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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CHRISTAL FIELDS,

Appellant,

v.

STATE OF WASHINGTON  
DEPARTMENT OF EARLY LEARNING,

Respondent.

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**DEPARTMENT OF EARLY LEARNING'S ANSWER TO AMICI  
RE PETITION FOR DISCRETIONARY REVIEW**

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## I. IDENTITY OF RESPONDENT

The State of Washington, Department of Early Learning, Respondent, answers the amici who have filed briefing in support of Appellant Christal Fields' Petition for Review (PFR).

## II. ARGUMENT

### A. **Belated Constitutional Claims Not Properly Raised By Parties Cannot Support Review Under Either The State Or Federal Constitution**

Twice now in this litigation, issues not brought forward by Ms. Fields have been raised by Amici alone. First, Amicus Northwest Justice Project (NWJP) asserted an equal protection argument at Division I that was only taken up by Ms. Fields in her Petition for Review to this Court. *See* AR 10-11, AR 112-121, AR 143-145, AR 158; Opening Brief of Appellant Christal Fields; Reply Brief of Appellant Christal Fields; Ct. Apps. Slip. Op. at 5-6; PFR at 2, 14-15. A second issue never addressed by the parties in this case, the potential application of the Washington Equal Rights Amendment (ERA), Article 31, §1, has been raised by Amici Legal Voice et al. Legal Voice Br. at 6-7.

This Court should not allow Amici to drive the course of legal argument, contrary to well-established case law that issues addressed on appeal must be raised by actual parties. *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015) (appellate court will not address

arguments raised only by amicus), *cert. denied sub nom. Evans v. City of Seattle, Wash.*, 137 S. Ct. 474 (2016). *Cummins v. Lewis Cnty.*, 156 Wn.2d 844, 850 n.4, 133 P.3d 458 (2006) (same).

There is no constitutional issue here that justifies review under RAP 13.4(b)(3), because the Court of Appeals correctly analyzed the due process issues that are legitimately a part of this case. Even if new issues were to be considered as part of this case, they would not support review. This Court should reject review, and the unpublished decision by the Court of Appeals should remain the final word on this case.

**1. The Equal Protection Arguments Asserted In This Case Would Not Warrant Review Even If Timely And Properly Asserted**

Even if the issue of equal protection was fairly placed before this Court by the arguments of the parties, it would not warrant review here. Ms. Fields does little more than cite article I, section 12 as a source of equal protection. Pet. at 14-15. She provides no substantive analysis. Amici attempt to assist her by arguing that heightened scrutiny should be applied because women and persons of color are disproportionately impacted by rules like those at issue here. But disparate impact standing alone has not been held sufficient to invoke heightened scrutiny in an equal protection challenge under article I, section 12.

The appropriate level of scrutiny in equal protection claims depends upon the nature of the classification or rights involved:

Suspect classifications, such as race, alienage, and national origin, are subject to strict scrutiny. Strict scrutiny also applies to laws burdening fundamental rights or liberties. Intermediate scrutiny applies only if the statute implicates both an important right and a semisuspect class not accountable for its status. Absent a fundamental right or suspect class, or an important right or semi-suspect class, a law will receive rational basis review.”

*State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). The classifications in the challenged rules rest on criminal history, not a suspect or semisuspect class. And Amici have cited no case in which the opportunity to pursue specific employment has been recognized as a fundamental right. Some cases cited by Amici, such as *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 163 P.2d 1278 (1983), have mentioned the possibility of such recognition, but have not done so. *See id.* at 270-71 (applying strict scrutiny because the challenged statute burdened “fundamental right to travel,” after rejecting disparate impact as a basis to do so).

In a case cited by Amicus Legal Voice, *Crossman v. Dep't. of Licensing*, 42 Wn. App. 325, 328-29, 711 P.2d 1053 (1985), the Court refused to apply “heightened scrutiny” to a statute allegedly creating a “quasi-suspect class” or an “important” but not fundamental interest. The

Court referenced the dictum in *Macias*, but characterized it as “unsound” because it depended on an inapplicable federal due process case (*Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971)). *Id.* at 329. The Court in *Crossman* stated explicitly that it did not adopt “heightened scrutiny.” *Id.* at 328 n.3. Neither has any case decided since *Crossman*.

Consequently, even if an equal protection claim under article I, section 12 were properly presented in this appeal—and raising it for the first time in the last two pages of the Petition for Review does not properly present it—the claim would receive rational basis review. The Court of Appeals, in rejecting Ms. Fields’ due process claims, concluded that a rational relationship exists between the challenged rules and the State’s interest in protecting the safety of children receiving care in those facilities. Ct. Apps. Slip Op. at 19. Ms. Fields’ equal protection claim, had it been properly presented, would be rejected under rational basis review.

This case contains no valid and reviewable equal protection claim. RAP 13.4(b)(3) has not been met and review should be denied by this Court.

**2. No Argument Under The Washington Equal Rights Amendment Supports Review By This Court, Whether Appropriately Raised Or Not**

The new Amicus argument regarding the Washington ERA (Const. art. 31) suffers from the same infirmities as the equal protection arguments,

and cannot provide a proper basis for review here. The argument is raised only by an Amicus, and the suggested ERA approach has no support in the case law.

Legal Voice asserts that disparate impact to the labor market due to predominance of women in the child care field is enough to trigger the ERA here. Legal Voice Amicus at 6-8. This is incorrect. As noted in *Bolser v. Liquor Control Board*, 90 Wn.2d 223, 231, 580 P.2d 629 (1978), a regulation that applies equally to men and women does not violate the ERA. This was so even though the *Bolser* case dealt with the regulation of erotic dancers, a field dominated by women because the regulation “contains no language which would make it applicable to one sex and not the other.” *Id.*

Further, while Legal Voice argues in a footnote that “DEL is responsible for ensuring that its rules do not undermine ... the interest in eradicating gender discrimination against women,” it fails to note that, with or without a background check process, the child care labor pool is historically made up largely of women. Legal Voice at 8, fn. 15. In 1999, long before WAC 170-06-0120 was enacted, women made up 95.5% of all child care workers, per the United States Census Bureau, a source also cited by Legal Voice. *Full time, Year Round Workers and Earnings in 1999 by Sex and Detailed Occupations: 2000* (2001). There is no evidence that

WAC 170-06-0120(1) has changed the proportion of male to female child care workers.

The Court should not accept review on this unsupported argument by an Amicus standing alone. This argument, like others made by Amici based on statistical information about incarceration and employment, is at heart a policy assertion that should be taken up with the legislative branch rather than pursued in the courts. There is no evidence in this case of state-based discrimination upon which the ERA could operate.

**B. The Court Of Appeals Properly Applied Rational Basis Review Without Any Of The Enhancements Incorrectly Supported By Amici**

Amici NWJP and Legal Voice argue that review should be accepted in order for this Court to apply an elevated form of rational basis review to WAC 170-06-0120(1) because race is implicated along with an interest in choosing employment. NWJP at 4-6; Legal Voice at 8-10. This argument again relies on an equal protection analysis inappropriate in a case with no argument by any party addressing equal protection until the last two pages of the PFR to this Court. Furthermore, there is not even a statistical link provided between the application of WAC 170-06-0120(1) and the racial makeup of child care workers. Legal Voice at 1-5, 7-9. In the realm of due process, the only constitutional concept developed and argued by Ms. Fields below, heightened scrutiny is not a factor for this type of regulation.

Case law cited by Amici to support their argument for heightened review is related to equal protection analysis rather than to substantive due process. *Id.* As acknowledged in *Crossman*, 42 Wn. App. at 327-329, an “important interest” that might trigger substantive due process analysis does not translate to the type of heightened analysis sometimes called for in equal protection jurisprudence. The generalized interest in choosing employment has been widely held to be subject to rational health and safety regulation, subject to ordinary rational basis review under both state and federal constitutional provisions. *See, e.g. Conn v. Gabbert*, 526 U.S. 286, 291-292, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999); *Amunrud v. Bd. of Appeals*, 158 Wash.2d 208, 222, 143 P.3d 571 (2006).

DEL has a statutory 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 five-year or permanent disqualification of an applicant for child care work. Wash. St. Reg. 08-08-101. Contrary to the contentions of Amici, rational basis review as applied by the Court of Appeals in this case sufficiently addresses Ms. Fields’ limited liberty interest in general employment. Amici’s arguments for a

heightened standard of review do not provide a basis for this Court to accept review.

There is no fundamental right at stake here, and thus 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. *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 (9<sup>th</sup> Cir. 1994); *Amunrud*, 158 Wn.2d at 224-225. The Court of Appeals correctly determined that the high burden for showing a regulation unconstitutional was not met here.

**C. This Court Should Not Accept Review To Reorder The Policy Decisions Already Made By The Legislature**

Several amici argue that because WAC 170-06-0120 disqualifies those with certain convictions from child care work, and because there is a demonstrated pattern of racial disproportionality in the criminal justice system, the disqualification of those with convictions is itself inappropriate due to disproportionality. National Employment Law Project and Washington State Labor Council, AFL-CIO (AFL-CIO) Amicus at 2-7; (Legal Voice) Amicus at 1-6; Civil Survival Amicus at 7-10. This argument inappropriately invites this Court to accept review in order to make legislative policy choices, not because there is a true basis for review under RAP 13.4(b)(4).

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 Court of Appeals decision finding this regulation to be within the authority of lawmakers, in keeping with this Court's jurisprudence, does not justify review.

Amici argue that the Court of Appeals decision raises issues of substantial public interest under RAP 13.4(b)(4) because, in their view, Ms. Fields presents as a model of rehabilitation who should be allowed to show she is able to care for children.<sup>1</sup> *Legal Voice* at 2, 10; *Civil Survival* at 2, 5; *NWJP* at 2, 9; *AFL-CIO* at 1-2, 9-10. This argument misses the mark. Background checks are about more than simple ability to perform caregiving tasks; they focus on protection of the public in general and on children in particular. RCW 43.215.205; WAC 170-06-0010(3) and (4). Ms. Fields' personal outcome does not and should not dictate judicial interpretation a constitutionally permissible regulation of an economic interest in particular employment that is designed specifically to ensure child safety. The Court should decline review under RAP 13.4(b)(4).

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<sup>1</sup> In at least the case of *Amicus Civil Survival*, this is based on a mistaken view of the record. The statement at page 5 of its brief—that Christal Fields has not had any conviction since her 1988 Robbery 2 conviction—is simply false, as the record shows a host of convictions from that point until 2006. CP 69-73.

Amicus Civil Survival argues that WAC 170-06-0120(1) should be invalidated as against the state policy of rehabilitation. Civil Survival at 1-2. However, this misrepresents the legislature's nuanced stance on the topic, avoiding as it does the designation of Ms. Fields' felony charge of Robbery 2 as a "violent offense" which is not eligible to be vacated under 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." Legislative policy on rehabilitation has considered and rejected the argument Amici urge this Court to take up on review. Their request should be denied.

The use of statistics and legislative declarations present in this briefing 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. It is the province of the legislature to decide if this Robbery 2 will at some point be a candidate for rehabilitation programs, or if DEL background checks for child care workers will be brought into that program.

Indeed, all of the Amicus briefs spend much time discussing statistics and disparate impact, urging this court to find WAC 170-06-0120

unconstitutional because of these factors and the growing support for assisting convicted persons in rehabilitating after serving their time. AFL-CIO at 2-7; Legal Voice at 1-6; Civil Survival at 2-7; NWJP Amicus at 5-9. However, these discussions, which are largely not specific to child care workers, do not change the constitutional factors at play or their analysis, due to the fact that this remains an economic regulation subject to rational basis review. *Conn v. Gabbert*, 526 U.S. at 291-292; *Amunrud*, 158 Wn.2d at 21. Status as a person with a criminal record is not a suspect classification that would present a cognizable equal protection argument under the Fourteenth Amendment, even if that had been raised by Ms. Fields.

In this case, the Court should not take up the invitation of Amici to legislate by invalidating a regulation formulated with the approval of the legislature and in furtherance of policies advocated by lawmakers. WAC 170-06-0120 should be upheld because it does not run afoul of substantive due process protections. This is so even if the Court does not believe that it is the best or fairest way to further the policies of the state. *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999).<sup>2</sup> Amici are well placed to

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<sup>2</sup> Amicus Civil Survival undertakes a comparison between child care and foster care licensing background checks, stating that because child care workers can be disqualified for more offenses, WAC 170-06-0120 is unconstitutional, while the foster care regulations, WAC 388-06A-0170 and -0180, are legitimately protective of children. Civil Survival at 6-7. No such comparison is appropriate under rational basis review, which does not require precision or forbid alleged overbreadth. *Amunrud*, 158 Wn.2d at 224-226; *State v. Seward*. 196 Wn.App. 579, 584, 384 P.3d 620 (2016)

pursue this issue through legislative channels if they so choose, but their arguments in this judicial forum should not prevail.

### III. CONCLUSION

Amici argue grounds for review not properly before this Court and have failed to demonstrate that the Court of Appeals decision in case presents a significant question of law or an issue of substantial public interest to justify review under RAP 13.4(b). The Respondent respectfully requests that the Court deny Ms. Fields' Petition for Review.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of December, 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 Washington State 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:

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

DATED this 11th day of December, 2017, at Seattle, WA.



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**ATTORNEY GENERAL'S OFFICE, SHS, SEATTLE**

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