NO. 75406-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHRISTAL FIELDS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF EARLY LEARNING,

Respondent.

DEPARTMENT'S BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves the disqualification of potential child care worker Christal Fields by the Department of Early Learning (Department or DEL) from unsupervised access to child care children due to criminal history discovered during a routine background check. Christal Fields neither applied for nor was she denied a "license" for child care.[1] DEL obtained summary judgment on disqualification because (1) a conviction of Attempted Robbery was undisputedly attributed to Ms. Fields and (2) this crime is listed in WAC 170-06-0120(1) as a conviction that will permanently disqualify an individual from having unsupervised access to child care children. The summary judgment motion process did not address Ms. Fields' other criminal history or conduct, because it was not relevant to the legal issue presented.

II. ISSUES PRESENTED FOR REVIEW

A. Is procedural due process analysis inapplicable to an agency's application of regulatory requirements to an agreed factual scenario? Answer: Yes. Procedural due process concerns itself with the methods used to ascertain facts and make decisions, with attention to whether the procedures used have an acceptable protection against error considering the

[1] Child care licenses are granted only to those who operate a child care facility, whether that be a child care home, center, or school age program. RCW 43.215.010(1); RCW 43.215.250; WAC 170-295-0020; WAC 170-296A-1000; WAC 170-297-1000.

respective interests of involved parties. The simple act of making a decision subject to review is not appropriate for a procedural due process challenge.

B. Does WAC 170-06-0120 comport with substantive due process in allowing background check applicants to challenge their disqualification for listed crimes through a hearing process that affords them notice and the opportunity to be heard on issues such as legitimacy of the prior conviction and whether a crime matches with the list? Answer: Yes. DEL may lawfully determine certain minimum criteria for child care worker applicants, including absence of certain criminal history, and every appellant has the opportunity to present information showing that the history listed is not theirs, does not contain a disqualifier, or has been changed or expunged.

III. STATEMENT OF THE CASE

Christal Fields has a criminal history with multiple crimes, including a 1988 felony conviction for Attempted Robbery 2. CP 69-71. When Ms. Fields applied for background clearance through the Department of Early Learning seeking to work in child care, she was denied due to her criminal history, including both mandatory disqualifying crimes and other crimes over a long period of time speaking to her character. CP 142-143. Ms. Fields was notified of her disqualification in a letter from DEL dated

November 10, 2014. CP 49-51. The letter did not render a decision on child care licensure for Ms. Fields, as she did not seek to be licensed but only to work in child care. *Id.* The letter included instructions on how to seek review from the Office of Administrative Hearings (OAH) if Ms. Fields disagreed with the decision to disqualify her. *Id.*

Ms. Fields did seek review with OAH, filing her hearing request timely through counsel. CP 53-54. Ms. Fields' primary argument in her review request was that DEL had misidentified her criminal history as that of another person. *Id.* However, when DEL demonstrated through a motion for summary judgment that Ms. Fields had an automatically disqualifying conviction that was undoubtedly her own, her position changed. CP 131-136, 139-152. Ms. Fields has asserted since summary judgment was sought that she should not have been disqualified based on criminal history when she has shown rehabilitation since that time. She also has argued that her disqualification denied her due process. CP 131-136.

Summary judgment was granted to DEL by Administrative Law Judge Jason Grover on June 4, 2015. CP 155-164. This was affirmed on agency review by Review Judge Johnette Sullivan on September 29, 2015. CP 186-193. Both decisions granting summary judgment relied on the plain language of WAC 170-06-0120(1) and WAC 170-06-0070(1). Neither addressed constitutional issues, which are beyond the scope of

administrative agency review. CP 155-164, 186-193.

Ms. Fields appealed the Final Order to superior court on October 28, 2015. The superior court upheld disqualification as determined by DEL on May 31, 2016. CP 310-311.

Ms. Fields now seeks review by this Court. CP 312-317. She has argued that WAC 170-06-0120 is unconstitutional facially and as applied to her in this case. Opening Brief of Appellant Christal Fields (App. Brief) at 11. Ms. Fields does not meet her burden as a petitioner to show that the DEL Final Order was incorrect under the standards of review allowed by the Washington Administrative Procedures Act (APA) as set forth in argument below.

IV. AUTHORITY

A. APA Review Is Deferential And Presumes That The Agency Action Is Correct

RCW 34.05.570(3) governs this appeal.[2] Under this statute, the appellate court directly reviews the final agency action, giving deference

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[2] The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
(d) The agency has erroneously interpreted or applied the law;
(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for

to agency findings of fact and affirming them when based on substantial evidence, and applying de novo review to questions of law. *E.g. Heinmiller v. Dept. of Health,* 127 Wn.2d 595, 601, 903 P.2d 433 (1995). The burden is on Ms. Fields to show that the agency action is invalid. *See* RCW 34.05.570(1)(a) (burden is on party claiming invalidity of agency action). In this case, given the fact that she is challenging the constitutionality of a regulation, she is held to the beyond a reasonable doubt standard. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). Statutes and duly adopted regulations are presumed to be constitutional. *City of Seattle v. Eze,* 111 Wash.2d 22, 26, 759 P.2d 366 (1988); *Longview Fibre Co. v. Dep't of Ecology,* 89 Wash.App., 627, 632, 949 P.2d 851 (1998). As examined in detail below, Ms. Fields is not able to meet the great burden imposed upon her in this constitutional challenge, and thus the regulation should not be overturned, nor should the individual disqualification at issue in this case be reversed.

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judicial review, supplemented by any additional evidence received by the court under this chapter;
(f) The agency has not decided all issues requiring resolution by the agency;
(g) A motion for disqualification under RCW 34.05.425 or RCW 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
(i) The order is arbitrary or capricious.

B. DEL's Background Check Authority Allows For Categorical Denial Of Clearance Related To Criminal History

RCW 43.215.005 sets forth the legislative expectations and priorities for the Department of Early Learning. Explicit in these priorities is the protection of child safety, and in particular the assurance that those individuals employed in the child care field will have a check of their criminal backgrounds. RCW 43.215.005(4) notes that one purpose of the licensing laws is:

> To provide tools to promote the hiring of suitable providers of child care by:
> (i) Providing parents with access to information regarding child care providers;
> (ii) Providing parents with child care licensing action histories regarding child care providers; and
> (iii) **Requiring background checks of applicants for employment in any child care facility licensed or regulated under current law**; ...(Emphasis added).

The legislative priority of background checks for applicants to child care positions is further articulated in RCW 43.43.832(6)(b), which requires DEL:

> to adopt rules and investigate conviction records, pending charges, and other information including civil adjudication proceeding records...When authorizing individuals who will or may have unsupervised access to children who are in child day care, in early learning programs, or receiving early childhood learning education services in licensed or certified agencies including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older. ...

In carrying out this mandate, DEL promulgated WAC 170-06-0120 to spell out how certain criminal convictions would be treated in the background assessment process. Because this rule was adopted pursuant to legislative authority, it is presumed to be constitutional. *Eze,* 111 Wn.2d at 26; *Longview Fibre Co.* 89 Wn. App. at 632.

V. ARGUMENT

A. Christal Fields Does Not Meet Basic Requirements For DEL Clearance

It is undisputed that Ms. Fields has at least one criminal conviction which renders her unable to pass a background check through the Department of Early Learning. CP 144-147. Ms. Fields' prior criminal history of an Attempted Robbery 2 conviction from December 28, 1988 requires DEL disqualification. WAC 170-06-0120(1). Ms. Fields has argued that this regulation is unconstitutional as a violation of due process. However, as demonstrated below, disqualification of individuals from discrete work with sensitive populations due to past criminal behavior is not prohibited by the U.S. Constitution,[3] and Ms. Fields' situation, while sympathetic, does not change that basic legal fact. This Court should not overturn WAC 170-06-0120(1), which is a basic preliminary safety precaution to screen out those whose background is not compatible with work caring for young children.

[3] Ms. Fields has not cited to nor supported a *Gunwall* analysis that would implicate the Washington State Constitution in this case. *State v. Gunwall*, 109 Wn.2d 54, 720 P.2d 808 (1986).

B. Ms. Fields' Hearing Was Limited By The Legal Posture Of Her Case, Not By A Denial Of Procedural Due Process

Ms. Fields argues that her procedural due process rights were violated because her hearing was not meaningful as required under the precedent of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). App. Brief at 24-26. Her argument is couched in the terms of procedural due process, but shows itself to be inappropriately forced into an improper mold. Ms. Fields is not arguing that summary judgment as a process of declarations, motions, oral argument, and written ruling subject to review is invalid. Instead, she asserts that the fundamentals of WAC 170-06-0120(1), which provide grounds for DEL to seek summary judgment where there is proven disqualifying criminal history, is constitutionally defective. That argument is one of substantive due process, and does not implicate the steps taken at OAH to adjudicate DEL's summary judgment motion.

Ms. Fields has not and cannot show that in a case with disputed facts, she would not have received a full evidentiary hearing at OAH with witnesses, exhibits, and arguments presented to a neutral Administrative Law Judge. In fact, had the criminal charge upon which DEL sought summary judgment been one which she disputed, Ms. Fields would have been provided with a full administrative hearing and the opportunity to call witnesses and present evidence that the charge was not hers or was not the charge alleged.

1. Ms. Fields Had The Opportunity To Challenge The Evidence Showing She Should Be Disqualified With Testimony And Exhibits

Ms. Fields had access to procedures that appellants sought in *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004), a case cited by Ms. Fields which does not truly support her position. *Moore* addressed a challenge to a statute requiring the Department of Licensing to suspend a driver's license without either a pre- or post-deprivation hearing simply upon notice by a court of certain fines and convictions. In finding this statutory scheme unconstitutional, the Court's reasoning was driven by the following observation of the process provided, and lacking, by the DOL suspension protocol:

> Nevertheless the City maintains there was no due process violation because Moore and Wilson, like all drivers who have their license suspended under RCW 46.20.289, had an opportunity to be heard at their respective court hearings on the underlying violation. But as Moore and Wilson argued below, **that court hearing does not address ministerial errors** that might occur when DOL processes information obtained from the courts pertaining to license suspensions and revocations, **e.g., misidentification, payments credited to the wrong account, the failure of the court to provide updated information when fines are paid**.
>
> *Moore*, 151 Wn.2d at 674-675 (Emphasis added).

Here, Ms. Fields had the rights that the drivers in *Moore* lacked, and was poised to make an argument as to the veracity of her criminal history before DEL focused on the uncontested conviction within her

criminal history that fell within WAC 170-06-0120(1). CP 53-54. Ms. Fields could have attempted to prove that this conviction was not hers, was not for the named crime, or did not actually fall within the regulation. Thus, the DEL hearing process offered to her would fully satisfy the *Moore* Court. The substance of WAC 170-06-0120(1), and its mandate to disqualify with certain proven convictions, is what Ms. Fields is truly challenging in her appeal.

2. Court Decisions Have Affirmed Provisions Much Like WAC 170-06-0120 So Long As There Is An Opportunity For Challenge, Which DEL Licensing Hearings Provide

In *Amunrud v. Board of Appeals,* 158 Wn.2d 208, 143 P.3d 571 (2006), *cert denied,* 549 U.S. 1282, 127 S. Ct. 1844, 167 L.Ed.2d 324 (2007), another decision cited by Ms. Fields, the court explained why due process did not require an opportunity to explain extenuating circumstances where one finding, there the non-payment of child support, led legally to another, in that case the suspension of Mr. Amunrud's professional driver's license:

> RCW 74.20A.320 provides a person with the opportunity for an administrative hearing in order to challenge the driver's license suspension. Additionally, unlike the statutes at issue in *Moore,* Amunrud has a right to appeal the license suspension. The procedures set forth in RCW 74.20A.320 also allow for a stay of the suspension pending the outcome of the hearing and for up to six months pending the outcome of a child support [143 P.3d 576] modification hearing under WAC 388-14A-4515. Finally, Amunrud could obtain a release of his driver's license

> suspension from DCS by signing a repayment agreement under WAC 388-14A-4520. *See* WAC 388-14A-4525.
>
> As to Amunrud's final contention that the Board did not consider his unusual circumstances and thus, he was denied "meaningful" review, his argument is without merit. First, Amunrud could have appealed the March 29, 2002, order that raised his child support payment to $421 per month. Second, Amunrud could again file a motion to modify support with the court. Amunrud was $16,255 in arrears on his child support payments and was made aware that failure to make payments could result in the suspension of his driver's license. Because Amunrud was given an opportunity to be heard at a meaningful time and in a meaningful manner, his right to procedural due process was not violated.

Amunrud, 158 Wn.2d at 218.

This logic applies with equal force to Ms. Fields' situation. First, Ms. Fields had a full opportunity to litigate the underlying criminal action which resulted in her conviction of Attempted Robbery 2. Also, she had the opportunity within the OAH hearing process to challenge her disqualification and prove that the conviction record cited as a reason for disqualification was false (although she would not be able to collaterally attack the conviction itself through the administrative process per WAC 170-06-0110(1). Thus, while the hearing process afforded to Ms. Fields did not meet all of her desires for redemption, it did allow her the opportunity to show she was not the individual with the named conviction. At OAH, she conceded that the Attempted Robbery 2 conviction belonged to her, removing the matter from the realm of factual determination to a process of legal determination. CP at 140-141. This

does not violate procedural due process.

Here, Ms. Fields' complaint is really a substantive one: she feels that it is unconstitutional for DEL to disqualify her based solely on criminal history. App. Brief at 26-27. This complaint focuses on what the law provides, not the procedure by which the law is applied, and is better addressed through an examination of substantive due process, as set forth below. No balancing of factors under *Mathews* is necessary, and it will not be undertaken here. Ms. Fields has not met her heavy burden to show WAC 170-06-0120 is unconstitutional because her procedural due process argument is flawed.

C. The DEL Director's List Constitutionally Sets A Minimum Standard For All Child Care Workers

Ms. Fields argues that it is unconstitutional for DEL to disqualify her based only on a crime she committed. App. Brief at 10-11. As she admits in her briefing, Ms. Fields' substantive due process claim is subject only to rational basis review. App. Brief at 13. That standard does not change when considering her as-applied challenge. In order to meet her heavy burden of showing beyond a reasonable doubt that WAC 170-06-0120 is unconstitutional, Ms. Fields must show that there is no rational relation to a legitimate state interest in listing certain crimes that will disqualify an applicant from working with children. *Amunrud*, 158

Wn.2d at 222.[4] She cannot meet this burden for the regulation as a whole or for how that regulation has been applied to her situation.

1. Rational Basis Scrutiny Does Not Require The Particularized Showing Advanced By Ms. Fields

Ms. Fields suggests throughout her briefing that allowing individuals with a criminal past to show whether or not they are currently qualified to care for children is the only constitutionally acceptable way for DEL to carry out its duty to screen applicants for unsupervised access to child care children. App. Brief at 23. Her suggestion is not supported even by the case law that she cites, which instead indicates that the reviewing court may assume basic facts in conducting its analysis. *Amunrud*, 158 Wn.2d at 224-225. Ms. Fields has falsely inflated the requirements of rational basis review, "the most relaxed form of judicial scrutiny," which is satisfied wherever there is 1) a legitimate state interest and 2) a rational connection between the interest and the means by which that interest is pursued. *Amunrud*, 158 Wn.2d at 222-223. Her vision for the rational basis test is akin to intermediate or strict scrutiny, as it would require not only a connection between the two factors, but proof of efficiency on an individual level. That sort of careful tailoring has no applicability to rational basis review. *Id.*

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[4] Ms. Fields claims that *Gleason v. Glasscock*, No. 2:10-CV-02030-MCE, 2012 WL 1131438 (E.D. Cal. Mar. 29, 2012), a non-binding authority at best, supports her claim that only a full hearing will satisfy her as applied challenge. That is false. The petitioner in *Gleason* had a chance for hearing but turned it down, yet the court still granted a motion to dismiss on the substantive due process claim.

Because the *Amunrud* case examines similar principles, that Court's application of rational basis review is helpful here. In protesting his license suspension, taxi driver Amunrud asserted that because the reason for suspension was not related to his driving safety, it could not pass rational basis review. The Court disagreed, noting that a state may have a legitimate state interest arising out of a particular program other than that which is most obvious. *Amunrud*, 158 Wn.2d at 224-225. Further, as the Court noted:

> In determining whether a rational relationship exists, a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest. *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993); *see Seeley,* 132 Wash.2d at 795, 940 P.2d 604; *Glucksberg,* 521 U.S. 702, 117 S.Ct. 2258.

Id. (emphasis added).

The *Amunrud* court went on to find that it was reasonable of the legislature to believe that taking away one valuable economic asset, *e.g.* a driver's license, could encourage parents to fund the care of their children in order to avoid continued suspension. *Amunrud,* 158 Wn.2d at 224. This was not explicitly based on evidence presented to the court, but on a survey of judicial opinions in other forums and the *Amunrud* Court's own common sense evaluation. *Id.*

Ms. Fields also cites *Freedom to Travel Campaign v. Newcomb,*

82 F.3d 1431 (9th Cir. 1996) in support of her claim that DEL must make a substantial showing in support of its rational basis for excluding those with certain criminal convictions from child care work. App. Brief at 9. This citation does not support her claim. In *Freedom to Travel Campaign*, involving a challenge to the federal ban on travel to Cuba, the Court observed that the area of foreign relations was largely immune from judicial review as the exclusive province of the executive branch, and only as an aside noted that: "Even were we to second guess the President, this is not a case where the Government has set forth no justifications at all." *Freedom to Travel Campaign,* 82 F.3d at1439. The Court did not require an extensive showing and did not rule based on the showing presented to dismiss the due process complaint by the petitioners. *Id.*

Contrary to the suggestion of Ms. Fields, this court is not required to find agency evidence in support of rational basis for regulation within the record of the case presented. Instead, the court may evaluate the term "rational" in a reasonable manner that takes into account ordinary experience. *Amunrud*, 158 Wn.2d at 223-224. This task is not difficult either in Ms. Fields' case or in consideration of WAC 170-06-0120 in general, as set forth below.

2. Protecting Children From Harm, Including Shielding Them From Individuals With Serious Criminal Histories, Is Integral To DEL's Licensing Mandate, And Constitutes A Legitimate State Interest

Ms. Fields does not contest the proposition that protecting children from harm is a legitimate state interest. App. Brief at 28. While she disputes the method chosen by the legislature and DEL under legislative mandate to carry out this state interest, her dispute does not impact the interest at stake, and is itself unavailing, as seen from the analysis that follows. Thus, the first element of the two part rational basis test is met without the need for further review.

3. Automatic Disqualification Of Persons Convicted Of Serious And Often Violent Felonies Is Rationally Related To The Important Interest Of Child Safety

The overall theme of Ms. Fields' attack on WAC 170-06-0120(1) is that this type of mandatory list of disqualifying crimes is over-inclusive and therefore constitutionally flawed. App. Brief at 15, 27. Such an argument has no place in rational basis analysis, which does not require narrow tailoring to achieve the stated interest, as a higher level of review would. *Amunrud*, 158 Wn.2d at 222-223. As noted by the 9th Circuit in the *Wedges/Ledges* case cited in Ms. Fields' brief:

> When reviewing the substance of legislation or governmental action that does not impinge on fundamental rights, moreover, we do not require that the government's action actually advance its stated purposes, but merely look

> to see whether the government could have had a legitimate reason for acting as it did.

Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz., 24 F.3d 56, 65 (9th Cir. 1994).

This is just such as case as described in *Wedges/Ledges*: there is not a fundamental right to employment choice, as even Ms. Fields has admitted. App. Brief at 7-8.

Further, Ms. Fields' refusal to acknowledge that keeping those convicted of serious felonies out of child care might improve child safety is unrealistic, and does not consider the actions that these individuals, including her, have engaged in. In arguing that the list of crimes set forth in WAC 170-06-0120(1) is not rationally related to the unarguably legitimate governmental interest of child safety, Ms. Fields has carefully chosen the crime on the list which seems the most unrelated to competence as a child care provider, homicide by watercraft, and ridiculed its inclusion, noting that "few childcare centers are located on boats."[5] App. Brief at 10. However, an analysis of the crime's actual components shows why an individual convicted of this offense may be cause for concern if allowed to interact unsupervised with young children:

[5] Ms. Fields also asserts that a mob boss would be "free to work in child care after five years," forgetting that DEL may qualify for character as well as for specific criminal activity. *See* WAC 170-06-0070(4).

> (1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the operating of any vessel by any person, the operator is guilty of homicide by watercraft if he or she was operating the vessel:
>
> (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 79A.60.040;
>
> (b) In a reckless manner; or
>
> (c) With disregard for the safety of others.

RCW 79A.60.050.

It certainly is a concern for the welfare of children if an individual who has been shown to have driven a vehicle, here a boat, under the influence or to have operated a vehicle with such recklessness or disregard for the safety of as to cause a death. Child care children are often transported in vehicles, usually cars, and no one would tolerate any intoxicated, reckless driving or driving with disregard to the safety of others in the child care setting. Rational factors support the inclusion of that crime, however ridiculous it first sounds, on the disqualification list.

Similarly, with Ms. Fields' own particular charge of Attempted Robbery 2, the elements are of great interest in applying rational basis review:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome

> resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

> (1) A person is guilty of robbery in the second degree if he or she commits robbery.
> (2) Robbery in the second degree is a class B felony.

RCW 9A.56.210.

Ms. Fields asserts that there is no rational basis between a conviction for attempting this conduct and a disqualification from unsupervised access to child care children. App. Brief at 16. She relies on the fact that there was not individualized evidence presented below of her particular circumstances, again asking that DEL be required to produce more than is required under rational basis review. *Id.* It is Ms. Fields with the burden to show, beyond a reasonable doubt, that the regulation is unconstitutional. *Eze,* 111 Wn.2d at 26; *Longview Fibre Co.,* 89 Wn. App. at 632. Her objection to the lack of an in-depth review of her life circumstances does not meet that requirement. Prohibition of those with a history of conduct explained in the robbery statutes is rationally related to the important state interest of protecting children from harm, which is a primary purpose of DEL, as explained in RCW

43.215.005(c). No more is required under the U.S. Constitution. *Amunrud*, 158 Wn.2d at 223-224.

4. U.S. Supreme Court Precedent Has Approved Irrebuttable Presumptions As Constitutional Where Those Presumptions Satisfy Rational Basis Review

In *Weinberger v. Salfi*, 422 U.S. 749, 767-785, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), the U.S. Supreme Court evaluated the constitutionality of an irrebuttable presumption that any marriage entered into within the last 9 months before a social security recipient's death was entered into for the purpose of securing spousal survival benefits, and would thus result in a denial of those benefits. The Court indicated that such a presumption would pass constitutional muster if it did not implicate a suspect classification or impinge on a fundamental right. *Salfi*, 422 U.S. at 767-768.

Ms. Fields claims in her briefing that the *Salfi* decision was the product of a deferential approach to social security law rather than a general statement about the limits of procedural due process. App. Brief at 21-22. However, this reasoning is not supported by a thorough review of the dense text of that decision. At the conclusion of a lengthy review of cases[6], the Court concludes that:

[6] Appellant's cite to the *Salfi* decision is actually a quoted passage of one of the cases reviewed by the *Salfi* Court within its overview of the case law, rather than the Court's conclusion. *See Salfi*, 422 U.S. at 768.

> The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could **rationally** have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. **We conclude that the duration-of-relationship test meets this constitutional standard**.

Salfi, 422 U.S. at 777 (emphasis added).

The test applied in *Salfi* is the test this Court uses for economic regulations not impacting a suspect classification or fundamental right: rational relationship between the stated objective and the regulation at issue. No special deferential standard was applied, and the precedent set in *Salfi* is validly considered when evaluating the constitutionality of WAC 170-06-0120(1). Just as Congress is allowed to use imprecise means to limit those eligible for benefits, DEL is able to limit those who qualify to work with children, for the purposes of child safety.

In this case, as Ms. Fields concedes, the right to choose a specific employment is not a fundamental right subject to greater than rational basis review. App. Brief at 7-8. Ms. Fields' status as a person convicted of a felony is not a suspect classification, again removing this case from higher levels of scrutiny. Thus, under the rationale of the *Salfi* case, Ms. Fields may not prevail in her claim simply on the basis that she is not

allowed to rebut the presumption of WAC 170-06-0120(1) that she is not suitable to have unsupervised access to child care children due to her conviction. As the *Salfi* Court noted, scrutiny of every governmental determination of this sort would call into question "countless legislative judgments" made to streamline otherwise cumbersome approval processes:

> Congress can **rationally** conclude not only that generalized rules are appropriate to its purposes and concerns, but also **that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern** which they might be expected to produce.

Salfi, 422 U.S. at 781 (emphasis added).

Here, the same considerations which persuaded the Court in *Salfi* apply. Not only does WAC 170-06-0120 meet the requirements of rational basis review as discussed above, but striking down every provision of this type would result in a tremendous and unwarranted burden upon agencies charged with protecting health and safety to do in depth assessments of every individual, even those with serious and dangerous criminal history. The same analysis would also oblige the Department to individually evaluate underage applicants on their merits,[7] consider those without requisite education and training, and fully evaluate those with findings of child abuse or neglect. Ms. Fields should not

[7] A child care center director or program manager must be 21 years of age. *See* WAC 170-295-1010(1) and WAC 170-295-1020(1)(a).

prevail on her constitutional claims, either as to the facial validity of this rule or as applied to her situation.

5. Authority Based On The Constitutional Provisions Of Another State Is Not Helpful In This Case

Ms. Fields places much reliance on a Pennsylvania decision, *Peake v. Commonwealth*, 132 A.3d 506 (2015). However, that decision specifically relies on the Pennsylvania State Constitution:

> Due process challenges under the Pennsylvania Constitution are analyzed "more closely" under the rational basis test than due process challenges under the United States Constitution.

Peake, 132 A.3d at 518.

Thus, that case is of little practical meaning to this Court in addressing the U.S. Constitution's due process clause and its application to the current case. While Ms. Fields claims that distinction of this case from binding precedent is "splitting a hair," the truth is that there is no relevant precedent that supports Ms. Fields' position. App. Brief at 18. Applicable precedent such as the *Salfi* decision shows why Ms. Fields' constitutional challenge to WAC 170-06-0120 should be rejected in its entirety.

6. Supreme Court Precedent Arising Before The Rational Basis Test Or Involving Fundamental Rights Does Not Advance Appellant's Cause

Ms. Fields cites cases within her brief which are not on point due

to their age and context within due process jurisprudence. These cases do not add to the well-established principle that regulations impacting the interest in choosing employment, which is not a fundamental right, are to be evaluated under rational basis review. Cases not employing that standard, for whatever historical reason, are not helpful in this case.

One case relied upon by Ms. Fields, *Heiner v. Donnan*, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772 (1932), was decided two years before the first application of the rational basis test in *Nebbia v. New York*, 291 U.S. 502, 54 S. Ct. 505; 78 L. Ed. 940 (1934) and thus does not stand for the modern application of substantive due process. A *Lochner*-era[8] understanding of substantive due process is not helpful to this modern discussion of the limits of a state's power to regulate economic affairs to further the health, safety, and welfare of its population. Economic regulations not impacting fundamental rights are subject to no more than rational basis review, which in this situation does not result in a finding that WAC 170-06-0120(1) is unconstitutional.

Another case advanced by Ms. Fields is *Vlandis v. Kline,* 412 U.S. 441, 93 S. Ct. 2230, 37 L.Ed.2d 63 (1973). That decision, although couched at the time in terms of presumptions, became the first of a series of decisions which came to be understood as relying on the fundamental

[8] *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539; 49 L. Ed. 937 (1905)

right to travel, which is the factor elevating the analysis beyond rational basis. Certainly, under the current understanding of rational basis review, a regulation such as that at issue in *Vlandis*, which was a distinction between residents and non-residents for purposes of higher education tuition, would have been upheld but for the impact on the right to travel. The Court explained in *Saenz v. Roe*, 526 U.S. 489 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) that the right to travel underpinned many decisions of this type, and specifically cited *Vlandis* as an example of the proposition that:

> [O]ur cases have not identified any acceptable reason for qualifying the protection afforded by the Clause for "the 'citizen of State A who ventures into State B' to settle there and establish a home." *Zobel,* 457 U. S., at 74 (O'CONNOR, J., concurring in judgment). Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State.

Saenz, 526 U.S. at 502.

The *Saenz* case was decided by application of strict scrutiny to the suspect classification of recent versus long term citizens of the state of California regarding welfare benefits, not on analysis of whether irrebuttable presumptions were involved. *Saenz v. Roe*, 526 U.S. 489 (1999).

Here, when dealing with a lesser right such as the interest in selecting an occupation, Ms. Fields cannot realistically argue that intermediate or strict scrutiny should be applied. Cases such as *Amunrud* in this state and *Conn v. Gabbert,* 526 U.S. 286, 291-292, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) at the federal level show that rational basis review is alive and well in the area of economic regulation, despite past forays into other territory which ended as fundamental rights questions. *e.g. Saenz v. Roe*, 526 U.S. 489 (1999). Rational basis review applies even to what Ms. Fields derides as irrebuttable presumptions, as is appropriate when dealing with basic requirements such as age, education, and background, which are ubiquitous in employment criteria and generally accepted by state and federal courts as rational and acceptable regulation of economic interests. Ms. Fields has brought nothing new to this discussion with her citation to inapplicable authority. She has failed to meet her high burden of showing beyond a reasonable doubt that the economic regulation imposed in WAC 170-06-0120(1) is unconstitutional.

It is rational for the state to conclude that those with serious felonies in their criminal history pose a risk to children, and to thus exclude them from child care positions. Ms. Fields should not prevail in her petition for review based on her substantive due process claims.

VI. CONCLUSION

The Department requests that this Court uphold the final agency order of disqualification in this case because Ms. Fields has failed to establish that she is entitled to relief based upon RCW 34.05.570(3)(a) for constitutional deficiencies. WAC 170-06-0120(1) is a rational application of state police power that permissibly and constitutionally determines that individuals with certain criminal or other background findings may not work in child care. Summary judgment was properly granted to DEL upon a showing that this appellant had such a preclusive conviction in her background. There was no denial of due process. Accordingly, the Review Decision and Final Order issued by the Board of Appeals on June 4, 2015 should be affirmed on review.

RESPECTFULLY SUBMITTED this 7th day of November, 2016.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the below date, the original documents to which this Declaration is affixed/attached, was filed in the Court of Appeals, Division One, under Case No.75406-8-I, and a true copy was e-mailed, and delivered via legal messenger or otherwise caused to be delivered to the following attorneys or party/parties of record at the e-mail addresses and addresses as listed below:

1. Keith Scully, Newman Du Wors LLP, 2101 4th Avenue, Suite 1500, Seattle, WA 98121-2336; keith@newmanlaw.com and
2. Prachi Dave, ACLU of Washington, 901 5th Avenue, Suite 630, Seattle, WA 98164; pdave@aclu-wa.org.

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

DATED this 7th day of November, 2016, at Seattle, WA.

NICK BALUCA, Legal Assistant
OID #91016