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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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ANA GARCIA, CARMEN PACHECO-JONES, and  
NATALYA SEMENENKO,

Appellants,

v.

WASHINGTON STATE DEPARTMENT  
OF SOCIAL AND HEALTH SERVICES,

Respondent.

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**DEPARTMENT'S RESPONSE TO BRIEF OF AMICUS CURIAE  
LEGAL VOICE**

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ROBERT W. FERGUSON  
Attorney General

LAUREN R. KIRIGIN, WSBA No. 45297  
Assistant Attorney General  
P.O. Box 40124  
7141 Cleanwater Drive SW  
Olympia, WA 98504-0124  
E-Mail: [lauren1@atg.wa.gov](mailto:lauren1@atg.wa.gov)  
Telephone: 360-586-6530  
Fax: 360-586-6565  
OID: 91021

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## I. INTRODUCTION

The Amicus Curiae Brief of Legal Voice asserts the unconstitutionality of statutes that Appellants have not challenged. It raises legal theories that Appellants have not argued. It relies on purported facts that are not in the record. Even if its arguments were properly considered by this Court, they lack merit.

Legal Voice's Amicus Brief asserts that there is sex discrimination in violation of the Equal Rights Amendment (ERA). However, Appellants have never claimed sex discrimination, in the superior court or in their appellate briefing. Further, Legal Voice's proposed interpretation of the ERA to claim a violation is unworkable, even if that issue was presented by this case.

Further, Legal Voice's Amicus Brief asserts that strict scrutiny applies under the Washington State Constitution's Privileges and Immunities Clause. Appellants have argued only that a form of rational basis review applies.

Legal Voice serves an important role in helping to advocate for the interest of women and girls, but this Court should reject its invitation to invalidate unchallenged statutes under legal theories not advanced by the parties. This Court should instead affirm the superior court's order dismissing Appellants' Petition.

## II. ARGUMENT

The Department's<sup>1</sup> actions that are before this Court are: (1) its recommendation to the Washington State Records Committee to increase the minimum retention period for founded findings of child abuse and neglect to 35 years; and (2) the Department's rules at WAC 388-71-0540, WAC 388-825-640, -645.

Legal Voice raises new facts, claims, and issues that this Court should not consider. Legal Voice also argues for an unworkable application of the ERA that is not supported by the record. Neither the Department's recommendation for a minimum record retention period nor its rules violate the Washington State Constitution's Privileges and Immunities Clause. This Court should affirm the Thurston County Superior Court's order dismissing Appellants' Petition for Judicial Review.

### A. **This Court Should not Consider Legal Voice's Allegations of Purported Facts**

Legal Voice bases its arguments on facts that are not in the record, such as allegations about the demographics of homecare workers. *See* Amicus Br. at 2-9. None of this information was raised before the superior court below. Further, Legal Voice has failed to lay a foundation for

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<sup>1</sup> On July 1, 2018, the DSHS Children's Administration transitioned out of DSHS and, with the Department of Early Learning, became the Department of Children, Youth, and Families (DCYF). *See* Laws of 2017, ch. 6.

the reliability of the studies underlying its assertions of fact. While it does cite the Bureau of Labor Statistics, it also relies upon research by other non-governmental entities whose methodologies have not been laid bare before this Court, such as the Paraprofessional Healthcare Institute and Service Employees International Union (SEIU) 775. *See* Amicus Br. at 3, n. 2-3. In addition, Legal Voice has failed to show that the broad definition of “homecare worker” reflects the types of employment for which a founded finding of child abuse and neglect would be disqualifying under RCW 74.39A.056(2). Because Legal Voice’s proposed research material is not part of the record, and because at least some of the research upon which Legal Voice bases its arguments have not been shown to be reliable, this Court should decline to rely upon Legal Voice’s alleged facts.

**B. This Court Should Decline to Consider Claims that Only Legal Voice has Made**

This Court should not give weight to Legal Voice’s legal arguments regarding the constitutionality of statutes. Legal Voice’s Amicus Brief exacerbates confusion as to the nature of the agency actions at issue; it advances a claim that Appellants have not made.

The agency actions at issue in this appeal are the Department’s 2009 recommendation about a minimum records retention period and three promulgated rules. The constitutionality of the statute that mandates

Appellants' employment disqualification—RCW 74.39A.056(2)—is not at issue. Yet, Legal Voice appears to challenge three statutes in this case, including RCW 74.39A.056. Amicus Br. at 1-2. Thus, the arguments claiming unconstitutionality advanced by Legal Voice are irrelevant to this appeal.

**C. The Court Should Not Consider Issues that Only Legal Voice has Raised**

Similarly, this Court should not consider the new legal theories and issues raised only by amicus Legal Voice. Appellate courts do not consider issues raised only by amici. *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015). Almost none of the legal theories argued in Legal Voice's Amicus Brief are raised by Appellants, including Legal Voice's argument under the ERA and its argument for heightened judicial scrutiny under the Privileges and Immunities Clause.

As a result, this Court should not address Legal Voice's arguments that the three statutes it collectively refers to as "the Directive" violate the ERA. Amicus Br. at 2, 9. Those statutes are not at issue in this case. Further, the ERA was neither raised in the parties' briefing nor considered by the trial court. *See* CP 922-27; *see also* Appellants' Br.; *see also* Resp't. Br.; *see also* Appellants' Reply Br.

This Court should not consider Legal Voice's argument that the three statutes they characterize as "the Directive" violates the Privileges and Immunities Clause under an intermediate or strict scrutiny level of review. Appellants' argument under the Privileges and Immunities Clause is that the Department's recommendation to increase its minimum retention period for CPS records demands rationality. Appellants' Br. at 40, 44, 46. Legal Voice's argument that the Privileges and Immunities Clause demands a higher level of scrutiny was not raised by the Appellants. This Court should not consider these legal theories and issues raised only by Legal Voice.

**D. Legal Voice's ERA Argument is Unworkable in Practice and is Not Supported by the Record.**

If this Court does address Legal Voice's arguments related to the ERA, it should reject them. Legal Voice's interpretation of the ERA is unworkable, and the record does not support the argument that the statutes Legal Voice challenges cause an unconstitutional disparate impact on women.

**1. Legal Voice's interpretation of the ERA is unworkable in practice**

The ERA provides, "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Const., art. XXXI, § 1. The thrust of the ERA is "to end special treatment

for or discrimination against either sex.” *Marchioro v. Chaney*, 90 Wn.2d 298, 305, 582 P.2d 487 (1978).

Legal Voice’s application of the ERA to invalidate facially neutral laws is not supported by existing interpretations. No Washington appellate court decision has held that a facially neutral statute having a disparate impact on women violates the ERA. Legal Voice’s reliance on *State v. Brayman*, 110 Wn.2d 183, 751 P.2d 294 (1988), is misplaced. That case concerned the constitutionality of an amendment to the measurement of a person’s intoxication level for purposes of the Driving While Under the Influence of Intoxicants (DWI) statute. *Brayman*, 110 Wn.2d at 186. Under the amendment, a *per se* DWI offense was based on a person’s *breath*-alcohol ratio instead of a person’s *blood*-alcohol ratio. *Id.* The respondents in that case argued that the amendment was unconstitutional under the ERA because it had a disparate impact on women: the new breath alcohol reading overestimated women’s blood alcohol. *Id.* at 202-03. The Washington State Supreme Court held that the respondents failed to prove the new breath alcohol standards had a disparate impact on women. *Id.* at 203. The Court, however, did not address whether proof of a disparate impact would have established a violation of the ERA. *See also Rhoades v. Dep’t of Labor and Indus.*, 143 Wn. App. 832, 181 P.3d 843 (2008) (concluding, in ERA

challenge, that the challenger had not demonstrated proof of a disparate impact).

Legal Voice's interpretation of the ERA is also unworkable in practice and would lead to absurd results. If, as Legal Voice contends, the ERA prohibits the State from adopting any statute or regulation that has a disproportionate impact on women, and if, as Legal Voice also argues, all statutes or regulations affecting "homecare workers" necessarily have a disproportionate impact on women, then the State could never adopt rules to regulate workers for purposes of protecting vulnerable adults under RCW 74.39A.056(2). The ERA cannot reasonably be interpreted to prohibit the State from adopting regulations necessary to protect vulnerable populations simply because the individuals subject to the regulations are statistically more likely to be women.

More broadly, under Legal Voice's theory, any health and safety regulation affecting any profession, trade, or job class that lacks an equal sex ratio would be similarly forbidden. That application of the ERA is untenable, and if this Court addresses Legal Voice's argument, it should reject it.

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**2. Legal Voice's ERA argument is not supported by the record in this case**

Alternatively, this Court can reject Legal Voice's argument on the basis that the record does not support the contention that any statute or Department action has a disparate impact on women. In *Brayman* and *Rhoades*, the courts rejected disparate impact theories based on the insufficiency of the evidence of a disparate impact. That same reasoning in *Brayman* and *Rhoades* applies here. This Court need not determine whether a facially neutral statute having a disparate impact on women violates the ERA because evidence in the record does not show a disparate impact on women or women of color in this case. Legal Voice has not argued—nor could it reasonably argue—that this Court should take judicial notice of the studies, *cf. State v. Duran-Davila*, 77 Wn. App. 701, 704-05, 892 P.2d 1125 (1995) (listing showings necessary for judicial notice), nor has Legal Voice moved to admit additional evidence pursuant to RAP 9.11.

Even if the general statistics were properly before this Court, they do not show the Department violated the ERA, as the Department's recommendation and rules regarding record retention are not based on sex. This Court should reject Legal Voice's arguments to the contrary and affirm the superior court's decision to deny Appellants their requested relief.

**E. The Department's Recommendation and Rules do not Violate the Washington State Constitution's Privileges and Immunities Clause**

Legal Voice urges this Court to expand the Privileges and Immunities Clause of the Washington State Constitution to provide equal protection beyond that provided in the Fourteenth Amendment to the United States Constitution. Amicus Br. at 11-20. Its argument is flawed in several ways.

First, Legal Voice ignores the historic understanding of the Privileges and Immunities Clause. The Washington State Supreme Court has recognized that the Privileges and Immunities Clause is not a state version of the Federal Equal Protection Clause; it requires “equal protection” under the law but serves a different purpose. While the Equal Protection Clause targets hostile discrimination and prohibits states from denying benefits that are generally available to others under the law, the Privileges and Immunities Clause targets undue favoritism and prohibits a grant of special privileges and immunities that give persons or groups elevated status before the law. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1009 (2014) (“Whereas the Fourteenth Amendment was generally intended to prevent discrimination against disfavored individuals or groups, article I, section 12 was intended to prevent favoritism and special treatment for a few, to the disadvantage of

others.”); *Id* at 791 (Stephens, J., dissenting) (“[A]rticle I, section 12 warrants separate analysis ‘when the threat is not of majoritarian tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than discrimination.’”) (quoting *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d, (2002) (*Grant County I*)).

Legal Voice disregards this well-established distinction and instead argues that the Privileges and Immunities Clause provides a remedy for discrimination allegedly inherent in a final founded finding of child abuse or neglect. *See* Amicus Br. at 14. However, the Privileges and Immunities Clause was not intended to provide a remedy for discrimination against disfavored individuals or groups—that is the role of the Fourteenth Amendment to the United States Constitution. Instead, it was intended to prevent favoritism and special treatment for a few at the expense of others. *See Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 317 P.3d 1009; *State v. Smith*, 117 Wn.2d 263, 287, 814 P.2d 652 (1991) (Utter, J., concurring). Thus, it makes little sense to construe the Privileges and Immunities Clause to provide a higher level of scrutiny here, where there is no historic basis for construing it in that fashion. Instead, like the voter disenfranchisement scheme at issue in *Madison v. State*, 161 Wn.2d 85, 95-98, 163 P.3d 757 (2007), the Department’s recommendation for a

minimum records retention period and rules at issue here do not involve a grant of favoritism and do not invoke the Privileges and Immunities Clause.

Second, like Appellants, Legal Voice’s argument fails to identify a “privilege” or “immunity” that triggers the Privileges and Immunities Clause. In a challenge brought under the Privileges and Immunities Clause, the first step is to analyze whether the challenged law involves a privilege or immunity; if it does not, then the Privileges and Immunities Clause is not implicated. *Ass’n of Wash. Spirits & Wine Distrib. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 359-60, 340 P.3d 849 (citing *Ockletree*, 179 Wn.2d at 776); *see also Madison*, 161 Wn.2d at 95-98. Not every statute authorizing a particular class to do something—or prohibiting a particular class from doing something—involves a “privilege or immunity” subject to the Privileges and Immunities Clause. *Ockletree*, 179 Wn.2d at 778; *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419, (2004) (*Grant County II*). Rather, the term “privileges and immunities” refers only to “those fundamental rights which belong to the citizens of the state by reason of such citizenship.” *Grant County II*, 150 Wn.2d at 813 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P.3d (1902)).

In addressing claims brought under the Privileges and Immunities Clause, the Washington State Supreme Court has been careful to narrowly

define the right that is asserted to be a “privilege” or “immunity.” For example, the petitioners in *Am. Legion Post 149 v. Dep’t of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008), claimed their right to carry on business was at issue; the court defined the real issue as whether there was a fundamental right to smoke tobacco inside of a place of employment. *Id.* at 607-08. Similarly, in *Ass’n of Wash. Spirits & Wine Distrib.*, 182 Wn.2d 342, the petitioners also claimed an infringement on their right to carry on business; the court defined the actual right at issue as “the right to sell liquor under the authority of a license issued pursuant to the state’s police power.” *Id.* at 362. In each of these cases, the court found no “privilege or immunity” that implicated the Privileges and Immunities Clause.

The apparent right at issue here is to specific jobs involving unsupervised access to vulnerable adults after having been found to have abused or neglected a child. However, Legal Voice and Appellants make a far broader claim that departs from precedent, asking the Court to evaluate a broadly described privilege they label as the ability to work in the occupation of one’s choice. Amicus Br. at 12; Appellant’s Br. at 18. Neither the precisely stated narrow right, nor the broad right argued by Legal Voice is recognized as a “privilege” or “immunity” under the Privileges and Immunities Clause. A person does not have a fundamental liberty interest

in pursuing an occupation of his or her choice. Resp't Br. at 32-33. Both the Washington State Supreme Court and the United States Supreme Court have so held. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 219-20, 143 P.3d 571 (2006); *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999). Further, like the court in *Am. Legion Post* and *Washington Spirits & Wine Distributors*, this Court should construe the asserted right narrowly and decline to expand the Privileges and Immunities Clause to apply when the Department reasonably regulates certain fields of employment.

Legal Voice also argues for heightened scrutiny under the Privileges and Immunities Clause because of alleged disparate impact on women of color. Amicus Br. at 14. The record in this case does not support the allegation of a disparate impact; it was not alleged or argued below. And even if the record did support such an allegation, such an impact would be by operation of the unchallenged statute, RCW 74.39A.056, not the Department's recommendation or rules that are at issue in the case. *See* CP at 924-26. As stated above, this case is not about the constitutionality of a statute but of several Department actions: its recommendation to the State Records Committee to increase its minimum retention period for CPS investigative records, and three rules regarding the ability to work in an unsupervised capacity with vulnerable populations.

In any event, none of the cases Legal Voice cites support heightened scrutiny here. *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 668 P.2d 1278 (1983), and *Hanson v. Hutt*, 83 Wn.2d 195, 517 P.2d 599 (1973), were decided before *Grant County I*, and applied only federal equal protection analysis. *Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 970 P.2d 774 (1999), was brought under the Fourteenth Amendment to the United States Constitution, not the Privileges and Immunities Clause. Each involved a suspect classification (race, sex, national origin, respectively). Status as a person with a final founded finding of child abuse or neglect is not a suspect classification.

Because working in certain jobs involving unsupervised access to vulnerable adults, after having been found to have abused or neglected a child in their care, is not a fundamental right that belongs to the citizens of the state by reason of their citizenship, the Privileges and Immunities Clause is not implicated. However, even if it were, the Department's recommendation regarding retention of its child abuse and neglect investigation records passes constitutional muster under the Privileges and Immunities Clause. The record shows reasonable grounds for its recommendation to the Records Committee to increase the minimum records retention period to 35 years. Resp't. Br. at 6-7.

In recommending an increase to the minimum retention period for CPS records, the Department advances a legitimate governmental interest of improving its ability to protect children in its care. SR at 30, 451, 454. It was already required to maintain its foster care licensing records for a minimum of 35 years. SR at 23. At the time, it was retaining its investigative records for six years, and then destroying them. However, at least one child died while in the Department's care because the Department was unable to fully assess the safety of the foster home in which the child had been placed. SR at 23, 453; *see also* 477. The record thus shows that the Department had a rational basis for recommending an increase of the minimum retention period for founded findings to 35 years. That recommendation is not unconstitutional.

In light of the above, this Court should find the Department's recommendation and rules to be constitutional and affirm the superior court's order by denying Appellants their requested relief.

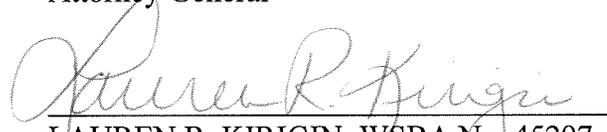
## **I. CONCLUSION**

Legal Voice raises new facts, claims, and issues that this Court should not consider here. Legal Voice also argues for an unworkable application of the ERA that is not supported by the record in this case. Neither the Department's recommendation nor rules violate the Washington State Constitution's Privileges and Immunities Clause. This Court should

affirm the Thurston County Superior Court's order dismissing Appellants' Petition for Judicial Review.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of September, 2018.

ROBERT W. FERGUSON  
Attorney General



LAUREN R. KIRIGIN, WSBA No. 45297  
Assistant Attorney General  
PO Box 40124  
Olympia, WA 98504-0124  
Email: [lauren1@atg.wa.gov](mailto:lauren1@atg.wa.gov)  
Telephone: 360-586-6530  
Fax: 360-586-6659  
OID: 91021

## CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document on the following via the COA e-filing portal on the date below as follows,

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Matthew A. Carvalho, Amicus Counsel  
Andrew J.D. Kashyap, Amicus Counsel  
Elizabeth S. Weinstein, Amicus Counsel

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5<sup>th</sup> day of September 2018, at Tumwater,  
Washington.

  
DONA BETH FISCHER  
Legal Assistant

**SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE**

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