

FILED
SUPREME COURT
STATE OF WASHINGTON
4/23/2018 3:07 PM
BY SUSAN L. CARLSON
CLERK

NO. 95024-5

SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTAL FIELDS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF EARLY LEARNING,

Respondent.

**BRIEF OF THE STATE OF WASHINGTON DEPARTMENT OF
EARLY LEARNING IN RESPONSE TO BRIEFS OF AMICI
LEGAL VOICE ET AL., AND NATIONAL EMPLOYMENT LAW
PROJECT ET AL.**

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I. INTRODUCTION

Amici Legal Voice et al. and the National Employment Law Project et al. (NELP) ask the Court to find WAC 170-06-0120(1) unconstitutional based on their allegations that it has a disparate impact on women and minorities and reduces employment opportunities for persons with criminal histories. Legal Voice also asserts state constitutional claims not raised or argued by Ms. Fields to the superior court or Court of Appeals. Amici's attempts to reframe the appeal and insert new constitutional claims should be rejected. The only issues properly before this Court are the due process claims Ms. Fields raised and argued below and in her petition for review.

The challenged regulation, WAC 170-06-0120(1), does not impinge on any fundamental liberty interest and is rationally related to the State's legitimate interest in ensuring the safety and well-being of children in child care. The Court of Appeals should be affirmed.

II. STATEMENT OF FACTS

The factual and procedural background of this appeal are set out in the Court of Appeals decision, *Fields v. Dep't of Early Learning*, No. 75406-8-I, slip op. at 1-3 (Wash. Ct. App. Aug. 21, 2017), and in the Department's Supplemental Brief at 2-4 (filed Feb. 16, 2018). In summary, Ms. Fields failed to disclose her extensive criminal history when she submitted the criminal background check application required for work in child care. A year and a half later, the Department learned of her criminal record, which included a disqualifying conviction listed in

WAC 170-06-0120(1), and notified Ms. Fields that her criminal history precludes her from having unsupervised access to children in child care. She requested and was granted an administrative hearing, at which she first denied much of the criminal history, and then asserted that she had turned her life around. The disqualification was upheld.

On judicial review, Ms. Fields argued that WAC 170-06-0120(1) facially violates substantive due process and that procedural due process requires the Department to afford her a hearing to show that she has been rehabilitated. Amici attempted to raise additional state constitutional claims, but their arguments were theirs alone. Until Ms. Fields reached this Court, she never made an equal protection argument or invoked the Washington Constitution—and even in this Court, Ms. Fields has made only a token argument regarding the Washington Constitution. Pet. at 14-15; Appellant’s Suppl. Br. at 16-18.

III. ARGUMENT

The two amicus briefs focus on how the challenged rule affects persons with criminal histories, and argue that the rule is irrational and discriminatory because it hinders the employment prospects of those persons. In doing so, they brush aside the legitimate public interest the rule actually serves—the safety and well-being of children in child care. Because neither amicus brief demonstrates the absence of a rational connection between that public interest and the list of disqualifying crimes in WAC 170-06-0120(1), neither brief provides any basis for finding WAC 170-06-0120(1) to be unconstitutional beyond a reasonable doubt.

A. The Court Should Not Consider the New Issues Raised by Amici

Legal Voice starts with three premises: that the pattern of arrest and conviction in America disproportionately affects people of color; that persons released from prison are less likely to reoffend if they are employed than if they are unemployed; and that child care workers are predominantly women. Legal Voice Amicus Br. at 2-9. From these premises, Legal Voice concludes that the challenged rule discriminates against women of color and asks the Court for an unprecedented expansion of article I, §section 12 of the Washington Constitution as a means to invalidate the rule. Legal Voice Amicus Br. at 10-18. Their novel constitutional argument should be rejected for three reasons.

First, the Court should not consider a constitutional issue raised only by Amici. *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015), *cert. denied sub nom. Evans v. City of Seattle*, 137 S. Ct. 474 (2016); *Cummins v. Lewis County*, 156 Wn.2d 844, 850 n.4, 133 P.3d 458 (2006). The constitutional argument Legal Voice raises was not considered by either the trial court or the Court of Appeals.¹

Second, this Court first interpreted article I, section 12 independently from the federal Constitution in *Grant County Fire Prot.*

¹ Similarly, because Ms. Fields did not cite or argue the state constitution in briefing to the Court of Appeals, this Court need not consider her belated attempt to raise an article I, section 3 challenge in the final pages of her supplemental brief. *See Cummins*, 156 Wn.2d at 851 (“It is a well-established maxim that this court will generally not address arguments raised for the first time in a supplemental brief and not made originally by the petitioner or respondent within the petition for review or the response to petition.”).

Dist. 5 v. City of Moses Lake, 145 Wn.2d 702, 729, 42 P.3d 394 (2002) (*Grant County I*), *rev'd on reh'g on other grounds*, 150 Wn.2d 791, 83 P.3d 419 (2004) (*Grant County II*). In subsequent cases, the Court has not reached full agreement on when and whether to apply article I, section 12.² It would not seem prudent to attempt to resolve that disagreement in a case in which article I, section 12 has not been fully briefed by the parties.

Third, as explained in the next section, Legal Voice does not justify the expansion of article I, section 12 that it seeks.

B. Legal Voice's Request to Expand the Scope of Article I, Section 12 Disregards This Court's Prior Decisions

Legal Voice urges the Court to expand article I, section 12 of the Washington Constitution to provide equal protection beyond that provided in the Fourteenth Amendment to the United States Constitution. Legal Voice Amicus Br. at 10-18. Its argument is flawed in several ways.

First, Legal Voice ignores the historic understanding of article I, section 12. This Court's cases recognize that article I, section 12 is not a state version of the federal Equal Protection Clause; it serves a different purpose. The federal Equal Protection Clause targets hostile discrimination and prohibits states from denying benefits that are generally available to others under the law. In contrast, article I, section 12

² See, e.g., *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006) (six opinions filed); *Madison v. State*, 161 Wn.2d 85, 163 P.3d 757 (2007) (five opinions filed); *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 317 P.3d 1009 (2014) (three opinions filed). *But see Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 363, 340 P.3d 849 (2015) (unanimous decision concluding that no privilege or immunity was at issue).

targets undue favoritism and prohibits a grant of special privileges and immunities that give persons or groups elevated status before the law. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1009 (2014) (“Whereas the Fourteenth Amendment was generally intended to prevent discrimination against disfavored individuals or groups, article I, section 12 was intended to prevent favoritism and special treatment for a few, to the disadvantage of others.”). *See also id.*, 179 Wn.2d at 791 (J. Stephens, dissenting) (“article I, section 12 warrants separate analysis ‘when the threat is not of majoritarian tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than discrimination’”) (quoting *Grant County I*, 145 Wn.2d at 725-31); *Andersen v. King County*, 158 Wn.2d 1, 15, 138 P.3d 963 (2006) (article I, section 12 “has been historically viewed as securing equality of treatment by prohibiting undue favor, while the equal protection clause has been viewed as securing equality of treatment by prohibiting hostile discrimination.”). Legal Voice disregards that well-established distinction.

Second, Legal Voice fails to identify a “privilege or immunity” that would invoke article I, section 12. Not every statute authorizing a particular class to do something—or prohibiting a particular class from doing something—involves a “privilege or immunity” subject to article I, section 12. *Ockletree*, 179 Wn.2d at 778; *Grant County II*, 150 Wn.2d at 812. Rather, the term “privileges and immunities” refers only to “those fundamental rights which belong to the citizens of the state by reason of

such citizenship.” *Grant County II*, 150 Wn.2d at 813 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

In addressing article I, section 12 claims, the Court has been careful to narrowly define the right that is actually asserted to be a “privilege.”³ For example, in *Grant County II*, the petitioners claimed they were denied the right to vote and the right to petition government; the Court disagreed, defining the actual right at issue to be the right to petition for annexation, which is not a fundamental right under either the federal or state constitution. 150 Wn.2d at 815-16. Similarly, the petitioners in *Am. Legion Post 149 v. Dep’t of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008), claimed their right to carry on business was at issue; the Court defined the real issue as whether there was a fundamental right to smoke tobacco inside a place of employment. *Id.* at 607-08. In *Ass’n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 340 P.3d 849 (2015), the petitioners also claimed an infringement on their right to carry on business; the Court defined the actual right at issue as “the right to sell liquor under the authority of a license issued pursuant to the State’s police power.” *Id.* at 362. In each of these cases, the Court found no “privilege or immunity” that implicated article I, section 12.

Thus, in an article I, section 12 challenge, the first step is to analyze whether the challenged law involves a privilege or immunity. If it

³ The Court has not distinguished between a “privilege” and an “immunity” in determining whether and how to apply article I, section 12. *Ockletree*, 179 Wn.2d at 777 n.6. This brief uses the term “privilege” for convenience.

does, the Court then asks whether there was a “reasonable ground” for granting the privilege or immunity. If it does not, then article I, section 12 is not implicated. *Ass’n of Wash. Spirits*, 182 Wn.2d at 359-60 (citing *Ockletree*, 179 Wn.2d at 776); see also *Madison v. State*, 161 Wn.2d 85, 95-98, 163 P.3d 757 (2007).

The actual right at issue here is the ability to work in child care after committing a crime listed in WAC 170-06-0120(1). Legal Voice makes a broader claim—that the protected privilege is the ability to work in the occupation of one’s choice. Legal Voice Amicus Br. at 12. It makes no difference. Neither asserted right is recognized as a “privilege or immunity” under article I, section 12. And the Department already has demonstrated that a person does not have a fundamental liberty interest in pursuing an occupation of his or her choice. DEL’s Suppl. Br. at 6-13. Both this Court and the U.S. Supreme Court have so held. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 219-20, 143 P.3d 571 (2006); *Conn v. Gabbert*, 526 U.S. 286, 291-292, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999). Because working as a child care provider is not a fundamental right that belongs to the citizens of the State by reason of their citizenship, article I, section 12 is not implicated.⁴

⁴ “If there is no privilege or immunity involved, this leaves only the question of whether the challenged statute violates the equal protection clause of the federal constitution.” *Ockletree*, 179 Wn.2d at 776 n.4 (citing *Am Legion Post 149*, 164 Wn.2d at 608). Legal Voice has not alleged a violation of the Equal Protection Clause; it is asking for “a more protective application” of article I, section 12. Legal Voice Amicus Br. at 14.

Legal Voice nevertheless moves ahead, arguing that article I, section 12 should be expanded to provide a remedy for the discrimination suffered by persons who are unable to work in child care because of a disqualifying conviction listed in WAC 170-06-0120(1). Legal Voice Amicus Br. at 13-14. As explained above, article I, section 12 was not intended to provide a remedy for discrimination against disfavored individuals or groups—that is the role of the Fourteenth Amendment. Article I, section 12 was intended to prevent favoritism and special treatment for a few at the expense of others. *See Ockletree*, 179 Wn.2d at 776, 791; *Andersen*, 158 Wn.2d at 15; *Grant County I*, 145 Wn.2d at 729; *State v. Smith*, 117 Wn.2d 263, 287, 814 P.2d 652 (1991) (Utter, J., concurring). Like the voter disenfranchisement scheme at issue in *Madison*, 161 Wn.2d at 96-98, WAC 170-06-0120(1) does not involve a grant of favoritism and does not invoke article I, section 12.

Finally, Legal Voice argues for heightened scrutiny of the disqualifying crimes in WAC 170-06-0120(1) under article I, section 12, because of alleged disparate impact on women of color. Legal Voice Amicus Br. at 13-14. None of the cases it cites support heightened scrutiny for a neutral regulation restricting employment in child care because of a criminal conviction. *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 668 P.2d 1278 (1983), and *Hanson v. Hutt*, 83 Wn.2d 195, 517 P.2d 599 (1973), were decided before *Grant County I*, 145 Wn.2d 702, and applied only federal equal protection analysis. *Fusato v. Wash. Interscholastic Activities Ass'n*, 93 Wn. App. 762, 970 P. 2d 744 (1999), was brought

under the Fourteenth Amendment, not article I, section 12. Each involved a suspect classification (race, sex, national origin, respectively). Status as a person with a criminal record is not a suspect classification. *See, e.g., United States v. Wicks*, 132 F.3d 383, 389 (7th Cir. 1997); *Hilliard v. Ferguson*, 30 F.3d 649, 652 (5th Cir. 1994); *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970).

More significantly, alleged disparate impact based on race and sex does not lead to heightened scrutiny unless an intent to discriminate is also shown. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). Absent a “clear pattern, unexplainable on grounds other than [the alleged class] . . . impact alone is not determinative.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). *See also Hernandez v. New York*, 500 U.S. 352, 372-73, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (O’Connor, J., concurring) (“An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation.”). *Accord Macias*, 100 Wn.2d at 269-70; *Fahn v. Cowlitz County*, 93 Wn.2d 368, 378, 610 P.2d 857 (1980); *Fusato*, 93 Wn. App. at 770. No showing of intent has been made here.

Legal Voice also claims Ms. Fields’ disqualification is a “hybrid” requiring heightened scrutiny. Legal Voice Amicus Br. at 17. The “hybrid” situation is derived from *Emp’t Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990),

where Justice Scalia suggested it in dictum as a basis for distinguishing a handful of earlier decisions that had applied a heightened standard of review in Free Exercise cases. *Id.* at 882. His “hybrid rights” analysis is unique to the Free Exercise context and has been widely criticized. *See, e.g., Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008) (citing cases). The case *Legal Voice* cites for this doctrine, *First United Methodist Church of Seattle v. Hr’g Exam’r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 916 P.2d 374 (1996), varies so greatly from this case that it provides no applicable legal authority.

There is no authority for the proposition that more than rational basis review is necessary for a presumptively constitutional economic regulation that applies equally to all citizens seeking employment in child care. This Court should not consider article I, section 12 in deciding this case, but the result of any such consideration should be that WAC 170-06-0120(1) does not improperly grant a “privilege or immunity” to one class of citizens that is not provided on equal terms to another.

C. Legal Voice Argues for an Unworkable Application of the Equal Rights Amendment

Legal Voice’s effort to invoke Washington’s Equal Rights Amendment (ERA), article XXXI, section 1, suffers from the same infirmities as its other constitutional arguments. Like article I, section 12, the ERA is raised only by Amici and should not be considered. *See City of Seattle*, 184 Wn.2d at 861 n.5; *Cummins*, 156 Wn.2d at 850 n.4. And like

article I, section 12, it provides no basis for invalidating WAC 170-06-0120(1).

Legal Voice asserts that disparate impact to the labor market due to predominance of women in the child care field is all that is required to trigger the ERA here. Legal Voice Amicus Br. at 18-20. This is incorrect. As explained in *Bolser v. Liquor Control Bd.*, 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. Like WAC 170-06-0120(1), the challenged regulation in *Bolser* contained no language that would make it applicable only to one sex. *Id.*

Moreover, there is no indication WAC 170-06-0120(1) has resulted in any disparate impact against women working in child care. In 1999, before WAC 170-06-0120(1) was enacted, women made up 95.5% of all child care workers; in 2016, that number was 93.8%, which is statistically indistinguishable given the margin of error in the 2016 data.⁵ During the same time period, wage parity has improved: in 1999, female

⁵ See U.S. Census Bureau, *Full time, Year Round Workers and Earnings in 1999 by Sex and Detailed Occupations: 2000* (2001), <https://www2.census.gov/programs-surveys/demo/tables/industry-occupation/time-series/median-earnings-2000-final.xlsx> (line 261, column E) (“1999 Table”); U.S. Census Bureau, *Full-Time, Year-Round Workers and Median Earnings in the Past 12 Months by Sex and Detailed Occupation: 2016* (2017), <https://www2.census.gov/programs-surveys/demo/tables/industry-occupation/time-series/median-earnings-2016-final.xlsx> (line 283, column H) (“2016 Table”). All cited websites last visited April 20, 2018.

child care workers earned only 66.4% of male child care workers; in 2016, that number had improved to 83.8%.⁶

Accepting Legal Voice's unsupported argument that a neutral regulation to protect children in child care violates the ERA because most child care providers are women would mean that no regulation to protect children in child care could be imposed. More broadly, any health and safety regulation affecting a profession, trade, or job class that lacks an equal sex ratio would be similarly forbidden. That application of the ERA makes no sense, and it makes no sense when applied to WAC 170-06-0120(1). There is no evidence in this case of state-based discrimination upon which the ERA could operate, and no valid argument for the invalidation of WAC 170-06-0120(1).

D. Substantive Due Process Does Not Require That WAC 170-06-0120(1) Enhance Employment Opportunities for Persons With Criminal Records

Like Legal Voice, NELP focuses on the interests of persons with criminal records, rather than the legitimate public interest the rule is intended to address—the safety and well-being of children in child care. The first twelve pages of NELP's amicus brief repeats Legal Voice's allegations. Beginning on page 13, NELP makes a different argument: that a lifetime ban is unjustifiable because recidivism drops to low levels after a few years.

⁶ 1999 Table, line 261, column I; 2016 Table, line 283, column P.

But recidivism does not decline to zero in either study that NELP cites. More significantly, citing two studies does not prove a lack of empirical evidence. NELP Amicus Br. at 14. Recidivism is a difficult subject to study, as noted in a 2015 report from the Congressional Research Service. That report summarized some of the definitional problems in comparing recidivism studies, then explained the practical difficulties of tracking individuals over a span of years and of relying on state or national-level data sets that contain inherent inaccuracies and omissions that affect the results of recidivism studies. Congressional Research Service, Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism* 5-6 (Jan. 12, 2015), <https://fas.org/sgp/crs/misc/RL34287.pdf>. Moreover, most recidivism studies last no more than three to five years⁷ and they leave out individuals who break the law without getting caught. The Marshall Project, Dana Goldstein, *The Misleading Math of “Recidivism”* (Dec. 4, 2014), <https://www.themarshallproject.org/2014/12/04/the-misleading-math-of-recidivism>. Because so many factors play into estimates of recidivism, recidivism “is not a pure measure of community safety or individual rehabilitation.” Jeffrey A. Butts & Vincent Schiraldi, *Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections* 9 (Harvard Kennedy Sch., Mar. 15, 2018),

⁷ See, e.g., U.S. Dep’t of Justice, Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (Apr. 2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>. This is a five-year recidivism study.

https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pj/files/recidivism_reconsidered.pdf.

WAC 170-06-0120(1) was not adopted to enhance employment opportunities for persons who have been convicted of crimes involving harm or threats of harm to persons, including children. When there is reasonable uncertainty as to whether those persons are now safe to have unsupervised access to children in child care, it is not unreasonable to err on the side of protecting children, especially when the governing statute requires it. RCW 43.215.005(4)(c) (“[Safeguarding and promoting] the health, safety, and well-being of children receiving child care and early learning assistance . . . is paramount over the right of any person to provide care”). It is not unreasonable to seek to protect children by establishing a list disqualifying crimes that correspond to the federal and state statutes described above, or that otherwise include harm or threat of harm as an element of the crime. Moreover, RCW 43.215.060 directs the Department to comply with federal requirements and conditions that affect funding; because 42 U.S.C. § 9858f, the federal statute controlling state access to federal funding, sets no time limit on the period of disqualification, it is reasonable not to set a time limit on the period of disqualification for the crimes on the Department’s list.⁸

⁸ Without citation to authority, NELP implies that the presence of a “substantial public interest in removing employment barriers to people with records” requires application of heightened scrutiny. NELP Amicus Br. at 10. Presumably, the “tailoring” NELP seeks would be applied in a substantive due process analysis. *See id.* at 14-15 (asking the Court to hold that the challenged rule violates Ms. Fields’ “constitutional right to due process.”). In essence, NELP is arguing that the rule is not rationally related

Finally, NELP repeats Ms. Fields’ argument that the choice of crimes listed in WAC 170-06-0120(1) is irrational because many of them “have nothing whatsoever to do with children.” NELP Amicus Br. at 13 n.11; *see also* Legal Voice Amicus Br. at 1. In fact, the list contains three overlapping categories of crimes, and each category is rationally related to the safety and welfare of children in child care. One category includes crimes that fall within the funding prohibition in 42 U.S.C. § 9858f(c).⁹ The second category includes crimes that are defined in

to a public interest it was never intended to serve. The Court should reject that argument. The Department demonstrated in the Court of Appeals and again in its briefing in this Court that the rule is rationally related to the safety and welfare of children in child care and therefore survives Ms. Fields’ substantive due process challenge.

⁹ 42 U.S.C. § 9858f(c) provides in relevant part:

A child care staff member shall be ineligible for employment by a child care provider that is receiving assistance under this subchapter if such individual—

...

(D) has been convicted of a felony consisting of—

(i) murder, as described in section 1111 of title 18;

(ii) child abuse or neglect;

(iii) a crime against children, including child pornography;

(iv) spousal abuse;

(v) a crime involving rape or sexual assault;

(vi) kidnapping;

(vii) arson;

(viii) physical assault or battery;

...

(E) has been convicted of a violent misdemeanor committed as an adult against a child, including the following crimes: child abuse, child endangerment, sexual assault, or of a misdemeanor involving child pornography.

RCW 43.43.830(7) as a “Crime against children or other persons.”¹⁰ The third category includes crimes that are not listed in either the federal or state statute, but (like the crimes listed in the two cited statutes) require proof of actual or threatened harm or endangerment to a person for a conviction.¹¹ The following table summarizes this categorization:

¹⁰ RCW 43.43.830(7) provides as follows:

“Crime against children or other persons” means a conviction of any of the following offenses: Aggravated murder; first or second degree murder; first or second degree kidnapping; first, second, or third degree assault; fourth degree assault (if a violation of RCW 9A.36.041(3)); first, second, or third degree assault of a child; first, second, or third degree rape; first, second, or third degree rape of a child; first or second degree robbery; first degree arson; first degree burglary; first or second degree manslaughter; first or second degree extortion; indecent liberties; incest; vehicular homicide; first degree promoting prostitution; communication with a minor; unlawful imprisonment; simple assault; sexual exploitation of minors; first or second degree criminal mistreatment; endangerment with a controlled substance; child abuse or neglect as defined in RCW 26.44.020; first or second degree custodial interference; first or second degree custodial sexual misconduct; malicious harassment; first, second, or third degree child molestation; first or second degree sexual misconduct with a minor; commercial sexual abuse of a minor; child abandonment; promoting pornography; selling or distributing erotic material to a minor; custodial assault; violation of child abuse restraining order; child buying or selling; prostitution; felony indecent exposure; criminal abandonment; or any of these crimes as they may be renamed in the future.

¹¹ Six of the listed crimes do not fall within these categories. Three of those crimes require direct violation of a court order that may relate to children: violation of child abuse restraining order (RCW 26.44.063, .150), violation of civil anti-harassment protection order (RCW 9A.46.040), and violation of protection/contact/restraining order (RCW 26.50.110). The other three crimes are bail jumping (RCW 9A.76.170), sexually violating human remains (assuming the victim is not a child) (RCW 9A.44.105), and voyeurism (assuming the victim is not a child) (RCW 9A.44.115). The inclusion of these crimes does not make the list or the use of the list irrational.

Crime listed in WAC 170-06-0120(1)	42 U.S.C. § 9858f(c)	RCW 43.43.830(7)	Other
Abandonment of a child	x	x	
Arson	x	x	
Assault 1	x	x	
Assault 2	x	x	
Assault 3 domestic violence	x	x	
Assault of a child	x	x	
Bail jumping			
Child buying or selling	x	x	
Child molestation	x	x	
Commercial sexual abuse of a minor	x	x	
Communication with a minor for immoral purposes	x	x	
Controlled substance homicide			x
Criminal mistreatment	x	x	
Custodial interference		x	
Dealing in depictions of minor engaged in sexually explicit conduct	x		
Domestic violence (felonies only)	x	x	
Drive-by shooting	x	x	
Extortion 1		x	
Harassment domestic violence			x
Homicide by abuse			x
Homicide by watercraft			x
Incendiary devices (possess, manufacture, dispose)			x
Incest	x	x	
Indecent exposure/public indecency (felonies only)	x	x	
Indecent liberties	x	x	
Kidnapping	x	x	
Luring	x		
Malicious explosion 1			x
Malicious explosion 2			x
Malicious harassment	x	x	
Malicious mischief domestic violence			x
Malicious placement of an explosive 1			x
Manslaughter		x	
Murder/aggravated murder	x	x	
Possess depictions minor engaged in sexual conduct	x		
Rape	x	x	
Rape of child	x	x	
Robbery		x	
Selling or distributing erotic material to a minor	x	x	
Sending or bringing into the state depictions of a minor	x		
Sexual exploitation of minors	x	x	

Sexual misconduct with a minor	x	x	
Sexually violating human remains			
Use of machine gun in felony			x
Vehicular assault	x		
Vehicular homicide (negligent homicide)		x	
Violation of child abuse restraining order			
Violation of civil anti-harassment protection order			
Violation of protection/contact/ restraining order			
Voyeurism			

WAC 170-06-0120(1) was adopted solely to protect the safety and welfare of children in child care. The listed crimes rationally relate to that purpose. The rule is neutral on its face and impacts only economic interests. Amici clearly consider the rule to be bad public policy because it diminishes employment opportunities for persons with criminal records. But their appeal to a different policy than the rule is intended to serve is not a basis for invalidation under substantive due process. Their argument harkens back to the *Lochner* era, when the U.S. Supreme Court used its own economic policy to invalidate health and safety legislation. This Court recognized the fallacy of that approach, and it was a decision of this Court that led to the end of the *Lochner* era.¹² The Court should reject the invitation by Ms. Fields and her Amici to judge the rule based on its economic wisdom, rather than an evaluation of whether the list is rationally related to the State’s legitimate interest in the safety of children.

As explained in the Department’s supplemental brief at 6-13, a person does not have a fundamental liberty interest in pursuing an

¹² *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P.2d 1083 (1936), *affirmed sub nom. West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937).

occupation of his or her choice. Both this Court and the U.S. Supreme Court have so held and therefore apply rational basis review. *Amunrud*, 158 Wn.2d at 219; *Conn*, 526 U.S. at 291-292. The burden is on Ms. Fields and her amici to demonstrate beyond a reasonable doubt that there is no rational relationship between the challenged rule and the State's legitimate interest in protecting the safety and welfare of children in child care. *Amunrud*, 158 Wn.2d at 220-22. They have not met their burden.

IV. CONCLUSION

The Court should not consider the constitutional issues raised and argued only by these Amici. Neither their constitutional arguments nor their appeals to policy provide a basis for reversing the decision of the Court of Appeals affirming the constitutionality of WAC 170-06-0120(1). That decision should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of April, 2018.

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