

1 **WO**

2

3

4

5

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

6

7

8

Don and Thelma Dillon, husband and wife,

No. CV 08-796-PHX-DGC

9

Plaintiffs,

ORDER

10

vs.

11

State of Arizona; Department of Economic Security; Office of Licensing Certification & Regulation; Arizona Child Protective Services; Janice Mickens, an employee of Child Protective Services; Michelle Heermans, F/K/A Michelle Kohler, an employee of Child Protective Services; Mark Peterson, an employee of Child Protective Services; Victoria Stevens, and employee of Child Protective Services; Eric Hobson, an employee of Child Protective Services.

18

Defendants.

19

20

21

Plaintiffs move for partial summary judgment to establish liability for a violation of 42 U.S.C. § 1983. Dkt. #14. A response, objection, reply, and supplement have been filed. Dkt. ##32-35. For the following reasons, the Court will deny the motion.¹

22

23

24

25

¹Plaintiffs have requested oral argument. The request is denied because the parties have fully briefed the issues. See Dkt. ##2, 19, 32-35. Oral argument will not aid the Court's decision or result in unfair prejudice to Plaintiffs. See *Lake at Las Vegas Investors Group, Inc. v. Pac. Dev. Malibu Corp.*, 933 F.2d 724, 729 (9th Cir. 1991); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998); *Mahon v. Credit Bur. of Placer County, Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999); see also Fed. R. Civ. P. 78.

26

27

28

1 **I. Background.**

2 **A. Procedural posture.**

3 Plaintiffs are husband and wife residing in the city of Glendale in Maricopa County,
4 Arizona. Defendants are agencies and employees of the State of Arizona. Defendants
5 removed three foster children from Plaintiffs' care, without prior notice, on March 29, 2005.
6 Dkt. ##2 at ¶¶ 28-32; 19 at ¶ 28. This incident was followed by Defendants' revocation of
7 Plaintiffs' foster care license and reversal of that action by the Appeals Board of the Arizona
8 Department of Economic Security. *See* Dkt. ##2 at ¶¶ 34-36; 32 at 32-33.

9 Plaintiffs filed a complaint in Arizona Superior Court on December 20, 2007. *See*
10 Dkt. #2. The complaint asserted five tort claims under Arizona law and violation of
11 Plaintiffs' civil rights under 42 U.S.C. § 1983. Dkt. #2 at ¶¶ 64-96. Defendants removed the
12 case to this Court pursuant to 28 U.S.C. § 1441. Dkt. #1. Defendants then filed a motion to
13 dismiss, which the Court granted in part by dismissing Plaintiffs' state law claims for failure
14 to comply with Arizona's notice of claims statute. Dkt. ##6; 17 at 4-7.

15 As Defendant's motion to dismiss was pending, Plaintiffs filed a motion for partial
16 summary judgment on what is now their sole remaining cause of action: violation of § 1983.
17 Dkt. #14. Plaintiffs seek to establish liability for three distinct violations of § 1983, and "an
18 order declaring that the Department of Economic Security (hereinafter 'DES'), the Office of
19 Licensing, Certification and Regulation (hereinafter 'OLCR'), and Child Protective Services
20 (hereinafter 'CPS'), violated Plaintiffs' rights." *Id.*

21 **B. Facts.**

22 Plaintiffs attended training for adoption and therapeutic foster care in April of 2002
23 at a private agency, and received a certificate of attendance as part of an effort to become
24 foster parents. Dkt. ##14 at ¶ 14; 15-2 at 4. On January 16, 2004, the OLCR, a subdivision
25 of the DES, granted Plaintiffs a license to operate as a foster home for one child. Dkt. ##15-3
26 at 2; 32 at 4. CPS, a separate subdivision of the DES, ultimately placed three young brothers
27 in Plaintiffs' care after the OLCR increased Plaintiffs' license to three foster children on
28

1 January 16, 2005. Dkt. ##14 at 3; 32 at 3; 33 at ¶ 5. Defendant Heermans, a CPS employee,
2 planned to make the brothers eligible for adoption. Dkt. #33 at ¶ 9. She disputes, however,
3 that she told Plaintiffs that CPS was placing the brothers with Plaintiffs for adoption. Dkt.
4 ##2 at ¶¶ 18-19; 33 at ¶ 9.

5 One of the brothers had special needs requiring a therapeutic environment. Dkt. #14
6 at 3-4; 33-2 at 10, 20. Plaintiffs had applied to become licensed as a therapeutic home, but
7 State authorities had not yet processed their application at the time of the brothers' placement.
8 Dkt. ##14 at 3; 33 at ¶ 12. The three brothers began to exhibit behavioral difficulties in
9 Plaintiffs' home, which the parties attribute to different causes. *See* Dkt ##14 at 4; 33 at ¶ 4.
10 While discussing these difficulties with Mr. Dillon in March of 2005, Defendant Mickens, a
11 CPS employee, expressed her understanding that CPS would not remove the brothers from
12 Plaintiffs' home absent evidence of abuse or neglect. Dkt. ##14 at 4-5; 33-2 at 9.

13 Following some confusion within CPS about whether Plaintiffs' home had a
14 therapeutic rating, its employees, including Ms. Mickens, concluded that it did not.
15 Dkt. #33-2 at 10-11. On March 29, 2005, CPS took two of the three brothers into custody at
16 school. Shortly thereafter, Defendants Heermans and Hobson arrived unannounced at
17 Plaintiffs' home to remove the third child. Dkt. ##14 at 5; 33 at ¶ 9-11. Mr. Dillon was
18 home, but was reluctant to surrender the boy to CPS until he could call Ms. Mickens to
19 discuss the removal because he believed it conflicted with her earlier statements regarding the
20 placement. Dkt. ##14 at 5-6; 33-2 at 9-10. CPS employees called police to Plaintiffs' home.
21 Dkt. ##14 at 5; 32 at 4. Mr. Dillon ultimately surrendered the child after speaking with
22 Ms. Mickens on the phone and being assured that they would meet in person to resolve the
23 matter. Dkt. ##14 at 5-6; 33-2 at 9-10.

24 CPS did not return the brothers to Plaintiffs' home, and the OLCR informed Plaintiffs
25 on June 13, 2005 that the State had revoked their foster care license primarily due to Mr.
26 Dillon's failure to cooperate with CPS. Dkt. ##14 at 6; 15-7 at 2-3; 32 at 4, 9. Plaintiffs
27 contested this revocation on November 18, 2005 before an Arizona Administrative Law
28

1 Judge, who affirmed the OLCR's determination. Dkt. ##14 at 6; 32 at 9. The Appeals Board
2 of the DES reversed on July 21, 2006, and subsequently affirmed its reversal. Dkt. ##14 at
3 6; 32 at 9. The Appeals Board determined that revocation of Plaintiffs' license was not
4 authorized by Arizona law because the OLCR had not presented sufficient evidence to
5 demonstrate that Mr. Dillon was disqualified as a foster parent, or that his reluctance to
6 cooperate with CPS justified the revocation. Dkt. ##15 at ¶¶ 17(C); 33 at ¶¶ 17-18.

7 In this action, Plaintiffs argue that Defendants violated their due process rights under
8 the Fourteenth Amendment to the United States Constitution by (1) removing the three
9 brothers from Plaintiffs' foster care without prior notice or a hearing as required by A.R.S.
10 § 8-515.05, (2) terminating Plaintiffs' relationship with the brothers as foster parents and
11 prospective adoptive parents without a juvenile court's order contrary to A.R.S. § 8-113, and
12 (3) improperly revoking Plaintiffs' foster care license contrary to Ariz. Admin. Code R6-5-
13 5815 and 5816. Dkt #14 at 8-16. In moving for partial summary judgement, Plaintiffs argue
14 that Defendants are barred by collateral estoppel and *res judicata* from contesting the findings
15 of the Appeals Board. Dkt. #14 at 14-16.

16 **II. Discussion.**

17 **A. Summary judgement under § 1983.**

18 Summary judgment is appropriate if the evidence, viewed in the light most favorable
19 to the nonmoving party, shows "that there is no genuine issue as to any material fact and that
20 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking
21 summary judgment "always bears the initial responsibility of informing the district court of
22 the basis for its motion, and identifying those portions of [the record] which it believes
23 demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477
24 U.S. 317, 322 (1986). Only disputes over facts that might affect the outcome of the suit will
25 preclude the entry of summary judgment, and the disputed evidence must be "such that a
26 reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,*
27 *Inc.*, 477 U.S. 242, 248 (1986).

28

1 42 U.S.C. § 1983 provides that “[e]very person who, under color of any statute . . . of
2 any State . . . , subjects, or causes to be subjected, any citizen . . . to the deprivation of any
3 rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the
4 party injured in an action at law.” In this Circuit, “the requirements for relief under [§] 1983
5 have been articulated as: (1) a violation of rights protected by the Constitution or created by
6 federal statute (2) proximately caused (3) by conduct of a ‘person’ (4) acting under color of
7 state law.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

8 Two elements of § 1983 are not disputed in this action. First, states and their agencies
9 are not “persons” for purposes of § 1983. *See Arizonans for Official English v. Arizona*, 520
10 U.S. 43, 69 (1997); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007); *Hale v. Arizona*,
11 993 F.2d 1387, 1398 (9th Cir. 1993) (en banc). State officials sued in their individual
12 capacity are “persons” for purposes of the statute. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 31
13 (1991); *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003). Because Plaintiffs can assert no
14 § 1983 claim against the State and its agencies, the Court will consider Plaintiff’s motion only
15 with respect to the state employees named in the complaint. Second, there is no dispute that
16 these employees acted under color of state law during the events described in the complaint.
17 *See, e.g.,* Dkt. #19 at ¶ 96.

18 **B. Collateral estoppel and *res judicata*.**

19 State law governs the application of collateral estoppel and *res judicata* to a state
20 judgment. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985);
21 *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990). In this case, the judgment
22 sought to be enforced is from Arizona. Plaintiffs must show that the state employees named
23 in their complaint are bound by the decision of the Appeals Board. *See State Compensation*
24 *Fund v. Yellow Cab Co. of Phoenix*, 3 P.3d 1040, 1044, ¶ 14 (Ariz. Ct. App. 1999).

25 In Arizona, collateral estoppel occurs when (1) the issue to be litigated was actually
26 litigated in a prior proceeding, (2) a final judgement was entered in the prior litigation, (3) the
27 party against whom the doctrine is to be invoked had a full opportunity to litigate the issue,
28

1 (4) the party actually did litigate the issue, and (5) the issue was essential to a final judgment.
2 *See Garcia v. General Motors Corp.*, 990 P.2d 1069, 1073 (Ariz. Ct. App. 2000); *Circle K*
3 *Corp. v. Indus. Comm’n of Ariz.*, 880 P.2d 642, 645 (Ariz. Ct. App. 1993). Under the doctrine
4 of *res judicata*, a valid final judgment is conclusive with respect to a party or its privy as to
5 every issue decided and every issue that could have been decided. *Heinig v. Hudman*, 865
6 P.2d 110, 115 (Ariz. Ct. App. 1994); *accord Clark v. Bear Stearns & Co., Inc.*, 966 F.2d
7 1318, 1320 (9th Cir. 1992). “As the Arizona Supreme Court has recognized, generally a
8 person who is not a party to an action is not bound by the result.” *Daystar Inv. v. Maricopa*
9 *County Treasurer*, 88 P.3d 1181, 1185 (Ariz. Ct. App. 2004) (quoting *Scottsdale Mem’l*
10 *Health Sys., Inc. v. Clark*, 759 P.2d 607, 612 (Ariz. 1988)); *see also Cochise Sanitary Servs.,*
11 *Inc. v. Corp. Comm’n*, 410 P.2d 677, 679 (Ariz Ct. App. 1966) (finding that *res judicata* and
12 collateral estoppel did not apply to a non-party to a proceeding resulting in a decree adverse
13 to the Arizona Corporation Commission – the doctrines applied only to the Commission).

14 In this case, the Appeals Board addressed whether revocation of Plaintiffs’ license was
15 proper under Arizona law. Dkt. #16-9 at 7. Only the OLCR was a party. *Id.* at 2. The
16 individual defendants were not parties before the Appeals Board and did not have an
17 opportunity to litigate issues relating to the OLCR’s licensing activities. Plaintiffs argue,
18 nonetheless, that the individual defendants are bound by the Appeals Board decision because
19 they are privies of the OLCR. Dkt. #34 at 2. The Court does not agree.

20 Plaintiffs’ reliance on *Olson v. Morris*, 188 F.3d 1083 (9th Cir. 1999) is misplaced.
21 In *Olsen*, the Arizona Board of Psychologist Examiners revoked a psychologist’s professional
22 license after he had performed an exorcism on a foster child. *Id.* at 1085. Instead of
23 appealing that decision to the state courts as he was permitted to do, the psychologist filed a
24 constitutional claim in federal court. The Ninth Circuit applied the doctrine of *res judicata*
25 because the psychologist – who was a party to the state proceeding – could have raised his
26 constitutional argument at the state level, but failed to do so. *Id.* at 1086-87.

27 Unlike *Olsen*, Plaintiffs in this case seek to invoke *res judicata* offensively against
28

1 defendants who were not parties to the Appeals Board proceeding. The individual defendants
2 are not privies of the OLCR for purposes of *res judicata* or collateral estoppel because they
3 are not employees of the OLCR and had no interest or involvement in the appeal other than
4 as witnesses. *See Aldrich*, 837 P.2d at 1183. Thus, Plaintiffs have not demonstrated that the
5 individual defendants are bound by the findings of the Appeals Board.

6 **C. Plaintiffs’ due process claims.**

7 In cases of procedural due process, “the deprivation of a constitutionally protected
8 interest ‘is not itself unconstitutional; what is unconstitutional is the deprivation of such an
9 interest without due process of law.’” *Humphries v. Los Angeles*, --- F.3d ---, 2009 WL
10 102101, *10 (9th Cir. 2009) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). Courts
11 assess procedural due process claims in two steps: “‘the first asks whether there exists a
12 liberty or property interest which has been interfered with by the State; the second examines
13 whether the procedures attendant upon that deprivation were constitutionally sufficient.’” *Id.*
14 (quoting *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)). Liberty interests can
15 arise both from the Constitution and from state law. *See Wilkinson v. Austin*, 545 U.S. 209,
16 221 (2005). “Stated simply, ‘a State creates a protected liberty interest by placing substantive
17 limitations on official discretion.’” *Thompson*, 490 U.S. at 462 (quoting *Olim v. Wakinekona*,
18 461 U.S. 238, 249 (1983)).

19 **1. Violation of A.R.S. § 8-515.05.**

20 Plaintiffs assert that Defendants’ unannounced removal of the three brothers violated
21 limitations on CPS’s authority in A.R.S. § 8-515.05. That statute provides in relevant part that
22 “[u]nless a child is removed from a licensed foster parent . . . to protect the child from harm
23 or risk of harm . . . [or] to place a child in a therapeutic setting . . . the department shall inform
24 the licensed foster parent of the department’s intent to remove a child.” *Id.* Plaintiffs argue
25 that CPS made the unannounced removal in retaliation for Plaintiffs’ complaints relating to
26 the brothers’ behavioral problems, and that CPS used the foster family’s lack of a therapeutic
27 rating as a mere pretext. *See* Dkt. #14 at 6. Defendants present evidence that they were
28

1 compelled to conduct the removal without notice due to Plaintiffs’ non-therapeutic rating and
2 out of concern for potential harm to the brothers. *See, e.g.*, Dkt. #33, ¶¶ 22, 24. This evidence
3 creates a genuine issue of material fact for trial.²

4 **2. Plaintiffs’ rights as foster parents and prospective adoptive parents.**

5 Plaintiffs argue that Defendants’ actions abrogated their rights as foster parents and
6 prospective adoptive parents. For at least two reasons, the Court cannot grant summary
7 judgment on the basis of Plaintiffs’ status as foster parents.

8 First, the Ninth Circuit has suggested that foster parents generally do not have a liberty
9 interest in retaining their foster children. *See Backlund v. Barnhart*, 778 F.2d 1386, 1390 (9th
10 Cir. 1985) (explaining that a state agency’s use of its statutory discretion to terminate a foster
11 relationship did not violate the foster parents’ liberty interests because “[t]he relationship
12 between . . . foster parent and foster child is a creature of . . . [the state’s] child welfare
13 statutes”). Plaintiffs’ reliance on *Smith v. Org. of Foster Families for Equality and Reform*,
14 431 U.S. 816, 844-45 (1977), and *McLaughlin v. Pernsley*, 693 F. Supp. 318 (D. Pa. 1988),
15 is not persuasive. In *Smith*, the Supreme Court never decided the question of whether foster
16 parents have a distinct liberty interest in foster relationships. *See* 431 U.S. at 846 (stopping
17 short of explaining what “liberty interest might otherwise exist in the foster family as an
18 institution”). *Pernsley* held that Pennsylvania authorities wrongfully removed a black child
19 from a white foster couple’s home because the authorities failed to provide the couple with
20 advance notice. 693 F. Supp. at 319-20, 327, 331. The court reasoned that Pennsylvania law
21 mandated fifteen days’ written notice prior to all removals, thereby creating “a liberty interest
22 in favor of the McLaughlins deserving Due Process Clause protection.” *Id.* at 325. Unlike
23 the absolute statutory requirement in *Pernsley*, A.R.S. § 8-515.05 does not require CPS
24 employees to provide families with notice prior to terminating foster relationships. To the

25
26 ² Like their statutory argument, Plaintiffs contend that Defendants violated the DES’s
27 Children’s Services Manual by removing the brothers without notice. *See* Dkt. #14 at 10-11.
28 This contention also raises factual issues because the Manual requires notice “unless an
emergency situation exists.” *See* Dkt. ##14 at 10; 16-11 at 2.

1 contrary, CPS may cut these ties abruptly to place children in a therapeutic setting or to
2 protect them from possible harm, issues on which there is a factual dispute in this case.

3 Second, the parties disagree on factual issues potentially relevant to the liberty interest
4 determination. Defendants assert that the State of Arizona at all times had the right to legal
5 and physical custody of the boys under a court order of dependency. Dkt. #33, ¶ 28.
6 Plaintiffs, they claim, never had custody of the boys pursuant to a court order, but instead had
7 mere permissive custody through a foster care agreement with the State. *Id.* And as noted
8 above, the parties disagree on the true reasons for the removal of the boys. The Court
9 concludes that Plaintiff’s claim based on their status as foster parents must be decided on the
10 basis of a more complete factual record.

11 Nor can the Court grant summary judgment on Plaintiffs’ claim that they were
12 prospective adoptive parents. Arizona has special statutory and administrative procedures to
13 protect prospective adoptive parents: “[a] child who has been placed in a *certified adoptive*
14 *home* by any agency or the [DES] *shall not be removed* from the home except on order of the
15 juvenile court.” A.R.S. § 8-113(A) (emphasis added). Additionally, “[d]uring the
16 probationary period or any extension, prospective adoptive parents who have complied with
17 the provisions of this chapter have . . . the right to physical custody of the child unless the
18 child is removed by order of the juvenile court after notice and a hearing.” *Id.* at § 8-113(I).
19 Arizona defines a “prospective adoptive parent” as “a person who has applied to an adoption
20 entity *to become certified* to adopt a child,” rather than a person possessing an actual
21 certification. *See* Ariz. Admin. Code R6-5-6501(35) (emphasis added).

22 The key question is whether Plaintiffs were in fact prospective adoptive parents under
23 Arizona law. Defendants present evidence disputing that the brothers’ placement was
24 adoptive (*see* Dkt, #33-2 at 4-5, 11-12), and Plaintiffs have not presented undisputed facts
25 showing they were certified for adoption or were undertaking a certification process. Genuine
26 issues of material fact therefore remain regarding Plaintiffs’ status as certified or uncertified
27
28

1 prospective adoptive parents.³

2 **3. Revocation of Plaintiffs' foster care license.**

3 Finally, Plaintiffs argue that the "State Defendants" improperly revoked their foster
4 license because no licensing investigation or interviews supported the OLCR's revocation.
5 Dkt. #34 at 10; *see* Ariz. Admin. Code R6-5-5815 and 5816. As noted above, however, states
6 and their agencies are not "persons" within the meaning of § 1983. *Arizonans for Official*
7 *English*, 520 U.S. at 69. Plaintiffs have not sued any employees of the OLCR in their
8 individual capacity, and have failed to show that the CPS employees named in the complaint
9 were in any way responsible for the license revocation or the OLCR's failure to follow
10 licensing regulations. Moreover, Defendants directly dispute that the OLCR failed to conduct
11 an investigation. Dkt. #32 at 10. Plaintiffs have not shown as a matter of undisputed fact that
12 any "person" named in this case violated their rights by improperly revoking their foster
13 license.

14 **IT IS ORDERED** that Plaintiffs' motion for partial summary judgment (Dkt. #14) is
15 **denied.**

16 DATED this 20th day of February, 2009.

17
18 

19
20 _____
21 David G. Campbell
22 United States District Judge
23
24
25

26 _____
27 ³Additionally, Plaintiffs have not cited any legal authority indicating that CPS's
28 alleged promises regarding adoption of the brothers made Plaintiffs "prospective adoptive
parents" under Arizona law. *See* Dkt. #14 at 3, 12; *cf.* Ariz. Admin. Code R6-5-6501(35).