NO. 75406-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Christal Fields, an individual,

Appellant

v.

State of Washington Department of Early Learning,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

OPENING BRIEF OF APPELLANT CHRISTAL FIELDS

NEWMAN DU WORS LLP
Keith Scully, WSBA # 28677
2101 Fourth Ave., Suite 1500
Seattle, WA 98121
(206) 274-2801

ACLU OF WASHINGTON
Prachi Dave, WSBA #50498
901 5th Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Cooperating Attorney for ACLU of Washington

Attorneys for Appellant Christal Fields

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I. INTRODUCTION

Petitioner Christal Fields is the poster child for rehabilitation. She was convicted of attempted robbery in 1988—almost thirty years ago—during a period of time when she was a homeless domestic violence victim addicted to drugs. Her crime involved grabbing a woman's purse and trying unsuccessfully to run away with it.

She did prison time and has now completely turned her life around. She is drug and alcohol free, and has been for years. She has successfully raised her own children and her grandchildren, held down jobs, and volunteers with numerous organizations including the Seattle Police Department helping others who, like herself as a young woman, are in difficult life circumstances. But she cannot get a job doing what she loves and is demonstrably good at, because the Washington Department of Early Learning (DEL) has chosen to implement a lifetime ban preventing anyone who has an attempted robbery conviction from working in childcare—no matter how long ago, no matter the circumstances, no matter how life has turned out for the applicant.

The United States Constitution prevents this type of arbitrary action. Ms. Fields has both substantive and procedural due process rights to pursue her chosen profession without an arbitrary ban. Ms. Fields asks that the Court find DEL's policy

unconstitutional on its face. In the alternative, Ms. Fields asks that the Court find DEL's policy unconstitutional as applied. The remedy she seeks is not a court-mandated childcare license: it is simply a chance to tell her story to DEL and prove that she is fit to work.

II. ASSIGNMENTS OF ERROR

Substantive due process requires a rational relationship between a restriction on employment and a government interest. DEL prohibits anyone from working in childcare if they committed any of 50 enumerated crimes, regardless of how long ago those crimes took place, what the circumstances were, or who the applicant is at the time of application. Does DEL's arbitrary rule violate substantive due process?

Procedural due process requires a meaningful hearing. DEL deprived Christal Fields of her childcare license without considering whether she can safely work in childcare because DEL created an automatically-disqualifying list of 50 separate criminal offenses. Should this matter be reversed to allow Ms. Fields to present evidence of her fitness?

III. STATEMENT OF THE CASE

A. Ms. Fields has overcome a difficult childhood and drug addiction and is now clean and sober.

Ms. Fields grew up in a dysfunctional family home. By the age of 14, she was living with her father and a succession of

her father's sexual partners. (CP 66.) Drug abuse was rampant in the house, and conflicts between Ms. Fields and the other people living there were frequent. *Id.* At age 16, she found herself homeless, and turned to a series of male partners who gave Ms. Fields drugs and demanded that she prostitute herself. *Id.* For years, she was lost to that world: she has a string of prostitution arrests and drug convictions, with an occasional misdemeanor assault or property crime. *Id.* On one occasion, in 1988, she participated in an attempted robbery. Ms. Fields' crimes were a direct result of her drug addiction. *Id.* Ms. Fields takes full responsibility for those crimes. *Id.*

King County's drug court program turned her life around. In 2006, she enrolled in drug court and began that intensive program. (CP 66.) She's been clean and sober ever since, and maintains her sobriety and drug-free life by regular participation in NA. *Id.* Her life is very different today than it has ever been in the past. She is successfully raising her now 17-year-old son, and assisting in the care of her grandson. *Id.* She has been gainfully employed—first as the caregiver for an elderly adult, and then in childcare—since 2006. *Id.* During the two years where she lived in group housing, she was promoted to resident manager based on her responsibility and commitment to working with others. *Id.* Now, she has her own

apartment, and is looking forward to spending the rest of her life independent, drug-free, and gainfully employed. *Id.*

She is committed to giving back to the community. As a series of letters from places she has worked and volunteered demonstrate, she's deeply involved in working to make others' lives better. (CP 111–124.) She is a Narcotics Anonymous sponsor. (CP 66.) She is a counselor for chronically homeless persons. (CP 116.) And, as a letter from Seattle Police Officer Christopher Toman notes, her work as a volunteer motivational speaker for the Department's Drug Market Initiatives program has helped the Department work to control drug trafficking, and to help those trapped in the drug trade to get out. (CP 119.)

B. Ms. Fields is passionately committed to childcare and well-qualified to do it.

Drug court was one cornerstone for Ms. Fields. The other was discovering her passion and aptitude for childcare. She loves working with children, and has thrown herself into every possible training necessary to do her job well and safely. (CP 125–130.) She is well-liked and successful. (CP 111–124.) For example, Ms. Fields worked as a counselor in a harm-reduction facility for chronically homeless persons suffering from mental health issues, physical disabilities, and chronic chemical dependency. Her employer, the Compass Housing Alliance, said that she "ranks at the top in reference to sound

ethics, professionalism, and de-escalation techniques." (CP 116.) Her supervisor there noted that:

> Clients look up to her for solid support and clear guidance. Christal's positive attitude, unconditional compassion, and enlightening energy (with a smile) are the qualities that Christal always exhibits for our unfortunate clients.

Id. A co-worker reports that she brings "inspiration and hope" to the clients she serves. (CP 118.) She's supported by her employer, a Washington State-licensed childcare center. (CP 112-114.) Before DEL revoked her license, Ms. Fields successfully worked in childcare there. *Id.*

C. DEL barred Ms. Fields for life from working in childcare without a meaningful hearing based solely on a 1988 attempted-robbery conviction.

DEL is Washington's state agency charged with evaluating the fitness of early learning programs like day care centers and preschools and licensing child care workers. DEL relied on a single disqualifying prior offense—a 1988 attempted robbery conviction—to disqualify Ms. Fields. DEL initially granted Ms. Fields a childcare license and she worked successfully at the Community Day Center for Children. (CP112–114.) But after a local television station ran a story on Ms. Fields's criminal history, DEL notified Ms. Fields that it

was revoking her license. Ms. Fields timely filed a request for a hearing and DEL affirmed its revocation.

D. Ms. Fields exhausted her administrative remedies.

Ms. Fields timely appealed DEL's decision to an Administrative Law Judge. DEL moved for summary judgment solely on the basis of Ms. Fields 28-year-old attempted second-degree robbery conviction. (CP 140.) Although Ms. Fields argued that WAC 170-06 violated constitutional due process protections, the ALJ found that he did not have authority to consider constitutional challenges. (CP 124–173.) Ms. Fields timely moved for an internal appeal of that decision, and on September 30, 2015, a Review Judge affirmed the ALJ's determination that the APA required constitutional challenges to be brought in Superior Court. (CP 165–166; CP 186–188.) Ms. Fields then timely filed a petition for review with the superior court. (CP 198–203.) On May 31, 2016, the Superior Court denied Ms. Fields's petitions. (CP 310-311.) Ms. Fields timely appealed. (CP 312-317.)

IV. ARGUMENT

A. This Court should apply a de novo standard of review.

The Administrative Procedure Act (APA) governs judicial review of agency action. *Ryan v. State, Dept. of Social*

and Health Servs, 171 Wn.App. 454, 287 P.3d 629 (2012). This Court reviews the constitutionality of a rule or the application of a rule de novo. *Amunrud v. Bd. of Appeals*, 158 Wn. 2d 208, 215, 143 P.3d 571, 574 (2006). In reviewing an agency order, this court may grant relief from the order if it determines that the order, or the statute or rule on which the order is based, is unconstitutional on its face or as applied. RCW 34.05.570(3). Ms. Fields has the burden of demonstrating constitutional invalidity. RCW 34.05.570(1)(a).

B. Ms. Fields's right to work in her chosen profession is a protected liberty interest.

Ms. Fields raises constitutional procedural and substantive due process challenges. Both types of due process challenge require Ms. Fields to demonstrate a protected liberty interest. The Supreme Court has recognized that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity" that the Constitution was meant to protect. *Truax v. Raich*, 239 U.S. 33, 41 (1915). There can be no question that the right to pursue a chosen occupation is a protected interest. *Barry v. Barchi*, 443 U.S. 55, 64 n. 11 (1979)(licenses issued to horse trainers were protected by due process and equal protection); *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999)(the "Fourteenth Amendment's Due Process Clause includes some generalized

due process right to choose one's field of private employment"); See also *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir.1999)(the pursuit of profession or occupation is a protected liberty interest that extends across a broad range of lawful occupations); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F.Supp. 1260, 1271 (S.D. Cal. 1997)("'[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts' " of the federal constitution.); *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn. 2d 516, 519 (2001)(due process requires proof by clear and convincing evidence in a medical disciplinary proceeding.)

C. DEL created an arbitrary bar to childcare licensure based on prior criminal history.

DEL is a state agency created by the Legislature. One of DEL's mandates is to "safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance." RCW 43.215.005. RCW 43.215.200 enables DEL to establish minimum standards for licensure. *Stewart v. State, Dep't of Soc. & Health Servs.*, 162 Wn. App. 266, 272, 252 P.3d 920, 923 (2011).

Although the Legislature requires individuals who are seeking childcare licenses to be fingerprinted in order to

determine if an applicant has a criminal record, nowhere did the Legislature mandate that any crime be a ban to licensure. RCW 43.215.215(2). Instead, the Legislature required DEL to collect and *consider* criminal history, but expressly avoided any mandatory bar. *Id.*

In order to determine whether a particular individual is "of appropriate character, suitability, and competence to provide child care," the Legislature allowed DEL to consider the "involvement of child protective services or law enforcement agencies with the individual for the purpose of establishing a pattern of conduct, behavior, or inaction with regard to the health, safety, or welfare of a child." RCW 43.215.215(1) (emphasis added.) But, the Legislature has not directed DEL to adopt any particular process or standards.

DEL adopted rules governing the child care licensure process in the Washington Administrative Code. The purpose of these rules is to help DEL evaluate the "character, suitability, or competence of persons who will care for or have unsupervised access to children in child care." WAC 170-06-0010 (4). DEL's overall application process allows DEL to consider a broad range of factors, including criminal history. *See, generally*, WAC 170-06-040. Many of these factors are left to the discretion of DEL staff to implement.

Despite the lack of a specific legislative mandate to bar persons convicted of crimes, DEL also created an expansive laundry list of disqualifying offenses in WAC 170-06-0120. Thirty-five crimes, ranging from soliciting prostitution to burglary and coercion, carry a five-year ban. *Id.* Fifty crimes, including all degrees of robbery and attempted robbery, carry a lifetime ban. *Id.* Inexplicably, homicide by watercraft carries a lifetime ban—even though few childcare centers are located on boats—but a mob boss convicted of leading organized crime is free to work in child care after five years. There appears to be no readily available rulemaking history explaining why DEL created an arbitrary bar, or how DEL picked particular crimes for inclusion. The WAC itself provides no support for DEL's arbitrary decisions to include certain crimes but not others.

Specifically, WAC 170-06-0070(1) provides that "[a] subject individual who has a background containing any of the permanent convictions on the director's list, WAC 170-06-0120(1), will be permanently disqualified from providing licensed child care, caring for children or having unsupervised access to children in child care." Robbery in the second degree is one of the convictions. WAC 170-06-0120(1). Under WAC 170-06-0050(1) convictions that are preceded by the word "attempted" are to be given the same weight as those convictions which are not preceded by the term "attempted."

DEL also established a hearing and appeal process, subject to the APA. This process provides notice to an affected individual and establishes the right to a hearing. WAC 170-06-0090. But, for crimes included in the lifetime ban list, there is no meaningful hearing: the applicant is automatically disqualified, and evidence demonstrating fitness is irrelevant to the inquiry.

D. Ms. Fields raises both facial and as-applied challenges to WAC 170-06

Ms. Fields has challenged WAC 170-06 on its face, and separately alleges that DEL's decision denying her certification violates the Constitution as applied to her. In order to prevail on her facial challenge, Ms. Fields must prove that "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669 (2004). A statute that is unconstitutional on its face is rendered "totally inoperative." *Id.* No circumstance exists in which WAC 170-06 could be constitutionally applied because DEL blindly bars applicants with any of the enumerated convictions without considering any other evidence. There are undoubtedly circumstances where particular applicants should be disqualified because of their criminal history, despite or because of other evidence presented. But the regulation fails on its face because DEL does not know which cases those are.

By contrast, an as applied challenge to the constitutional validity of an administrative rule asserts that the application of the rule to Ms. Fields specifically is unconstitutional. *Redmond*, 151 Wn.2d at 669. Unlike a facial challenge, an as-applied challenge results in a ruling that affects only Ms. Fields and future similarly-situated persons. *Id.* For example, the Court could find that Ms. Fields is entitled to a hearing to determine her fitness and that DEL could not automatically bar her from working in childcare based on her particular conviction. Future applicants would then need to separately prove that, under their own particular circumstances, they too were entitled to a hearing.

E. WAC 170-06 violates substantive due process

Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures. *Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir.1994). The analysis between procedural and substantive due process is distinct: DEL cannot rely on its procedures to justify its lifetime ban. *Blaylock v. Schwinden*, 862 F.2d 1352, 1355 (9th Cir.1988) ("Substantive due process refers to certain actions that the government may not engage in, no matter how many procedural safeguards it employs."). 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.

1. There is no rational basis for the lifetime bar imposed by DEL.

State restrictions on the right to practice a profession receive rational basis review. *Amunrud*, 158 Wn. 2d at 220; *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). This standard is applied to both facial and as-applied challenges, and to both substantive and procedural due process claims. *Id.* The regulation must be struck down if there is no rational connection between the challenged regulation and a legitimate government objective. *Williamson*, 348 U.S. at 488. Rational relationship scrutiny in the context of a public safety regulation like this one requires that DEL's rule must bear a "substantial relation to the public health, safety, morals, or general welfare." *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 (9th Cir. 1994).

The state may, in the exercise of the police power, regulate businesses in order to promote the public welfare without offending substantive due process. *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn. 2d 493, 503 (1991). But the police power is not infinite; it is limited to regulations that genuinely protect

health and safety. *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 754–55 (1884).

Invoking safety is not a talisman to allow unlimited state regulation. For example, in *Cornwell v. California Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260 (S.D. Cal. 1997), the court denied a motion to dismiss a claim that California's cosmetology regulations were unconstitutional even though they contained health and safety training because the 1600 required hours of training did not rationally achieve the safety objective. By contrast, courts have upheld state regulations when there is a demonstrable rationale for the specific regulations and its purported purpose. For example, in *Wedges/Ledges*, the 9th Circuit approved a temporary ban on a particular kind of arcade game because as many as 60 of the machines had been modified to allow illegal gambling and the municipality needed time to come up with safeguards to protect against future illegality. *Wedges/Ledges*, 24 F.3d at 65. Similarly, in *Henderson*, the court found the denial of a banking permit did not violate substantive due process because the particular bank was in poor financial health and had not successfully implemented required management reforms. *Fed. Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991). Unlike *Wedges/Ledges* and *Henderson*—where specific facts

demonstrated a clear connection between the specific prohibition and the harm prevented—there is nothing more than guesswork here. On a facial level, DEL asks the Court to find that its list of crimes—most completely unrelated to children—means that a person convicted cannot safely work in childcare. On an as-applied level, the court must find a rational relationship between a 28-year-old attempted robbery conviction followed by clear evidence of rehabilitation and a lifetime ban on working with children.

Likewise, in *Gleason v. Glasscock*, No. 2:10-CV-02030-MCE, 2012 WL 1131438, at *4 (E.D. Cal. Mar. 29, 2012), the Eastern District of California recently upheld the denial of a particular horse racing license based on criminal history only after a full hearing and evaluation of the nature of the offenses and other factors.

And in *Amunrud v. Bd. of Appeal*s, 124 Wn. App. 884, 890 (2004) aff'd, 158 Wn. 2d 208, (2006), the court found a rational relationship between suspending drivers' licenses for failure to pay child support and the state's interest in collecting child support only after the state presented evidence that the program was effective. See also *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996) (upholding Cuba travel ban after government presented compelling reasons ban was necessary to pressure Cuba to enact democratic reforms.)

Here, DEL has produced no evidence whatsoever. The list fails on its face because there is nothing in the record demonstrating that there is a connection between child safety and each of the crimes on DEL's lifetime-ban list. And, given that DEL refused to consider Ms. Fields' extensive evidence of rehabilitation, there is certainly no evidence rebutting Ms. Fields' contention that the ban is not rational as-applied to her facts.

Neither does public safety provide a sufficient rationale to permanently exclude everyone with any of the 50 listed crimes. There is no demonstrated connection between a list of prior crimes—no matter how old and no matter the circumstances—and the ability to function safely and effectively as a childcare worker.

As-applied, Ms. Fields' conviction had nothing to do with childcare. And Ms. Fields has amply demonstrated that the conviction is a part of her distant past—when she was in abusive relationships, living on the streets, and addicted to drugs. DEL must do its duty and evaluate Ms. Fields' candidacy given all the facts and circumstances, and not blindly reject her application based on an arbitrary rule. Refusing to evaluate her suitability for working in childcare based solely on the existence of a 28-year-old attempted robbery conviction is not rationally related to DEL's mission.

Facially, DEL presents only guesswork and conjecture that its list of 50 crimes actually protects children. By contrast, in *Amunrud*, the court extensively weighed actual evidence. The court held:

> [T]he sanction and the underlying conduct [] must only be rationally related. The *State has met this burden by providing evidence* that license suspension, or the threat of license suspension, has proven an effective support enforcement tool in Washington. According to a DSHS publication, the DCS "received over $48.5 million in voluntary payments as a result of the license suspension program" from October 2001 to September 2003.
>
> To test effectiveness of the program, "DCS compared collections on [cases where DCS initiated a license suspension action] for six months before and six months after the license suspension activity." The test revealed that "collections increased more than 300% on the cases against which DCS took a license suspension action." Because the threat of license suspension is an effective tool, it is rationally related to the problem of delinquent obligors.
>
> *Amunrud*, 124 Wash. App. at 890 (emphasis added.)

There is no such evidence here.

Other courts have found similar regulations facially unconstitutional. In *Peake v. Com.*, No. 216 M.D. 2015, 2015 WL 9488235 (Pa. Commw. Ct. Dec. 30, 2015), the Pennsylvania Commonwealth Court found Pennsylvania's lifetime ban on working with older adults based on criminal

history unconstitutional. The court considered a Pennsylvania regulation substantively identical to Washington's: a lengthy list of crimes that either prohibited working as a care provider for life or for ten years from the date of conviction. Applying Pennsylvania's analogous constitutional protections, the court found that the regulation facially violated substantive due process.

DEL may claim that decision should be ignored because the Pennsylvania constitution requires that constitutional challenges be analyzed "more closely" under the rational basis test than due process challenges under the United States Constitution. *Peake*, 132 A.3d at 518. But the Pennsylvania court still applied rational-basis review. Whether it did so "more closely" is splitting a hair, and this Court should follow Pennsylvania's lead.

2. Irrebutable presumptions, like DEL's lifetime bar, are disfavored under the Due Process Clause.

The *Peake* court noted that Pennsylvania created an irrebuttable presumption that a criminal conviction barred working in childcare. As the court held, "irrebuttable presumptions often run afoul of due process protections because they infringe upon protected interests by utilizing presumptions that the existence of one fact is statutorily conclusive of the truth of another fact." *Peake*, 2015 WL

9488235, at *9. The court explained that an irrebuttable presumption is not constitutional where: (1) it encroaches on an interest protected by the due process clause; (2) the presumption is not universally true; and (3) reasonable alternative means exist for ascertaining the presumed fact. *Id.*

Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause. *Vlandis v. Kline*, 412 U.S. 441, 446, 93 S. Ct. 2230, 2233, 37 L. Ed. 2d 63 (1973)(Collecting cases.) For example, in *Vlandis*, the Court invalidated Connecticut's irrebuttable presumption that a student who was living out of state when they registered in a Connecticut state school was considered to be an out-of-state student for tuition purposes for the duration of time they were pursuing their degree. Although recognizing that Connecticut had a strong interest in protecting its in-state students, the creation of an irrebuttable presumption failed rational basis scrutiny because there were viable alternative methods for determining residency. *Id.*

Similarly, in *Heiner v. Donnan*, 285 U.S. 312 (1932), the Court was faced with a constitutional challenge to a federal statute that created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment by the estate of a higher tax. In holding that this irrefutable assumption was so

arbitrary and unreasonable as to deprive the taxpayer of his property without due process of law, the Court stated that it had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Id.* at 362.

This court should follow Pennsylvania's lead and find that a lifetime irrebuttable presumption that any one of 50 crimes disqualifies an applicant from caring for others is unconstitutional. The irrebuttable presumption established fails the *Peake* test because it encroaches on Ms. Fields' liberty interest, it is not universally reliable since convicted felons can demonstrably work safely in childcare (as Ms. Fields did before DEL revoked her license), and there is a reasonable alternative means: a hearing wherein Ms. Fields can present evidence of ability to work safely with children.

The *Peake* court further noted that the regulation failed to pass constitutional muster because it "lacks fine-tuning because it treats all the enumerated crimes, regardless of their vintage or severity, as the same even though they present very different risks of employment." *Id*. at * 9. WAC 170-06 fails on its face and as applied for the same reason: DEL bars, for life, anyone convicted of attempted robbery just as it does persons convicted of child murder or rape.

In rejecting *Peake*, the trial court in this case relied heavily on *Weinberger v. Salfi*, 422 U.S. 749 (1975), finding that *Weinberger* approved irrebutable presumptions like the one found here. The trial court's reliance was mistaken. In *Weinberger*, the Court considered a social security regulation that allowed the social security administration to bar anyone married within nine months of a social security recipient's death from receiving survivor benefits. The Court noted that social security regulations receive special treatment under the constitution: "we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." *Weinberger*, 422 U.S. at 768. "Patently arbitrary" is different than rational basis review, which requires a "substantial relationship" between the claimed benefit and the regulation that attempts to achieve it. *Wedges/Ledges*, 24 F.3d at 65.

And, far from providing a broad-brush approval of irrebuttable presumptions, the *Weinberger* Court affirmed that an irrebuttable presumption even in the social security context only passed constitutional muster if it would rationally prevent a particular abuse, and that "the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule." *Weinberger*, 422 U.S. at 777.

The *Weinberger* Court approved a carefully-tailored, narrowly-constructed presumption designed to prevent a particular harm. The statute barred recently-married spouses from receiving survivor's social security benefits, but also contained a range of exemptions designed to make sure that marriages entered into for legitimate reasons rather than to get extra social security money were not caught up in the ban. *Weinberger*, 422 U.S. at 780-81. For example, a recent marriage that also involved an adoption was not excluded. The Court found that the rule was reasonably calculated to identify "the assumption of responsibilities normally associated with marriage" as opposed to a sham entered into for benefits. *Id.* Even if the relaxed standard present for social security cases applied to Ms. Fields, DEL's rule would still fail. Unlike *Weinberger's* carefully-constructed rule containing exemptions to ensure that only recent sham marriages are captured, DEL's rule is for life, and sweeps up not just one type of potential misconduct but instead bars a whole swath of prior crimes, some of which have no relationship to childcare, without providing any exceptions for persons who have committed those particular crimes.

3. Ms. Fields should be permitted to access DEL's existing system of individualized determination of fitness.

In *Weinberger*, the Court found that requiring individual determinations would be a significant burden on both applicants and the social security administration, and would not necessarily result in a more accurate identification of sham marriages. *Weinberger*, 422 U.S. at 781-83. Individualized determinations would require the creation of a hearing infrastructure capable of dealing with potentially millions of claimants, and would require determining "marital intent, life expectancy, and knowledge of terminal illness"—all factors that are both deeply personal and difficult to evaluate in a hearing. *Id.*

Unlike the specter of a whole new judicial inquiry into the personal details and impetus for millions of marriages, DEL already has an established system for determining fitness to work in childcare. And, in fact, this system already contains the inquiries and factors that every eligible person must meet before they are licensed. *See, generally*, WAC 170-06-040 et seq. Ms. Fields is not asking that DEL create a special system for her; she is asking to be allowed to access an existing system. The administrative burden of considering criminal history rather than applying a per-se bar is insignificant.

F. WAC 170-06 also violates procedural due process both facially and as applied.

The United States Constitution guarantees that federal and state governments will not deprive an individual of "life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV, § 1. When a state seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). The opportunity to be heard must be "at a meaningful time and in a meaningful manner" appropriate to the case. *Amunrud*, 158 Wn. 2d at 216-17.

The opportunity to be heard must be "meaningful" and not a mere formality. *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn. 2d 516, 527 (2001).There was no meaningful hearing here because Ms. Fields never had a chance to address the core question: whether her ancient attempted robbery conviction means she cannot safely work in childcare.

Mathews establishes a three-factor test for determining whether a hearing passes constitutional muster. The three factors of the *Mathews* test are (1) the potentially affected interest; (2) the risk of an erroneous deprivation of that interest through the challenged procedures, and probable value of

additional procedural safeguards; and (3) the government's interest, including the potential burden of additional procedures. *City of Bellevue v. Lee*, 166 Wn. 2d 581, 585 (2009).

Merely holding a hearing and allowing Ms. Fields to challenge whether she had an attempted robbery conviction does not satisfy procedural due process when DEL refused to consider any evidence other than the mere existence of the conviction to determine whether Ms. Fields could safely work in a daycare center. *Mathews* requires more than just any hearing: The Court must balance the *Mathews* factors to determine if a meaningful hearing was afforded. *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 527 (2001) (balancing Mathews factors and determining that a physician license-suspension hearing must be held under the clear and convincing evidence standard.)

In *Amunrud*, the Court affirmed a rule allowing suspension of a driver's license for nonpayment of child support. *Amunrud*, 158 Wn. 2d at 218. The Court noted that the punitive and coercive aspects of license suspension passed muster under substantive due process, and that procedural due process was afforded because the driver could have challenged the child support obligation in a different proceeding. *Id.* Driving and paying child support are unrelated, and *Amunrud* allows the State to use one to influence the other. But DEL

cannot penalize and coerce Ms. Fields for her attempted robbery conviction by denying her access to her occupation. Unlike *Amunrud*, which allowed the State to try and stop child support malfeasance by preventing driving, DEL's mandate is not to stop robberies by preventing employment. DEL's due process must relate to childcare—to whether Ms. Fields' attempted robbery conviction actually prevents her from working safely in childcare, not whether she just has it. Denying her an opportunity to present her evidence related to childcare because she has an attempted robbery conviction violates due process.

The state presented extensive evidence in *Amunrud* that the desired state objective was met through license suspension. There is no evidence in the record here that an attempted robbery conviction - or any conviction - demonstrates lifelong unfitness for child care. The record simply contains no evidence that a permanent bar on licensure for certain employment for certain convictions bears any actual relation to the legislative objective of protecting children.

The *Mathews* factors weigh in favor of allowing Ms. Fields and all childcare license applicants a chance to prove that they can safely work with children. The first *Mathews* factor requires identification of the nature and weight of the private interest affected by the official action challenged. *Amunrud*, 158

Wn. 2d at 217. As the Washington Supreme Court recognized in *Nguyen*, Ms. Fields' interest in her professional license is "profound." *Nguyen*, 144 Wn. 2d at 527. Ms. Fields stands to lose more than her job: childcare is her calling. She has invested time, money, and energy into getting her license, and losing it means more than that she is deprived of income. It means she cannot follow her chosen path, and cannot give back to the community through helping children. Further, as the court recognized in *Nguyen*, depriving Ms. Fields of her license because she allegedly cannot safely work in childcare adds the stigma of impropriety to the sting of losing her chance to work in her chosen field.

The second *Mathews* factor, the risk of an erroneous deprivation of that interest through the challenged procedure, and probable value of additional procedural safeguards, weighs heavily in favor of requiring DEL to consider each applicant on a case-by-case basis. Washington needs qualified child care providers. An arbitrary bar prevents all of us from having access to the full panoply of qualified applicants. The value of a full hearing is that it allows applicants like Christal Fields a chance to demonstrate whether they are qualified. It also requires DEL to carefully consider each applicant, regardless of criminal history or lack thereof, for whether they can safely work with young children. And this is not a significant burden: DEL does

this anyway for all applicants who are not automatically barred. DEL presented no data on the number of individuals rejected for licensure based on criminal history, but the number of persons who have both been convicted of one of the enumerated crimes and who want to work in childcare

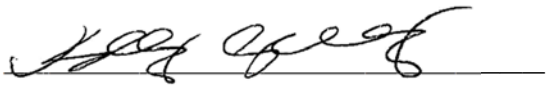
The third factor, the state's interest, also weighs strongly in favor of a substantive hearing. The state has an undeniable interest in protecting children. It has no interest in barring qualified providers – the state's interest is protective, not punitive. Protecting children is best met by a careful inquiry into each applicant's fitness, including criminal history, not a blanket ban. The state's interests are amply met by allowing DEL to consider criminal history but also requiring a substantive hearing where DEL must consider all other relevant evidence and make a case-by-case determination.

V. CONCLUSION

WAC 170-03-230 is unconstitutional on its face because no set of circumstances exists in which the statute, as currently written, can be constitutionally applied to bar persons from ever working in childcare based on previous convictions without considering the facts and circumstances of each application for licensure. WAC 170-03-020 is further unconstitutional as applied to Ms. Fields because disqualifying her based on a 28-year-old attempted robbery conviction is not rationally related

to DEL's mission. Ms. Fields' conviction is old, occurred at a time when she was influenced by drug addiction and poverty, and for which she paid her debt to society. She has fully rehabilitated herself and enjoys excellent working relationships with colleagues and community. The crime had nothing to do with childcare. And Ms. Fields has thoroughly demonstrated her childcare capability through the support of childcare providers and law enforcement whose job it is to protect the health and safety of others The Court should find that DEL's regulation is unconstitutional and remand for further proceedings.

RESPECTFULLY SUBMITTED this 7th day of October 2016.



Keith Scully, WSBA No. 28677
Newman Du Wors LLP
Prachi Dave, WSBA No. 50498
ACLU of Washington
Attorneys for Appellant
Christal Fields

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2016, I caused the foregoing to be served via Messenger to:

Attorney for State of WA. Department of Early Learning
Patricia L. Allen
Assistant Attorney General
Attorney General of Washington
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

I declare under penalty of perjury that the foregoing is true and correct.

Chy Eaton