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**SUPREME COURT OF THE STATE OF WASHINGTON**

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Yevgeny Semenenko and Natalya Semenenko,

Appellant/Petitioner

v.

Department of Social and Health Services,

Respondent/Respondent.

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**MEMORANDUM OF AMICUS CURIAE AMERICAN CIVIL  
LIBERTIES UNION OF WASHINGTON IN SUPPORT OF  
PETITION FOR REVIEW**

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## **IDENTITY AND INTEREST OF AMICUS**

The identity and interest of amicus is set forth in the Motion for Leave to File Amicus Curiae Memorandum, filed with this Memorandum.

## **ISSUE ADDRESSED BY AMICUS**

DSHS child abuse findings have such a devastating impact on individuals' constitutionally protected interests that significant questions of constitutional law and questions of substantial public interest are present, justifying review under RAP 13.4 (b)(3) and (4).

## **FACTS AND RULINGS BELOW RELEVANT TO GROUNDS FOR REVIEW**

The following facts are taken from petitioners' brief and the Court of Appeals' opinion. On November 10, 2009, Petitioners brought their drug-addicted teenage daughter to a licensed drug treatment center for admission.<sup>1</sup> When their daughter locked herself in a bathroom and began consuming drugs, a struggle ensued between her and Petitioners.<sup>2</sup> DSHS received a report, including a video, the day after the incident.<sup>3</sup>

A December 2009 DSHS letter informed Petitioners that the case against them had been closed. However, on April 5, 2010, 146 days after the underlying incident, Petitioners received a letter from DSHS informing

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<sup>1</sup> *Semenenko and Semenenko v. Dept. of Social & Health Serv.*, No. 70354-4-1, Unpublished Opinion (Div. I Aug. 11, 2014) (hereinafter "Slip. Op.") at 1.

<sup>2</sup> Slip Op. at 1.

<sup>3</sup> Slip Op. at 1-2.

them that the child abuse allegations against them were “founded.”<sup>4</sup> Petitioners’ daughter immediately called DSHS and was told the finding was a mistake.<sup>5</sup> Petitioners thus did not request review of the finding until Natalya Semenenko lost her job in vulnerable person care as a result of the child abuse finding on her record.<sup>6</sup> DSHS denied review as more than twenty days had passed since the finding.<sup>7</sup>

Former RCW 26.44.030(11)(a) (now (12)(a)) states “In no case shall the [DSHS] investigation extend longer than ninety days from the date the report is received.”<sup>8</sup> Former RCW 26.44.125(2) required individuals who received “founded” findings from DSHS to request review within twenty days of receipt of the finding. The Court of Appeals ruled there is no “good cause” exception to the twenty-day rule, precluding any right to a hearing here, and that DSHS’s abuse finding was not void despite the finding being made long after the ninety-day period.<sup>9</sup>

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<sup>4</sup> Slip Op. at 2. The April 5, 2010 letter was a form letter indicating that the abuse finding was based solely on the video tape footage of the incident. The letter gave no reason for DSHS’s delay beyond the ninety-day period. The letter also gave a vague and misleading explanation of the consequences of the “founded” finding, nowhere indicating that the finding would permanently appear on Petitioners’ records. Semenenko Decl., Ex. A. at 2, CP 92-99.

<sup>5</sup> Semenenko Decl. at 2, CP 14-17.

<sup>6</sup> Slip Op. at 3.

<sup>7</sup> Slip Op. at 4.

<sup>8</sup> The statute sets out one exception to this ninety-day time limitation, which is not relevant in this case.

<sup>9</sup> Slip Op. at 8, 10-12.

## AMICUS ARGUMENT SUPPORTING REVIEW

### A. This Case Involves Constitutionally Protected Property and Liberty Interests That Are of Substantial Public Interest.

DSHS child abuse findings implicate significant property and liberty interests that clearly are protected under the Due Process Clause. This Court (citing the United States Supreme Court) has held procedural due process “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”

*Nguyen v. Dept. of Health Med. Quality Assurance Comm.*, 144 Wn.2d 516, 522, 29 P.3d 689 (2001) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

The Court of Appeals’ interpretation of the applicable statutes here allows DSHS to indefinitely hold open an investigation and issue a founded finding of abuse or neglect ***without regard*** to the passage of time, while simultaneously holding there is absolutely ***no possibility*** for parents or anyone else to obtain a hearing on the merits of the charges if they miss the internal twenty-day (now thirty-day) deadline ***for any reason***. This interpretation allows DSHS to restrict individuals’ liberty and property interests without providing them with a fair opportunity to protect those interests and thus cries out for this Court’s review and guidance.

One significant ramification of a finding of child abuse or neglect

is the permanent bar on a person's ability to be licensed or employed in many professions, including in child care or vulnerable person care.<sup>10</sup>

Washington courts have long recognized that licenses (whether professional or nonprofessional) bestow a property interest on the licenseholder such that due process rights are implicated when a governmental agency makes a finding resulting in the deprivation of that license. *See, e.g. Nguyen*, 144 Wn.2d at 523 (holding a medical license constituted a “constitutionally protected property interest which must be afforded due process”); *Hardee v. Dept. of Social and Health Serv.*, 172 Wn.2d 1, 18, 256 P.3d 339 (2011) (revocation of home child care license implicated constitutional due process rights).<sup>11</sup>

In the context of vulnerable person care, child care, and in other highly-regulated industries, the State both requires employers to run background checks of employees and mandates disqualification from employment if there is an abuse finding. *See* RCW 74.39A.056(1)(a) and

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<sup>10</sup> *See, e.g.*, WAC 388-113-0300 and 388-97-1820 (child abuse finding is a permanent bar from being licensed, contracted, or authorized to have unsupervised access to children or vulnerable adults in a wide range of fields).

<sup>11</sup> While the Court's analysis of how much protection those due process rights afford varies depending on the specific type of license at issue, the fact that licenses constitute a property interest that warrants due process protection is well-settled. *See, e.g., In re Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 788, 329 P.3d 853 (2014) (due process analysis regarding deprivation of certification for Professional Guardian Board); *Olympic Healthcare Serv. II LLC v. Dept. of Social & Health Serv.*, 175 Wn. App. 174, 181-83, 304 P.3d 491 (2013) (due process analysis regarding deprivation of adult family home license).

(2) (requiring bar to employment of long-term care workers with abuse findings); WAC 388-06-0110 (requiring background checks). In this way, a DSHS finding of child abuse is functionally equivalent to a loss of license because it constitutes a state action that completely bars employment in particular fields.<sup>12</sup> In essence, DSHS's procedure is a form of "blacklisting" the subjects of its findings, ensuring those individuals will be forever barred from employment in particular fields or positions.<sup>13</sup>

Moreover, this Court has found that deprivation of a person's occupation—regardless of the type of occupation—implicates not merely his economic interests, but also his liberty interests. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006) ("pursuit of an occupation or profession is a liberty interest protected by the due process clause") (citing *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999)).

Even outside of the occupational context, a DSHS finding of child abuse implicates the liberty interest of those subject to the finding based on damage to their personal reputation. As this Court has recognized,

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<sup>12</sup> *Cf. Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994) ("[t]he deprivation [of due process rights of plaintiff against whom child abuse finding was made] stems from the fact that employers *must* consult the list before hiring [Plaintiff]") (emphasis in original).

<sup>13</sup> The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting, 92 Mich. L. Rev. 139, 162-63 (Oct. 1993).

“stigma-plus,” or the injury to one’s reputation *plus* a more tangible interest, implicates a liberty interest that must be protected by due process. *In re Meyer*, 142 Wn.2d 608, 620, 16 P.3d 563 (2001) (citing *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). *See also, Lee TT. v. Dowling*, 87 N.Y.2d 699, 709, 642 N.Y.S.2d 181 (N.Y. 1996) (finding of child abuse satisfied “stigma plus” test because “the inclusion of petitioners in the Central Register not only harmed their personal reputations, it affected their present employment [in child care] and effectively foreclosed them from any future employment in the child care area”); *see also Ulrich v. City and County of San Francisco*, 308 F.3d 968, 982-83 (9th Cir. 2002) (liberty interest implicated when employee that was subject of professional incompetence report was unable to be rehired because of the report).

The fate of Petitioner Natalya Semenenko serves as a representative example of all of these potential deprivations of liberty and property. “Natalya was deprived of a means of livelihood impacting all of [the family’s] children and the entire family.”<sup>14</sup> Specifically, Petitioner Semenenko, who worked as a caregiver, was fired from her employment when her employer ran a background check on her as required by state regulations—forever stripping her of the ability to pursue her occupation

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<sup>14</sup> Semenenko Decl. at 3, CP 14-17.

in the regulated adult care industry. Additionally, the findings of abuse against Petitioners are stigmatizing on their face,<sup>15</sup> and combined with her loss of employment, the findings of abuse meet the “stigma-plus” test. For these reasons, the DSHS finding of child abuse against Petitioners serves to deprive Petitioners of constitutionally-protected property and liberty interests in pursuing their occupations, and thus the grounds for review under RAP 13.4(b)(3) are met.

Moreover, this is an issue of significant public interest warranting review under RAP 13.4(b)(4). Because DSHS findings of abuse or neglect must be made available to employers in care-providing industries, as explained above, any person employed in those industries is necessarily impacted because any such person has the potential to be “blacklisted” and lose her livelihood as a result of the Court of Appeals’ ruling on the laws in this case.<sup>16</sup> In fact, one of DSHS’s primary functions is to maintain a background check unit and disseminate findings of abuse and neglect (among other data) to any authorized entity requesting the information, including public and private agencies. WAC 388-06-0700, 0710; RCW

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<sup>15</sup> Semenenko Decl. at 2 (“But even beyond [losing Natalya’s job] we feel that our good name has been tarnished.”), CP 14-17.

<sup>16</sup> The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting, 92 Mich. L. Rev. 139, 140-41 (Oct. 1993) (“When states make their child abuse registries available to employers and potential employers . . . child care workers risk disciplinary action and foreclosure of employment opportunities if they are identified as child abusers.”).

43.43.832. DSHS conducts over 300,000 background checks annually.<sup>17</sup>

DSHS thus has a considerable impact on decisions related to individual employment, which is an issue of significant public interest.

**B. The Substantial Rights and Severe Consequences Involved Require Heightened Protections and Process.**

“Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.” *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972) (internal quotations omitted). In Washington, “[t]he essential elements of the constitutional guaranty of due process, in its procedural aspect, are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case.” *In re Deming*, 108 Wn.2d 82, 94, 736 P.2d 639 (1987). The Court of Appeals’ interpretation of the former RCW 26.44.125(2) and the former RCW 26.44.030(11)(a) raises serious questions about the sufficiency of protection for the liberty and property interests at stake.<sup>18</sup>

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<sup>17</sup> “Background Check Central Unit,” DSHS website, <http://dshs.wa.gov/bccu> (last visited November 20, 2014).

<sup>18</sup> Indicated Reports of Child Abuse or Maltreatment: When Suspects Become Victims, 51 Fam. Ct. Rev. 316 (Apr. 2013) (advocating that severe consequences of listing in Central Registry as child abuser requires heightened protections for those investigated).

RCW 26.44.125(2) establishes a twenty-day (now thirty-day) period during which subjects of founded abuse findings can request review. The statute provides that failure to request informal internal review forever bars an individual from obtaining a full and fair hearing on the merits of the abuse finding. That exhaustion requirement alone may implicate due process rights given the interests at stake. However, the due process violation is made worse when the statute is interpreted to exclude an exception for “good cause,” as such holding is analogous to denying a defendant both a hearing and *any opportunity* to later challenge a conviction—even based on actual innocence. This greatly increases “the risk of an erroneous deprivation of [constitutionally-protected] interests through the procedures used,” *Mathews*, 424 U.S. at 333-35, which calls into question the constitutional validity of such an interpretation. *See Cooke v. Colvin*, No. C13-0504-MAT, 2013 WL 4777307, at \*2 (W.D. Wash. Sept. 5 2013) (slip copy) (holding claimant for social security benefits was wrongfully deprived of opportunity to show good cause for missing administrative deadline and stated a due process claim).<sup>19</sup>

Similarly, DSHS’s refusal to be bound by the statutory time limits for abuse investigations necessarily implicates due process rights. On its

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<sup>19</sup> The court in *Cooke* stated: “Adequate protection of the right to appear at a hearing is important because, by waiving attendance at a hearing, the appellant gives up an opportunity to present additional oral testimony . . . to the decision-maker, even though this could affect the decision.” *Cooke v. Colvin*, 2013 WL 4777307, at \* 2 (internal quotations omitted). *See also Johnson v. Seattle*, 335 P.3d 1027, 1034 (Wn. App. 2014) (vehicle violation hearing that did not allow for plaintiff to assert a legal nonconforming use defense violated plaintiff’s due process rights); *Redmond v. Moore*, 151 Wn.2d 664, 673, 91 P.3d 875 (2004) (statute authorizing the suspension of driver’s licenses without an administrative hearing violates drivers’ due process rights because of the risk of erroneous deprivation of interests).

face, the former RCW 26.44.030(11)(a) restricted DSHS's authority to issue findings of abuse: "In no case shall the investigation extend longer than ninety days from the date the report is received." The statute's "legislative purpose" clearly identifies the need to protect due process rights of all parties impacted by DSHS investigations, including through adherence to this ninety-day limit. *See* RCW 26.44.100(1).<sup>20</sup> Given the severe consequences to individuals when DSHS makes abuse findings, a ruling that DSHS may indefinitely hold open an investigation of child abuse is an expansion of DSHS authority at the expense of individual due process rights that calls for this Court's constitutional scrutiny.

In sum, by rigidly enforcing the twenty-day review period for those convicted of child abuse or neglect without *any* leniency for "good cause" exceptions, while providing DSHS with absolute leniency for its own investigation deadlines, the Court of Appeals tramples liberty and property interests of individuals such as Petitioners without due process.

### CONCLUSION

For the reasons stated here and in the Semenkos' Petition for Review, review should be granted.

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<sup>20</sup> This provision states: "The legislature finds parents and children are often not aware of their due process rights when agencies are investigating allegations of child abuse and neglect. The legislature reaffirms that all citizens, including parents, shall be afforded due process."

DATED this 1<sup>st</sup> day of December, 2014.

BY:           s/Nancy L. Talner            
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No. 90871-1

**Semenenko v. Department of Social and Health Services**

**DECLARATION OF SERVICE**

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below I served a copy of the **MEMORANDUM OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW**, by emailing the same with consent to email service, to:

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Signed this 1<sup>st</sup> day of December 2014, at Seattle, King County, Washington.

  
Suzette Barber, Legal Assistant

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Good afternoon,

Attached for filing in Case No. 90871-1, *Semenenko v. DSHS*, are the following documents:

- Motion of American Civil Liberties Union of Washington for Leave to File Amicus Curiae Memorandum in Support of Review
- Memorandum of Amicus Curiae American Civil Liberties Union of Washington in Support of Petition for Review
- Declaration of Service for Motion
- Declaration of Service for Memorandum

The documents are filed by Nancy Talner, Bar No. 11196 ([talner@aclu-wa.org](mailto:talner@aclu-wa.org)) and Elizabeth S. Weinstein, Bar No. 45763 ([eweinstein@yarmuth.com](mailto:eweinstein@yarmuth.com)). Counsel have previously agreed to service by email in this case and are copied above. If you have any questions, please contact me.

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