requirements must conduct a check of the central registry for each individual caregiver and all other personnel at the facility. Such facilities are required to provide notice to all parents that includes a representation that a background check has been conducted on all caregivers and other personnel. Mo. Rev. Stat. §210.254.2.

Under Missouri's Family Care Safety Act (Mo. Rev. Stat. §§ 210.900 *et seq.*), every child-care worker or elder-care worker hired by a child-care facility (whether licensed or license-exempt) must register with the Department of Health and Senior Services. Part of the registration process involves a background screening that includes a check of the child abuse central registry, and the registration form. Mo. Rev. Stat. §210.906. All applicants must consent to background checks and to release of information contained in the background check. Mo. Rev. Stat. §§ 210.906 and 210.909. The inclusion of a person's name in the central registry will be disclosed to *anyone* screening or interviewing an individual for a position in child-care, elder-care or personal-care, as well as to anyone contemplating the placement of an individual in a child-care, elder-care or personal-care setting. Mo. Rev. Stat. §210.921.

Many child-care providers or employers are required to be licensed by the Children's Division of the Department of Social Services. Mo. Rev. Stat. §210.516. The department may prohibit any person found in the central registry from being present in any licensed family day care home, group day care home or child day care center during

child-care hours. 19 C.S.R. 30-61.105; 19 C.S.R. 30-62.102. The Department may refuse to issue, deny or revoke licenses to any child placing agency which employs persons who abuse or neglect children or are the subject of multiple reports of child abuse or neglect which upon investigation results in a finding of probable cause to suspect child abuse or neglect. 13 C.S.R. 40-73.017. At licensed facilities, if any report exists for which the investigator found "probable cause" of abuse or neglect, the Department of Health may prohibit the alleged perpetrator from being present in the facility during child care hours. 19 CSR 30-62.102(1)(K). The regulations do not specify any standard by which the Department of Health is to make this determination. Nor do they provide for any appeal of a determination that the alleged perpetrator may not be present in the facility.

A child-placing agency or adoption intermediary shall complete an adoptive family assessment of each eligible adoptive family prior to placement of a child in the home, which shall include a screening check with the central registry. 13 C.S.R. 40-73.080.

In Missouri, "[a]ll foster, adoptive and relative care providers, prior to being granted licensure/relicensure, approval/reapproval or certification/recertification status, shall submit to the division an application for background screening and investigation upon the form required by the division." 13 C.S.R. 40-59.030.

The results of child abuse and neglect background screenings must be maintained in the files of any facility applying for annual fire safety and health and sanitation inspections. 19 C.S.R. 30-60.020.

On page 37 of its brief, Appellant asserts that "Missouri law places no burden on employment." This is of course wrong. On page 45, Appellant correctly acknowledges that "the right to seek and maintain employment has been recognized as a liberty interest," but incorrectly states that "no provision of Missouri law actually places a burden on employment itself, nor does any provision prohibit an employer from hiring a Registry entrant or mandate their discharge." This, too, is flatly wrong. *See e.g.*, discussion of Mo. Rev. Stat. §210.025 at the beginning of this subsection (b).

Even apart from the outright prohibitions of employment pursuant to Mo. Rev. Stat. §210.025, the entire central registry scheme was designed with the obvious purpose and effect of discouraging the employment of persons named therein by any child-care or elder-care facility, and of discouraging the prospects for those who would like to adopt or become foster parents. Appellant cannot argue that the central registry scheme is an essential means to the goal of protecting children on one hand but then insist that it is not effective in discouraging prospective child-care employers from employing citizens whose names are on the list. Appellant cannot have it both ways. The Second Circuit was more forthright when it noted that New York's law had a purpose "to ensure that individuals on the Central Register do not become or stay employed or licensed in positions that allow substantial contact with children" unless the employer is aware of their status. *Valmonte*, 18 F.3d at 995. Exactly the same can be said about the Missouri central registry scheme.

Appellant apparently argues that the "plus" element of "stigma plus" cannot be satisfied by demonstrating a burden on adoption or foster parenting. But even granting

there is no fundamental constitutional right to adopt or be a foster parent (as opposed to seeking and maintaining employment, which appellant recognizes as a liberty interest), appellant's observation misses the point. As shown in subpart (a) *supra*, the "plus" obviously need not be a constitutional right on its own, else there would be no need for the "stigma plus" doctrine. It is enough that there is reputational injury ("stigma") plus a burden on the liberty interest one asserts in pursuing the private associations inherent in adoption and foster parenting. Foster parenting is, in addition, an employment opportunity that would be discouraged under the Missouri registry scheme and even prohibited under Mo. Rev. Stat. §210.025.3(1), which forbids anyone in the central registry from receiving state or federal money.

3 There Is No Need To Wait Until An Actual Loss Of Employment Or Other Injury Occurs.

To establish a constitutionally protected interest it is not necessary that the individual whose name has been placed in the central registry actually suffer a loss of employment or other injury. *See Valmonte*, 18 F.3d at 999 (Individual whose name was placed in central registry does not need to "'await the consummation of threatened injury to obtain preventative relief.'" *citing Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). An individual's claim is ripe "if the perceived threat due to the putatively illegal conduct of the appellees is sufficiently real and immediate to constitute an existing controversy." *Valmonte*, 18 F.3d at 999.

Several courts have concluded that a sufficiently real and immediate threat of injury exists based on the impairment of an individual's future employment prospects

even if that individual has not yet suffered an adverse employment decision as a result of being included in the registry. *See Cavarretta*, 660 N.E.2d at 254-55 (fact that placement of plaintiff's name in registry had not yet resulted in adverse employment decision did not negate plaintiff's due process rights; inclusion in the registry placed a tangible burden on plaintiff's employment prospects); *Valmonte*, 18 F.3d at 999 (individual's presence on the central register was direct threat not only to her reputation but also to her employment prospects); *Anonymous v. Peters*, 730 N.Y.S.2d 689 (N.Y. 2001) (hypothetical impediment to plaintiff's ability to seek employment in childcare or ability to adopt a child sufficient to satisfy "stigma plus" standard).

B What Process Is Due?

To establish that a regulatory scheme is unconstitutional, there must not only be a constitutionally protected liberty or property interest; it must also be shown that the procedural safeguards established by the state are insufficient to protect that interest. *Valmonte*, 18 F.3d at 1002. The amount of process that is due depends on a balancing of (1) the private interest affected by the state's action; (2) the risk of erroneous deprivation of that interest under the existing procedure and the value of any additional procedural safeguards, and (3) the governmental interest involved. *See Valmonte*, 18 F.3d at 1003 *citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

There is little dispute that both the private interest affected by the state's action and the governmental interest are substantial. The individual has an interest in securing future employment in the child-care field, or to adopt, or to be a foster parent, free from the restrictions imposed by the scheme created by the state to discourage the realization

of those interests. *Valmonte*, 18 F.3d at 1003. The state, as *parens patriae*, has a significant interest in protecting children from abuse and maltreatment. *Id. See also Dupuy*, 141 F.Supp.2d 1090, 1136 (plaintiffs have legitimate liberty interest in pursuing employment in child care field; state has equally powerful countervailing interest in the protection of children); *Petition of Preisendorfer*, 719 A.2d 590, 593 (N.H. 1998)(both state and individual listed on child abuse registry assert compelling interests).

Where both sides assert compelling interests, the critical factor becomes the risk of erroneous deprivation of the liberty interest at stake. *Valmonte*, 18 F.3d at 1003; *Preisendorfer*, 719 A.2d at 593. As demonstrated in Part I(A) *supra* and in Part I(B)(1) immediately *infra*, the current Missouri statutory scheme substantially impairs compelling interests of private persons. Part I(B)(2) discusses several elements of the current Missouri statutory scheme that create an enormous risk of error. That part also demonstrates the value to all concerned of additional procedural safeguards. Part I(B)(3) demonstrates how the state's interest, while compelling, would not be impaired by providing private persons the process that is due.

1 The Private Interests Are Compelling, Including The Right To Pre-Deprivation Due Process.

Much of what could be addressed here has already been discussed in Part I(A), which shows that the Missouri statutory scheme inflicts "stigma plus" on persons whose

names are placed in the registry.[10] This subpart addresses several additional arguments advanced by appellant (Appellant's Brief 55-57) regarding the private interests affected.

Appellant first argues (Appellant's Brief 55-56) that the individual respondents have not suffered any injury from inclusion in the registry, and therefore there is no private interest to consider. Appellant's premise, that no actual injury was suffered here, is wrong. For example, A.W. was foreclosed from seeking a substitute teaching job at a public school in Texas where she wanted to work, and F.A. was foreclosed from working in her church's nursery in Kansas City. Moreover, as the cases in Part I(A)(3) hold, there is no need to wait until an actual loss of employment or other injury occurs. And even if appellant's argument had merit, it would not defeat the trial court's finding of facial unconstitutionality, which does not depend on whether the individual parties here were injured.

Appellant argues that since the individuals here "obtained and won a full adversarial trial on the merits," the issue "is whether they should have had such a proceeding sooner." Appellant's Brief 56. Appellant's premise is almost correct: the trial fell short of being completely adversarial in that the court admitted and considered

[10] Appellant attempts to restate the individual respondents' interest as nothing more than a "desire" not to have their names on the registry, and then concludes that this interest is "minimal." Appellant's Brief 56. Both the premise and the conclusion are flatly wrong, and are contradicted by the evidence and the manifest purpose and effect of the statutory scheme.

the hearsay statements of the two alleged "victims," and the court used a "probable cause" standard rather than a "preponderance of the evidence" standard. In other respects, it was a "full adversarial trial on the merits," and the individual respondents "won" it. Appellant's conclusion—that "the issue is whether they should have had such a proceeding sooner"—is also largely correct: the only complaint about the trial, other than the two stated above, is the fact that it did not take place until after the names of the accused had been subject to disclosure from the registry for more than two years.

Appellant is wrong in its attempts to shrink this period to 11 months, the period of time between placement of the individual respondents' names in the registry and the date of review by the Citizen Abuse and Neglect Review Board (CANRB). Appellant's Brief 56-57. Appellant is fully aware that the claim here is that the CANRB "hearing" does not satisfy due process, and appellant concedes that "there is no process available to subpoena witnesses to appear at the CANRB hearing, that testimony is not given under oath, that cross examination is not permitted, and that the rules of evidence are not observed." Appellant's Brief 75.[11]

[11] Appellant's unwarranted suggestion that the time period between inclusion in the registry and a due-process hearing included "any requests for continuance made by petitioners and all other delays occasioned by the circumstances of the petitioners" (Appellant's Brief 57 n.7) is especially audacious in light of the fact that the trial in this case was delayed for approximately three months due to the pregnancy of one of the attorneys for appellant. While this was obviously recognized by everyone as a valid

The relevant issue here, in which the question regards the constitutionality of the Missouri statutory scheme, is whether a constitutionally significant period of time elapses between placement on the list and a due process hearing. This the Court can, and should, decide on the basis of a fair reading of the statute and facts about which it can take judicial notice.

Once an investigation is opened, the division must complete its investigation within 30 days unless it can articulate good cause for keeping the investigation open. The alleged perpetrator must be notified of the division's determination—either that probable cause exists or that the report is unsubstantiated—within 90 days of the date of the report. The alleged perpetrator then has 60 days to request an administrative review. Within 15 days of such a request, the county director must decide whether to uphold the probable cause finding. The alleged perpetrator then has an additional 30 days to request review before the CANRB. Thus, approximately 6½ months after the report is made, and months after the "probable cause" determination becomes part of the central registry, the alleged perpetrator can first request a hearing before the CANRB.

As previously noted, very little process is provided the accused at the hearing before the CANRB. The CANRB review is not considered an "adversary proceeding in a

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reason for delay, the individual respondents were hardly responsible for it. What it demonstrates is that even innocent delays outside of anyone's control extend the time during which constitutional injury continues when deprivations precede a full due process hearing, as they did here.

contested case" as that phrase is defined in the Missouri Administrative Procedure Act. *Lipic v. State*, 93 S.W.3d 839, 842 (Mo.App. E.D. 2002).

There is no time specified by which the CANRB must schedule this "hearing." In practice, it takes several months before such a hearing can be scheduled. For example, in the incident involving B.A., the initial report of abuse was made on June 4, 2001. On August 1, 2001, the division notified the accused of its conclusion that probable cause of abuse existed. The accused requested a review by the CANRB on August 21, 2001. That review did not occur until July 10, 2002 – almost a year later.

Once the review takes place, the CANRB must make a decision within 7 days of the date of the review hearing. The accused must be notified of that decision within 35 days of the date of the review hearing. If aggrieved by the decision, the accused has sixty days to file a petition in the appropriate circuit court seeking a *de novo* judicial review. In the B.A. matter, a year elapsed between the time that the alleged perpetrators were notified of the probable cause finding–which required that those individuals be included in the child abuse registry–and the time that the CANRB upheld that finding. Alleged perpetrators have no right to proceed to court until the CANRB made its determination.

Substantial delays in reaching this level of review themselves violate due process. In this case, through no fault of the individual respondents or the trial court, the two-day trial in this matter did not occur until more than two years after the four respondents' names were placed in the central registry. The U.S. Supreme Court has stated that "due process requires, *inter alia*, a hearing at a meaningful time." *Cavarretta*, 660 N.E.2d 250, 256 (Ill.App. 2 Dist. 1996) *quoting Cleveland Board of Education v. Loudermill*,

470 U.S. 532, 547 (1985). Even apart from the facts of this case, the Court can take notice of the fact that trials commonly occur a year or more after cases are filed, given the need for completion of formal discovery and the difficulties in scheduling the trials themselves.

During this two-year time period, irreparable damage can and does occur to citizens whose names are in the registry. The information divulged from the central registry does not even inform the recipient as to whether the accused is appealing the listing. Once information is divulged it cannot be retrieved. Central Registry information is required to be kept in the personnel files of various employers and it is disclosed to potential employers and to private persons inquiring about institutions where they are thinking about placing a family member. The genie cannot be put back in the bottle. Having one's name cleared by the trial court does not "unring" the bell as to disclosures made during the two years prior to the trial. The innocent will forever be identified in unknown files as abusers of children.

Appellant's reliance on *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) to justify post-deprivation hearings is misplaced. The government interest there arose from the government as employer, a factor not present here: "To require more than [an informal hearing] prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546. Similarly, in *State ex rel. Donelon v. Division of Employment Security*,971 S.W.2d 869 (Mo.App. W.D. 1998), the court found that the Division of Employment Security,"as a branch of the government that serves the people and taxpayers of the state, does have a

substantial interest in the immediate and effective discipline to promote efficiency, maintain morale and instill public confidence." *Id.* at 876. The government as employer has a need for pre-hearing deprivations that are not present here.

The facts in *Mathews v. Eldridge*, 424 U.S. 319 (1976), are typical of instances in which post-deprivation hearings were declared sufficient, because there the claimant's disability payments during the time he was wrongfully denied them would be recouped. *Id.* at 340. In cases like the one at bar, no one knows how many files contain information wrongfully identifying private citizens as child abusers, and there is no way to recoup the loss, as would be possible in cases involving money or tangible goods.

In Missouri, sex offenders, including rapists, are treated better than this. They do not have their names placed on any list prior to their being convicted of or pleading guilty to a sexual offense, or otherwise being afforded full due process rights. Mo. Rev. Stat. §589.400 *et seq.*

In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Supreme Court expressed its preference for predeprivation hearings, but noted two exceptions:

> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. See *Loudermill,* 470 U.S., at 542, 105 S.Ct., at 1493; *Memphis Light,* 436 U.S., at 18, 98 S.Ct., at 1564; *Fuentes,* 407 U.S., at 80-84, 92 S.Ct., at 1994-96; *Goldberg,* 397 U.S., at 264, 90 S.Ct., at 1018. Conversely, in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, see *Ingraham,* 430 U.S.,

> at 682, 97 S.Ct., at 1418, or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process.

Id. at 132. The case at bar is not a "situation where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake," *see Ingraham v. Wright,* 430 U.S. 651 (1977)(public junior high school students not entitled to predeprivation hearing prior to being spanked on buttocks by wooden paddle), or a constitutional injury caused by a random or unauthorized governmental act.

Another exception to the predeprivation rule was noted in *Bell v. Burson*, 402 U.S. 535 (1971), a license-suspension case in which the Court held that "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective." *Id.* at 542. In the case at bar, there is similarly no emergency requiring placement of a name in the registry. Emergency removals of abused or neglected children should and do take place long before the names of the alleged abusers are placed in the central registry, a process that takes weeks and sometimes months—long enough for a full due process hearing.

"Postdeprivation" due process "is an exception, and not the rule." *Wayfield v. Town of Tisbury,* 925 F.Supp. 880, 886 (D.Mass.1996).

2 The Risk Of Error Under Existing Procedures Is Enormous, And Additional Procedural Safeguards Would Benefit Everyone, Including The State.

As discussed above, the damage wrought by disclosures wrongfully identifying citizens as child abusers, even when later rectified by court order, is enormous and irreparable. This section discusses the second prong of the *Mathews v. Eldridge* test—the risk of error under existing procedures and the value of additional procedural safeguards. Specific aspects of the current law that were argued by the individual respondents and found by the trial court to be unconstitutional are addressed herein.

a Delay In Obtaining Due Process.

While delay is a specific constitutional deficiency in the current Missouri central registry scheme, it is also the overarching constitutional problem. Accordingly, it has been discussed in Part I-II(B)(1) *supra*, and those arguments will not be repeated here.

b Failure To Observe Regular And Established Rules Of Evidence, Including Requiring Testimony To Be Under Oath, The Right Of The Accused To Compel The Testimony Of Witnesses To The Same Extent As The Division Can, And The Right To Cross-Examine Witnesses.

Determining whether abuse or neglect of a child has occurred is extraordinarily and almost exclusively a fact-intensive enterprise. In such cases, the Supreme Court has

spoken forcefully of the need for observance of regular and established rules of evidence and the taking of evidence:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.g., ICC v. Louisville & N.R. Co., 227 U.S. 88, 93--94, 33 S.Ct. 185, 187--188, 57 L.Ed. 431 (1913); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103--104, 83 S.Ct. 1175, 1180-1181, 10 L.Ed.2d 224 (1963). What we said in Greene v. McElroy, 360 U.S. 474, 496--497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:
>
> > 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only

> in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.'
>
> Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970).

In the case at bar, the trial court ruled that names of citizens should not be included in the central registry for purposes of dissemination to prospective employers prior to their opportunity for a due process hearing, that included, among other things:

> B) Testimony under oath or affirmation by all witnesses;
>
> C) Observance of regular and established Missouri rules of evidence;
>
> D) The right of the accused to compel the testimony of witnesses to the same extent their testimony can be compelled by the Respondent;
>
> E) The right to cross-examine all witnesses;

Order and Judgment, Appellant's Appendix A-21 and A-22.

Testimony under oath or affirmation. Under the current statute, no testimony is required to be under oath or affirmation until the *de novo* trial in circuit court, and even then, the position of the appellant is that the hearsay statements of the alleged victims, not made under oath, should be admitted. In the case at bar, the trial court received the hearsay statements of the two alleged victims, B.A. and S.D., over the objection of the accused, but nevertheless found no probable cause. The trial court, however, also found it to be unconstitutional to base inclusion in the central registry for purposes of dissemination to prospective employers on accusations not made under oath. Requiring

such accusations to be under oath or affirmation is in the interests of both citizens and the state, and is relatively cost-free.

Observance of regular and established Missouri rules of evidence. Under the current statute, no rules of evidence are observed at any stage prior to the *de novo* trial, and even there the appellant's position was that the trial court should admit the out-of-court statements of the alleged victims. T. 29-33. This differed from its prior position taken in opposition to the four respondents' motion for summary judgment. In that response, the division argued that the rule forbidding the accused from compelling the testimony of the alleged victims was harmless, because it "does not change the rules of evidence at all—it does not make admissible hearsay statements of either" of the alleged victims. Division's Response to Motion for Summary Judgment pp. 16-17, Respondents' Supplemental Legal File p. SLF16-17. Now it appears that the division may have reverted to this same position. In its brief, it argues that while it is "true that Missouri law does not permit a suspected perpetrator to compel the testimony of the victim or the reporter," there is no harm to the accused because, "at a trial *de novo*, the court is to decide the case anew on the **evidence before the court**." Appellant's Brief 61 (emphasis in original). The only way to read this argument is that even appellant now agrees that the hearsay out-of-court accusations of the alleged victims would not be admitted by the trial court, absent a recognized hearsay exception.

The trial court received the statements for purposes of this case, and found that even if it considered them it would still have exonerated the four respondents. Order and Judgment, Appellant's Appendix A14. Nevertheless, the trial court also ruled it to be

unconstitutional to use such hearsay statements as a basis for the inclusion of names in the central registry for purposes of dissemination to potential employers. However, the trial court's requirement in part (C) of its order is worded in such a way, for example, as to allow for the hearsay statements where there is a special exception. *Cf.* the special provision of the Missouri statutes allowing certain hearsay statements in criminal cases of children under 12 (now under 14). Mo. Rev. Stat. §491.075.[12]

In sum, respondents are aware of no Missouri statutory or case law that makes allowance for special hearsay rules in the case of *de novo* judicial review under Chapter 210. Accordingly, the trial court's ruling that regular and established rules of evidence should obtain as a matter of constitutional law is already the practice in Missouri state courts. It should also be a requirement, as a matter of procedural due process, that objectionable hearsay should not be the basis for inclusion in the central registry to the extent such inclusion impairs employment rights, adoption or foster parenting.

The right of the accused to compel the testimony of witnesses to the same extent their testimony can be compelled by the division. Under the current statutory scheme, the accused are not permitted to compel the attendance of the alleged victim or

[12] The statute used in this hypothetical example may be challenged in the wake of *Crawford v. Washington,* 124 S.Ct. 1354 (2004), which held that, with respect to out-of-court testimonial evidence in criminal cases, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374.

of the reporter who made the hotline call. Section 210.152.5, Mo. Rev. Stat., outlines the procedures for a *de novo judicial review.* It provides that the "alleged perpetrator may subpoena any witnesses except the alleged victim or the reporter." This precludes even the taking of depositions of victims or the reporter by the accused. At least one court has concluded that an individual accused of committing child abuse or neglect is entitled to the "same protections in regard to the rights to compel and confront witnesses as are afforded to constitutionally protected interests in criminal prosecutions." *State v. Jackson*, 496 S.E.2d 912 (Ga. 1998); *see also Goldberg v. Kelly*, 397 U.S. at 269-270, discussed *supra*. In *Jackson*, an alleged child abuser brought a declaratory judgment action challenging the constitutionality of the statutory scheme providing for the establishment of a registry for reports of child abuse. The statute in question provided that a child under the age of 14 could not be compelled to appear and testify at any administrative hearing to determine whether the evidence supported the classification assigned to the report, *e.g.*, unfounded (no credible evidence), confirmed (at least equal or greater credible evidence that abuse occurred) or unconfirmed (some credible evidence but not enough to classify report as confirmed). *Id*. at 914.

In holding that due process required that the alleged perpetrator be afforded the ability to compel the presence of witnesses and confront them, the Georgia Supreme Court noted that the "right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense. . . . This right is a fundamental element of due process of law." *Id*. at 915 (internal citations omitted). The court concluded that the need to insure that the witness' statement was under oath and

subject to cross-examination was "at the very core of the concept of a fair hearing." *Id*. Because the court concluded that the hearing afforded to an alleged perpetrator under the Georgia statute was insufficient to protect that individual's rights, the court declared unconstitutional the entire act governing the Georgia registry. *Id*. at 917.

At least one other court has acknowledged an alleged's perpetrator's right to confront the witnesses testifying against him, albeit in a slightly different context. In *South Carolina Dep't of Social Services v. Wilson*, 574 S.E.2d 730 (S.C. 2002), the South Carolina Supreme Court considered what process was due to an alleged perpetrator of sexual abuse of a child at a hearing instigated by the Department of Social Services to intervene and provide protective services to the child. At issue was whether the alleged perpetrator (who was the child's parent) had a right to be present during the child's testimony. The court concluded that in the absence of a particularized inquiry by the court as to whether the child would be traumatized by testifying in the father's presence, the father's due process rights were violated by his removal from the courtroom during her testimony. *Id*. In so holding, the court recognized that where important decisions turn on questions of fact, "due process often requires an opportunity to confront and cross-examine adverse witnesses." *Id*. The determination of whether an individual has committed child abuse or neglect turns entirely on fact. Moreover, because this determination largely involves private conduct, it also turns largely on the credibility of the witnesses. The *Wilson* case decided by the Supreme Court of South Carolina and the *Jackson* case decided by the Supreme Court of Georgia are authority to the effect that

Missouri's blanket prohibition on compelling the presence of the victim and witness substantially increases the risk of an erroneous deprivation of an individual's rights.

Under current Missouri law, the state is under no such restriction. The trial court, mindful of potential circumstances under which it would be unwise to force youthful victims of abuse or neglect to undergo depositions or examination at trial by the accused, did not require that the accused be able to force the appearance of such witnesses. Thus the trial court did not go as far as did the Georgia Supreme Court in *Jackson*. Rather, the trial court held simply that the state should have no greater power to require the appearance of witnesses than does the accused. This requirement advances the search for truth in that it provides the same kind of evenhandedness present in all due process proceedings. It does not force the state to make its youthful witnesses available to a hostile parent or other alleged abuser.

The right to cross-examine all witnesses. Finally, under the current Missouri statutory scheme, cross-examination of witnesses is not allowed at any level, not even at the CANRB hearing, until the trial *de novo* in the circuit court. Under *Goldberg v. Kelly*, cross-examination of adverse witnesses is elemental. 397 U.S. at 269-270. Again, this rule does not require the division to produce youthful witnesses whom the division does not want cross-examined. It simply requires that if witnesses testify there should be an opportunity for cross-examination.

c Failure To Use A Neutral Decision Maker.

In the case at bar, the names of the accused were placed in the central registry by the investigator who handled the case for the division from the beginning. In *Goldberg v. Kelly* the Supreme Court held that "an impartial decision maker is essential." 397 U.S. at 271. *See also People v. David W.*, 733 N.E.2d 206, 213 (N.Y. 2000)(finding that "State did not bear the burden of proof at any proceeding before a neutral fact finder").

In the case at bar, Mr. Englehardt, the division's investigator, admitted under oath, months before trial, that he had made multiple mistakes in placing the respondents' names in the central registry, that such mistakes should be corrected, and that he would talk to his supervisors about the problem. T. 92-104. Yet no names were removed from the central registry until the division was order to do so by the trial court. The division and its agents were anything but neutral decision-makers in this case.

d Use Of "Probable Cause" As A Standard Rather Than "Preponderance Of The Evidence."

Prior to August 28, 2004, when the 2004 amendments (House Bill 1453) went into effect, Missouri's statutory and regulatory framework provided that an individual would be identified as an alleged perpetrator of child abuse or neglect upon a finding of "probable cause" to believe that such abuse or neglect occurred. The "probable cause" standard was used throughout every level of review afforded to the alleged perpetrator by the statutory scheme both prior to and after the inclusion of that individual on the central registry. Accordingly, the "probable cause" standard was used at every level, including the trial court, to assess the department's case against the individual respondents and their

inclusion in the central registry. The case at bar is utterly unaffected by the 2004 amendments, which did not go into effect until eight months after the trial court's judgment of January 8, 2004.

It seems clear that cases entering the system after August 28, 2004 will be assessed according to a "preponderance of the evidence" standard. *See* Mo. Rev. Stat. §§ 210.110(2), 210.152.2, 210.152.4. Unfortunately, it is not clear how those cases that entered the central registry before that date as "probable cause" cases will be treated through the review and appeal process. Sections 210.152.2(1) and 210.152.4 appear to indicate that cases entering the system prior to August 28, 2004 would continue to be assessed throughout the review and appeal process under a "probable cause" standard. Accordingly, while the individual respondents wish that the department were correct in its argument that the 2004 amendments mooted the standard of proof issue, no support for mootness on this issue is found in the language of the amendments. If a citizen's name was placed in the central registry prior to August 28, 2004, it appears that his or her case may continue to be assessed according to a "probable cause" standard.

Accordingly, the argument which follows relates to names placed in the central registry prior to August 28, 2004. Within 30 days after an oral report of abuse or neglect, the local office of the children's division must make a determination on the hotline report unless "good cause" exists for failing to complete the investigation in 30 days. Mo. Rev. Stat. §210.145. Although the division must complete the investigation and make a determination within 30 days, the alleged perpetrator is not notified of the disposition until 90 days after the date of the hotline report. Mo. Rev. Stat. §210.152.2. At that time,

the alleged perpetrator is notified either that the division has determined that probable cause exists or that there is insufficient probable cause of abuse or neglect. *Id*. If the division determines there is probable cause, the division retains identifying information regarding the abuse or neglect.

It is unclear from the statutes precisely when a finding of probable cause is entered into the central registry. However, presumably it occurs either at the 30-day conclusion of the investigation, when the information system must be updated to include the results of the investigation, or 90 days after the date of the hotline report, at which time the alleged perpetrator is notified that the report was either substantiated or unsubstantiated. According to evidence adduced at trial, it is entered as soon as the social worker completes his investigation and the supervisor signs off. In this case, it was entered on July 12, 2001. Appellant's Br. 15. The "central registry" is defined in the pertinent statute as "a registry of persons where the division has found probable cause to believe prior to the effective date of this section or by a preponderance of the evidence after the effective date of this section . . . that the individual has committed child abuse or neglect. . . ." Mo. Rev. Stat. §210.110(2) (as amended).

Appellant's outline of the child abuse/neglect appeal process is substantially correct. Appellant's Br. 19-23. However, it was not followed in the case at bar. For instance, the investigator who made the initial finding and supervisor who signed off on it were not the persons authorized in the statutes or regulations, as set forth in appellant's brief. They were rather personnel from the OHI unit, which has no statutory or regulatory authority at all.

Although an alleged perpetrator can seek administrative review from the county director for the division of family services and ultimately the CANRB, the CANRB must sustain the division's determination "if such determination was supported by evidence of probable cause prior to the effective date of this section or is supported by a preponderance of the evidence after the effective date of this section and is not against the weight of such evidence." Mo. Rev. Stat. §210.152.4 (as amended). If the accused is aggrieved by a decision of the CANRB, that individual can seek *de novo* judicial review from the circuit court. The Missouri Court of Appeals for the Southern District has stated that the purpose of the *de novo* judicial review is to permit "the trial court to make an independent determination of probable cause to suspect an alleged perpetrator of child abuse based upon testimony and evidence." *Williams v. State, Department of Social Services, Division of Family Services*, 978 S.W.2d 491, 494 (Mo.App. S.D. 1998).

Several courts have concluded that at a minimum, due process requires that at some point during the review process, the state agency be required to prove abuse or neglect by a preponderance of the evidence. For example, in *Preisendorfer*, the Supreme Court of New Hampshire 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."[13] *Preisendorfer*, 719 A.2d 590 (N.H. 1998). The New

[13]Although the *Preisendorfer* case was decided based on the due process clause of the New Hampshire Constitution, *see* 719 A.2d at 592, its logic is clearly applicable to

Hampshire statute permitted the state agency to file a report in the state's central registry upon a showing of probable cause. *Id*. at 593.

The Supreme Court of New Hampshire concluded that this standard did not comport with due process. "Due process dictates the adoption of a minimum standard of proof that '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.'" *Id*. at 593. Unlike the preponderance of the evidence standard–which places the risk of error in roughly equal fashion–the probable cause standard places the brunt of the risk of error, if not the entire risk of error, on a person subject to inclusion in the registry. *Id*. at 594.

Other courts have also articulated the unfairness of minimal standards of proof such as the "credible evidence" and "probable cause" standards.[14] For example, in *Lee T.T. v. Dowling*, 664 N.E.2d 1243 (N.Y.App. 1996), the New York Court of Appeals concluded that due process required that the New York Social Services Department "substantiate reports of child abuse by a fair preponderance of the evidence before they may be disseminated to providers and licensing agencies as a screening device for future

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claims premised upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

[14]*See e.g., Cavarretta v. Department of Children and Family Services*, 660 N.E.2d 250 (Ill.App. 2 Dist. 1996)(equating "credible evidence" and "probable cause" standards of proof).

employment." *Id*. at 1252. The court outlined the dangers of a minimal standard of proof in this context. It noted that child abuse frequently involves private conduct and is based upon the reports of minors or actions of a minor observed and interpreted by others. "There may be no supporting eyewitness testimony or objective evidence to support the report and therefore the evaluation of it may involve, to a large degree, subjective determinations of credibility." *Id*. at 1251. Under the "credible evidence" or "probable cause" standards, a fact finder might be tempted to rely on an intuitive determination, ignoring contrary evidence. *Id*. *See also Valmonte*, 18 F.3d at 1004 (finding "credible evidence" standard unacceptable because it resulted in many individuals being placed on registry who did not belong there).

As to citizens whose names were put in the central registry prior to August 28, 2004 in Missouri, the "probable cause" standard creates a far greater risk of error than many of the state statutory schemes because it does not appear that an alleged perpetrator is ever afforded a hearing or review at which the standard is proof by a preponderance of the evidence. Even at the level of *de novo* judicial review in the circuit court, the standard seems to be whether probable cause exists to suspect an alleged perpetrator of child abuse. *See Williams v. State, Department of Social Services, Division of Family Services*, 978 S.W.2d 491, 494 (Mo.App. S.D. 1998)(purpose of *de novo* judicial review is to permit "the trial court to make an independent determination of probable cause to suspect an alleged perpetrator of child abuse based upon testimony and evidence").

Thus, in Missouri, an individual accused of child abuse or neglect will be included on the central registry indefinitely, without there ever having been a determination by a

preponderance of the evidence that such abuse or neglect occurred. There is no provision in the statutes for the removal of identifying records regarding a report for which the division determined that probable cause existed. *See generally* Mo. Rev. Stat. §210.152 (delineating when reports are to be retained and removed).

The distinction between "probable cause" and "preponderance of the evidence" is significant because of the substantial difference it makes in the distribution of the risk of error, coupled with language in the statute that may lead to confusion. While the statute defines "probable cause" as "available facts when viewed in the light of surrounding circumstances which would cause a reasonable person to believe a child was abused or neglected" (R.S.Mo. 210.110(10)), it does not define the ***quantum*** of proof that differentiates "probable cause" from other standards, such as "preponderance of the evidence." The cases frequently use the same language or language similar to that used in R.S.Mo. 210.110(10), but they also demonstrate the unmistakable differentiations between the quantum of proof required under a "probable cause" standard and a "preponderance of the evidence" standard.

For instance, in *State v. Tokar*, 918 S.W.2d 753, 767 (Mo. banc 1996), the Missouri Supreme Court found that "probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense." And in *State v. Kampschroeder***,** 985 S.W.2d 396, 398 (Mo. App. E.D. 1999), the appeals court held that "[p]robable cause exists when the circumstances and facts would warrant a person of

reasonable caution to believe an offense has been committed." This is language almost identical to that found in R.S.Mo. 210.110(10).

The definition of "probable cause" does not end there, however. The ***quantum*** of proof for "probable cause" is emphatically less than for a "preponderance of the evidence." In *State v. Laws*, 801 S.W.2d 68, 70 (Mo. banc 1990), the Missouri Supreme Court defined the probable cause requirement as follows:

> The magistrate need only find a "fair probability" that contraband will be found, *id.;* it is not necessary to establish the presence of contraband either *prima facie,* or by a preponderance of the evidence, or beyond a reasonable doubt. *State v. Hall,* 687 S.W.2d 924, 929 (Mo.App.1985).

Similarly, the U.S. Supreme Court has held that the "level of suspicion" required for a probable cause finding "is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means 'a fair probability that contraband or evidence of a crime will be found' (citations omitted)." *U.S. v. Sokolow,* 490 U.S. 1, 7 (1989). And in *State v. Berry,* 801 S.W.2d 64, 66 (Mo. banc 1990), this Court noted:

> In *Texas v. Brown,* 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983), the plurality said that probable cause "does not demand any showing that such belief be correct or more likely true than false." Although no majority opinion from the United States Supreme Court has followed *Brown,* the Eighth Circuit has adopted *Brown's* definition in *United States v. Wayne,* 903 F.2d 1188, 1196 (8th Cir.1990).

Accordingly, when the definition of "probable cause" as found in R.S.Mo. 210.110(10) and the cases is expanded to define the ***quantum*** of proof required, unmistakable differences between the standards of "probable cause" and "preponderance of the evidence" emerge.

As held by the cases cited above, the "preponderance of the evidence" standard correctly distributes the risk of error, while the "probable cause" standard does not. And in the case at bar, as admitted by the division, there was actual error, on the record for more than two years, not just the risk of error. T. 92-104.

3 The State's Interests Are Accommodated And Even Advanced By The Decision Of The Trial Court.

The third factor to be considered under *Mathews v. Eldridge* is the state's interest.[15] All parties, and the trial court, agreed that "the state, as *parens patriae*, has a significant interest in protecting children from abuse and maltreatment." Order and Judgment, Appellant's Appendix A20.

[15] Appellant principally relies on *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) to justify post-deprivation hearings. Its reliance is misplaced. The government interest there arose from the government as employer, a factor not present here: "To require more than [an informal hearing] prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546.

Nothing in the trial court's judgment infringes on this important state interest. The trial court's judgment is directed solely at use of the central registry to impair employment rights, adoption and foster parenting, and then only to the extent citizens' names are placed in the registry prior to their being afforded the opportunity of a full due process hearing.

a The Trial Court's Judgment Does Not Impair Law Enforcement Or Child Protection.

Adherence to constitutional mandates recognized by the trial court's judgment does not result in any impediment to law enforcement or child protection. Under current law, the division does not, of course, have the power to prosecute criminal cases, and does not have the power to place children in emergency or non-emergency protective custody (R.S.Mo. 210.125.3). Nothing in the trial court's judgment impairs the division's ability to cooperate or participate in the prosecution of criminal cases or the protection of children. Under the judgment of the trial court, the division would continue to be allowed to collect information on abuse and neglect suspects and share it internally and with police, sheriffs, juvenile offices, grand juries, prosecutors and all other law enforcement functionaries. The trial court's judgment does not forbid maintenance of the central registry, even as it is presently constituted, for these purposes.

As to any instance of child abuse or neglect serious enough to warrant criminal charges, standard bond requirements, used by courts throughout Missouri, keep the criminally accused away from potential victims. And the central registry would continue to include any person who has pled guilty or been convicted of a host of crimes (Mo.

Rev. Stat. §210.110(2)), or waived his or her right to a due process hearing. The trial court's judgment requires only that citizens be afforded the "opportunity" for a due process hearing. Any child in danger would have already been removed pursuant to the emergency protective custody provisions available to physicians, law enforcement and juvenile authorities throughout the state. This removal or other provision for the child's safety would take place weeks and sometimes months before the name of the child's alleged abuser is placed in the central registry.

The trial court's judgment, which simply forbids using the central registry as it is currently constituted to impair employment opportunities, adoption and foster parenting, is accordingly not the draconian measure appellant suggests. For instance, sex offenders in Missouri, including rapists, do not have their names placed on any list prior to their being convicted of or pleading guilty to a sexual offense, or otherwise being afforded full due process rights. Mo. Rev. Stat. §589.400 *et seq.* Citizens who have been wrongfully suspected of nothing more than non-criminal, slightly-excessive spanking should be able to expect at least as much due process as the state affords to rapists.

b The State's Interests Are Advanced When Due Process Is Advanced.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). It does not advance the public interest in Missouri to inflict constitutional harm, in the form of publication of false positive conclusions resulting from a lack of due process, on citizens who have devoted their lives to caring for

children. The state's legitimate interest in maintaining a list that is neither over-inclusive nor under-inclusive coincides with the interests of the accused. Procedural due process, as set forth in the trial court's judgment, is the means to that end.

In providing for *de novo* judicial review for anyone whose name is in the central registry, the State of Missouri has acknowledged the overriding importance to all parties of getting at the truth before citizens are irrevocably branded as child abusers. Both appellant and the individual respondents agree that such a hearing is necessary; the primary issue in this case is when it should take place. The trial court decided that it should take place before citizens' names are disclosed as child abusers to potential employers and before inclusion on the list would impair adoption or foster parenting. Its order and judgment went no further than that.

The judgment of the trial court allows for a list that can continue to be over-inclusive for law enforcement and child protection purposes, but must be subjected to the stricter scrutiny afforded by procedural due process before being used to impair employment rights, adoption or foster parenting.

III Appellant Has Waived Any Right To Appeal The Trial Court's Void For Vagueness Finding, Because It Was Based Only On Unconstitutionality "As Applied" To The Four Respondents, And Appellant Has Not Appealed The Reversals Of The Division's Findings Against The Four Respondents.

The trial court found that Mo. Rev. Stat. §210.110(1) was unconstitutional "as applied" to the four respondents, in that the phrase, "spanking, administered in a reasonable manner, shall not be construed to be abuse," was unconstitutionally vague.

Appellant's Appendix A20. However, the trial court had already separately concluded that there was no probable cause that any of the four respondents had abused or neglected either child in the first place. *Id.* A15-16. Accordingly, the trial court's finding that the statute's exclusion of certain conduct (reasonable spanking) from the definition of abuse was unconstitutionally vague "as applied" does not affect its reversals of the division's findings, which reversals have not in any event been appealed. The trial court did not find the phrase to be facially unconstitutional, and therefore its decision would have no binding effect on other cases.

Were this Court nevertheless to take up the issue of the constitutionality of the phrase in question, respondents would in candor direct the Court's attention to *State v. Brown,* 140 S.W.3d 51 (Mo. banc 2004). *State v. Brown* was decided on August 3, 2004, after the trial court's decision in the case at bar. While it is not directly on point, it pertains to the same underlying statute and contains this Court's most recent enunciation regarding the void for vagueness doctrine.

IV The Trial Court Did Not Err In Declaring The Pre-Trial Review Requirements Of The Act To Be A Violation Of The Open Courts Guaranty In The Missouri Constitution, Because Respondents Were Seeking Redress For Personal Injuries.

The Missouri Constitution's Bill of Rights, Article I, section 14 provides: "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Article I, section 14 "prohibits any law that *arbitrarily or*

unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury." *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo.banc 2000).

Appellant argues simply that this is not a case about "personal injuries." Actually, it is. In *Gremminger v. Missouri Labor and Indus. Relations Comm'n*,129 S.W.3d 399 (Mo.App. E.D. 2004), the court found that "personal injuries" include injuries to reputation:

> "Personal injury" is not defined in the Act. The primary rule of statutory construction is to ascertain legislative intent by giving the words used in the statute their plain and ordinary meaning. *American Healthcare v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999); Section 1.090 RSMo 2000. In the absence of statutory definitions, we may look to dictionary definitions to find a word's plain and ordinary meaning. *American Healthcare*, 984 S.W.2d at 498; *State Dept. Soc. Ser. v. Brookside Nursing*, 50 S.W.3d 273, 276 (Mo. banc 2001). Webster's Third New International Dictionary (1996) defines "personal injury" as "1: an injury affecting one's physical and mental person as contrasted with one causing damage to one's property 2: an injury giving rise to a personal action at law." *Id.* at 1686.
>
> In addition, when a statute contains terms that have had other judicial or legislative meanings attached to them, we presume the legislature acted with knowledge of that judicial or legislative action. *Citizens Elec. Corp. v. Dept. of Revenue*, 766 S.W.2d 450, 452 (Mo. banc 1989). We may therefore consider other

legislative or judicial meaning given to a term. *Brookside,* 50 S.W.3d at 277. The Missouri Supreme Court has held: "The words ‘personal injuries' as defined by lexicographers, jurists, and text-writers and by common acceptance, denote an injury either to the physical body of a person or to the reputation of a person, or to both." *Soukop v. Employers Liability Assur. Corporation,* 341 Mo. 614, 108 S.W.2d 86, 90 (1937). "Personal injury" is construed to mean "bodily injury" in its restrictive sense, but is construed to mean an injury to a personal right in its broad sense. *Gray v. Wallace,* 319 S.W.2d 582, 583-84 (Mo.1958). *See also* 43A C.J.S. *Injury* 770 (1978). A "personal right" in law is a right "that forms part of a person's legal status or personal condition, as opposed to the person's estate." Black's Law Dictionary 1323 (7th ed.1999). Injuries to a person's reputation or feelings exemplify injuries to personal rights. *St. John's Regional Health Center, Inc. v. Windler,* 847 S.W.2d 168, 171 (Mo.App.1993). Actions for injuries to personal rights include libel, slander, criminal conversation, seduction, false imprisonment, and malicious prosecution. *Gray,* 319 S.W.2d at 584; *St. John's* 847 S.W.2d at 171; *Vitale v. Sandow,* 912 S.W.2d 121, 122-23 (Mo.App.1995); 43A C.J.S. *Injury* 769 (1978).

Thus, in its broad sense, "personal injury" is coextensive with the class of torts known as "personal torts," "which involve injuries to the person, whether to the body, reputation or feelings." *Travelers Indemnity Company v. Chumbley,* 394 S.W.2d 418, 422 (Mo.App.1965).

Id. at 402-403.

Both the common law and the Missouri statutes recognize various legal injuries to person, property and character and provide remedies for such injuries. While a statute may modify or abolish a cause of action that had been recognized by common law or by statute, it may not erect an arbitrary or unreasonable barrier in seeking a remedy for a recognized injury. *Kilmer v. Mun*, 17 S.W.3d at 550. Here, the statutory scheme governing the establishment of a child abuse registry recognizes the right of an alleged perpetrator to seek review of a probable cause determination that has been made by the division of family services. That review encompasses two levels – review by the CANRB and then a *de novo* judicial review. The review by the CANRB constitutes an arbitrary and unreasonable barrier to an accused individual's right to obtain a judicial review in the circuit court.

The CANRB review is an arbitrary delay of an individual's right to judicial review. This is evident from the nature of the proceeding. For example, there is no deference by the circuit court to the determination of the CANRB. Rather, the circuit court must conduct "a fresh hearing on the matter and is not limited in any way by previous decisions of the Division or the CANRB." *Petet v. State, Dept. of Social Services, Division of Family Services*, 32 S.W.3d 818, 821 (Mo.App.W.D. 2000). Moreover, the CANRB proceeding is wholly lacking in procedural protections. It is not considered an "adversary proceeding in a contested case" as that phrase is defined in the Missouri Administrative Procedure Act. *Lipic v. State*, 93 S.W.3d 839 (Mo.App.E.D. 2002). The procedures are informal. Statements are not required to be made or presented under oath or by affirmation. Nor are they subject to cross-examination. *Id*. The alleged

perpetrator is not even required to be present – he or she may submit an unsworn written statement in lieu of a personal appearance.

The requirement that an alleged perpetrator proceed before the CANRB before proceeding to court is logically akin to the medical review board procedure that was struck down by the Missouri Supreme Court in *State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner*, 583 S.W.2d 107 (Mo.banc 1979). In that case, a medical malpractice plaintiff challenged the statutory requirement that she first seek review of her claims before a professional liability review board before filing a lawsuit. The determination of the review board, like that of the CANRB, was non-binding on the plaintiff. The Missouri Supreme Court held that the requirement that the plaintiff first proceed before the review board was an unconstitutional infringement on the plaintiff's rights under the "open courts" provision of the Missouri Constitution.

The principal distinction between the procedure at issue in *Cardinal Glennon*, and the statutory scheme governing review of a "probable cause" finding, is the nature of the judicial proceeding that the plaintiff is ultimately trying to pursue. The right of access under the "open courts" clause has been interpreted to mean "simply the right to pursue in the courts the causes of action the substantive law recognizes." *Kilmer*, 17 S.W.3d at 549. The right to bring a medical malpractice action is clearly a cause of action recognized by the substantive law. The right to clear one's name from the central registry is also a right clearly recognized by the substantive law in that it is specifically provided for by statute. Recognized rights of action arise both by common law and by statute.

Kilmer, 17 S.W.3d at 550 ("[b]oth the common law and our statutes recognize various legal injuries to person, property and character and provide remedies for such injuries.")

Were it not for Chapter 210, which provides for *de novo* appeal to the circuit court, the accused would certainly have rights to proceed to court under Missouri's substantive law, by way, for instance, of injunctive relief, declaratory relief, mandamus, or prohibition, to require the division to maintain its central registry in a way that is constitutional. Thus the prohibition on attacking the statute that creates the cause of action does not come into play in the case at bar. *See Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771 (Mo. banc 2003). It is true that the exclusive remedy for challenging actions of the division is through *de novo* appeal. *Brown v. Stangler*, 954 S.W.2d 707 (Mo.App. W.D. 1997). But Chapter 210 did not create the right to challenge the findings of the division. That right predated Chapter 210.

The requirement that the accused proceed first before the CANRB before seeking review in court violates the Open Courts Clause of the Missouri Constitution.

V Respondents Do Not Contest Appellant's Argument That Respondents' Costs Should Not Be Taxed Against The State.

At the request of counsel for respondents, costs were taxed against the department. There was no occasion for the trial court to amend its order, as the department did not raise this issue at the trial court. Respondents do not contest appellant's point that respondents' costs should not be taxed against the state in this case.

CONCLUSION

The trial court's judgment declares the state's central registry scheme to be unconstitutional, to the extent it impairs employment rights, adoption or foster parenting, without first providing due process to the accused. The trial court's decision upholds the compelling interests of the accused without jeopardizing the state's compelling interests in law enforcement and emergency child protection, while correcting the enormous risk of error brought about through the statute's failure to provide procedural due process. The trial court's judgment should therefore be affirmed.[16]

Dated: September 13, 2004

Timothy Belz, Esq. #31808
Ottsen, Mauzé, Leggat & Belz, L.C.
112 South Hanley, 2nd Floor
St. Louis, MO 63105
314/726-2800
Fax 314/863-3821

Al W. Johnson #31485
University Club Tower, Suite 1380
1034 Brentwood Boulevard
St. Louis, Missouri 63117
Telephone: (314) 725-1600
Facsimile: (314) 725-1609

Attorneys for Respondents

[16] Not at issue in this appeal are the trial court's reversals, on the merits, of the division's probable cause findings of abuse and neglect against the four respondents, as that part of the trial court's judgment was not appealed.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to Rule 84.06(g), two copies of the foregoing brief and a copy of the brief on disk were hand-delivered, this 13th day of September, 2004, to:

Joel E. Anderson, Esq.
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

_____
One of the Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

Timothy Belz, one of the attorneys of record for the Respondents in the above-references appeal, certifies that

1. Respondent's Brief contains the information required by Rule 55.03;

2. Respondents' Brief complies with the limitations contained in Rule 84.06(b);

3. Respondents' Brief, excluding the cover page, certificate of service, this certificate, signature blocks and appendix, contains 22,220 words, as determined by the word count tool contained in Microsoft Word 2000 software with which this brief was prepared; and

4. The diskette accompanying this brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

Dated: September 13, 2004

_____

Timothy Belz #31808
One of the Attorneys for Respondents

RESPONDENTS' APPENDIX