NO. 95024-5

SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTAL FIELDS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF EARLY LEARNING

Respondent.

DEL ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, Department of Early Learning, Respondent, answers the Petition for Review (PFR).

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals issued an unpublished decision on August 21, 2017, upholding dismissal of the appellants' hearing request at the Office of Administrative Hearings (OAH) on summary judgment and confirming the constitutionality of WAC 170-06-0120(1). The order upholding dismissal is attached as pages 3-17 of the Appendix to the PFR.

III. ISSUES PRESENTED FOR REVIEW

1. Whether WAC 170-06-0120(1), adopted pursuant to legislative authority granted in RCW 43.215.215, provides substantive and procedural due process to those seeking clearance to work in child care.

2. Whether claims under the Washington State Constitution can be presented and heard for the first time through a Petition for Review to this Court.

IV. RESTATEMENT OF THE CASE

Christal Fields' extensive 20-year criminal history (1985-2006), including a 1988 felony conviction for Attempted Robbery 2, led DEL to disqualify her from unsupervised access to child care children. Administrative

Record (AR) 6-8, 22-29, 99-100.[1] AR 6-8. Ms. Fields was provided with written notice of the DEL disqualification action, including instructions on how to seek review. *Id.*

Ms. Fields obtained review at the Office of Administrative Hearings (OAH), followed by an appeal to the DEL Review Judge, judicial review in King County Superior Court, and review by Division I of the Washington Court of Appeals. AR 10-11, AR 112-121, AR 143-145, AR 158, Slip Op. at 1. Summary judgment in favor of DEL has been upheld at every level based on the plain language of WAC 170-06-0120(1) and WAC 170-06-0070(1). AR 112-121; 143-145; Slip Op. at 17.

Ms. Fields requested that this Court review her case through a PFR submitted on September 20, 2017. She has maintained throughout this case that WAC 170-06-0120 is unconstitutional facially and as applied to her. Until her Petition for Review to this Court, however, Ms. Fields relied exclusively on the Fifth and Fourteenth Amendments to the United States Constitution to make her due process arguments. She never sought relief under the Washington State Constitution, never presented a *Gunwall*[2]

[1] Despite her persistent inappropriate use of the term in briefing, Ms. Fields was not denied a child care "license." Disqualification of persons seeking to care for children in child care is governed by WAC 170-06-0070 and WAC 170-06-0120. Denial of an application for a license to operate a child care center is addressed in WAC 170-295-0100. Ms. Fields was disqualified under WAC 170-06-0070 and WAC 170-06-0120.

[2] *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808(1986).

analysis, and never sought relief on the theory of equal protection at any of the four levels of review preceding this PFR. *See* AR 10-11, AR 112-121, AR 143-145, AR 158; Opening Brief of Appellant Christal Fields; Reply Brief of Appellant Christal Fields (Reply Brief); Slip. Op. at 5-6; PFR at 2, 14-15.

V. REASONS WHY REVIEW SHOULD BE DENIED

A. There Is No Viable Constitutional Claim Warranting Review In This Case.

Ms. Fields claims that this Court should review the findings of Division I in her case under RAP 13.4(b)(3) because: (1) the constitutionality of a regulation like WAC 170-06-0120 has not been considered by this Court before; (2) another state has disapproved of a similar regulation under its own constitution; and (3) state agencies and courts need guidance on applying constitutional principles to WACX 170-06-0120(1). PFR at 5-7. None of these arguments show that this case presents a significant question of constitutional law warranting review by this Court.

1. The Due Process Claims Argued By Ms. Fields Were Rejected By The Court Of Appeals Based On Well-Established Norms Of Due Process Analysis.

As the Court of Appeals' decision here demonstrates, the application of due process principles to WAC 170-06-0120 is neither difficult nor

surprising. Slip Op. at 6-16. The procedural due process arguments made in this case are hollow at best and require little analysis. Slip Op. at 16; PFR at 10-11. Regarding substantive due process, the opinion issued August 21, 2017, clearly explains how well understood principles of rational basis review led to the decision to affirm Ms. Fields' disqualification. Slip Op. at 6-15. Due process is not a winning argument for appellant, and provides no reason for this Court to review the matter.

a. Ms. Fields' Procedural Due Process Claim Is Nothing More Than A Substantive Complaint In Disguise, And Does Not Present A Legal Question For Review By This Court.

Despite her continued pursuit of this issue, procedural due process is not a fit for Ms. Fields' complaints about WAC 170-06-0120(1). Disqualification under this regulation always provides an avenue for appeal, with the scope of that appeal depending on the facts and law applicable to the case at hand. WAC 170-06-0090; WAC 170-06-0100. Had her case been one which could withstand summary judgment, Ms. Fields would have been able to be present with counsel before a neutral decision-maker, present evidence and witnesses, cross examine opposing witnesses, give argument, receive a written decision, and seek further review if aggrieved. WAC 170-03-0340 through -0620.

In her PFR, Ms. Fields devotes little more than a page of argument to the procedural due process issue. PFR at 10-11. Her presumption that a "meaningful hearing" equates to a full hearing on whatever information a complainant would like to bring before the tribunal is unsupported by the case law. As explained by the seminal case of *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the purpose of employing balancing factors and assessing a procedure is to determine whether further safeguards are required to increase the certainty in the fact finding outcome, given the importance of the interests at stake.

Here, there is no risk of error at all. Ms. Fields has admitted that the conviction of interest is hers, and thus the fact of interest to the proceeding may be relied upon with confidence. PFR at 1. No procedural change is necessary to assist in determining the truth in this case, and the full panoply of protections provided at the Office of Administrative Hearings ensures that cases with disputed facts are handled with ample procedural due process. WAC 170-03-0340 through -0620. There is no reason for this Court to grant review on Ms. Fields' procedural due process claim.

b. Rational Basis Review Was Appropriately Utilized In The Decision Below To Uphold The Constitutionality Of WAC 170-06-0120(1).

DEL has a mandate to regulate child care agencies and ensure the safety of both facilities and the employees in those agencies. RCW

43.215.200. As a part of that mandate, and in furtherance of child safety, DEL developed WAC 170-06-0120 to clearly identify criminal convictions which would result in either 5 year or permanent disqualification of an applicant for child care work. Wash. St. Reg. 08-08-101.

Although Ms. Fields has accepted in her briefing that rational basis review applies to any constitutional challenge of an economic regulation such as this one, she continues to seek to broaden the definition of rational basis review. PFR at 7-8. Contrary to Ms. Fields' contentions, rational basis review as applied by the Court of Appeals in this case sufficiently addresses her limited liberty interest in general employment.[3] This Court should not accept review.

Rational basis review requires no more than a rational connection between the legal requirement and a legitimate state interest. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). The interest here is the admittedly important one of child safety, and the rational connection with criminal activity deemed by the legislature to be "crime against children or persons" in RCW 43.43.830(7) is obvious. Ms. Fields'

[3] Ms. Fields' continued insistence that Washington courts should follow the lead of *Peake v. Commonwealth*, 132 A.3d 506 (2015), a case which uses Pennsylvania's constitution to apply a more rigorous form of rational basis review, is inappropriate. The Court of Appeals rightly focused on the U.S. Constitution, upon which Ms. Fields' claims have rested throughout. The *Peake* case does not raise an issue for this Court's review under RAP 13.4(b)(3).

argument concedes as much when she says that some crimes on the DEL list "have a facial connection to child welfare." PFR at 7. Ms. Fields' mistake is in arguing that rational basis review allows a court to pick and choose which parts of a regulation are most likely to advance the government's identified interest. To the contrary:

> When reviewing the substance of legislation or governmental action that does not impinge on fundamental rights, moreover, we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did.

Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz., 24 F.3d 56, 65 (9th Cir. 1994).

DEL need not prove that child safety is actually advanced by excluding Ms. Fields or any other particular person with a crime listed in WAC 170-06-0120. *Amunrud*, 158 Wn.2d at 224-225; *Wedges/Ledges* 24 F.3d at 65. The Court of Appeals correctly determined that the high burden for showing a regulation unconstitutional was not met here, and this Court should not further review the issue.

2. Ms. Fields' Belated Attempt To Inject Arguments Under The Washington Constitution Should Not Form The Basis For Review.

Ms. Fields' claims under the Washington Constitution should not be considered because this Court generally does not review issues that were

not presented to the court of appeals. *Peoples Nat. Bank of Wash. v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973). Even now, her legal argument is scanty and does little more than mention the concepts of due process and equal protection under the Washington Constitution, with no *Gunwall* analysis for any of her arguments. PFR at 14-15. Because she provides no analysis to support her claims, this Court should decline to review them. *Bryant v. Palmer Cooking Coal Co.,* 86 Wn. App. 204, 216, 936 P.2d 1163 (1997).

3. Ms. Fields' Lack Of Gunwall Analysis Limits Her To Federal Due Process Analysis.

Washington courts have often used the federal standard in analyzing due process claims and have often held that the state constitution provides no higher level of protection in the area of due process. *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473(1996); *City of Bremerton v. Widell*, 146 Wn.2d 561, 579, 51 P.3d 733 (2002). More recently, this Court has indicated that while the language of the state and federal constitutions is nearly identical in the area of due process, independent analysis can be undertaken with proper presentation of the Gunwall factors for analysis. *Bellevue Sch. Dist. V. E.S.*, 171 Wn.2d 695, 710-11, 257 P.3d 570 (2011). Here, Ms. Fields dismissed the importance of that analysis, which would be too tardy for review even if she attempted it for the first time at this level.

PFR at 14-15. Thus, Ms. Fields is limited to her due process claims under the U.S. Constitution. Because the Court of Appeals amply and correctly determined that those constitutional claims lacked merit, Ms. Fields should not be granted review based on any due process claims, whether under the state or federal standard.

4. Appellant May Not Pursue A Last-Minute Equal Protection Claim Under Either The State Or Federal Constitution.

As has been noted above, claims that are not raised at the Court of Appeals should not be addressed for the first time through a PFR to this Court. *Peoples Nat. Bank*, 82 Wn.2d at 830. Ms. Fields has had a full and fair opportunity to develop her case over a matter of years, yet never claimed an equal protection issue until her attempt at a fifth level of review. *See* AR 10-11, AR 112-121, AR 143-145, AR 158; Opening Brief of Appellant Christal Fields; Reply Brief of Appellant Christal Fields (Reply Brief); Slip. Op. at 5-6; PFR at 2, 14-15. This court should decline her invitation, which is brief and not supported by legal analysis, to review this tardy claim.

5. An Alleged Need To Clarify Basic Due Process Principles Does Not Warrant Review By This Court.

Ms. Fields argues that this Court must accept review to provide "guidance for agencies and lower courts for how to evaluate the

constitutionality of DEL's 50-crime lifetime ban or similar lists." PFR at 7. This argument assumes that because the exact situation of DEL's list has not been litigated to this Court before, other judicial bodies and agencies are at a loss as to how to deal with it. This is not persuasive, given that the principles of due process are flexible precisely to apply to different fact patterns, as the Court of Appeals did without difficulty in the unpublished decision below.

The Court of Appeals properly read the case law and statutory scheme in rejecting appellant's arguments that her disqualification through WAC 170-06-0120 was contrary to the principles of due process. Had the opposite conclusion been reached, resulting in potentially hundreds of disqualifications made over the years becoming void regardless of the conduct prompting those disqualifications, review would be important to address a serious issue of safety for children and the public. As it stands, nothing presented in this case justifies review under RAP 13.4(b)(3), because there is no confusing or new issue of law to be addressed. Review should be denied and the unpublished decision by the Court of Appeals should remain the final word on this case.

B. Proper Deference By The Court Of Appeals On Public Policy Is Not A Matter Of Substantial Public Interest.

RAP 13.4(b)(4) allows review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Ms. Fields has not produced an issue of substantial public interest in this case. To the contrary, Ms. Fields' case is a matter in which the judiciary has wisely deferred to the legislature due to that body's traditional strengths of being able to gather public comment and shape policy through debate and amendment over time. "The legislature, not this court, is in the best position to assess policy considerations." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 109, 285 P.3d 34 (2012). *See also Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) ("An argument for the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature. . . . [W]e should not create public policy but instead recognize only clearly existing public policy under Washington law."); *City of Seattle v. Montana*, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996) ("If the regulation tends to promote public safety, health, morals or welfare, then its wisdom or necessity is a matter left exclusively to the legislative body") (applying principle to a municipal regulation).

The delegated legislative authority under which WAC 170-06-0120 was adopted encompasses a traditional area of state regulation: safety for a vulnerable population. *See* RCW 43.215.005(4)(c). The unpublished decision finding this regulation to be within the authority of lawmakers, in

keeping with this Court's jurisprudence, is not a matter of public import justifying review.

Ms. Fields argues that the Court of Appeals decision raises issues of substantial public interest under RAP 13.4(b)(4) based largely on her own particular situation. She asserts that she should have been able to demonstrate rehabilitation rather than being automatically disqualified for a felony conviction because she feels she is now individually fit to work in child care. PFR at 1-4, 12-13. Ms. Fields' personal outcome does not and should not dictate interpretation by the courts of a constitutional regulation of an economic interest in particular employment especially when the regulation is based on child safety. Review by this Court should be declined.

To the extent that Ms. Fields relies upon the situation of women and minorities in this state to argue that WAC 170-06-0120(1) should be overturned as against the policy of rehabilitation, she demonstrates just how far she is asking this Court to intrude into the province of a co-equal branch of state government. PFR at 12-13. Ms. Fields' use of statistics and legislative declarations is just the sort of evidence that the legislature may consider in deciding whether to legislate in the area of clearing child care workers and thereby alter DEL's clearance requirements; something that has not happened in the 11 years that DEL has used WAC 170-06-0120.

Further, Ms. Fields' argument refuses to acknowledge that, for all the legislative movement in the area of rehabilitation, the legislature has clearly voiced its current view on the particular crime she committed. Robbery 2 is classified by statute as a "violent offense," and one that cannot be vacated as other crimes, even other felonies, can be. *See* RCW 9.94A.640(2)(b) and RCW 9.94A.030(55)(a)(xi). Further, the legislature has spoken particularly to this crime as one which is a danger to children, naming it in RCW 43.43.830(7) as a "Crime against children or other persons."

The redemptive movement which Ms. Fields invites this Court to join by crossing over into policymaking has not reached the crime at issue here. It is for the legislature to decide if this crime will at some point be a candidate for rehabilitation programs. This Court should not accept review under RAP 13.4(b)(4) on the basis of a misplaced invitation to this Court to move beyond the judicial sphere.

VI. CONCLUSION

The Appellant has failed to establish that the Court of Appeals decision in case presents a significant question of law or an issue of substantial public interest that should be resolved by the Supreme Court. The Respondent respectfully requests that the Court deny Ms. Fields' Petition for Review.

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RESPECTFULLY SUBMITTED this 19th day of October, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Supreme Court, under Case No.95024-5, and a true copy was e-mailed or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses as listed below:

1. Keith Patrick Scully, Newman DuWors, LLP at keith@newmanlaw.com;
2. Prachi Vipinchandra Dave, ESQ, at pdave@aclu-wa.org;

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

DATED this 19th day of October, 2017, at Seattle, WA.

NICK BALUCA, Legal Assistant
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ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE

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