NO. 91561-0

SUPREME COURT OF THE STATE OF WASHINGTON

JUDE I. DOTY,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER

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I. INTRODUCTION

Jude Doty does not deny he employed his children in a dangerous business: his 13-year-old son rode on a moving house 22 feet off the ground, and both that son and his 11-year-old brother operated heavy equipment, such as a backhoe. Doty argues that strict scrutiny should apply when state child labor laws are applied to such work. Review of that argument is not warranted because he did not raise it at the Court of Appeals and because he shows no fundamental right to employ a child in a dangerous business. His petition should be denied.

II. ISSUES PRESENTED

> Does the application of Washington's child labor laws to a parent employer implicate any fundamental right of the parent?

III. STATEMENT OF THE FACTS

A. Doty Employed His 13-Year-Old and 11-Year-Old Sons in His House-Moving Business

Doty operated a house-moving and construction business in Yakima. Administrative Record (AR) 175-76; Finding of Fact (FF) No. 6.[1] He is a sole proprietor who employs workers. AR 175, 189, 214-18; FF 6. For several months, he relocated houses from a hospital property to three different sites. AR 177-79; FF 6.

Neighbors, contractors, coworkers, city officials, and multiple

[1] The Director's decision is found at AR 704-25.

Department of Labor and Industries (Department) investigators observed Doty employing his two sons, 13-year-old Zachary and 11-year-old Stephen, in his commercial enterprise to move the houses. AR 147-51, 153-54, 261-62, 269-71, 279, 281, 283, 290-94, 309-10. Doty stated that he wanted to train his sons in the construction and house-moving industry while he homeschooled the children. AR 166-67, 170, 461-62; FF 6, 7.

House moving involves the use of heavy equipment such as bulldozers, backhoes, and tractors. AR 198; FF 7. Both Zachary and Stephen operated and worked near heavy equipment over the period of several weeks. AR 147-50, 198, 269-70, 277; FF 7, 10. For example, the hospital project required leveling the dirt. *See* AR 197-98. A subcontractor would do this work if Doty and Zachary did not. AR 197-98. WAC 296-125-030(17) prohibits all minors from operating or working near bulldozers, backhoes, and tractors.

Doty had Zachary ride on the top of moving houses to push low-hanging telephone wires, cables, traffic lights, and other obstacles out of the way. AR 153, 183-84, 309-10; AR Vol. 4 (videotape); FF 8. One of these roofs measured approximately 22 feet above ground level. *See* AR 153, 310; FF 9. No fall protection was in place to prevent Zachary from falling as he moved around the roof. AR 126, 294; AR Vol. 4; FF 8. With or without fall protection, Doty had Zachary ride on the roof of a moving

house to lift wires and cables because it is "profitable" to have someone clear obstacles. AR 184. This is because he has to pay if he breaks a wire when moving a house. AR 185. WAC 296-125-030(28) prohibits all minors from performing work more than 10 feet above ground or floor level. This work is dangerous because of the danger of falling and the risk of electrical shock from moving the wires. AR 126, 128, 309-10; FF 9.

Zachary and Stephen also acted as outside helpers (spotters) to guide moving houses. AR 186, 190, 269; FF 14. Doty had spotters (including his sons) walk in front of the moving houses to look for obstacles. AR 188. This is because Doty would have to pay if a sign was clipped. AR 186. Doty would have two spotters, one on each side of the road. AR 188. Doty would have Zachary or Stephen act as a spotter on one side of the road. AR 186, 190. When he had Zachary or Stephen act as a spotter, Doty did not need to have another worker to perform this task. *See* AR 188-89. This work was "beneficial" because Doty would have to pay another spotter (i.e., not his son) for his work. AR 186, 189. WAC 296-125-030(2) prohibits all minors from working as an outside helper on public roads or directing moving motor vehicles. This work is dangerous because it presents the hazard of being hit by another vehicle. AR 127.

The Department found that death or serious physical harm was

imminent from Doty's practices. *See* AR 126-28, 315, 320, 342, 406, 417; FF 9-11, 13-19. Mary Miller, a child labor expert, explained that construction is dangerous for minors and that the rate of injuries at construction sites is much higher than for minors working in any other industry. AR 298-99. She stated that working near heavy equipment exposes minors to the risk of being crushed, dismembered, or maimed and that Doty's practices could result in death or serious injury to both boys. AR 299.

B. The Department Found That Doty Committed 25 Serious Violations of Child Labor Laws

On January 28, 2003, the Department cited Doty for violating child labor laws by permitting his sons to work on construction sites, in the proximity of heavy equipment, and at more than 10 feet above ground level. *See* AR 320; FF 2; WAC 296-125-030(17), (28), -033(4). The Department also issued an order of immediate restraint on January 28, 2003. AR 322; RCW 49.12.390.

For the next two days, despite the restraint order, Doty had the children again perform construction work. AR 261-65, 270-71, 294-95. On January 30, 2003, Zachary tipped over a backhoe tractor while working under Doty's supervision. AR 290. On January 31, 2003, the Department cited Doty again for allowing Zachary and Stephen to work at construction

sites, to operate bulldozers and backhoe tractors, and for allowing Zachary to act as an outside helper on a public road while moving a house. AR 326-27; FF 5; WAC 296-125-030(2), (17), -033(4).

The Department found 25 serious violations of child labor laws. AR 320, 326-27. Doty appealed. FF 1. The administrative law judge affirmed. AR 3-23.

C. The Director Determined That Doty Had Employed His Sons in the House Moving Business

Doty appealed to the Director of the Department. AR 768. The Director affirmed the citations, making numerous findings regarding the work the boys performed on site. AR 724; FF 7, 8, 10-18, 26, 27.

The Director found that Doty permitted his sons to perform activities in furtherance of the house moving business at the construction sites, such as operating heavy equipment or earth-moving equipment. FF 10, 12, 26. The Director found that the boys were not there to play or watch. FF 27. Doty did not dispute that the boys performed the work. FF 20, 21. The work Zachary performed on top of the houses was profitable for the business. FF 26. The Director found that Doty did not have to pay subcontractors to smooth out dirt when Zachary did so. FF 26. Doty admitted that the boys performed necessary construction tasks that other workers on-site would be paid to do. FF 27.

The work performed by the boys benefited the business, furthered the goals of the business, and displaced labor. FF 28. The Director rejected Doty's arguments that the child labor laws exempted him because he was a parent. CL 10. WAC 296-125-015(2) defines "employ" in the context of child labor laws as "to engage, suffer, or permit to work." CL 9, 12, 13.

The Director considered Doty's argument that he was training the boys and thus they were not his employees. CL 14. The Director concluded that training is covered by the child labor laws if it is also employment. CL 14. The evidence showed there was an appreciable benefit rendered to Doty because both Zachary and Stephen performed labor that rendered a commercial advantage to Doty's business. CL 14; WAC 296-125-043(4). The Director concluded that Doty was their employer under WAC 296-125-015 and -043. CL 14.

D. The Court of Appeals and Superior Court Affirmed the Director's Determination That Doty Was the Employer

Doty appealed to superior court. CP 3-9. The superior court affirmed the Director, holding that the Department had the statutory authority to promulgate its definition of "employ," that Doty was an employer under that definition, and that the regulation was constitutional. CP 686-95. On appeal to the Court of Appeals, Doty raised numerous

arguments that he was not the employer of the children. The Court of Appeals rejected those arguments, determining that the Department's definition of "employ" under WAC 296-125-015 was valid and Doty's activities were employment. *Doty v. Dep't of Labor & Indus.*, No. 72021-9-1, 6-13 (Feb. 17, 2015) ("slip op."). In his Appellant's Brief, Doty claimed a violation of his constitutional and homeschooling rights of a parent. Appellant's Br. at 23-24. The Court of Appeals rejected this argument, noting that the Court in *In re Custody of Smith* had "singled out child labor as an area in which the State may exercise its authority . . . ." Slip op. at 13 (citing *In re Custody of Smith*, 137 Wn.2d 1, 16, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)). The Court of Appeals noted, "Beyond his bare contentions, Doty does not explain how his constitutional and statutory rights to raise his children and direct their occupational education include a right to violate other statutes and regulations enacted to protect the safety, health, and welfare of minors." Slip op. at 14.

Doty petitioned this Court for review. He does not renew his claim that he was not an employer. *See* Pet. at 1-9. Instead, he argues only that the Court of Appeals should have applied strict scrutiny when analyzing his constitutional rights to raise his children. *Id.* He did not make this argument at the Court of Appeals. *See* Appellant's Br. at 23-24.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. This Court Should Not Review a Constitutional Argument Raised for the First Time at the Supreme Court and Unsupported by Authority

The uncontested child labor violations in this case present no significant constitutional issue. Doty does not contest that he violated child labor regulations when he employed his minor children to perform highly hazardous work on a construction site. Pet. at 1-9. Instead, he claims that this case involves the fundamental right to "rear [one's] children without State interference." Pet. at 5. From this, he argues that the Court of Appeals erred by not applying strict scrutiny in his case. Pet. at 7. Doty made no claim that strict scrutiny applied at the Court of Appeals. *See* Appellant's Br. at 22-23. This Court does not consider a petitioner's new argument on appeal where that party failed to properly raise or preserve the issue in the Court of Appeals. *See Pappas v. Hershberger*, 85 Wn.2d 152, 153-54, 530 P.2d 642 (1975).

More critically, Doty has not identified a fundamental liberty interest subject to strict scrutiny. He provides no authority for the proposition that a parent has a fundamental right to employ his or her children in a commercial enterprise. *See* Pet. at 1-9. This is fatal to his claims and this Court should deny review on this basis. It is not enough to claim an association to a fundamental right; rather, the fundamental right

needs to be directly described. *See Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (requiring a "careful description of the asserted fundamental liberty interest"). To adequately present a constitutional argument, a party must cite authority and present a cogent argument. RAP 10.3(a)(6); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994).[2]

B. No Fundamental Right Exists To Employ a Child in a Business

Doty does not have a fundamental right to employ his children in a dangerous business or a hazardous work environment. Doty cites no authority showing that employing one's children in a business implicates a fundamental liberty interest. The Department does not regulate how Doty "raises" his children. The Department regulates Doty as an employer in the public realm, not as a parent acting in the private realm. *See Prince v. Massachusetts*, 321 U.S. 158, 168-69, 166 S. Ct. 438, 88 L. Ed. 645 (1944). In *Prince*, the Court upheld a conviction of a child's custodian for violating a law that prohibited children from selling periodicals in a public place. *Id.* The statute made it a crime for a parent or custodian to "permit[] . . . such minor to work in violation [of the periodical law]." *Id.* at 161. Recognizing the critical need to protect children from the dangers of child

[2] Although Doty cites article I, section 3 of the Washington State Constitution, his cited authority is solely under the federal constitution and thus his state law claim should not be considered. Pet. at 3-6; *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

employment, the Court held that "legislation appropriately designed to reach such evils is within the state's police power, whether against the parents' claim to control of the child or one that religious scruples dictate contrary action." *Prince*, 321 U.S. at 169. The Court recognized the need to protect children in the realm of employment:

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.

Id. at 168-69 (footnotes omitted). The key in *Prince* is that the State may regulate work in the public realm, regardless of whether there was parental involvement. *Id.* at 166, 168-69.

Like the custodian in *Prince*, Doty permitted his children to perform dangerous work activities in public places. FF 7-18. This Court recognized in *Smith* that child labor may be regulated by the State. *Smith*, 137 Wn.2d at 16. "Although the [*Prince*] court acknowledged the parent's constitutionally protected right to child-rearing autonomy, it found a narrow exception necessary in light of the 'crippling effects of child

employment,' 'more especially in public places.'" *Smith*, 137 Wn.2d at 16 (quoting *Prince*, 321 U.S. at 168). Thus, this Court recognized a narrow exception to child-rearing autonomy when the State regulates child labor. Contrary to Doty's suggestion at 7, no strict scrutiny applies when the State engages in such regulation as it does not involve a fundamental right.

In any event, Doty makes no claim that there would be a different result had strict scrutiny been employed. Pet. at 1-9. There would not. The State has a compelling interest in protecting children from working in highly hazardous construction environments. *See Smith*, 137 Wn.2d at 15. Such protection is narrowly tailored to only cover employment—not mere occupational training activities that do not rise to the level of employment. Doty does not dispute the Court of Appeals' holding that the boys' work did not meet the six-part test for the training exemption from child labor laws. Slip op. at 8 (quoting Dep't of Labor & Indus., Admin. Policy ES.C2 12 (2008)).[3] For example, Doty does not dispute that the boys' work benefited his business or that they displaced regular employees. Slip op. at 12. Because the regulation of child labor focuses only on employment activities and not private child-rearing activities, it is narrowly tailored to accomplish the compelling state interest to protect children. *See Smith*, 137 Wn.2d at 15.

[3] Available at http://www.lni.wa.gov/workplacerights/files/policies/esc2.pdf, last visited (May 29, 2015).

C. No Substantial Public Interest Is Presented by an Employer Who Does Not Dispute He Violated Child Labor Laws

The Washington child labor laws prevent children of young ages from working in hazardous activities, such as riding on the top of a moving house or operating a backhoe. WAC 296-125-030, .033. Such requirements are readily discerned to all employers. Doty argues that there is a substantial issue of public interest in knowing what his obligations are. Pet. at 8-9. His obligations are clear: when he employs his children—a determination he does not now contest—he must follow WAC 296-125.

V. CONCLUSION

Doty's petition presents no significant constitutional issue. The United States Supreme Court and this Court have recognized that the State may regulate child labor. Doty's challenge to the application of child labor regulations to protect his children does not present an issue of substantial public interest when he does not contest that he employed his children and that their work violated the child labor regulations. The Court should deny review.

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RESPECTFULLY SUBMITTED this 8th day of June, 2015.

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NO. 91561-0

SUPREME COURT OF THE STATE OF WASHINGTON

JUDE I. DOTY, Petitioner, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Answer and this Certificate of Service in the below described manner:

Via Email filing to:
Ronald R. Carpenter
Supreme Court Clerk
Supreme Court
Supreme@courts.wa.gov

Via First Class United States Mail, Postage Prepaid to:
Robert E. Caruso
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DATED this 8th day of June, 2015.

SHANA PACARRO-MULLER
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Pacarro-Muller, Shana (ATG)
Cc: Sandstrom, Anastasia (ATG)
Subject: RE: 91561-0; Jude Doty v. Dep't of Labor & Indus.

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RE: *Jude Doty v. Dep't of Labor & Indus.*
Case No. 91561-0

Dear Mr. Carpenter:

Attached for filing is the Department's Answer and Certificate of Service regarding the above referenced matter.
Thank you,

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