

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/17/2017 8:00 AM  
BY SUSAN L. CARLSON  
CLERK

No. 95024-5

*In the*  
**SUPREME COURT**  
*of the*  
**STATE OF WASHINGTON**

---

CHRISTAL FIELDS,  
*Petitioner,*

vs.

STATE OF WASHINGTON  
DEPARTMENT OF EARLY LEARNING,  
*Respondent.*

---

PETITION FOR REVIEW OF JUDGMENT OF THE  
COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I  
Case No. 75406-8

---

**MEMORANDUM OF AMICI CURIAE  
NATIONAL EMPLOYMENT LAW PROJECT AND  
WASHINGTON STATE LABOR COUNCIL, AFL-CIO  
IN SUPPORT OF PETITION FOR REVIEW**

---

REBECCA SMITH (WSBA No. 12834)  
NATIONAL EMPLOYMENT LAW PROJECT  
317 17TH AVENUE SOUTH  
SEATTLE, WA 98144  
EMAIL: RSMITH@NELP.ORG  
PHONE: (206) 324-4000  
*COUNSEL FOR AMICI CURIAE*

**ORIGINAL**

filed via  
**PORTAL**

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
IDENTITY AND INTEREST OF AMICI CURIAE.....	1
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	2
ARGUMENT .....	2
I. An Immense Segment of the Population—Disproportionately People of Color—Have Arrest or Conviction Records that Can Hinder Their Employment. ....	2
II. The Public Benefits from Increased Employment Among People with Records—Not Policies that Irrationally Exclude Qualified Workers.....	6
III. Given the Substantial Public Interest in Removing Employment Barriers to People with Records, DEL’s Licensing Ban Should be Tailored to DEL’s Legitimate Goals and Restricted to a Defined Time Period.....	7
CONCLUSION.....	10

## TABLE OF AUTHORITIES

### Cases

<i>Green v. Mo. Pac. Railroad</i> , 523 F.2d 1290 (8th Cir. 1975).....	8
<i>In re Kindschi</i> , 52 Wn. 2d 8 (1958) .....	8
<i>State ex rel. Wash. State Fin. Comm. v. Martin</i> , 62 Wn. 2d 645 (1963) ....	7

### Other Authorities

Alfred Blumstein & Kiminori Nakamura, <i>Extension of Current Estimates of Redemption Time</i> (2012), <a href="https://goo.gl/Cbt1MF">https://goo.gl/Cbt1MF</a> .....	9
Beth Avery, et al., Nat’l Emp’t Law Project, <i>Fair Chance Licensing Reform</i> (2017), <a href="https://goo.gl/ozgupZ">https://goo.gl/ozgupZ</a> .....	2
Bruce Western, <i>The Impact of Incarceration on Wage Mobility and Inequality</i> , 67 Am. Soc. Rev. 526 (2002) .....	4
Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Policy Research, <i>The Price We Pay</i> (2016), <a href="https://goo.gl/h3L6wr">https://goo.gl/h3L6wr</a> .....	6
Council of State Gov’ts, Justice Ctr., <i>National Inventory of the Collateral Consequences of Conviction</i> , <a href="http://bit.ly/2lFhpxP">http://bit.ly/2lFhpxP</a> .....	4, 5
Devah Pager, <i>The Mark of a Criminal Record</i> , 108 Am. J. Soc. 937 (2003) .....	3
Dick M. Carpenter II, et al., Inst. for Just., <i>License to Work</i> (2d ed. 2017), <a href="https://goo.gl/VkYbEp">https://goo.gl/VkYbEp</a> .....	5
Elizabeth K. Drake, et al., Wash. State Inst. for Pub. Policy, <i>Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs</i> , 4 Victims & Offenders 170 (2009) .....	7
Equal Employment Opportunity Commission, Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, No. 915-002 (2012), <a href="http://bit.ly/2y0HyNK">http://bit.ly/2y0HyNK</a> .....	8
Mark T. Berg & Beth M. Huebner, <i>Reentry and the Ties that Bind</i> , 28 Just. Q. 382 (2011) .....	7
Megan C. Kurlycheck, et al., <i>Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?</i> , 5 Criminology & Pub. Pol’y 483 (2006) .....	9

Nancy G. La Vigne, et al., Urban Inst., <i>Women on the Outside</i> (2009), <a href="http://urbn.is/2yZYmoP">http://urbn.is/2yZYmoP</a> .....	6
Rebecca Vallas, et al., Ctr. for Am. Progress, <i>Removing Barriers to Opportunity for Parents with Criminal Records and Their Children</i> (2015), <a href="https://goo.gl/8c2BZL">https://goo.gl/8c2BZL</a> .....	6
Soc’y for Human Res. Mgmt., <i>Background Checking—The Use of Criminal Background Checks in Hiring Decisions</i> (2012), <a href="http://bit.ly/2wJxh7U">http://bit.ly/2wJxh7U</a> .....	3
The Sentencing Project, <i>Criminal Justice Facts</i> , <a href="http://bit.ly/2jHETny">http://bit.ly/2jHETny</a> .....	8
The Sentencing Project, <i>The Color of Justice</i> (2016), <a href="http://bit.ly/1ZOy1R4">http://bit.ly/1ZOy1R4</a> .....	2
The White House, <i>Occupational Licensing</i> (2015), <a href="https://goo.gl/HuRajy">https://goo.gl/HuRajy</a> .....	4
Tracey Lloyd, Urban Inst., <i>When Relatives Return</i> (2009), <a href="http://urbn.is/2iHDgnY">http://urbn.is/2iHDgnY</a> .....	6
U.S. Bureau of Justice Statistics, <i>Prisoners in 2007</i> (2008), <a href="https://goo.gl/zRNjh2">https://goo.gl/zRNjh2</a> .....	3
U.S. Bureau of Justice Statistics, <i>Prisoners in 2015</i> (2016), <a href="https://goo.gl/u8VJGx">https://goo.gl/u8VJGx</a> .....	3

## **IDENTITY AND INTEREST OF AMICI CURIAE**

The interests of Amici are described in the amicus motion.

## **INTRODUCTION**

People with arrest and conviction records form a shockingly large portion of the population both across the United States and in Washington. These individuals—disproportionately people of color—face an uphill battle when seeking work due to employer preferences and various legal restrictions. Such hiring barriers often deny people with records a means to support their families and communities. And their resulting unemployment weakens the economy and reduces public safety.

Even before submitting a single job application, people with records may find themselves barred from entering entire professions. Washington's tangle of occupational licensing laws excludes millions of residents with records from numerous desirable professions. The licensing disqualifications prescribed by the Department of Early Learning ("DEL") reveal the destructive impact of a lifetime, automatic, and overbroad licensing ban on even the most dedicated workers. Petitioner Christal Fields is a qualified and committed childcare worker with a nearly 30-year-old robbery conviction. Yet even this old and unrelated conviction acts as an automatic bar to working in her chosen field. Because DEL's ban allows for no exceptions, Ms. Fields received no meaningful

opportunity to argue that she poses no risk to children. And because the ban is lifelong, the fact that three decades have passed since her conviction makes no difference. DEL's inflexible ban merits review by this Court because hard-working people like Ms. Fields deserve to be fairly considered for licensed professions.

### STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

### ARGUMENT

#### **I. An Immense Segment of the Population—Disproportionately People of Color—Have Arrest or Conviction Records that Can Hinder Their Employment.**

Over 70 million people—or nearly one in three U.S. adults—have an arrest or conviction record. Beth Avery, et al., Nat'l Emp't Law Project, *Fair Chance Licensing Reform 5* (2017), <https://goo.gl/ozgupZ>. In Washington alone, an estimated 1.2 million individuals, or more than one-fifth of the state population, have a record. *Id.* at 29. Even more startling than the size of the population marked by the criminal justice system is the race disparity among these individuals. In Washington, black people are incarcerated at a rate of 1,272 per 100,000 residents—nearly six times the rate for white people. The Sentencing Project, *The Color of Justice 5* tbl.1 (2016), <http://bit.ly/1ZOy1R4>.

Most incarcerated individuals eventually reenter their communities. In 2015 alone, 21,939 people were released from Washington prisons. U.S. Bureau of Justice Statistics (“BJS”), *Prisoners in 2015*, at 11 tbl.7 (2016), <https://goo.gl/u8VJGx>. That number more than tripled in just fifteen years, with only 6,764 people released in 2000. *Compare id.*, with BJS, *Prisoners in 2007*, at 16 app. tbl.4 (2008), <https://goo.gl/zRNjh2>.

While it’s in everyone’s interest for this large population to successfully reenter their communities, the stigma of criminal justice involvement often holds them back. What’s more, that stigma can have a lifelong impact on their job opportunities. Surveys indicate that nearly nine in ten employers perform background checks for some or all of their positions. Soc’y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3 (2012), <http://bit.ly/2wJxh7U>. When applicants reveal a record up front, their job prospects plummet, with the callback rate for white applicants cratering from 34 to 17 percent. Devah Pager, *The Mark of a Criminal Record*, 108 *Am. J. Soc.* 937, 957–58 (2003). Black applicants are penalized even more harshly, with their callback rate dropping from 14 to five percent. *Id.*

Legal restrictions further compound the effects of employer screening by mandating background checks or disqualifying people with

records from certain positions. A national inventory documents 342 laws and regulations of this kind in Washington. Council of State Gov'ts, Justice Ctr., *National Inventory of the Collateral Consequences of Conviction*, <http://bit.ly/2IFhpxP> (last visited Nov. 7, 2017) [hereinafter *CSG Inventory*].<sup>1</sup>

Before ever encountering barriers at the hiring stage, many people with records are screened out of entire professions due to licensure. Washington has the third highest rate of occupational licensure in the nation, with licensed workers comprising 30.5 percent of the workforce. The White House, *Occupational Licensing* 24 tbl.1 (2015), <https://goo.gl/HuRajy>. Licensure is even more pervasive in lower-income occupations that might otherwise offer good work opportunities to formerly incarcerated people. Criminal justice involvement often forces people into unsteady jobs with little wage growth. Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 *Am. Soc. Rev.* 526, 528–29 (2002). Unfortunately, a nationwide review of 102 lower-income occupations—from security guards to dental assistants—revealed that over three-fourths require a license in Washington. Dick M.

---

<sup>1</sup> Select “Employment” from “Categories” dropdown menu, then select “Advanced Search,” and select “Washington” from “Jurisdiction” dropdown menu. Some of these restrictions are mandatory and others discretionary, but, in both cases, they frequently prevent people with records from obtaining employment.



Carpenter II, et al., Inst. for Just., *License to Work*, 21 tbl.4 (2d ed. 2017), <https://goo.gl/VkYbEp>.

Many licensing laws disqualify people with records. In Washington alone, the CSG Inventory documents 586 state-imposed licensing restrictions against people with records.<sup>2</sup> *CSG Inventory, supra*.<sup>3</sup> These broad restrictions encroach further on the already limited employment opportunities available to millions of Washingtonians with records,<sup>4</sup> who are disproportionately people of color.<sup>5</sup>

---

<sup>2</sup> Among those restrictions, 360 are “permanent” disqualifications that could last a lifetime, and 217 are “mandatory/automatic” disqualifications for which licensing agencies have no choice but to reject an applicant. *CSG Inventory, supra*; see detailed instructions *infra* note 3).

<sup>3</sup> Select both “Occupational and Professional Licenses and Certification” and “Business Licenses and Other Property Rights” from “Categories” dropdown menu, then select “Advanced Search” and select “Washington” from “Jurisdiction” dropdown menu. We selected both categories as the User Guide cautions that the “difference between professional and business licensure will not be clear, and a comprehensive search should select both categories.” See *CSG Inventory, User Guide*, Question and Answer 13, <http://bit.ly/2yLupcv>. Select “Permanent/Unspecified” from “Duration” dropdown menu for lifetime disqualifications, and select “Mandatory/Automatic” from “Types” dropdown menu for blanket disqualifications.

<sup>4</sup> While no data is available on how many people are denied licenses by Washington agencies because of their records, it’s safe to assume that a large number of people are impacted, given that over one-fifth of the state population has a record and nearly one-third of workers in the state have a license to do their jobs.

<sup>5</sup> For a discussion of licensing bans’ disparate impact on people of color, please refer to the Petition for Review. See Pet. for Rev. 13–14. For a more detailed discussion of the issue, please refer to the amicus brief filed by Legal Voice in the court of appeals. See Br. of Amici Curiae Legal Voice et al. at 6–9, *Fields v. Washington Dep’t of Early Learning*, 200 Wn. App. 1027 (Ct. App. 2017).

## II. The Public Benefits from Increased Employment Among People with Records—Not Policies that Irrationally Exclude Qualified Workers.

Barriers to work translate into an inability to provide for family members, often leaving those with records with no choice but to lean on their families for support. Nearly half of U.S. children have at least one parent with a record. Rebecca Vallas, et al., Ctr. for Am. Progress, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children* 1 (2015), <https://goo.gl/8c2BZL>. Meanwhile, a survey of family members reported that more than two-thirds of returning parents had difficulty paying child support. Tracey Lloyd, Urban Inst., *When Relatives Return* 15–16 (2009), <http://urbn.is/2iHDgnY>. One study of women with felony records found that nearly two-thirds had to rely on a family member or friend for financial support eight to ten months after release. Nancy G. La Vigne, et al., Urban Inst., *Women on the Outside* 7 (2009), <http://urbn.is/2yZYmoP>.

Financial difficulties faced by families undermine the overall economy. A study of 2014 data estimated that reduced employment prospects for people with records translated into a loss of about \$78 to \$87 billion in annual gross domestic product. Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Policy Research, *The Price We Pay* 1 (2016), <https://goo.gl/h3L6wr>. By contrast, according to a 2007 analysis of

Washington's criminal justice system, providing job training and employment to formerly incarcerated people reduced criminal justice costs and generated more than \$2,600 for each taxpayer. Elizabeth K. Drake, et al., Wash. State Inst. for Pub. Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs*, 4 Victims & Offenders 170, 185 (2009).

Because employment is a crucial factor to reducing recidivism, eliminating barriers to work for people with records also enhances public safety. A 2011 study found that employment was the single most important influence on decreasing recidivism—two years after release nearly twice as many employed people with records had avoided another brush with the law as those without jobs. Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind*, 28 Just. Q. 382, 397–98 (2011). In sum, the benefits of removing job barriers faced by people with records emanate broadly; each of us has a stake in successful reentry.

**III. Given the Substantial Public Interest in Removing Employment Barriers to People with Records, DEL's Licensing Ban Should be Tailored to DEL's Legitimate Goals and Restricted to a Defined Time Period.**

The court of appeals forgot the axiom that “the rules of law should be . . . adaptable to the society they govern.” *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn. 2d 645, 665 (1963). Ignoring real-world context

and the significant implications of this case, the panel instead relied heavily on *In re Kindschi*, 52 Wn. 2d 8 (1958), a case decided long before mass incarceration truly beset the nation.<sup>6</sup>

Since the late 1950s, however, the legal landscape and criminal justice system have changed tremendously. After Congress outlawed race discrimination in employment via Title VII of the Civil Right Act of 1964 (“Title VII”), federal courts began to acknowledge the implications of Title VII for workers with records. *See, e.g., Green v. Mo. Pac. Railroad*, 523 F.2d 1290 (8th Cir. 1975). “Tough on crime” policies later took hold across the nation, and incarcerated populations have since skyrocketed. The Sentencing Project, *Criminal Justice Facts* (2017), <http://bit.ly/2jHETny>. Recognizing that automatic bans against hiring people with records may violate Title VII, the Equal Employment Opportunity Commission (“EEOC”) advises employers to individually assess job candidates with records and consider the nature of the offense, the nature of the job, and the time passed since the offense. EEOC, *Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*, No. 915-002 (2012), <http://bit.ly/2y0HyNK>. By analogy, an automatic licensing ban like DEL’s

---

<sup>6</sup> *See* Pet. for Rev. 8–9 (discussing the questionable analogy to *Kindschi*).

deserves caution as it ignores all nuance and needlessly excludes qualified applicants without allowing them to demonstrate that they pose no safety risk.<sup>7</sup>

Lifetime licensing bans are similarly unjustifiable: they ignore individuals' rehabilitation efforts and recidivism data. One notable study concluded that, six or seven years after release, the likelihood of committing an offense was only marginally higher for a formerly incarcerated person than for the general population. Megan C. Kurlycheck, et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology & Pub. Pol'y* 483, 483 (2006). More recent research concluded that, after a relatively short time, ranging from three to seven years for different offenses, the probability of a new arrest for individuals with records fell even *below* the probability for the general population. See Alfred Blumstein & Kiminori Nakamura, *Extension of Current Estimates of Redemption Time* 37, 41 (2012), <https://goo.gl/Cbt1MF>. There is simply no empirical basis for a lifetime ban against those with a past record.

Despite over a decade of successfully caring for elders and children, Ms. Fields is forever disqualified from her profession by DEL's

---

<sup>7</sup> This arbitrary effect is further amplified by the overbroad coverage of DEL's ban. As highlighted by Petitioner, most of the offenses listed in the ban "lack[] a rational connection" to DEL's goal of ensuring child safety. Pet. for Rev. 10.

automatic, overbroad ban. Her continuing efforts at rehabilitation don't matter; regardless of her skill, work ethic, and experience, she lacks even an opportunity to demonstrate that she is fit for the profession.

This Court has a chance to ameliorate the destructive impact of DEL's arbitrary ban. While public safety is certainly an important interest, so too is the economic security of millions of people with records and their families. Public safety doesn't justify DEL's harsh rule, for the same goal can be achieved through restrictions that are tailored and time-limited.

#### CONCLUSION

For the forgoing reasons, Amici National Employment Law Project and Washington State Labor Council, AFL-CIO respectfully ask the Court to grant review of this important case.

Respectfully submitted,

/s/ Rebecca Smith

Rebecca Smith (WSBA No. 12834)  
*Attorney for Amici Curiae*  
*National Employment Law Project and*  
Washington State Labor Council, AFL-CIO

**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2017, I electronically filed the foregoing with the Clerk of the Supreme Court of the State of Washington by using the Washington State Appellate Courts' Portal, which will send a notice of electronic filing to all counsel of record.

/s/ Rebecca Smith

Rebecca Smith (WSBA No. 12834)  
*Attorney for Amici Curiae*  
*National Employment Law Project and*  
Washington State Labor Council, AFL-CIO

# NATIONAL EMPLOYMENT LAW PROJECT

November 16, 2017 - 5:20 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95024-5  
**Appellate Court Case Title:** Christal Fields v. State of Washington Department of Early Learning  
**Superior Court Case Number:** 15-2-26451-6

### The following documents have been uploaded:

- 950245\_Briefs\_20171116170259SC990074\_1422.pdf  
This File Contains:  
Briefs - Amicus Curiae  
*The Original File Name was Fields v. Wash DEL - Amicus Brief - FINAL 11.16.17.pdf*
- 950245\_Motion\_20171116170259SC990074\_8484.pdf  
This File Contains:  
Motion 1 - Amicus Curiae Brief  
*The Original File Name was Fields v. Wash DEL - Motion to File - FINAL 11.16.17.pdf*

### A copy of the uploaded files will be sent to:

- debip@nwjustice.org
- keith@newmanlaw.com
- meaganm@nwjustice.org
- pata1@atg.wa.gov
- pdave@aclu-wa.org
- shsseacf@atg.wa.gov

### Comments:

---

Sender Name: Rebecca Smith - Email: rsmith@nelp.org  
Address:  
317 17TH AVE S  
SEATTLE, WA, 98144-2147  
Phone: 206-324-4000

**Note: The Filing Id is 20171116170259SC990074**