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CLERK SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
DEPARTMENT OF EARLY LEARNING

Respondent,

v.

KATHLEEN HARDEE,

Petitioner.

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STATE OF WASHINGTON
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DEPARTMENT OF EARLY LEARNING
BRIEF IN RESPONSE TO AMICI ACLU/NELP, SEIU, NWJP, AND
VETERINARY MEDICAL ASSOCIATION

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT2

 A. A Higher Burden Of Proof Is Required Only
 When There Is A Fundamental Right, And
 A Business License Is Not A Fundamental
 Right.....2

 1. The Veterinary Medical Association
 And The Northwest Justice Project
 Erroneously Claim That Suspending
 Or Revoking A Family Home Child-
 Care License Affects A Fundamental
 Right.....3

 2. A Higher Burden Of Proof Is
 Required Only When There Is A
 Fundamental Right.....7

 B. Economic Consequences, Including
 Regulation Of Employment, Do Not Compel
 The Legislature To Use A Higher Standard
 Of Proof8

 C. Labeling The Proceeding Quasi-Criminal
 Should Not Be Used To Override A
 Legislative Standard Of Proof11

 D. The SEIU Brief Asks The Court To Depart
 From Constitutional Review Of Legislation
 And To Set Policy13

E.	Ms. Hardee Did Not Raise An Issue Claiming Different Treatment Based On Gender And, In Any Event, The Legislature Did Not Impose Different Treatment Based On Gender.....	15
F.	The Final Order Gave Due Regard To The ALJ's Opportunity To Observe The Witnesses	16
1.	Washington Statutes Lodge Authority For A Final Order In The Agency	17
2.	NWJP Identifies No Finding Where The Agency Failed To Give Due Regard To The ALJ Opportunity To Observe Witnesses	19
3.	The NWJP Relies On Cases Involving Different Statutory Standards.....	21
III.	CONCLUSION.....	24

TABLE OF AUTHORITIES

Cases

<i>Addington v. Texas</i> 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).....	7
<i>Amunrud v. Bd. of Appeals</i> 158 Wn.2d 208, 143 P.3d 571 (2006).....	4
<i>Benitez v. Rasmussen</i> 261 Neb. 806, 626 N.W.2d 209 (2001)	9
<i>Chen v. Mukasey</i> 510 F.3d 797 (8th Cir. 2007)	22
<i>Conn v. Gabbert</i> 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999).....	4
<i>Cornwell v. Cal. Bd. of Barbering & Cosmetology</i> 962 F. Supp. 1260 (S.D. Cal. 1997).....	5
<i>Dittman v. California</i> 191 F.3d 1020 (9th Cir. 1999)	4
<i>Dowell v. Dep't of Pub. Health & Human Servs.</i> 331 Mont. 305, 132 P.3d 520 (2006).....	9
<i>Hicklin v. Orbeck</i> 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978).....	5
<i>In re Lee TT. v. Dowling</i> 87 N.Y.2d 699, 664 N.E.2d 1243, 642 N.Y.S.2d 181 (1996).....	9
<i>In re Revocation of License of Polk</i> 90 N.J. 550, 449 A.2d 7 (1982)	5
<i>In re Revocation of License to Practice Med. & Surgery of Kindschi</i> 52 Wn.2d 8, 319 P.2d 824 (1958).....	11, 12

<i>In re Winship</i> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	7
<i>Islam v. Dep't of Early Learning</i> No. 63362-7, 2010 WL 3294285 (Wash. Ct. App. Aug. 23, 2010)	13
<i>Island Cnty. v. State</i> 135 Wn.2d 141, 955 P.2d 377 (1998).....	13, 14
<i>Kansas v. Hendricks</i> 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).....	12
<i>Mass. Bd. of Ret. v. Murgia</i> 427 U.S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976).....	5
<i>Mathews v. Eldridge</i> 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	10
<i>McDonald v. Dep't of Banking & Fin.</i> 346 So. 2d 569 (Fla. Dist. Ct. App. 1977)	21
<i>Medeiros v. Vincent</i> 431 F.3d 25 (1st Cir. 2005).....	5
<i>Meyer v. Nebraska</i> 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).....	5, 6
<i>Meyers v. Newport Consol. Joint Sch. Dist. 56-415</i> 31 Wn. App. 145, 639 P.2d 853 (1982).....	5
<i>Moore v. Ross</i> 687 F.2d 604 (2d Cir. 1982)	22
<i>Nebbia v. New York</i> 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934).....	4
<i>Nguyen v. Dep't of Health</i> 144 Wn.2d 516, 29 P.3d 689 (2001).....	2, 8, 12, 13, 15, 24

<i>Nw. Steelhead & Salmon Council of Trout Unlimited v. Dep't of Fisheries</i> 78 Wn. App. 778, 896 P.2d 1292 (1995).....	21
<i>Ongom v. Dep't of Health</i> 159 Wn.2d 132, 148 P.3d 1029 (2006).....	2, 8, 13, 15, 16, 24
<i>Petition of Grimm</i> 138 N.H. 42, 635 A.2d 456 (1993).....	5
<i>Petition of Preisendorfer</i> 143 N.H. 50, 719 A.2d 590 (1998).....	9
<i>Rivera v. Minnich</i> 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987).....	7
<i>Santosky v. Kramer</i> 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....	7
<i>Schware v. Bd. of Bar Exam'rs of N.M.</i> 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957).....	5
<i>Tapper v. Emp't Sec. Dep't</i> 122 Wn.2d 397, 858 P.2d 494 (1993).....	16, 17, 22
<i>Valmonte v. Bane</i> 18 F.3d 992 (2d Cir. 1994).....	9
<i>Vance v. Terrazas</i> 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980).....	8
<i>Washington v. Glucksberg</i> 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).....	6

Statutes

Fla. Stat. § 120.57(1)(b)(10) (1974)
(1974 Fla. Laws, ch. 74-310, § 1) 22

RCW 34.05.410-.476 2

RCW 34.05.461(3)..... 21, 23

RCW 34.05.464(4)..... 17, 21

RCW 34.05.464(8)..... 21

RCW 34.05.570(1)..... 10

RCW 43.215.005(3)..... 15

RCW 43.215.005(3)(c) 1, 3

RCW 43.215.205(2)..... 11

RCW 43.215.260 13

RCW 43.215.300(2)..... 1

Other Authorities

William R. Andersen,
*The 1988 Washington Administrative Procedure Act—
An Introduction*, 64 Wash. L. Rev. 781 (1989) 18, 19, 23

Regulations

WAC 170-06-0070(4)..... 10, 11

WAC 170-06-0070(8)..... 10

WAC 170-06-0090..... 10

WAC 170-296-0270(3)..... 13

I. INTRODUCTION

The Department of Early Learning (Department) answers the amicus briefs filed by the American Civil Liberties Union and National Employment Law Project (ACLU/NELP), Service Employees International Union (SEIU), the Northwest Justice Project (NWJP), and the Veterinary Medical Association.

Amici ask the Court to find that RCW 43.215.300(2)¹ denies procedural due process by applying a preponderance standard of proof. Amici criticize the ruling of the court of appeals for undervaluing the importance of child-care providers and for failing to weigh the economic consequences of losing a child-care facility license. They assert that a child-care license should be treated like the doctor's license and nursing assistant certification addressed in *Nguyen* and *Ongom*.² Amici ask the Court to bypass the legislative judgment that the safety of children in child care is paramount to the interest in operating the business. RCW 43.215.005(3)(c).³

¹ "In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a *preponderance of the evidence*." (Emphasis added.)

² *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001); *Ongom v. Dep't of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006).

³ The purpose of this chapter is "[t]o safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, which is paramount over the right of any person to provide care."

The amici briefs ignore case law from the United States Supreme Court and other states showing that the private interests emphasized by the amici do not compel a preponderance standard. As a result, amici fail to show that procedural due process rights prevent the legislature from selecting a preponderance standard of proof in this adjudicative proceeding.⁴

Moreover, because amici primarily ask for similar constitutional treatment, as in *Nguyen* and *Ongom*, overruling those two cases meets the thrust of amici's arguments. Those cases are the source of amici's argument that child care is not being respected compared to other occupations. Overruling those cases will also reestablish appropriate deference for legislative decisions and eliminate the uncertainty created by those two decisions.

II. ARGUMENT

A. **A Higher Burden Of Proof Is Required Only When There Is A Fundamental Right, And A Business License Is Not A Fundamental Right**

The due process issue in this case concerns a unique aspect of process—the standard of proof. The standard of proof allocates a variety of risks and interests implicated by adjudication of facts. When amici

⁴ “Adjudicative proceeding” refers to the process where a decision is based on an evidentiary record, with cross-examination, unbiased decision makers, discovery, written decisions, and judicial review. See RCW 34.05.410–.476.

argue for a higher standard of proof, they necessarily argue for a different allocation of risk than selected by the legislature, which would leave children and parents with less assurance that child-care facilities are safe.

Amici, thus, dispute the express purpose of RCW 43.215 to “safeguard and promote the *health, safety, and well-being of children receiving child care* and early learning assistance, which is *paramount over the right of any person to provide care.*” RCW 43.215.005(3)(c) (emphasis added). The preponderance standard serves this policy. Because there is no fundamental right at stake, the legislature is not compelled by due process to adopt amici’s view that Ms. Hardee’s private interests require a higher standard that would undermine the overarching purpose of ensuring protection of children.

1. The Veterinary Medical Association And The Northwest Justice Project Erroneously Claim That Suspending Or Revoking A Family Home Child-Care License Affects A Fundamental Right

The brief of the Veterinary Medical Association asserts that “[t]he 14th Amendment draws no distinction” between any occupation so that clear, cogent and convincing evidence will be applicable to any regulation affecting any occupation. Veterinary Br. at 3. The premise for this argument is that “federal constitutional law” makes the “right to practice an occupation . . . a fundamental liberty.” Veterinary Br. at 6. The

Northwest Justice Project (NWJP) similarly claims that Ms. Hardee “has a fundamental liberty interest in her child care license.” NWJP Br. at 11.

Contrary to amici, this Court and the United States Supreme Court hold that regulation affecting the right to choose a profession or operate a business does not involve a fundamental right or liberty.

In a line of earlier cases, this Court has indicated that the liberty component of the Fourteenth Amendment’s Due Process Clause includes *some generalized due process right to choose one’s field of private employment, but a right which is nevertheless subject to reasonable government regulation.*

Conn v. Gabbert, 526 U.S. 286, 291–92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999). This Court reached this same conclusion in *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), a case involving a procedural and substantive due process challenge to revocation of a taxi driver’s commercial driver license.

“[T]he United States Supreme Court has made clear that ‘rational basis review’ is the appropriate standard for reviewing such government licensing regulations. *Barry [v. Barchi]*, 443 U.S. 55, 61–62, 67–68, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979)] (applying “rational basis test” in the equal protection context . . .).

Amunrud, 158 Wn.2d at 220. *Amunrud* cites cases from across the country confirming the error of the amici’s fundamental right claim.⁵

⁵ *Nebbia v. New York*, 291 U.S. 502, 527–28, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (right to work in a particular profession or trade is protected, but subject to rational regulation); *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (rational

The NWJP brief cites nothing to support a fundamental right. The Veterinary brief cites two cases that do not support its argument. First, it cites *Hicklin v. Orbeck*, 437 U.S. 518, 98 S. Ct. 2482, 57 L. Ed. 2d 397 (1978), where the Court struck down an Alaska law requiring certain oil and gas leases, easements, or right-of-way permits for pipeline purposes requiring that qualified Alaska residents be hired in preference to nonresidents. *Hicklin* held that the law violated the privileges and immunities clause, but it did not say that participating in a particular occupation was a fundamental right.

The Veterinary brief's second case is *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). *Meyer* struck down a Nebraska law forbidding the teaching of a foreign language on an arbitrary and

basis review applies to acupuncture license); *Meyers v. Newport Consol. Joint Sch. Dist.* 56-415, 31 Wn. App. 145, 639 P.2d 853 (1982) (right to employment is not fundamental and applying rational basis review); *In re Revocation of License to Practice Med. & Surgery of Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958) (applying rational basis review to license revocation); *Medeiros v. Vincent*, 431 F.3d 25, 29 n.3 (1st Cir. 2005) ("well settled" that there is no fundamental right to pursue a livelihood or occupation, and "legislation or regulation impinging upon such a right therefore is subject only to 'rational basis' review, rather than 'strict scrutiny'"); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1271-72 (S.D. Cal. 1997) (regulation of occupation "subjected to rational basis review"); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (applying rational basis review to restrictions on government employment because no fundamental right); *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 238, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (no fundamental right to practice law); *In re Revocation of License of Polk*, 90 N.J. 550, 570, 449 A.2d 7 (1982) (professional license "cannot be equated with a fundamental right" and such licenses are "always subject to reasonable regulation in the public interest"); *Petition of Grimm*, 138 N.H. 42, 50, 635 A.2d 456 (1993) ("The right to work in one's occupation has never been placed on equal footing with fundamental personal rights.").

capricious basis, not based on any fundamental right. *Meyer*, 262 U.S. at 403 (statute “is arbitrary and without reasonable relation to any end within the competency of the state”). *Meyer* does not hold or imply that there is a fundamental right to pursue a regulated business or employment.

The amici’s claim of fundamental rights should also be rejected under *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).⁶ In *Glucksberg*, the Court addressed when courts should find a new fundamental right for purposes of substantive due process. The “threshold requirement” is to identify a carefully circumscribed “fundamental right[] found to be deeply rooted in our legal tradition” that is supported by “concrete examples.” *Id.* at 722. The case law shows no such legal tradition regarding regulation of businesses and professions. Because there is no fundamental right, a court need require no “more than a reasonable relation to a legitimate state interest to justify the action” and there is no “need for complex balancing of competing interests in every case.” *Id.* at 722.

Ms. Hardee’s interest in her license is protected by due process, but the license is not a fundamental right or liberty interest.

⁶ Although *Glucksberg* concerns substantive due process, it applies here because amici claim a higher standard of proof by arguing a fundamental right exists. It would make little sense for a license to be a fundamental right for procedural due process, but not for substantive due process.

2. A Higher Burden Of Proof Is Required Only When There Is A Fundamental Right

Due process does not require a burden of proof higher than the preponderance burden if the state action does not affect a fundamental right. The Veterinary and NWJP briefs tacitly admit this by arguing that the Court should find that the license is a fundamental right. The other amici (ACLU/NELP and SEIU) simply fail to rebut the cases showing that the higher standard of proof is required only in cases involving fundamental rights, not various other important interests.

For example, no amici disputes that the United States Supreme Court has required a higher standard of proof under the due process clause only when the private interest involves liberty (such as avoiding confinement) or involves a fundamental right (such as parental rights).⁷ No amici disputes that the Court sustains use of the preponderance standard even when there are serious private interests, where the interests are not fundamental rights.⁸ See Dep't Supp. Br. at 8–11. In dozens of

⁷ See, e.g., *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (declaration of juvenile delinquency and detention causes a “complete loss of personal liberty” required proof beyond a reasonable doubt); *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (commitment to psychiatric hospital requires clear and cogent evidence); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (termination of parental rights, complete destruction of fundamental right of parent to raise child, requires clear and convincing evidence).

⁸ *Rivera v. Minnich*, 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987) (upholding state statute requiring a preponderance of the evidence when establishing paternity and rejecting arguments regarding the severe lifetime consequences and stigma of such paternity); *Vance v. Terrazas*, 444 U.S. 252, 266, 100 S. Ct. 540, 62 L. Ed. 2d

pages of briefing, amici simply ignore the overwhelming weight of national case law and argue for extension of *Nguyen* and *Ongom* to this license.

A preponderance standard of proof reasonably allocates risks among dissimilar private interests when there is no fundamental right at stake. Here, the standard of proof allocates the risk of a decision by putting it on the private interests of children in adequate and safe care facilities except when the state proves its case by a preponderance. The risk is on the licensee only if the evidence preponderates against the licensee. Only then is the Department authorized to suspend or revoke the license.

B. Economic Consequences, Including Regulation Of Employment, Do Not Compel The Legislature To Use A Higher Standard Of Proof

Economic impacts on the licensee and collateral effects on other employment are not a basis for overriding the legislature's allocation of risk in the statutory burden of proof. Instead, the consequences of revocation described by amici are normal economic and regulatory consequences related to a finding that a child-care facility was unsafe.

461 (1980) (preponderance standard meets due process in expatriation proceedings, which are "civil in nature and do not threaten a loss of liberty").

For example, the ACLU/NELP describes how a “negative action” can be considered in certain future employment or licenses. Each consequence or reputational affront cited by amici is rationally related to the fact that a provider was proven unfit to be licensed for child care. These consequences are undoubtedly serious for some licensees, but, nevertheless, they are economic consequences.

The ACLU/NELP also points to the potential for impact on child-care employment in other states. This claimed economic consequence is not a sound reason for a higher standard of proof. Other states commonly use a preponderance standard of proof for child-care facility licensing and for substantiating allegations of child abuse that affect employment.⁹

The NWJP argues the Court should impose a higher standard of review to ensure an adequate supply of child-care facilities for the many families who depend on child care. NWJP at 2. The NWJP’s statistics do not suggest that regulatory oversight affects the supply of child-care facilities; if it did, it would be a matter for the legislature to

⁹ *E.g.*, *Petition of Preisendorfer*, 143 N.H. 50, 56, 719 A.2d 590 (1998) (legislature may protect children by using preponderance of the evidence standard for naming person in abuse registry that “essentially excludes the petitioner from his profession for at least seven years”); *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001) (preponderance standard applies in Nebraska in case challenging listing for finding of child neglect or abuse); *Valmonte v. Bane*, 18 F.3d 992, 1003–04 (2d Cir. 1994) (preponderance test appropriate to substantiating child abuse); *Dowell v. Dep’t of Pub. Health & Human Servs.*, 331 Mont. 305, 132 P.3d 520 (2006) (same); *In re Lee TT. v. Dowling*, 87 N.Y.2d 699, 664 N.E.2d 1243, 642 N.Y.S.2d 181 (1996) (state burden is preponderance at hearing to expunge finding of abuse on registry).

consider. Moreover, it defies logic to suggest that parents who depend on child care would be more interested in a convenient facility than in the safety of the children. The Veterinary brief offers a strawman version of this argument, arguing that because the public depends on daycare services, the public interest is not “bolstered by erroneous de-licensure of qualified daycare providers.” Veterinary Br. at 5. This rhetoric is hollow because it presumes that de-licensures are erroneous. A license revocation reflects the preponderance of evidence and is presumed correct under RCW 34.05.570(1).

The Court should reject amici’s focus on regulatory and economic consequences because it does not show a fundamental right and fails to meet the legal precedent. Moreover, the focus on the licensee’s interest does not meet *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), because it does not consider the competing public and private interests. Every consequence described by amici—such as an effect on future employment—is a consequence that also protects vulnerable populations.¹⁰

¹⁰ Furthermore, the consequences are not as absolute as suggested by amici. For example, any person who has a negative action is entitled to seek reinstatement and apply for future licenses. WAC 170-06-0070(4), (8). In those situations, the person is entitled to additional notice and opportunity to be heard to evaluate the relevance of a past negative action. WAC 170-06-0090.

The amici argument describes an unmanageable rule of law because it relies on ad hoc evaluation of private interests. The Veterinary brief confirms that such ad hoc evaluations have no limits, asserting a higher standard of proof for *any* type of occupation or business interest.

C. Labeling The Proceeding Quasi-Criminal Should Not Be Used To Override A Legislative Standard Of Proof

The amici place great reliance on the label “quasi-criminal.” *E.g.*, Veterinary Br. at 5. The SEIU brief speculates that a Department action against a child-care licensee could affect future employment more than a criminal conviction for driving under the influence.¹¹ Resort to this label is a different type of ad hoc, individualized assessment of private interests, similar to amici’s reliance on economic consequences. It does not justify barring the legislature from selecting the preponderance standard.

Like the *Nguyen* opinion, the amici cite *In re Revocation of License to Practice Med. & Surgery of Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958), a case decided shortly after the state authorized regulation of doctors by a board. The *In re Kindschi* opinion, however, only says that it is “somewhat difficult” to classify the disciplinary proceeding. It used the label quasi-criminal because the proceeding was “for the protection of the

¹¹ This argument is also inaccurate because it disregards the agency’s ability to consider character in licensing a provider. Repeated or recent DUIs could be relevant in determining whether to license an applicant. See RCW 43.215.205(2); WAC 170-06-0070(4).

public” and addressed alleged “misconduct.” *In re Kindschi*, 52 Wn.2d at 10. The term did not imply that fundamental liberties or rights are at stake. To the contrary, *In re Kindschi* held that the medical profession is subject to state regulations with a “rational connection” to legitimate purposes. *Id.* at 11–12 (citing *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957)).

In re Kindschi confirms that the label quasi-criminal is not a shortcut for determining the standard of proof required by due process. It shows that the label does not substitute for analysis, particularly because the label can be misunderstood. It might imply to some that criminal procedures are needed. It might imply that criminal punishment may be occurring, which is clearly not the case. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (evaluating when civil commitment constitutes criminal punishment).

The Court should reject the unmanageable ad hoc rules offered by amici. “There is no facile calculus for determining in every case what the standard of proof should be.” *Nguyen*, 144 Wn.2d 543 (Ireland, J., dissenting). The United States Supreme Court cases provide a bright line and avoid case-by-case weighing of economic consequences or resort to a label like quasi-criminal. In the absence of a fundamental right, legislative

bodies may impose the preponderance standard of proof to accommodate the competing private and public interests.¹²

D. The SEIU Brief Asks The Court To Depart From Constitutional Review Of Legislation And To Set Policy

The SEIU criticizes *Hardee* and the more recent opinion in *Islam v. Department of Early Learning*, No. 63362-7, 2010 WL 3294285 (Wash. Ct. App. Aug. 23, 2010), because the courts concluded that the legislature could select the preponderance of evidence standard. The SEIU asserts that “due process is not a policy choice to which the legislature should be given deference.” SEIU Br. at 4. SEIU cites this Court’s ruling in *Island County v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998), but that case does not support SEIU’s flawed view of the role of the judiciary.

Island County explains why the Court uses “beyond a reasonable doubt” when a statute is challenged:

The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some

¹² Even if the Court does not reverse *Nguyen* or *Ongom*, it should affirm how the court of appeals distinguished those cases. A personal and portable credential, such as a doctor’s license, is entirely focused on the licensee. In contrast, a family home child-care license is issued only for a particular site, subject to invalidity if the provider moves. The regulatory interests are different and the licensee is aware of the state’s interest in the facility and its location, as well as the nonportability. RCW 43.215.260; WAC 170-296-0270(3). The court of appeals has properly rejected expansion of *Nguyen* beyond the holdings in those cases, because there are appropriate reasons for the preponderance standard when applied to a facility license.

deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.

Island Cnty., 135 Wn.2d at 147. It is a “fundamentally flawed notion of judicial power” to conclude that “the judiciary has a charter, in the guise of constitutional interpretation, to substitute itself for the executive and legislative branches of government.” *Id.* at 174 (Talmadge, J., concurring).

Contrary to the SEIU brief, a court decides if a statute satisfies minimum requirements of due process, but not by setting policy or choosing procedures it deems best. It reviews how the legislature addressed the competing interests such as whether there is a fundamental right, leaving the legislature to set policy regarding the allocation of risks. Legislation is presumed constitutional because a legislative body hears testimony and communicates with constituents. The legislature can best evaluate dissimilar concerns, such as the need for assurance that children are protected, economic consequences to licensees, and other private and public interests.¹³

¹³ The SEIU brief includes arguments that illustrate how the legislature is better equipped to address the tension between protection of children and licensing of the businesses. For example, SEIU speculates that there is only a small risk to children because parents can remove children from unsafe child care. The legislature, however, is not required to share SEIU’s speculation. It can conclude that parents cannot independently access the safety of child-care facilities and that it is of paramount importance to assure the safety of children in those facilities.

E. Ms. Hardee Did Not Raise An Issue Claiming Different Treatment Based On Gender And, In Any Event, The Legislature Did Not Impose Different Treatment Based On Gender

The ACLU/NELP argues that the court of appeals ruling should be changed to avoid different treatment of poor or marginalized minority women child-care providers compared to doctors. ACLU Br. at 13. This invites the Court to insert an analysis appropriate to an equal-protection claim. No party raised an equal-protection issue and amicus may not raise new issues.

Furthermore, there is no doubt that Washington laws value the importance of child care and women child-care providers. Licensing and oversight increases the quality of child-care facilities and enhances the value of providers, by ensuring safer care for Washington's children. RCW 43.215.005(3). The State therefore, readily agrees that child-care providers provide vital services. But the need to enhance the standing or respect for child-care facilities does not control the constitutional issue.

Overruling *Nguyen* and *Ongom* eliminates the false comparison offered by amici, who criticize an otherwise constitutional statute based on the decisions in those two cases. Rather than perpetuate a false comparison that amici characterize as an insult to women-owned or operated child-care businesses, the Court should hold that child-care

facility licenses and the license in *Nguyen* are subject to the same legislative discretion to choose an appropriate standard of proof.

F. The Final Order Gave Due Regard To The ALJ's Opportunity To Observe The Witnesses

The NWJP brief addresses Ms. Hardee's second issue, where she claims that the agency review judge reversed the ALJ's findings and substituted a view of the evidence based solely on hearsay rejected by the ALJ. Pet. for Review at 1.¹⁴

NWJP cites *Tapper v. Employment Security Department*, 122 Wn.2d 397, 858 P.2d 494 (1993), and concedes that this Court reviews *final* agency order findings for substantial evidence, not an ALJ's initial findings. NWJP Br. at 14. It nevertheless offers a number of arguments to bypass *Tapper*. As this Court held in *Tapper*: "Since the ALJ had the power to make findings of fact, the [reviewing officer] has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ." *Tapper*, 122 Wn.2d at 404.

The *Tapper* opinion rejects a number of NWJP arguments:

It would perhaps be more consistent with traditional modes of review for courts to defer to factual findings made by an

¹⁴ The petition for review raises two issues. Amici properly declined to address the third issue raised in Ms. Hardee's supplemental brief, where she argues that the review judge applied the wrong legal standard by concluding her son had unsupervised access to children at the facility. Hardee Supp. Br. at 2. The petition omits this issue and it is not argued in Hardee's supplemental brief. As such, it is not properly before the Court. See *Ongom*, 159 Wn.2d at 137 n.3.

officer who actually presided over a hearing rather than to findings made by an agency administrator. . . . In adopting RCW 34.05.464(4), however, *the Legislature has made the judgment that the final authority for agency decisionmaking should rest with the agency head rather than with his or her subordinates, and that such final authority includes "all the decision-making power" of the hearing officer.* RCW 34.05.464(4). Even were we inclined to do so, it is not our role to substitute our judgment for that of the Legislature.

Tapper, 122 Wn.2d at 405–06 (emphasis added).¹⁵

The NWJP proposal is vague and unnecessary here. First, Washington statutes have addressed their points to provide a meaningful review of the final agency decision, while including due regard for the initial decision. Second, the NWJP does not identify any findings where the agency failed to give “due regard to the presiding officer’s opportunity to observe the witnesses” as required by RCW 34.05.464(4). Third, the cases cited by NWJP concern different statutes in other states and do not apply to RCW 34.05.464(4), or this case.

1. Washington Statutes Lodge Authority For A Final Order In The Agency

Professor William Andersen’s seminal article on the APA, cited in *Tapper*, explains: “In designing a system of internal review, it is critical how much weight is to be afforded the decision of the person who presided over the hearing.” William R. Andersen, *The 1988 Washington*

¹⁵ A Westlaw search shows 284 subsequent decisions following *Tapper*.

Administrative Procedure Act—An Introduction, 64 Wash. L. Rev. 781, 815 (1989).

The Washington Act follows the federal act and the Model Act in lodging very broad power in the reviewing officer. The Act provides that the reviewing officer “shall exercise all the decisionmaking power that the reviewing officer would have had . . . had the reviewing officer presided over the hearing.” Presumably, this means that the reviewing officer *can freely substitute his or her judgment for that of the presiding officer* on all matters of law and policy.

On matters of fact, the same is apparently true, except that the Washington Act follows case law requiring a reviewing officer to give appropriate consideration to the administrative law judge’s findings on demeanor evidence. The Act provides that the initial order must identify any findings “based substantially on credibility . . . or demeanor” [footnote to RCW 34.05.461(3)] and that in reviewing factual findings of the presiding officer, the reviewing officer “shall give due regard to the presiding officer’s opportunity to observe the witnesses.” [footnote to RCW 34.05.464(4)]

Andersen, 64 Wash. L. Rev. at 816 (emphasis added) (ellipses in original) (footnotes omitted).

Noting points like those argued by NWJP, Professor Andersen concludes that it is “not a perfect solution.” *Id.* Nevertheless,

[i]t respects the legislative choice that final decision on policy matters be lodged in the agency, and it respects the hearing rights of parties by insuring [sic] that agency reviewers give some weight to those elements of the fact finding process that are affected by witness demeanor and credibility.

Id.

Contrary to the NWJP proposal, Professor Andersen concludes that judicial review does *not* involve free-roaming “heightened scrutiny” or specific deference or review of an ALJ’s findings.¹⁶ Instead, when a court reviews under the APA, the court asks

whether the order is supported by substantial evidence. The substantiality of the evidence is to be assessed specifically “in light of the whole record,” which includes transcripts of the agency hearing *and the credibility and demeanor findings of the presiding officer.*

Andersen, 64 Wash. L. Rev. at 816 (emphasis added) (quoting RCW 34.05.570(3)(e)).

As shown next, the record and the review judge decision show that this is not a case where the review judge ignored ALJ credibility findings in a way that renders the evidence less than “substantial evidence” in light of the whole record.

2. NWJP Identifies No Finding Where The Agency Failed To Give Due Regard To The ALJ Opportunity To Observe Witnesses

The NWJP brief claims the review judge “relied on hearsay.” NWJP Br. at 12. But the NWJP identifies no finding where the agency review judge did not give “due regard” to the ALJ’s “opportunity to

¹⁶ The NWJP supports its proposal by saying it is needed to alleviate institutional bias. NWJP Br. at 16. Professor Andersen explains the legislature authorized the agency to make new findings despite possible feelings that a review judge reviewing an ALJ could have an “institutional bias.” NWJP Br. at 16.

observe witnesses,” or where evidence supporting the finding would be less than substantial. Even under its vague proposal for “heightened scrutiny,” NWJP does not identify any erroneous finding in this case to which its suggested heightened standard would be applied, nor does it explain how such application would impact the final agency decision.

Contrary to NWJP’s misimpression of the case, the decision upholding revocation includes a detailed recitation of factual findings supported at every point by citations to testimony and exhibits. Dep’t Supp. Br. at 21–22 & n.10; Resp’t’s Br. at 32–39; CP at 249–82. When the review judge decided a finding differently than the ALJ, she addressed the difference and explained the reason for the difference. She cited the need for due regard and whether it could be applied. CP at 276–79. The review judge did not reverse the ALJ’s findings based on credibility because there were none. Instead, the review judge made findings on material facts that were missing—she addressed whether Ms. Hardee allowed her son unsupervised contact with children. CP at 274–75. When she addressed these facts, the review judge made findings based on testimony by parent JS, whose credibility was not cast into doubt by the ALJ’s findings. CP at 277. This record provides substantial evidence to support the findings, despite the initial ruling by the ALJ.

The NWJP cites statements from *Northwest Steelhead & Salmon Council of Trout Unlimited v. Department of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995), and argues that Washington courts have strayed from a “meaningful standard” of review under RCW 34.05.464(4). NWJP Br. at 12, 17–18. This criticism of *Northwest Steelhead* is a red herring, because the review judge in this case did what NWJP says should happen. The review judge provided “reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record” and complied with RCW 34.05.461(3) and .464(8). RCW 34.05.461(3).

Thus, this is not a case where the review judge entered findings without giving due regard to the ALJ. The final decision confronts the hearing officer’s ruling with details, reasons, and citations to the record, providing thorough reasons for every finding. CP at 249–82.

3. The NWJP Relies On Cases Involving Different Statutory Standards

The NWJP departs from Washington law in many places. For example, it quotes from *McDonald v. Department of Banking & Finance*, 346 So. 2d 569, 570 (Fla. Dist. Ct. App. 1977). But under Florida law, agency review of initial findings is quite different from RCW 34.05.464(4). Florida’s statute provides:

The agency in its final order . . . *may not reject or modify the findings of fact unless* the agency first determines from a review of the complete record, and states with particularity in the order, *that the findings of fact were not based upon competent substantial evidence* or that the proceedings on which the findings were based did not comply with essential requirements of law.

Fla. Stat. § 120.57(1)(b)(10) (1974) (1974 Fla. Laws, ch. 74-310, § 1). *McDonald* addresses how Florida courts review for compliance with this statutory limit. It has no application here, for the reasons expressed in *Tapper* and explained by Professor Andersen, above.

NWJP cites three cases for the broad proposition that “[t]he substantial evidence test was designed to accord deference to the *initial* fact finder specifically when credibility determinations are at issue.” NWJP Br. at 16 (emphasis added). One is a state criminal case that does not involve a final order that revises an initial order. The second case is *Moore v. Ross*, 687 F.2d 604, 609 (2d Cir. 1982), where the court explained that an agency is not required to give the same type of deference to an ALJ’s findings as an appellate court must give to a trial court’s findings. The third case is *Chen v. Mukasey*, 510 F.3d 797, 801 (8th Cir. 2007), where the court affirmed the agency’s adoption of initial findings that, unlike Ms. Hardee’s case, included explicit findings about credibility.

The NWJP brief overlooks the purposes of the Washington APA. An ALJ ruling followed by an agency review ensures consistency,

provides opportunities for further review de novo, and provides for review that avoids the costs of going to court. Dep't Supp. Br. at 18-22; Andersen, 64 Wash. L. Rev. at 816. Moreover, it is akin to a court's power to revise a commissioner's findings, or a federal district court review of a magistrate judge's findings. There is great value to proceedings in front of commissioners and magistrates, despite the power of reviewing courts.

The NWJP also overlooks how the Washington APA includes provisions that address the NWJP concerns for "due regard" to the opportunity to observe witnesses. Most obviously, an ALJ may use RCW 34.05.461(3): "Any findings based substantially on credibility of evidence or demeanor of witnesses *shall* be so identified." (Emphasis added.) The court may reverse if the record shows arbitrary substitution of findings that lack substantial evidence based on the record as a whole, while still recognizing that the phrase "due regard" gives the review judge latitude to exercise discretion.

The NWJP brief is out of step with Washington statutes and legislative intent. Like Ms. Hardee, the NWJP does not show how the review judge decision fails to give due regard to the ALJ's opportunity to observe witnesses.

III. CONCLUSION

Due process does not compel a clear, cogent, and convincing standard for a business or professional license or permit, whether that of a child-care facility or a doctor. The amici do not confront the relevant cases or show otherwise, offering only analogies to *Nguyen* and *Ongom*. In doing so, they illustrate why overruling those cases is the fairest approach for all licensees.

Overruling *Nguyen* and *Ongom* will restore stability and predictability to this area of law by eliminating endless line drawing regarding economic interests. It will restore Washington's consistence with the law of other states and the United States Supreme Court. It will restore proper deference to the role of the legislative bodies, rather than forever precluding those bodies from using the time-honored preponderance standard where it is appropriate to the competing interests.

Respectfully submitted this 8th day of October 2010.

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