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NO. 95024-5

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CHRISTAL FIELDS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF EARLY LEARNING,

Respondent.

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**SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON  
DEPARTMENT OF EARLY LEARNING ADDRESSING  
CERTIFICATE OF RESTORATION OF OPPORTUNITY**

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## **I. INTRODUCTION**

On May 10, 2018, following oral argument, the Court ordered supplemental briefing addressing the following question:

Would a certificate of restoration of opportunity issued pursuant to chapter 9.97 RCW provide Fields with an adequate remedy, and, if so, how does the availability of this statutory remedy affect the constitutional issues presented in this case?

The answer to the first question is yes: a Certificate of Restoration of Opportunity would provide Ms. Fields with the hearing she seeks, allowing her to produce evidence that she is rehabilitated and can safely have unsupervised access to children in child care or early learning settings.

Because the availability of an adequate statutory remedy fatally undermines the factual and procedural foundations for Ms. Fields' constitutional challenges, there is no need for the court to address them.

## **II. ARGUMENT**

### **A. The Certificate of Restoration of Opportunity**

#### **1. Purpose of a Certificate of Restoration of Opportunity**

The CROP Act took effect on June 9, 2016. Laws of 2016, ch. 81. Relevant to this case, a Certificate of Restoration of Opportunity (CROP) “provides a process for people previously sentenced by a Washington court who have successfully changed their lives to seek a court document confirming their changed circumstances.” Laws of 2016, ch. 81, § 1.

## **2. Obtaining a Certificate of Restoration of Opportunity**

The two operative sections of the CROP Act (Laws of 2016, ch. 81, §§ 2, 3) are codified in RCW 9.97.010 and .020. A “qualified applicant” for a CROP must satisfy the criteria listed in RCW 9.97.010(1):

- (1) A waiting period of 1 to 5 years, depending on the conviction;
- (2) Compliance with or completion of all sentencing requirements;
- (3) Criminal history cannot include a conviction for a class A felony (including attempt, criminal solicitation, and criminal conspiracy to commit a class A felony), certain sex offenses or crimes with sexual motivation, extortion in the first degree, drive-by shooting, vehicular assault, or luring; and
- (4) Has not been arrested or convicted of a crime subsequent to the conviction or convictions for which a CROP is sought.

A CROP is obtained from the superior court in the county in which the applicant resides or that sentenced and adjudicated the applicant. RCW 9.97.010(2).<sup>1</sup> An applicant may request a CROP that covers only specific convictions or that applies to all past criminal history, and the court has discretion to determine the scope of the CROP it issues. RCW 9.97.020(2).

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<sup>1</sup> If the sentencing was imposed by a court of limited jurisdiction, a CROP for that conviction must be obtained from the superior court in that county. RCW 9.97.010(2).

Obtaining a CROP need not be a long process. For example, Tara Simmons, Executive Director of Civil Survival (an amicus curiae in this case) obtained the first CROP only 15 days after the Act took effect.<sup>2</sup> The Administrative Office of the Courts has prepared instructions, forms, and an informational brochure to assist applicants in applying for a CROP.<sup>3</sup>

**3. Effect of a Certificate of Restoration of Opportunity in applications to the Department of Early Learning for approval to work with children in child care or early learning**

In general, when a qualified applicant holds a CROP and meets all other statutory or regulatory requirements, no state, county, or municipal department, board, officer, or agency may disqualify the applicant for a license, certificate, or qualification to engage in the practice of any profession or business solely based on the applicant's criminal history. RCW 9.97.020(1). Certain professional licenses are exempt from this provision, as are criminal justice agencies and the Washington State Bar Association. RCW 9.97.020(1)(a). In addition, there are requirements under federal law that cannot be abrogated by a CROP, including permanent disqualification for some crimes.<sup>4</sup>

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<sup>2</sup> See <https://legalfoundation.org/removing-a-barrier-to-reentry/>.

<sup>3</sup> The instructions and forms are available at <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=102>.

<sup>4</sup> For example, an applicant who has been convicted of a crime listed in 42 U.S.C. § 9858f(c) is disqualified from employment by a child care provider receiving assistance through a federal Child Care and Development Block Grant (42 U.S.C. §§ 9857-9858r),

The Department of Early Learning is not exempted from the CROP Act, and its rules allow a CROP to be considered:

As part of the background check process the department will conduct a character, suitability or competence assessment as follows:

(1) Compare the background information with the DEL director's list, WAC 170-06-0120, to determine whether the subject individual must be disqualified under WAC 170-06-0070(1) and (2). In doing this comparison, the department will use the following rules:

...

(f) The crime will not be considered a conviction for the purposes of the department when the conviction has been the subject of an expungement, pardon, annulment, certification of rehabilitation, *or other equivalent procedure based on a finding of the rehabilitation of the person convicted*, or the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

WAC 170-06-0050 (emphasis added).

A CROP is an “equivalent procedure based on a finding of the rehabilitation of the person convicted.”<sup>5</sup> It is specifically intended for

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and States are obligated to enforce that disqualification to receive federal funding. 42 U.S.C. § 9858f(a). Even though a CROP is available for some of these convictions listed in 42 U.S.C. § 9858f(c) under the terms of RCW 9.97, a CROP would not supersede the federal limitation. *See* Laws of 2016, ch. 81, § 20 (any part of the CROP Act that conflicts with “federal requirements that are a prescribed condition to the allocation of federal funds to the state” is inoperative to the extent of the conflict). *See* Br. of the State of Wash. Dep’t of Early Learning in Response to Brs. of Amici Legal Voice et al., and Nat’l Empl. Law Project et al. at 15 n.9 (quoting the federal list of disqualifying convictions). Second degree robbery, the conviction for which Ms. Fields was disqualified, is not on the federal list, and therefore this federal law does not bar her from obtaining a CROP and does not preclude the Department from considering her CROP if she presents one.

<sup>5</sup> Substantively identical language is present both in RCW 43.43.830(6), which defines “conviction record,” and in RCW 43.216.170(4), which applies to the new Department of Children, Youth, and Families, as of July 1, 2018.

persons who “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.” Laws of 2016, ch. 81, § 1. It provides a “process for people previously sentenced by a Washington court who have successfully changed their lives to seek a court document confirming their changed circumstances.” *Id.*

Accordingly, a conviction that otherwise would automatically disqualify an applicant from working in child care under WAC 170-06-0120 is no longer automatically disqualifying where it is the subject of a CROP. An applicant may still be disqualified upon an individualized determination that the person lacks the character, suitability, and competence to care for or have unsupervised access to children receiving early learning services, but the applicant is entitled to a hearing to contest such a disqualification. WAC 170-06-0070 through -0115.

On July 1, 2018, the new Department of Children, Youth, and Families will assume the powers and duties of the Department of Early Learning (and of the Department of Social and Health Services Children’s Administration). Laws of 2017, 3d Spec. Sess., ch. 6. The legislation that created the new Department also amended RCW 9.97.020 to address the applicability of CROPs to the new Department. Laws of 2017, 3d Spec. Sess., ch. 6, § 806. As amended, the CROP Act will provide as follows:

(b) Unless otherwise addressed in statute, in cases where an applicant would be disqualified under RCW 43.20A.710, and the applicant has obtained a certificate of restoration of opportunity, the department of social and health services *and the department of children, youth, and families* may, after review of relevant factors, including the nature and seriousness of the offense, time that has passed since conviction, changed circumstances since the offense occurred, and the nature of the employment or license sought, at their discretion:

(i) Allow the applicant to have unsupervised access to children, vulnerable adults, or individuals with mental illness or developmental disabilities if the applicant is otherwise qualified and suitable; or

(ii) Disqualify the applicant solely based on the applicant's criminal history.

RCW 9.97.020(1)(b) (effective July 1, 2018) (emphasis added).

Adding the reference to the Department of Children, Youth, and Families (shown in italic) makes it clear that the new Department is authorized to accept Certificates of Restoration of Opportunity when reviewing an applicant's criminal history, and then exercise its discretion to either (1) allow an applicant with a CROP to have unsupervised access to children in child care or early learning programs, or (2) disqualify the applicant based solely on the applicant's criminal history, notwithstanding the CROP.

Under this statute, neither disqualification nor approval is automatic. Rather, an applicant presenting a CROP to the Department is entitled to an individualized determination of "relevant factors, including the nature and

seriousness of the offense, time that has passed since conviction, changed circumstances since the offense occurred, and the nature of the employment or license sought.” RCW 9.97.020(1)(b) (effective July 1, 2018). This type of individualized determination necessarily implies a hearing at which information regarding those “relevant factors” can be presented.

There is an ambiguity in this amendment: RCW 43.20A.710 does not, by its own terms, apply to the new Department of Children, Youth, and Families. It applies solely to the Department of Social and Health Services (DSHS). *See* RCW 43.20A.020 (defining “department” and “secretary”). Nor does RCW 9.97.020(1)(b) expand the new Department’s authority under RCW 43.20A.710. Fortunately, the ambiguity can be resolved by recognizing that the same bill that amended RCW 9.97.020(1)(b) to reference the Department of Children, Youth, and Families also imposed on that Department precisely the same requirements relative to children that are imposed on DSHS in RCW 43.20A.710. *See* Laws of 2017, 3d Spec. Sess., ch. 6, §§ 224, 801.

For example, RCW 43.20A.710(1)(a) requires the Secretary of DSHS to investigate the conviction records of current employees and applicants for employment by DSHS. RCW 43.43.832(3) imposes the same requirement on the Secretary of the Department of Children, Youth, and Families for employment in that Department.

RCW 43.20A.710(1)(c) requires the Secretary of DSHS to investigate the conviction records of “[i]ndividuals or businesses or organizations for the care, supervision, case management, or treatment of children, persons with developmental disabilities, or vulnerable adults . . . .”

RCW 43.43.832(4) imposes the same requirement of the Secretary of the Department of Children, Youth, and Families when licensing or certifying agencies or authorizing individuals who will or may have unsupervised access to children in child day care or early learning programs.

RCW 43.20A.710(8) provides that a person whose criminal history would otherwise disqualify the person from a position which will or may have unsupervised access to children, vulnerable adults, or persons with mental illness or developmental disabilities shall not be disqualified by DSHS “if the otherwise disqualifying conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure.”

RCW 43.216.170(4) applies substantively identical language to the Department of Children, Youth, and Families.

The amendment to RCW 9.97.020(1)(b) thus is best understood as requiring the new the Department of Children, Youth, and Families to investigate the criminal history backgrounds of applicants who will or may have unsupervised access to children to the same extent under RCW 43.43.832(3) and (4) as DSHS does under RCW 43.20A.710(1)(a)

and (c), and then for both agencies to exercise their discretion in responding to a CROP as provided in RCW 9.97.020(1)(b).

#### **4. Availability and effect of a Certificate of Restoration of Opportunity to Ms. Fields**

The single disqualifying conviction in Ms. Fields' criminal history is her conviction for attempted second degree robbery in 1988. CP 70. That crime is one for which a CROP is available. RCW 9.97.010(1)(c). Although the list of other crimes for which Ms. Fields was convicted is lengthy, her most recent conviction and last date of incarceration appear to be in 2006. CP 70-72. Assuming she has no more recent conviction and is in compliance with or has completed all sentencing requirements, it appears that all of her other convictions also would be eligible for a CROP under RCW 9.97.010(1)(c). As noted above, the statute specifically provides that a CROP can cover all past convictions. RCW 9.97.020(2).<sup>6</sup>

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<sup>6</sup> The first checkbox in the Petition for Certificate of Restoration of Opportunity developed by the Administrative Office of the Courts alerts the petitioner to this option, as explained in the Instructions:

In the first section, tell the court which convictions or adjudications you want covered by the Certificate of Restoration of Opportunity (CROP):

Check the first box if you want the CROP to apply to all the convictions and adjudications you list in your declaration.

Check the second box if you want the CROP to apply only to a few of your convictions or adjudications, these may be the convictions and adjudications that result in the most barriers for you.

In the table, list each conviction and adjudication you want covered by the CROP and provide the information requested.

If Ms. Fields obtains a CROP for her attempted second degree robbery conviction, there would be no basis for automatically and permanently disqualifying her under WAC 170-06-0120(1). That does not mean that *approval* is automatic, but Ms. Fields has never requested automatic approval; she consistently has asked for a hearing to show that she is rehabilitated.<sup>7</sup> With a CROP in hand, a hearing would be available. If the Department, based on the information before it, were to determine that Ms. Fields lacks the character, suitability, and competence to care for or have unsupervised access to children receiving child care or early learning services, under WAC 170-06-0050 through -0070, she would have the opportunity for a hearing at which she could present evidence of her

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The Instructions and the Petition are available at <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=102>.

<sup>7</sup> “Ms. Fields asks the Court to remand for a hearing wherein DEL can consider her criminal history—and other evidence—and make a determination whether she can safely work with children.” Opening Br. of App. Christal Fields at 17 (filed in Court of Appeals Oct. 13, 2016).

“Ms. Fields [*sic*] request here is simple: she asks only that she be granted access to the hearing process DEL *already* has in place to evaluate the suitability of candidates without a prior criminal history.” Reply Br. of App. Christal Fields at 1 (filed in Court of Appeals Dec. 7, 2016).

“Ms. Fields seeks a hearing at which she can provide DEL with evidence of her suitability for work in this field. She would bear the burden of providing this information, which would include, for example, a former employer in the child care field vouching for her competency and care in working with children. And DEL would remain the decision-maker, charged with weighing that evidence against her criminal conviction.” Amended Suppl. Br. of App. at 9.

rehabilitation, qualifications, and safety. WAC 170-06-0070 through -0115.

She would have the remedy she seeks.

**B. Effect on the Constitutional Issues Presented in This Case**

**1. Because the availability of a Certificate of Restoration of Opportunity removes the procedural and factual premises on which Ms. Fields' due process claims depend, there is no basis for the Court to review those claims**

As explained above, the CROP Act, RCW 9.97, provides Ms. Fields with the remedy she seeks. The Court asked how the availability of that statutory remedy affects the constitutional issues presented in this case. The short answer is that it removes entirely any factual or procedural premise for Ms. Fields' due process arguments.<sup>8</sup>

From the beginning, Ms. Fields' core constitutional claim lay in substantive due process under the United States Constitution. *See* Suppl. Br. of the State of Wash. Dep't of Early Learning at 7.<sup>9</sup> Because her occupational interest does not rise to the level of a fundamental right, the Court applies rational basis review in a substantive due process analysis. *Id.* at 6-7 (citing *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220, 143 P.3d

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<sup>8</sup> The Department has explained why Ms. Fields' due process claims are the only claims properly before the Court. Suppl. Br. of the State of Wash. Dep't of Early Learning at 15-17.

<sup>9</sup> *See also* Br. of the State of Wash. Dep't of Early Learning in Response to Brs. of Amici Legal Voice et al., and Nat'l Empl. Law Project et al. at 2.

571 (2006); *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) (quoted in *Amunrud*, 158 Wn.2d at 220); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976)).

She bears the difficult burden of showing there is no rational relationship between the challenged rule and the Department's legitimate interest in protecting the safety and welfare of children in child care. *Amunrud*, 158 Wn.2d at 220-22. The Department has explained how Ms. Fields failed to meet that burden, both facially and as applied. Suppl. Br. of the State of Wash. Dep't of Early Learning at 10-15. And even though it is Ms. Fields who has the burden under rational basis review, the Department has shown how the list contains three overlapping categories of crimes, each of which is rationally related to the safety of children in child care. Br. of the State of Wash. Dep't of Early Learning in Response to Brs. of Amici Legal Voice et al., and Nat'l Empl. Law Project et al. at 15-18.

Although Ms. Fields characterizes her substantive due process challenge as both facial and as applied, her arguments have consistently focused on her contention that *her* 30-year-old attempted second degree robbery conviction is not rationally related to the safety of children in child care. She has not attempted to challenge second degree robbery or any other crime on the list in any systematic way. Because a CROP provides an

avenue to show a superior court that *her* employment opportunities should be restored, and then to show the Department that *she* is rehabilitated, qualified, and safe, RCW 9.97 cuts the footing out from under her substantive due process argument as applied. And because there is such an avenue, she cannot demonstrate facial invalidity, because she cannot demonstrate that there is no set of circumstances under which the rule could be constitutionally applied. *See City of Pasco v. Shaw*, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007); *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008).

As the one challenging the constitutionality of the rule, it is Ms. Fields' burden to prove the rule's unconstitutionality beyond a reasonable doubt. *Knudsen v. Wash. State Exec. Ethics Bd.*, 156 Wn. App. 852, 860, 235 P.3d 835 (2010); *Wash. Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 604, 154 P.3d 287 (2007); *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632-33, 949 P.2d 851 (1998). But the slender factual reed on which her substantive due process claims rested is no longer standing. Ms. Fields has demonstrated no factual basis for doubting a rational connection between the list of crimes and the safety of children. Her constitutional claims should be dismissed.

**2. Because a Certificate of Restoration of Opportunity would provide Ms. Fields the hearing she seeks, there is no need for the Court to address her constitutional claims**

Finally, Ms. Fields argued that she was denied procedural due process because she was not provided a hearing at which she could present evidence of rehabilitation. The Department contests Ms. Fields' assertion that she is raising a cognizable procedural due process claim. *See* Suppl. Br. of the State of Wash. Dep't of Early Learning at 13-15 (explaining that her challenge is not a procedural argument focused on ensuring that the law has been applied accurately to her, but rather a substantive argument seeking to change the law or obtain an exemption from the law).<sup>10</sup> The Department does not retreat from that argument. But even if Ms. Fields had raised a procedural due process claim, it is fully resolved because the CROP Act gives her a means by which to obtain the hearing she seeks.

**III. CONCLUSION**

Based on the record below, it appears that a Certificate of Restoration of Opportunity is available to Ms. Fields. The Certificate would provide her with the hearing she seeks, allowing her to produce evidence

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<sup>10</sup> The Court of Appeals likewise explained that Fields' procedural complaint "goes to the substance of DEL's rule, which we have addressed as a substantive due process claim." *Fields v. State of Wash. Dep't of Early Learning*, No. 75406-8-I, slip op. at 16 (Wash. Ct. App. Aug. 21, 2017) (unpublished), <http://www.courts.wa.gov/opinions/pdf/754068.PDF>.

that she has been rehabilitated and can safely have unsupervised access to children in child care or early learning settings. Access to the hearing she seeks removes the factual and procedural predicates for her constitutional claims, leaving the Court without any factual or procedural basis on which to doubt the rationality of the challenged rule. The Court should dismiss the constitutional challenges to the rule.

RESPECTFULLY SUBMITTED this 30th day of May 2018.

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## Transmittal Information

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### Comments:

SUPPLEMENTAL BRIEF OF THE STATE OF WASHINGTON DEPARTMENT OF EARLY LEARNING  
ADDRESSING CERTIFICATE OF RESTORATION OF OPPORTUNITY

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