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IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

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CHRISTAL FIELDS, an individual,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING,

Respondent.

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**COURT-REQUESTED SUPPLEMENTAL BRIEF OF APPELLANT  
REGARDING CROP**

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## I. INTRODUCTION

Ms. Fields respectfully submits this response to the Court's request for supplemental briefing regarding the impact of Certificates of Restoration of Opportunity (CROP) on her case.

This litigation has been pending for more than three years, including two years since the CROP statute was passed. From the beginning, the Department of Early Learning (DEL) has consistently maintained that Ms. Fields should be permanently disqualified from childcare work on the basis of an attempted robbery conviction she received thirty years ago. DEL has never argued that a CROP would exempt Ms. Fields from DEL's lifetime ban. Indeed, the first time DEL mentioned CROP was at the hearing before this Court.<sup>1</sup>

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<sup>1</sup> The Court remains free to reject DEL's reference to CROP because it was raised at such a late date. *See, Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 675 n.6, 398 P.3d 1108 (2017) (declining to address arguments that were not briefed but raised for the first time in oral argument); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) ("RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.") DEL's reference to CROP at this late date conflicts with authority it relied on in supplemental briefing and in objecting to arguments raised by *amici* in support of Ms. Fields, with DEL citing the Court's long-standing rule that it will not review a case on a theory different from that presented at the trial level. Supplemental Br. of DEL at 17 n.5 (citing *City of Tacoma v. William Rogers Co., Inc.*, 148 Wn.2d 169, 175 n.4, 60 P.3d 79 (2002); *Peoples Nat. Bank of Wash. v. Peterson*, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973)). Yet in oral argument DEL pointed to "the briefing that's been filed by the *amici*" as the basis for injecting CROP into the case. But *amici* never made the argument that CROP would serve as a remedy to Ms. Fields; they simply cited to CROP as an example of reentry-related reform. Br. of Amici Curiae Legal Voice et al. at 2. The record remains thoroughly undeveloped regarding the state's CROP argument and as such, DEL may not now present a new ground for this court to consider.

Moreover Ms. Fields does not have a CROP and it remains unclear whether she would be issued one if she applied for one. And even if she had one, it is unclear whether DEL would use the CROP to exempt her from its lifetime ban because DEL has not taken any steps to incorporate CROP into its regulatory scheme. Finally, even if the agency did take such steps, CROP would not cure the fundamental constitutional deficiencies of the lifetime ban which—at a minimum—would still summarily exclude all those who do not have a CROP. This Court should reject DEL’s last-ditch effort to evade judicial review of its ill-conceived ban via a statute whose existence it has never previously acknowledged in its briefing. The Court should not make a ruling on the effect of CROP in the complete absence of a record or full briefing on a question of interpretation of a statute the State has never previously mentioned. CROP fails to provide an adequate remedy and there is no basis for this Court to avoid the substantial constitutional issues presented.

**II. QUESTIONS ON WHICH THE COURT REQUESTED SUPPLEMENTAL BRIEFING, WITH CORRESPONDING ANSWERS**

1. Would a certificate of restoration of opportunity issued pursuant to RCW 9.97 provide Fields with an adequate remedy?

Answer: No. CROP does not provide an adequate remedy because Ms. Fields does not have a CROP; it is unclear whether she

qualifies for one based on the language of the CROP statute; and it is unclear what impact a CROP, if issued, would have on DEL's disqualification procedure since the agency's lifetime ban rules remain in place with no mention of CROP.

2. If a certificate of restoration of opportunity would provide Fields with an adequate remedy, how does the availability of this statutory remedy affect the constitutional issues presented in this case?

Answer: The creation of CROP after the superior court ruling in this case does not provide an adequate remedy for Ms. Fields for the reasons listed in the Answer to Question 1. Even if CROP were a statutory remedy for some people—those with different records who seek work authorization in fields governed by agencies other than DEL— this court should address the constitutional issues presented because DEL's ban remains unconstitutional as to anyone without a CROP, like Ms. Fields.

### **III. SUMMARY OF RELEVANT FACTS AND PROCEDURE**

Ms. Fields worked in childcare for several months before DEL discovered a decades-old attempted robbery conviction. Attempted robbery is one of 50 lifetime disqualifying convictions in the Director's list. WAC 170-06-0120. On January 12, 2015, DEL sent Ms. Fields a

disqualification letter and revoked her authorization to work in childcare. Ms. Fields exhausted the administrative appeals procedure and filed a complaint in the King County Superior Court, which denied her claims on May 31, 2016. Ms. Fields then filed a notice of appeal, and the case progressed through the appellate process until it reached this Court.

On June 8, 2016, approximately one week after the superior court issued its decision, the CROP statute, discussed in detail below, went into effect. The statute authorizes some individuals with certain kinds of convictions to apply to a superior court for a certificate that may, in some limited circumstances, overcome conviction-based occupational licensing restrictions.<sup>2</sup> But issuance of the certificate is entirely discretionary on the court's part and the statute mentions some agencies like DSHS but not DEL specifically, leaving unclear the impact of a CROP on DEL's licensing decisions.

Ms. Fields has not applied for a CROP and does not have one for the attempted robbery conviction at issue. CROP was unavailable to Ms. Fields during the pendency of her administrative challenge to DEL's ban

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<sup>2</sup> It is important to note that even the testimony in support of the CROP bill indicated that it may ultimately be accessed by very few. Video Recording: *HB 1553: Hearing Before House Pub. Safety Comm.*, 64<sup>th</sup> Leg., at 1:26:43-1:27:01 (Feb. 3<sup>rd</sup>, 2015), available at <https://www.tvw.org/watch/?eventID=2015021074> (testimony of Dan Satterberg) (“I want to remind you this is something for someone who is highly motivated, they have to go through a lot of steps to prove that they deserve this, they have to submit it to the court, so the people who are going to pursue CROP, it's going to be a very small percentage of the 8,000 people a year who get out of prison, but they're the people that you want to help encourage.”)

because the statute went into effect several months after DEL permanently disqualified her from working in childcare. Thus, Ms. Fields was unable to develop a record about whether CROP would exempt her from DEL's disqualification rules. DEL never supplemented the record to provide Ms. Fields with guidance on how a CROP (if she were to obtain one) would impact her case.

Moreover, DEL has neither changed, nor proposed any change in, its regulations to account for the CROP process since it was enacted. And at no time between June 8, 2016, and oral argument before this Court did DEL contend that CROP had any impact whatsoever on Ms. Fields' case or that the existence of CROP would affect its actions in any way.

#### IV. ARGUMENT

##### A. **CROP is not an adequate remedy for DEL's unconstitutional rule.**

##### 1. **Courts that are qualified to issue a CROP are not obligated to do so, and it is unclear whether Ms. Fields would be able to obtain a CROP.**

A CROP *may* be issued at the discretion of the superior court from which it is sought and that discretion may be exercised in various ways.

RCW 9.97.020(2).<sup>3</sup> The reviewing court is given wide latitude to deny the

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<sup>3</sup> (2) A qualified court has jurisdiction to issue a certificate of restoration of opportunity to a qualified applicant.

(a) A court must determine, in its discretion whether the certificate:

(i) Applies to all past criminal history; or

(ii) Applies only to the convictions or adjudications in the jurisdiction of the court.

request, as is evident by the forms developed by the Administrative Office of Courts (AOC). *Court forms: Certificate of Restoration of Opportunity*, COURTS.WA.GOV, <https://www.courts.wa.gov/forms/?fa=forms.contribute&formID=102> (last visited May 30<sup>th</sup>, 2018).<sup>4</sup> A denial may be entered because the applicant failed to fulfill the requirements for a CROP in the first place, failed to list a complete criminal history, or was otherwise deemed unqualified for a CROP. *Id.*; RCW 9.97.020(7).

The CROP statute further precludes people who have been arrested or convicted of a new crime from qualifying for a certificate. RCW 9.97.010(1)(d). Ms. Fields has convictions that post-date her conviction for attempted robbery, and this provision alone may bar her from getting a CROP. As a result, the possibility of Ms. Fields obtaining a CROP is purely hypothetical. Because Ms. Fields does not have a certificate at this time and may not be able to obtain one in the future, a CROP cannot be considered an adequate remedy.

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(b) The certificate does not apply to any future criminal justice involvement that occurs after the certificate is issued.

(c) A court must determine whether to issue a certificate by determining whether the applicant is a qualified applicant as defined in RCW 9.97.010.

<sup>4</sup> The Washington Courts forms on CROPs include a form for an “Order of Dismissal of Petition for Certificate of Restoration of Opportunity” in which the court may make three types of findings: (1) Declined to consider (ORDDC), (2) Petitioner Ineligible (ORDIN), and (3) Court not qualified (ORDNQ).

2. **CROP's effect on DEL's disqualification provisions is wholly unknown.**

Even if Ms. Fields were to apply for and be issued a CROP, the certificate's effect on DEL's authorization process remains unclear. It is DEL and not the issuing court that has authority over determining whether Ms. Fields is qualified to work in childcare. Nothing in RCW 9.97 gives an issuing court authority to grant an individual a CROP *and* a license to work in a particular field. And the statute does not guarantee that having a CROP exempts a person from DEL's lifetime ban list. In relevant part, RCW 9.97.020(1) states: "*Except as provided in this section, no state, county, or municipal department, board, officer, or agency . . . may disqualify a qualified applicant, solely based on the applicant's criminal history, if the qualified applicant has obtained a certificate of restoration of opportunity and the applicant meets all other statutory and regulatory requirements . . .*" (emphasis added). Even if Ms. Fields were to obtain a CROP, the statutory language of RCW 9.97 leaves it unclear as to whether the CROP would provide any relief. This lack of clarity is compounded by the lack of clarity in the record about the effect of a CROP (because the issue was not raised previously). DEL has taken no action to provide Ms. Fields or others like her with any guidance: the agency's regulatory scheme is silent as to CROP despite DEL having had two years to

incorporate the statute into WAC 170-06. That WAC does not reference or incorporate CROP in any manner. No one who seeks DEL's authorization to work in childcare would be able to determine if and how a CROP would impact their application. Moreover, the CROP statute specifies that Department of Social and Health Sciences (DSHS) may disqualify any applicant from having unsupervised access to children "solely based on the applicant's criminal history." RCW 9.97.020(1)(c)(i). To the extent DEL may be allowed to treat CROPs in the same manner as DSHS<sup>5</sup> (continuing to disqualify applicants based solely on criminal history despite having a CROP when unsupervised access to children is involved) there are additional grounds to conclude that a CROP cannot constitute an adequate remedy.

And finally, all of the information before this Court (including DEL's own briefing) demonstrates DEL has retained its lifetime disqualification list in the face of CROP, providing no basis to believe DEL would treat Ms. Fields any differently were she to possess a certificate. Nowhere in its background check rules does DEL address the

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<sup>5</sup> DEL will soon be incorporated into the Department of Children, Youth, and Families (DCYF) and to the extent that the same discretion that the CROP statute allows DSHS also applies to DCYF, they will be allowed to disqualify individuals solely on the basis of criminal history, regardless of their possession of a CROP; this adds an additional layer of uncertainty in the manner that DEL/ DCYF will apply CROP vis a vis the existing lifetime disqualification list. See Wash. Dep't of Children, Youth, and Families, *General Information*, DCYF.WA.GOV, <https://www.dcyf.wa.gov/about/general-information> (last visited May 30<sup>th</sup>, 2018).

manner in which the agency might treat CROPs vis-à-vis the lifetime and five-year conviction bans. As they currently stand, those rules provide that Ms. Fields' attempted robbery conviction results in a permanent disqualification. WAC 170-06-0050(1)(f) mentions certain circumstances, such as a pardon, that allow a person to circumvent disqualification, but the provision does not address CROP. *See* WAC 170-06-0050(1)(f).<sup>6</sup> Had DEL intended CROP to provide a remedy, DEL should have incorporated the agency's intention into this particular subsection. But it did not.

Nor could a CROP fall under the catchall provision of WAC 170-06-0050(1)(f), which states that “[t]he crime will not be considered a conviction for the purposes of the department when the conviction has been the subject of [a] . . . procedure based on the finding of the rehabilitation of the person convicted, or . . . other equivalent procedure based on a finding of innocence.” WAC 170-06-0050(1)(f). The issuance of a CROP is not based on a demonstration of rehabilitation, nor is it based on a demonstration of innocence. Therefore, DEL's background check rules also demonstrate how CROP is not an adequate remedy.

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<sup>6</sup> WAC 170-06-0050(1)(f) lists a “certificate of rehabilitation” as one method by which an individual may overcome their disqualification. But a certificate of rehabilitation is not the same as a certificate of restoration of opportunity. Indeed, certificates of rehabilitation are not a form of relief available in the state of Washington. The enactment of WAC 170-06 preceded the enactment of the CROP statute.

DEL uses the Background Check Central Unit (BCCU) of DSHS to conduct its background checks. *See* Wash. Dep't of Social and Health Services, *Background Check System Project: About the Project*, DSHS.WA.GOV, <https://www.dshs.wa.gov/fsa/background-check-central-unit/background-check-system-project> (last visited May 30th, 2018). BCCU compares its search to DEL's list of disqualifying convictions and then generates one of four letters to be sent to the agency: (1) no record notification, (2) review required notification, (3) disqualify notification, (4) additional information needed notification. Wash. Dep't of Social and Health Services, *Notification of Background Check Results*, DSHS.WA.GOV, <https://www.dshs.wa.gov/altsa/notification-background-check-results> (last visited May 30th, 2018). Because BCCU currently has only DEL's disqualifying crime list and no instructions on the way it should report a CROP, it is unclear whether BCCU would generate a disqualification notification for Ms. Fields even if she were to obtain a CROP. Such a notification bars "[t]he applicant/ employee [from] unsupervised access to children or vulnerable adults unless they receive a revised Notification from BCCU (No Record or Review Required)." *Available at id.*

In contrast to the rules indicating that DEL's lifetime ban list remains in effect, DEL has provided no basis for its last-minute suggestion that a CROP might exempt Ms. Fields, having neither mentioned it in

briefing nor changed DEL regulations to provide her with such a pathway.<sup>7</sup> CROP cannot and does not provide the kind of process that Ms. Fields requests: a meaningful opportunity to show rehabilitation and fitness to **the authorizing agency** (not a separate court without authority over the occupational restriction at issue) **prior to** being subjected to disqualification based on a criminal conviction.

Any decision by this Court premised on the assumption that Ms. Fields can and will obtain a CROP—and that DEL will then provide her with relief—would unreasonably place the onus on Ms. Fields to apply for a CROP she may not obtain in the hopes of a speculative effect the CROP may not have on the license she seeks.

**B. Even if CROP were able to provide a remedy to some, the Court should decide the constitutional issues presented here.**

The constitutional deficiencies of DEL’s lifetime ban cannot be cured by CROP even if DEL incorporated it into its regulatory scheme and even if CROP were available to Ms. Fields. The ban would still be both irrational and wholly lacking in meaningful due process.

Two things are clear: (1) current DEL regulations unambiguously establish a lifetime disqualification for anyone convicted of one of 50

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<sup>7</sup> The lack of clarity regarding the way DEL treats CROPs is not, as the Deputy Solicitor General suggested during argument, easily rectified by an individual citizen like Ms. Fields. Rulemaking procedures are complicated, and the Washington Administrative Procedure Act contains twenty-four sections devoted to the subject. RCW 34.05.310-395.

crimes on the list; and (2) there is nothing in current DEL regulations that would provide Ms. Fields with a remedy for such disqualification.

Because there is no clear connection between the issuance of a CROP and the remedy sought (a hearing on the ability to work in childcare despite a lifetime disqualifying offense), this Court cannot avoid the constitutional issues presented. *Davis v. Cox*, 183 Wn.2d 269, 282, 351 P.3d 862 (2015) (stating that “we cannot use the doctrine of constitutional avoidance to ‘press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.’” (citations omitted))

Ms. Fields’ constitutional claims allege that the lifetime ban list is arbitrary and capricious in violation of substantive due process and that it precludes the possibility of a meaningful hearing in violation of procedural due process. The issuance of a CROP would address neither of these concerns because a CROP neither eradicates the conviction-based disqualifications in WAC 170-06-0120 nor provides any guidance to DEL about the right to a hearing and the manner in which the agency should consider prior conviction history vis-à-vis safety to provide child care and early learning services, for people with or without a CROP.

So long as DEL retains its lifetime ban list, meaning at a minimum it can still be applied to those lacking a CROP, the agency’s exclusion of vast categories of people from childcare work on the basis of prior

convictions alone remains constitutionally suspect. There is no rational relationship between a thirty-year-old conviction and present ability to safely care for children. CROP's availability to some does not address the factors that DEL should consider when determining whether a person with a prior conviction is suitable to work with children, including in cases where the crime has no relationship to children, or the process that those people are due. A determination of the constitutional issues here is absolutely necessary to the determination of the case. *Matter of Mota*, 114 Wn.2d 465, 471, 788 P.2d 538 (1990).

The constitutional issues are also of significant public interest. "Washington has the third highest rate of occupational licensure in the nation, with licensed workers comprising about 30.5 percent of the workforce." Br. of Amici Curiae Nat'l Emp't Law Project et al. at 6. The question of criminal convictions as occupational barriers is a critical one with widespread impact on Washingtonians and the agencies tasked with licensing or authorizing workers.

CROP cannot constitute an adequate remedy because Ms. Fields does not have a CROP, might not be able to get one, and DEL has no process for dealing with a CROP even if she did have one.<sup>8</sup> The

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<sup>8</sup> If DEL argues it has brought its regulations into compliance via CROP, the doctrine of voluntary cessation would have particular force: relief is predicated on actions the agency has no control over (issuance of a CROP by a qualifying court) and DEL has not

importance of the constitutional issues presented—which were thoroughly briefed and argued by capable counsel on a full record—should prompt the Court to decide them. CROPs will not be available to all who are affected by DEL’s irrational rules or lack of adequate process. CROP does not provide Ms. Fields an adequate remedy, but even if it did, the Court should address these important issues.

## V. CONCLUSION

This case has gone on for two years since the advent of CROP, and the State has remained silent on the statute only to raise it at the last possible moment without any support in the record. Resolving this case on the basis of CROP would not provide any guidance to agencies about the manner in which they are to *constitutionally* consider prior conviction history. Absent that guidance, hundreds of Washingtonians will continue to be excluded from work without constitutionally required procedures and protections, resulting in the unlawful and unwise exclusion of those with the suitability and competence to work.

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implemented any statutory, regulatory, or other protocol to ensure an exemption for Ms. Fields or others like her is administered without unfettered administrative discretion. *Bell v. City of Boise*, 709 F.3d 890, 900 (9th Cir. 2013) (noting defendants must show change is “entrenched” and “permanent” to moot case).

RESPECTFULLY SUBMITTED this 30th day of May, 2018.

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**Comments:**

Court-Requested Supplemental Brief of Appellant Regarding CROP

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