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WASHINGTON STATE SUPREME COURT

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CHRISTAL FIELDS,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,

Respondent.

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**BRIEF OF *AMICUS CURIAE* CIVIL SURVIVAL IN SUPPORT OF  
PETITION FOR REVIEW**

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## **I. INTERESTS OF *AMICUS CURIAE***

The interests of the proposed Amicus Curiae Civil Survival are described in the motion for leave to participate as amicus that accompanies this brief.

## **II. ISSUES TO BE ADDRESSED BY *AMICUS CURIAE***

- A. Do regulations that permanently bar individuals with certain criminal convictions from working in a particular field without being provided an opportunity to present evidence of rehabilitation and fitness to work within that field undermine the goals of reentry-related public policy declarations made by the Washington State legislature?
- B. Does Washington's current system for permanently barring people with certain criminal convictions from working in child care fail to be rationally related to the health and well-being of children?
- C. Do permanent bars to employment have negative impacts on community health, public safety, and children's need for diverse caregivers, particularly in communities of color?

## **III. STATEMENT OF THE CASE**

*Amicus* relies on the facts set forth in the Petition for Review.

## **IV. ARGUMENT**

For over four decades, Washington State has declared it to be a state public policy to support the rehabilitation of persons with felony convictions. H.B. 337 (Laws of 1973, ch. 135, § 1).<sup>1</sup> Central to these declarations is the recognition that access to meaningful employment plays a vital role in successful community reentry. *Id.* As such, the

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<sup>1</sup> See also S.S.B. 5423 (Laws of 2011, Ch. 106, § 1) ("it is in the interest of the public to promote the reintegration into society of individuals convicted of crimes.").

Petition for Review raises a significant question of public policy appropriate for review by this Court.

Moreover, this case raises significant questions of constitutional law requiring review because the Department of Early Learning (DEL) regulations applied to Ms. Fields have no rational relationship to children's health or well-being. Other statutory and regulatory schemes relating to child safety, such as federal law and foster care, treat persons convicted of felonies less severely and do not establish permanent bars. Further, the DEL regulations have racially disparate impacts that conflict with the agency's own best practices regarding caregiving within communities of color.

For these reasons, and those stated in the Petition for Review, Amicus Curiae urges this Court to accept review of the decision upholding the permanent disqualification of Ms. Fields – who has a 30-year history of rehabilitation and demonstrated experience successfully caring for young children – from providing child care.

**A. Regulations Mandating Permanent Bars to Employment for Persons with Criminal Convictions Undermine Clear Legislative Declarations of State Public Policy Related to Community Reentry.**

Almost 45 years ago, the Washington Legislature recognized support of rehabilitation and reentry to society for persons with felonies –

including access to employment – as important State public policy:

The legislature declares that it is the policy of the state of Washington to encourage and contribute to the rehabilitation of felons..., **and the opportunity to secure employment or to pursue, practice or engage in a meaningful and profitable trade, occupation, vocation, profession or business is an essential ingredient to rehabilitation and the responsibilities of citizenship.**

H.B. 337 (Laws of 1973, ch. 135, § 1) (emphasis added).<sup>2</sup>

These laudable reentry goals cannot be realized if persons with felony convictions, such as Ms. Fields, are forever barred from practicing or engaging in *meaningful* and *profitable* employment under regulations like those at issue in this case without being provided an opportunity to show how factors such as the passage of time, rehabilitation efforts, and the lack of a nexus between the conviction and the employment sought warrant access to employment.<sup>3</sup>

The inconsistency between the DEL regulations and the decades-old public policy is highlighted by recent legislative actions that specifically encourage rehabilitation and employment of people with criminal histories. In 2016, the Washington Legislature passed the

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<sup>2</sup> Codified at RCW 9.96A.010.

<sup>3</sup> The declaration of public policy referenced above is in the Chapter of the RCW relating to restoration of employment rights. RCW 9.9A.010. The statute specifically addresses employment and occupational licensing requirements by public entities and – significantly – states that, with limited exceptions, a person cannot be denied employment solely because of a prior felony conviction. RCW 9.96A.020. Moreover, the exceptions do not allow for total or arbitrary bans. Rather, denial is authorized only if the felony conviction relates directly to the employment sought and/or the amount of time that has passed since the conviction. *Id.*

Certification of Restoration of Opportunity Act (CROP).<sup>4</sup> A CROP gives a person with a criminal conviction the opportunity to obtain documentation from the sentencing court certifying successful rehabilitation. The individual may then request an occupational license that was previously unobtainable due to the criminal record. RCW 9.97.020. Recognizing that access to meaningful employment is one of the first steps in supporting successful reentry, the legislature stated,

[E]mployment is a key factor to the successful reintegration to society of people with criminal histories, and is critical to reducing recidivism, promoting public safety, and encouraging personal responsibility.

2 E.S.H.B. 1553, (Laws of 2016, ch. 81, § 1).

Equally important, the CROP Act requires that persons have the opportunity to present evidence of rehabilitation to the court before it decides whether the CROP will be granted:

Certificates of restoration of opportunity help reduce some barriers to employment for adults and juveniles by providing an opportunity for individuals to become more employable and more successfully reintegrate into society after they have served their sentence, **demonstrated a period of law-abiding behavior consistent with successful reentry, and have turned their lives around following a conviction.**

*Id.* (emphasis added).

Consequently, the regulations applied in Ms. Fields's case are in

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<sup>4</sup> 2 E.S.H.B. 1553 (Laws of 2016, ch. 81).

direct conflict with the State's policy regarding employment for people with criminal convictions. And, research supports the State's public policy position. In a case like Ms. Fields's, given the passage of nearly 30 years without any new criminal convictions, her likelihood of recidivism when compared to someone without a criminal record is non-existent.<sup>5</sup>

Accordingly, in deciding whether to accept discretionary review, this Court should take into account the State's long-established public policy regarding reentry goals and how regulations that arbitrarily mandate permanent bars to employment for persons with convictions hinder those goals. Such examination is necessary because permanent bars seriously threaten clear reentry objectives that have been reiterated by the State for over 40 years and make full community reintegration for persons with felony convictions nearly impossible.

**B. DEL's Permanent Bar for Child Care Workers Bears No Rational Relationship to Children's Health and Well-Being.**

DEL regulations requiring a lifetime ban on child care workers for certain convictions have no rational basis as they do not protect children or provide added safety. First, the analogous federal standard does not contain these same onerous restrictions. As the Court of Appeals noted in

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<sup>5</sup> See Michelle N. Rodriguez and Maurice Emsellem, "65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment," National Law Employment Project (March 2011) at 6 (major study of people with felony convictions found that 18-year-olds arrested for burglary had same risk of being arrested as same-aged individuals in general population after 3.8 years had passed since the first arrest).

this case, the Child Care and Development Block Grant establishes a federal standard for criminal record exemption in child care, delineating a list of felonies that must result in permanent bars on employment in child care. *Fields v. Dep't of Early Learning*, 2017 WL 3588960, \*8 (citing 42 U.S.C. § 9858f(c)). This list would not bar Ms. Fields. The federal standard also allows states to disqualify other individuals based on convictions for other crimes “that bear upon the fitness of an individual to provide care for and have responsibility for the safety and well-being of children.” 42 U.S.C. § 9858f(h). Washington’s restrictions do not satisfy this standard.

Second, comparing the child care worker standards with those for foster care licensing demonstrates the lack of connection to health and safety of children. Ms. Fields was denied a background clearance for employment as a child care provider because of a 30-year-old conviction for attempted robbery. *See* WAC 170-06-0120(1) (prohibiting anyone convicted of robbery from ever providing child care, with the same restriction for attempted robbery). Yet that same conviction would not bar her from obtaining a license as a foster care provider, even though both types of employment share the goal of ensuring child safety and welfare.

The regulations for getting a license to be a foster care provider present a rational relationship to the State’s goals. Under Washington law,

a conviction of robbery means a 5-year disqualification from getting a foster care license. *See* WAC 388-06A-0170(1)(a)-(e); 388-06A-0180(1)-(3); DSHS Secretary’s List of Crimes and Negative Actions For Use By Children’s Administration (March 2017), *available at* <https://www.dshs.wa.gov/sites/default/files/CA/pub/documents/secretaryslist.pdf>. This foster care licensing standard is in line with foster care standards in the majority of states, as well as federal laws regarding disqualification for child care employment.<sup>6</sup> On the other hand, DEL’s permanent bar for child care workers is inconsistent. DEL’s regulations are also not sound given that foster care providers have greater responsibility and less day-to-day oversight than child care workers. For example, by definition, “child care” is care for fewer than twenty-four hours a day, RCW 43.215.010(1)(a), (c), while “foster care” means “twenty-four-hour per day temporary substitute care for the child....” WAC 388-25-0010.

The permanent ban applied to Ms. Fields has no rational relationship to the state’s interest in the safety and well-being of children.

### **C. The Racial Disproportionality of Permanently Barring Child Care Workers with Certain Criminal Convictions**

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<sup>6</sup> *See* Child Welfare Information Gateway, *Background Checks for prospective foster, adoptive, and kinship caregivers*, Washington D.C.: U.S. Department of Health and Human Services, Children’s Bureau (2016) at 3-4 (most states have either a five- or ten-year bar on convictions that do not involve crimes against children, crimes of a sexual nature, or violent crimes, including homicide).

**Raises Significant Questions of Public Policy Regarding the Needs of Children, Who Benefit from a Diverse Child Care Workforce.**

DEL's bar for child care workers with certain convictions raises significant issues of public policy because, contrary to DEL's own best practices, the restrictions have a negative impact on children of color. Washington's criminal justice system creates and reflects racial disparities. African Americans, like Ms. Fields, comprise 17.9% of the prison population, but only 3.6% of the overall population, and are 5.7 times as likely to be incarcerated as white people. *See* Nellis, A., Ph.D., *The Color of Justice: Racial and Ethnic Disparities in State Prisons*, The Sentencing Project (June 14, 2016) at 16, 17. This Court has opined in the context of our juvenile justice system that "the racial imbalances in the juvenile justice system create and perpetuate barriers to economic and social advancement that vary, in the aggregate, on the basis of race." *State v. S.J.C.*, 183 Wn.2d 408, 433-34 (2015).

DEL's regulations permanently barring child care workers with certain convictions have a disproportionate impact on adults of color and a devastating impact on children of color. Studies show that children who are cared for by providers who reflect their communities have better outcomes and enhanced well-being. Adults representing minority groups provide positive role models and "often are more attuned to the challenges

related to poverty, racism, and immigration status that many children of color face in their communities.” Whitebook, M., Ph.D., *Building a Skilled Teacher Workforce: Shared and Divergent Challenges in Early Care and Education in Grades K-12*, Bill and Melinda Gates Foundation (September 2014) at 8.<sup>7</sup>

DEL itself acknowledges the benefits of having children taken care of by providers who are of the same cultural background as their families. DEL considers it a best practice for child care providers to “hire staff members with diverse backgrounds who reflect the diversity of the children and ... community.” Raff, C., Price, G., et. al., *Child Care Center: Licensing Guidebook 2<sup>nd</sup> Ed.*, The Washington State Department of Early Learning (2006) at 16. According to DEL, this is one way of ensuring that children receive culturally relevant instruction that help children “develop a positive sense of their own identity.” *Id.* at 69.

The impact of being educated by persons of the same race also has long-term benefits. For example, “[e]xposure to a black teacher...raises long-run educational attainment for black male students, especially among

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<sup>7</sup> See also Park., M., McHugh, M., Zong, J., and Batalova, J., *Immigrant and Refugee Workers in the Early Childhood Field: Taking a Closer Look*, Migrant Policy Institute at 2, 6 (April 2015) (“Promoting the diversity of the [child care] workforce as an important aspect of providing high quality services for children from diverse ethnic and linguistic backgrounds.” Whitebook, M., Kipnis, F. & Bellm., D., *Diversity and Stratification in California’s Early Care and Education Workforce*, Berkeley CA: Center for the Study of Child Care Employment (2008) at 2 (ideally the workforce “should reflect the diversity” of the children).

those from low-income households.” Gershenson, S., Hart, C. M. D., Lindsay, C. A., Papageorge, N. W., *The Long-Run Impacts of Same-Race Teachers*, IZA Institute of Labor Economics, Deutsche Post Foundation (March 2017) at 35.

DEL’s regulations have the effect of limiting child care workers of color, like Ms. Fields, from providing care to communities of color. Thus, the regulations permanently barring child care workers based on past crimes raise significant questions of public policy and constitutional law, as they bear no rational relation to the health and well-being of children.

## **V. CONCLUSION**

For the reasons set forth above, this Court should find that Petitioner has raised a significant constitutional question and an issue of substantial public interest that needs to be determined by this Court, thus meeting the criteria for review under RAP 13.4(b)(3) and (4).

Respectfully submitted and dated this 20th day of November, 2017.

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