NO. 95024-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Christal Fields, an individual,
Appellant/Petitioner,

v.

State of Washington Department of Early Learning,
Respondent.

MEMORANDUM OF AMICUS CURIAE NORTHWEST JUSTICE PROJECT IN SUPPORT OF GRANTING REVIEW

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I. INTRODUCTION

This case raises an issue of first impression in Washington: does crying "child protection" alone validate an agency's list of 58 crimes that result in an automatic, lifetime employment bar? Does it relieve the agency of its duty to have a rational basis for imposing a lifetime bar for certain crimes but only five years, or none, for others? Ms. Fields asks this Court to scrutinize the state's list of permanently disqualifying crimes and require more than a bare assertion that children are safer if we keep people with those convictions away from childcare jobs. The state has not advanced *any* nexus between certain convictions and a permanent risk of harm to children. In fact, research demonstrates that people with old convictions such as Ms. Fields pose no greater risk than people without a record.

The Department of Early Learning (DEL) has authority to advance a legitimate state interest to protect children in care settings. The federal and state constitutions prohibit state agencies from impairing individual rights beyond what is narrowly tailored and rationally related to advance that purpose. DEL's list sweeps too broadly and violates the constitution because permanent disqualification for at least some of the crimes bears no rational relationship to protecting children. The list also perpetuates racial inequities. The Court should accept review to consider and resolve this issue of substantial public interest.

II. INTEREST OF AMICUS

Northwest Justice Project (NJP) is the largest statewide non-profit law firm providing free civil legal aid to low-income people in Washington. NJP's interest is fully set out in its Motion to Participate as Amicus Curiae.

III. STATEMENT OF CASE

Amicus agrees with Ms. Fields' statement of case. NJP also demonstrates how permanently banning Ms. Fields from a broad swath of employment based on a 28-year-old conviction, with no right to establish her suitability, violates substantive due process under Const. Art. I, §12 of the Washington constitution and the Fourteenth Amendment.

IV. ARGUMENT

A. *The Court should apply heightened scrutiny to DEL's list of disqualifying crimes.*

1. **The employment ban is subject to heightened scrutiny under Art. I, §12 of the Washington Constitution.**

The ability to work in the occupation of one's choice is a privilege subject to constitutional protections.[1] This Court determined that Const. Art. I, §12 is subject to an independent analysis from the federal Equal Protection Clause.[2] Disparate impacts on protected classifications may be

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[1] *E.g.*, *Nebbia v. New York*, 291 U.S. 502, 527-28, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (right to work in a particular profession is a protected right subject to rational regulation); *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 n.4 (9th Cir. 1994) ("it is well-recognized that the pursuit of an occupation or profession is a protected liberty interest"); *Amunrud*, 158 Wn.2d at 220-21 .

[2] *Grant Cty. Fire Prot. Dist., No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 805, 83 P.3d 419 (2004).

subject to heightened scrutiny.[3] State regulation that imposes a class-based disqualification from one's protected privilege to work comes within Const. Art. I, §12[4] even if specific choice of employment is not a fundamental right.[5] The combined infringement on the privilege to engage in one's chosen employment with the disparate impact on race requires heightened scrutiny.[6] The state must demonstrate a compelling state interest and use the least restrictive method to achieve its objective.[7]

Ms. Fields, an African American woman, is simply asking that she not be disqualified from employment based *solely* on a prior conviction. Constitutional and common law history, pre-existing state law, and state and local concerns[8] all support a more protective application of Const. Art. I, §12 to the disqualification at issue. Even given the state's compelling interest in protecting children, the blanket ban is too broad. Allowing DEL

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[3] Amicus memos of LegalVoice and Columbia Legal Services more fully discuss the employment ban's disparate impact. *See, e.g.*, *Hanson v. Hutt,* 83 Wn.2d at 201 (under heightened scrutiny, a pregnancy disqualification violated article I, §12), *Macias v. Dept. of Labor and Industries,* 100 Wn.2d 263, 271, 275, 668 P.2d 1278 (1983) (dicta that disparate racial impact of an exclusion would allow for higher scrutiny).

[4] *Hanson v. Hutt*, 83 Wn.2d 195, 201, 517 P.2d 599 (1973) (disqualification from benefits due to pregnancy violates article I, § 12).

[5] *Hardee v. State, Dep't of Soc. & Health Servs.,* 172 Wn.2d 1, 15, 256 P.3d 339 (2011).

[6] *See First United Methodist Church of Seattle v. Hearing Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 248, 916 P.2d 374 (1996) (ordinance that disparately impacted religious institutions and posed a threat to free religion and speech was a 'hybrid' situation requiring higher scrutiny); *Macias*, 100 Wn.2d at 271 (regulation disparately impacting a racial minority and restricting right to travel).

[7] *Fusato*, 93 Wn. App. at 768-69
(citing *Westerman v. Cary*, 125 Wn.2d 277, 294, 892 P.2d 1067 (1994)).

[8] *Gunwall* criteria 3, 4 and 6.

to consider rehabilitation and direct evidence of suitability to provide childcare would focus on actual risk of potential harm and not mere assumptions.[9] Taking the list as whole, WAC 170-06-0120 fails scrutiny under Const. Art. I, §12.

2. The Court should review DEL's list under heightened rational basis scrutiny because it burdens a substantial right and reflects significant animus.

There are two levels of rational basis scrutiny of equal protection claims. Under the higher, "rational basis with bite" standard, the Supreme Court has invalidated classifications for bias or irrationality.[10] Washington courts endorse heightened scrutiny, finding "discriminatory classification that is based on prejudice or bias is not rational as a matter of law."[11]

The Supreme Court described this as a standard where legislation "can hardly be considered rational unless it furthers some substantial goal of the State"[12] Courts apply the standard when policy or legislation disparately affects significant rights, including personal liberty or common public expectations.[13] The significant right at issue here is the right to

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[9] *See In re Walgren*, 104 Wn.2d at 569

[10] See Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070 (2015) (see especially footnote 2).

[11] *Miguel v. Guess*, 112 Wn. App. 536, 553, 51 P.3d 89 (2002), *review denied*, 148 Wn..2d 1019, 64 P.3d 650 (2003), citing *Romer*, 517 U.S. at 633-34; *Cleburne*, 473 U.S. at 448; *Palmore*, 466 U.S. at 432-33.

[12] *Plyler*, 457 U.S. at 223–24.

[13] Legislation that has received "rational basis with bite" scrutiny includes eligibility for public benefits, contraceptive access, right to counsel, personal dignity, and education.

engage in employment of one's choosing, an issue of personal liberty and a common public expectation. Rules that adversely impact an unpopular group - such as people with convictions - should also receive a more searching rational basis review.[14] DEL disparately performs a suitability review for people with some convictions but bars Ms. Fields from childcare employment for life, regardless of her suitability to provide childcare.

B. *DEL's list of permanently disqualifying crimes is based on irrational assumptions and fails rational basis scrutiny.*

Substantive due process limits the government's ability to interfere with protected rights. Even if heightened scrutiny does not apply, a regulation restricting the right to pursue a trade or profession is valid only if it is rationally related to a legitimate state interest.[15] DEL's stated interest to protect children is inarguably legitimate. However, the Court below assumed but did not analyze the rational relationship between protecting children and DEL's automatic, permanent ban. The record in this case is devoid of any support that DEL's list achieves or advances the stated purpose. There is no rational relationship between Ms. Field's 28-year-old second degree robbery conviction and child safety.

The rational basis standard may be satisfied if DEL based its regulation on rational speculation, even if unsupported by evidence or

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[14] *See, e.g., Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011)
[15] *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006)

empirical data.[16] But bare assertions are not enough, especially when they target a disfavored group.[17] DEL must do more than cry "child protection" to establish a nexus justifying its permanent bar for the listed crimes.

A growing body of evidence establishes that no such nexus exists. Research shows that the risk an ex-offender will re-offend declines over time until it equals or falls below the risk for the general population.[18] A primary investigator in redemption research concluded, "for those who are concerned about the risks inherent in hiring people with criminal records, the value of criminal records in predicting future criminality diminishes with time and becomes virtually irrelevant after a maximum of no more than seven years for individuals with a single conviction, and no more than ten years for those with multiple convictions – and even less time for individuals with non-violent offenses."[19] The research contradicts assumptions that someone with a conviction permanently poses a higher risk than the general population.[20]

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[16] *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144 (1998) (emphasis added).
[17] *See, e.g., State v. Berrier*, 110 Wn. App 639, 649-50 (2002) (investigating and rejecting actual reasons offered by state for treating similarly situated persons differently); *State v. W.W.*, 76 Wn. App. 754, 759-60 (1995) (rejecting proffered reason that statute and court rule did not violate equal protection), *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 535, 93 S. Ct. 2821, 2826, 37 L. Ed. 2d 782 (1973) (no rational basis to exclude households with unrelated members from food stamps, impacted the disfavored group "hippies").
[18] *See* amicus memo from National Employment Law Project.
[19] As cited in 132 A.3d 506, 514 (Pa. Commw. Ct. Dec. 30, 2015) and in Petition for Review at p. 20 and Ex. A.
[20] *E.g.*, Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47(2) Criminology 327 (2009); Megan C.

1. Protective intent is advanced by focusing on current suitability, not punishment beyond any protective nexus.

Federal law does not require most of the crimes on DEL's list. It permits states to disqualify individuals for crimes "that bear upon the fitness of an individual to provide care for and have responsibility for the safety and well-being of children."[21] The Court of Appeals found support to include second degree robbery because it is one of the crimes in the definition of "crime against children or other persons" at RCW 43.43.830(7). While the definition includes second degree robbery, nothing compels it to be on a permanent ban list. Nor does the definition exempt the crime from the character, suitability, and competence review DEL must perform under RCW 43.215.215.

DEL's crime list differs significantly from the statutory definition. Of the 58 "crimes against persons" in RCW 43.43.830(7),[22] DEL makes 25 of them permanently disqualifying; another four are permanently disqualifying with variation from the statutory language. Twelve of the crimes hold a five-year disqualification under DEL's list, and one crime is not on the list at all. DEL adds 55 crimes that are not in the statutory definition; 22 are permanently disqualifying. The record offers no

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Kurlychek, Robert Brame, & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53(1) Crime & Delinquency 64 (2007).

[21] 42 U.S.C. §9858f(h)(1)

[22] Counts degrees separately, e.g., "first, second, or third degree assault" is three crimes.

explanation for the regulatory deviations from the federal or state crime lists. It offers no explanation as to why DEL decided to include, exclude, or add certain crimes. It offers no grounds – or even speculation – upon which DEL determined that some crimes are disqualifying permanently and others for five years. The regulation and the record in this case offer no discussion or nexus between protecting children and the crimes on DEL's list.

The legislature charged DEL to determine whether a person is of appropriate character, suitability, and competence to provide child care or services.[23] DEL may consider past involvement of child protective services or law enforcement to establish a pattern of conduct, behavior, or inaction with regard to the health, safety, or welfare of a child.[24] The law requires DEL to ensure that childcare workers are qualified. Instead of an automatic bar, concerning factors should trigger review of an applicant's qualification.

DEL already has a process to conduct individual reviews.[25] Many states have similar review processes for qualification to work with vulnerable adults.[26] Federal guidance suggests suitability reviews consider factors such as extenuating circumstances, time since conviction,

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[23] RCW 43.215.215(1)
[24] Id.
[25] *See, e.g.*, WAC 170-06-0050, -0060.
[26] Amanda Borsky et al., *Centers for Medicare & Medicaid Services National Background Check Program: Long Term Care Criminal Convictions Work Group* 2-3, 19-21 (2012), https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-13-24-Attachment-.pdf.

demonstration of rehabilitation, and relevancy of the crime to the employment sought.[27] Absent a connection between conviction and risk of harm, the mandatory ban is merely punitive. Punishment beyond the scope of the criminal process is a highly disfavored basis on which to regulate, even when governmental interests are legitimate.[28]

2. DEL's regulation violates substantive due process.

A regulation can be facially unconstitutional if a substantial number of its potential applications are unconstitutional.[29] DEL's distinction between a permanent or 5-year bar arbitrarily results in suitable, and even exemplary, persons being denied or terminated from employment. Ms. Fields, an African American mother and grandmother who has long and lovingly cared for children, is one example. The list of permanently barred crimes sweeps so broadly that it results in limitations devoid of any nexus to protecting children. Even under a "no set of circumstances" test,[30] this regulation is facially invalid given the arbitrary distinction among crimes.

The Court of Appeals relied on *In re Kindschi*,[31] which involved an eight-month suspension, not a lifetime bar. There may be a rational

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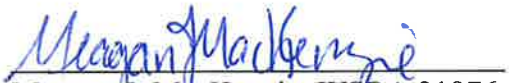
[27] *Id.* at D-9.
[28] *See, e.g., In re Walgren*, 104 Wn.2d 557, 572, 708 P.2d 380 (1985).
[29] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)
[30] *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004).
[31] 52 Wn.2d 8, 9, 319 P.2d 824 (1958)

relationship between protecting children and restricting people convicted of crimes against persons[32] from childcare work for a limited time. It is not rational to assume the relationship endures for the rest of that person's life. Blanket bans that allow no consideration of more relevant factors lead to ludicrous results that highlight the lack of relationship between the prohibition and a legitimate state interest.[33] The NW Justice Project asks the Court to grant review of this case.

Respectfully submitted on November 16, 2017.



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[32] See, e.g., RCW 43.43.830(7)

[33] See, e.g., *Warren County Human Services v. State Civil Service Commission (Roberts)*, 844 A.2d 70, 74 (Pa. Commw. Ct. 2004) (lifetime employment ban for assault unconstitutional because it did not determine actual fitness, limitations with no temporal proximity to the time of hiring are legally impermissible.); *Johnson v. Allegheny Intermediate Unit*, 59 A. 3d 10, 25 (Pa. Commw. Ct. 2012) (permanent ban on teacher with excellent 20-year job record due to felony manslaughter conviction was "unreasonable, unduly oppressive and patently beyond the necessities of the offense" and did not bear a real and substantial relationship to the interest in protecting children.)