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No. 95024-5

**SUPREME COURT OF THE STATE OF WASHINGTON**

Christal Fields,

Petitioner,
v.

State of Washington Department of Early Learning,

Respondent.

# MEMORANDUM OF *AMICI CURIAE* LEGAL VOICE, THE PUBLIC DEFENDER ASSOCIATION, INCARCERATED MOTHERS ADVOCACY PROJECT, AND SURGE IN SUPPORT OF PETITION FOR REVIEW

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## I. Introduction

Women are the fastest growing incarcerated population in the United States.[1] Like the majority of formerly-incarcerated people, women who leave prison are less likely to have had a high school education, which limits their employment options.[2] Unfortunately for many women with criminal convictions, the Department of Early Learning ("DEL") has implemented irrational barriers that prevent their employment in a field readily available to less-educated workers: childcare. The Court of Appeals' conclusion that the employment bar in WAC 170-06-0120(1) is rational ignores its disparate impact on women, especially women of color, leaving in place a gender discriminatory bar to employment. Amici urge this Court to accept review because this petition raises significant questions of both public interest and state constitutional law. RAP 13.4.

## II. Interest of Amici Curiae

The interests of amici curiae are set forth in the attached Motion for Leave to File Brief of Amici Curiae, and are incorporated by reference.

## III. Statement of the Case

Amici adopt the Petitioner's Statement of the Case.

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[1] The Sentencing Project, Trends in U.S. Corrections (June 2017), http://www.sentencingproject.org/issues/women.
[2] Id.

## IV. Argument

### A. This Court should accept review because WAC 170-06-0120(1)'s disparate impact on women, especially women of color, is an issue of substantial public importance.

By applying WAC 170-06-0120(1) ("the Rule") without exception, the DEL irrationally assumes that a child is safer with a person convicted of burglary five years after their conviction than with a person convicted of robbery ever. In doing so, the DEL is not protecting children, as Ms. Fields' situation demonstrates. Rather, the across-the-board application of the Rule has harmed Ms. Fields, and will harm the growing number of women, especially women of color, facing post-conviction sanctions.

#### 1. The Rule disproportionately harms women of color.

The U.S. has only five percent of the world's female population, but thirty percent of the world's female prisoners.[3] While incarceration is devastating regardless of gender, for women, incarceration and collateral consequences have a unique impact because of the already disadvantaged position of women in society. For example, women in state prisons are more likely than men to be survivors of physical or sexual abuse.[4]

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[3] Aleks Kajstura & Russ Immarigeon, States of Women's Incarceration: The Global Context, Prison Policy Initiative (2011).

[4] Melissa E. Dichter, Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update, National Online Resource Center on Violence Against Women (July 2015), http://vawnet.org/sites/default/files/materials/files/2016-08/AR_IncarcerationUpdate%20%281%29.pdf; *see also* Angela Myers, What You Need

Victimization is not the only risk factor. Compared to men, women who are incarcerated tend to have less education, more childcare responsibilities at home, and are more likely to be living in poverty before arrest.[5] Worse, being Black, Native American, or Latina also makes women more likely to be incarcerated, even though they are no more likely to commit crimes than white women.[6] In Washington, black people make up eighteen percent of the prison population but are only four percent of the state population, and Native American and Alaska Natives make up almost five percent of the prison population and only two percent of the state population.[7] Women of color are thus more likely to carry a criminal conviction that, if policies like the Rule remain in effect, has lifelong consequences for their economic security.

**2. The Rule contributes to the gender wage gap.**

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to Know About the Sexual Abuse to Prison Pipeline, National Organization for Women (Jun. 22, 2016), https://now.org/blog/what-you-need-to-know-about-the-sexual-abuse-to-prison-pipeline/ (having been abused is the number one indicator of whether a woman will see the inside of a prison cell).

[5] Bernadette Rabuy & Daniel Kopf, Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned, Prison Policy Initiative (July 9, 2015), https://www.prisonpolicy.org/reports/income.html.

[6] Incite!, *Women of Color & Prisons*, http://www.incite-national.org/page/women-color-prisons (last visited Dec. 20, 2016) (black women are three times more likely than white women to be incarcerated, though they are no more prone to commit crimes).

[7] Facts about Offenders in Confinement, Dep't of Corr. Wash. State (2017), http://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf.

It is well-documented that women in the U.S. are paid on average twenty percent less than men, and the wage gap is even greater for women of color.[8] Women in the workforce who do not have a college diploma are paid thirty percent less than men who have the same educational background.[9] In Washington State, black women are paid only 61.3 cents to every $1.00 made by white men.[10]

Exclusion from work because of criminal convictions exacerbates this shocking disparity. According to one survey, black women who were incarcerated were paid almost fifty percent less than women who had not been incarcerated, and thirty cents on the dollar compared to men who had not been incarcerated.[11] One reason for this is that having a criminal record restricts the places where an individual can work and with whom.

Naturally, jobs that involve working with vulnerable populations such as children and older adults are highly regulated and often require invasive investigations into an applicant's past. That limits employment in nursing homes and daycares, where wages are higher than in other

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[8] Nat'l Women's Law Center, *Wage Gap State Rankings*, http://nwlc.org/resources/wage-gap-state-state/ (2015).
[9] Anthony P. Carnevale et al., The College Payoff, Georgetown University Center on Education and the Workplace 10 (2011).
[10] Nat'l Women's Law Center, *Wage Gap State Rankings*, http://nwlc.org/resources/wage-gap-state-state/ (2015)
[11] Rabury & Kopf, *supra* note 5.

locations like retail shops and fast food restaurants. [12] For people without a high school or college diploma, work with sensitive populations can help them rise above minimum wage. Unfortunately, these female-dominated jobs have more job restrictions than the male-dominated jobs.

For example, childcare workers are ninety-five percent female while construction workers are ninety-five percent male.[13] Childcare workers must pass mandatory background checks, while construction workers only rarely face that requirement. *See, e.g.* RCW 9.97.020 (requiring background checks for people renovating buildings housing vulnerable people). A woman with a criminal conviction that prevents her from working with children might find work at a restaurant that does not have mandatory background checks, but her minimum wage pay would keep her in poverty at about $19,000 a year.

Of course, the DEL restrictions also apply to men, but only 5% of childcare jobs go to men.[14] This puts men and women in drastically different positions upon their release from prison. Now that women are the fastest growing population of incarcerated people, and female-dominated

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[12] Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L.Rev. 1806-1823 (2012).
[13] U.S. Census Bureau, *Full-Time, Year-Round Workers and Median Earnings in the Past 12 Months by Sex and Detailed Occupations: 2014* (2016).

jobs are more likely to be regulated by collateral sanction laws, post-conviction consequences for women are disproportionately severe.

### B. The Court of Appeals' failure to apply heightened scrutiny or invalidate the Rule under the Equal Rights Amendment raises a significant question of law.

As Ms. Fields and other amici have argued, the key error in the Court of Appeals' analysis was its conclusion that the Rule is subject to mere rational basis review. Under the Washington State Constitution, gender-discriminatory laws are not only subjected to strict scrutiny under the state equal protection analog, the privileges and immunities clause. *See* Maxwell v. Dep't of Soc. & Health Servs., 30 Wash. App. 591, 594, 636 P.2d 1102 (1981), *citing* Darrin v. Gould, 85 Wn.2d 859, 868, 540 P.2d 882 (1975). They are prohibited by the Equal Rights Amendment, Article XXXI, § 1 ("ERA") to the Washington Constitution.

#### 1. The ERA forbids sex discriminatory state action.

The ERA provides that "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex. Its protection goes "beyond [that] of the equal protection guaranty under the federal constitution." State v. Burch, 65 Wash. App. 828, 837, 830 P.2d 357 (1992), *citing* Darrin v. Gould at 877 and Marchioro v. Chaney, 90

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[14] Id.

Wn.2d 298, 305, 582 P.2d 487 (1978). Indeed, "[t]he ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny.'" Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County, 100 Wn.2d 109, 127, 667 P.2d 1092 (1983), *citing* Darrin v. Gould at 872.

While most ERA cases address explicit gender classifications, this Court's analysis in State v. Brayman, 110 Wn.2d 183, 751 P.2d 294 (1988) demonstrates that laws that have a disparate impact on women may also violate the ERA. In State v. Brayman, appellants argued that a particular blood alcohol test was likely to result in a disproportionate number of women drivers violating the legal limit for blood alcohol level. Id. at 201-204. This Court explained that the plaintiffs had not proved that the test in question actually had a disparate impact on women. Id.

Not so here. As explained above, it is well-documented that childcare is a field dominated by women. Thus, any prohibitions on access to that field are bound to fall more heavily on women. It is also beyond dispute that women, especially women of color, are currently incarcerated at unprecedented rates, and when they leave prison, they face numerous restrictions on access to work. While formerly-incarcerated men also face such consequences, they have, by virtue of gender, more access to professions that do not impose a permanent ban on people with criminal

convictions.[15] Ms. Fields's situation illustrates the problem: women of color are disproportionately burdened by a conviction-based bar on working in the field of early learning. Employment inequities based on gender are exactly the kind of societal discrimination that the ERA was adopted to eradicate. Thus, ignoring the disparate impact of the Rule raises serious constitutional concerns that *Amici* urge this Court to consider.

**2. The Rule is also unconstitutional under the Washington State Constitution's privileges and immunities clause.**

The ERA's absolute prohibition on sex-discriminatory laws should end the analysis. However, in addition to a singular sex-based burden, this Rule has a pernicious impact on women of color and their right to pursue an occupation. Taken together, those effects warrant heightened scrutiny under the privileges and immunities clause, Article I, § 12. *See* Crossman v. Dep't of Licensing, 42 Wash. App. 325, 328, 711 P.2d 1053 (1985) (". . . [H]eightened scrutiny might conceivably be applied to a statute that

[15] The DEL may argue that the sexism in sorting women and men into fields like child care versus construction is not of its making, and thus its rule is not the source of the gender disparity identified here. But DEL is responsible for ensuring that its rules do not undermine what has been identified by this Court repeatedly as a state interest of the highest order: the interest in eradicating gender discrimination against women. *See* Darrin v. Gould at 877 ("The overriding compelling state interest as adopted by the people of this state in 1972 is that: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.").

accords special treatment to quasi-suspect classes, such as those based on gender. . . or affects important but not fundamental interests.”).

The right to pursue work in a particular field is an important right. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 220, 143 P.3d 571 (2006). Generally, burdens on that right are subject to rational basis review. Id. However, women of color, whose right to work is particularly burdened by this Rule, experience discrimination that is unique and sometimes overlapping with the experiences of men of color and white women.[16] While disparate impact alone generally does not trigger strict scrutiny, this Court has indicated that heightened scrutiny may be appropriate where a classification has “a substantial disparate impact on a racial minority.” Macias v. Dep’t of Labor & Indus., 100 Wn.2d 263, 269-271, 668 P.2d 1278 (1983), (analyzing whether heightened scrutiny is appropriate for a regulation that disparately impacts a racial minority and the fundamental right to travel). Accordingly, courts should more closely scrutinize state action that harms people based on their positions within more than one traditionally suspect class, and when the nature of the right at stake is one of constitutional import. *See, e.g.*, Yakima County Deputy Sheriff’s Ass’n

v. Bd. of Commissioners, 92 Wn.2d 831, 839, 601 P.2d 936 (1979) (Utter, J., concurring) (courts "grant less deference" to the state when civil liberties are at stake). As this Rule has deprived Ms. Fields of work for which she is qualified, and will continue to harm women of color disproportionately, Amici urge this Court to accept review and to conduct a more searching inquiry into the DEL's basis for the Rule.

## V. Conclusion

The DEL's application of the Rule to Ms. Fields and women like her does not actually advance the stated interest in protecting children. Importantly, it undermines other compelling state interests, including the eradication of gender discrimination. For the reasons explained above, *Amic*i urge this Court to grant Ms. Fields' Petition for Review.

Respectfully submitted this 20th day of November, 2017.

_____//s//_____

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[16] See Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1 University of Chicago Legal Forum 141 (1989)

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