SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CHRISTAL FIELDS, Petitioner, v. STATE OF WASHINGTON DEPARTMENT OF EARLY LEARING, Respondent.	NO. 15-2-26451-6 SEA **PETITIONER'S REPLY BRIEF**

I. INTRODUCTION

The Department of Early Learning asks this Court to sanction a 50-crime-long arbitrary list of convictions that bar, for life, working in childcare. But DEL can cite no case finding that any similar list passes constitutional muster. Petitioner Christal Fields asks this Court to find that DEL's rule violates both procedural and substantive due process and is unconstitutional.

The remedy Ms. Fields seeks is not an automatic childcare license, much less "unsupervised access to child care children." (Response Brief at 6). Instead, 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. DEL's response to her petition boils down to the

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2101 Fourth Avenue, Suite. 1500
Seattle, Washington 98121
(206) 274-2800

peculiar proposition that due process entitles Ms. Fields to a hearing if and only if she wishes to challenge whether she was convicted of a particular crime—this begs the question, failing to address the underlying issue she properly raises here before this Court: whether she is entitled to a hearing to present evidence of her suitability for employment regardless of any prior convictions.

II. ARGUMENT

A. DEL's rule violates substantive process.

DEL claims that its rule banning, for life, any person with a conviction from a list of 50 crimes passes constitutional muster because the Court should defer to its judgment as to how best to protect children. But as many courts have recognized, virtually any regulation can be explained by invoking the talisman of public safety. E.g., *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 (9th Cir. 1994). Rational relationship scrutiny requires more. The details of DEL's rule must bear a "*substantial* relation to the public health, safety, morals, or general welfare." *Id.* The specifics of the rule, not just that it is aimed at public safety, are what must pass muster.

DEL correctly points out that the only way to satisfy rational basis review for prior crimes is to allow evidence of fitness to care for children to be considered. (Opposition at 12-13.) This is DEL's mandate, and it cannot shirk that duty by creating arbitrary lists. Citing *Amunrud*, DEL notes that, in some circumstances, the Court can find a rational basis without considering individual evidence. (Response Brief at 12-13, citing *Amunrud v. Bd. of Appeals*, 124 Wn. App. 884, 890 (2004) aff'd, 158 Wn. 2d 208, (2006). DEL's citation to *Amunrud* is puzzling. 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

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2101 Fourth Avenue, Suite. 1500
Seattle, Washington 98121
(206) 274-2800

> 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. DEL presents only guesswork and prejudice to justify its arbitrary decision.

DEL next falsely argues that the Legislature has chosen to require mandatory license suspensions. (Response at 14, claiming that Ms. Fields disputes "the method chosen by the legislature.") This is simply not true. The Legislature required DEL to collect and *consider* criminal history, but expressly avoided any mandatory bar. RCW 43.215.215(2).

DEL focuses on the elements of some of the crimes on its 50-crime list, and claims that a person who once—no matter how long ago—piloted a boat in a reckless manner might be unsafe to work around children. But that same argument could be advanced to anyone who had a traffic infraction. It could also be extended to anyone who ever paid a tax penalty: that, after all, is evidence of a careless reading of the tax code, and we don't want careless people taking care of our children. That argument could be further extended to bar anyone with even slightly impaired vision from working in childcare—it is safer to have physically perfect individuals caring for children. But no one would claim that it passes rational basis scrutiny to automatically bar any of these persons.

There simply is no substantial relation between Ms. Fields' crime—a nearly 30-year-old attempted robbery conviction—and her current application to work in childcare. The inclusion of a few crimes that directly involve children does not save DEL's regulation. DEL argues overbreadth may not be raised in a rational basis

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(206) 274-2800

review. But Ms. Fields is not raising an overbreadth argument: she attacks DEL's regulation on a both as-applied and facial basis. As applied, DEL barred her from working in childcare based on a nearly 30-year-old attempted robbery conviction. Facially, DEL's list of crimes, as a whole, does not rationally relate to protecting children. DEL's argument that some of the crimes on the list are more relevant to childcare than others does not make the list, as a whole, rational. Holding otherwise would allow any regulation with even one tiny rational piece to survive scrutiny in its entirety; applying this rationale, people wearing green shirts could be barred from childcare if "green shirt" was on the same list as "admitted they beat children."

In a footnote, DEL makes Ms. Fields' argument for her. DEL correctly notes that Ms. Fields wants to present her particular circumstances, but argues that this Court should not consider any evidence because "no evidence was accepted on those issues, and the only citation she makes to the record is to·her own prior briefing." (Response at 17 n. 6) Ms. Fields submitted a sworn declaration to DEL and DEL ignored it. She is entitled to have that evidence considered, and this Court should remand with instructions to do just that.

B. Other courts have persuasively indicated lifetime mandatory exclusion lists are unconstitutional.

Whether a lifetime mandatory-exclusion list passes constitutional muster is a question of first impression in Washington, and Ms. Fields has not suggested otherwise. But other decisions strongly suggest the right resolution. DEL can cite no case that upholds a lifetime mandatory-exclusion list. The sole court to have squarely considered the issue—Pennsylvania—held that these bans are facially unconstitutional. *Peake v. Com.*, No. 216 M.D. 2015, 2015 WL 9488235 (Pa. Commw. Ct. Dec. 30, 2015.) DEL claims 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

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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.

Likewise, DEL's reliance on *Weinberger v. Salfi*, 422 U.S. 749 (1975) is mistaken. In *Weinberger*, the Court considered a social-security regulation that allowed the social security administration to bar anyone married within 9 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.

In yet another baffling argument, DEL claims that Ms. Fields "refuses to acknowledge" that prior felonies might make someone unsafe to work around children. (Response at 15.) But Ms. Fields is not asking that DEL be barred from considering criminal history, and absolutely does acknowledge that any crime—including hers—*might* be relevant. Ms. Fields objects to the automatic, irrebuttable lifetime ban. She wants a chance to prove that her distant past does not affect her ability to safely function now as a childcare worker.

C. DEL's failure to hold a meaningful hearing violates procedural due process.

DEL dismisses Ms. Field's procedural due process challenge, claiming that procedural due process is limited only to "the methods used to ascertain facts and make decisions." (Response Brief at 3.) But that isn't right. 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), citing *Mathews*

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Seattle, Washington 98121
(206) 274-2800

v. Eldridge, 424 U.S. 319, 348 (1976). 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.

DEL makes no attempt to address the *Matthews* factors for whether a meaningful hearing is required, but instead attempts to distinguish *Nguyen* by claiming that "Ms. Fields' interest in being qualified to work with children is in no way analogous to the doctor's license to practice analyzed" in *Nguyen*. (Response at 9.) This is a troubling argument. *Everyone*, regardless of occupation, is entitled to due process. DEL cannot pick and choose which occupations receive it.

DEL next argues that *Hardee* limits *Nguyen* "only to its facts." (Response at 10, citing *Hardee v. State, Dep't of Soc. & Health Servs.*, 172 Wn. 2d 1, 13, 256 P.3d 339, 346 (2011). This is disingenuous. *Hardee* addressed only the question of whether DEL had to prove its case by a preponderance or by clear and convincing evidence. In *Hardee*, a home daycare operator's license was suspended after a hearing. The *Hardee* court held that the hearing examiner properly applied a preponderance of the evidence standard, and distinguished *Nguyen* only because *Nguyen* applied a higher standard to physician licenses. *Hardee*, 172 Wn. 2d at 9. To the extent *Hardee* has any bearing here, it supports Ms. Fields' claim: she wants the same due-process hearing the licensee received in *Hardee* but Ms. Fields was denied.

DEL's claim that *Amunrud* governs is even less availing. (Response at 10.) 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 substantive due process muster, 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 can't penalize and coerce Ms. Fields for

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2101 Fourth Avenue, Suite. 1500
Seattle, Washington 98121
(206) 274-2800

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 isn't 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.

DEL's argument that because Ms. Fields lost her case at summary judgment and that she would have had an opportunity to present evidence on a contested fact is confusing. (Response at 9.) It is the very hearing DEL denied her that she seeks. DEL sought summary judgment—before any hearing could be held—and the administrative law judge relied solely on the robbery conviction to grant it. A full evidentiary hearing is what should be ordered now.

III. CONCLUSION

For the reasons argued herein, this Court should hold that DEL's rule is unconstitutional either on its face or as applied and remand the case for further proceedings.

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NEWMAN DU WORS LLP

Keith Scully, WSBA No. 28677
2101 Fourth Avenue, Suite 1500
Seattle, WA 98121
Telephone: (206) 274-2800
Fax: (206) 274-28001
Email: keith@newmanlaw.com

Attorneys for Petitioner Christal Fields