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 OPENING BRIEF**

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's drug and alcohol free, and has been for years. She's successfully raised both children and 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 can't 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.

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

The U.S. Constitution prevents this type of arbitrary action. Ms. Fields has both substantive and due process rights to pursue her chosen profession without an arbitrary ban. DEL's policy hurts all of us. It hurts anyone with a criminal conviction from working. It hurts parents because extraordinary people like Christal Fields aren't able to work with our children. And it hurts safety, because DEL's arbitrary policy replaces a thoughtful case-by-case analysis with a rote prohibition based on criminal history. 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 isn't 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. STATEMENT OF ISSUES

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. FACTUAL BACKGROUND

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

Ms. Fields grew up in a broken home, and by the age of 14 was living with her father and a succession of her father's sexual partners. (AR 23.)[1] 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

[1] DEL filed a copy of the administrative record that is not numbered. Petitioner filed a duplicate copy with "AR____" page numbering. References are to the numbered copy.

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

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. Each of those crimes was 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. (AR 23.) 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's successfully raising her now 17-year-old son, and assisting in the care of her grandson. *Id.* She's been gainfully employed—first as the caregiver for an elderly adult, and then in childcare—since 2006. *Id.* She lived for two years in group housing, and 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's committed to giving back to the community. As a series of letters from places she's worked and volunteered demonstrate, she's deeply involved in working to make others' lives better. (AR 68–81.) She's an NA sponsor. (AR 23.) She's a counselor for chronically homeless persons. (AR 73.) 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. (AR 76.)

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 kids, and has thrown herself into getting every possible training necessary to do her job well and safely. (AR 82–87.) She's well-liked and successful. (AR 68–81.) 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

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

"ranks at the top in reference to sound ethics, professionalism, and de-escalation techniques." (AR 73.) 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. (AR 75.) She's supported by her employer, a Washington State-licensed childcare center. (AR 69–71.) 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. (AR 69–71.) But after a local television station ran a story on Ms. Fields' 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. (AR 97.) DEL admitted that Ms. Fields disqualification is mandatory. (AR 111.) 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. (AR 124–130.) 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. (AR 122–23; 143–45.) Ms. Fields then timely filed a petition for review with this court. (AR 155–60.)

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

IV. ARGUMENT

A. Standard of review

The Administrative Procedure Act (APA) governs judicial review of agency action. *Ryan v. State, Dept. of Social and Health Services* 171 Wn.App. 454 (2012). This Court reviews the constitutionality of a rule or the application of a rule de novo. *Local 2916 IAFF v. Public Employment Relations Comm'n*, 128 Wn.2d 375, 379 (1995). 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' 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 (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.)

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

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 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). 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 170-06-0040. Many of these factors are left to the discretion of DEL staff to implement.

But 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

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

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."

The Legislature's enabling statute provides no support for DEL's arbitrary bar. 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. The Legislature's direction to *consider*, but not outright bar based on, criminal history is a strong indicator that the Legislature did not intend the broad inflexible bar DEL created.

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[2] 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

[2] Ms. Fields challenges several portions of WAC 170-06. For brevity, the sections collectively are referred to as "WAC 170-06", unless a particular section applies.

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

disqualified because of their criminal history, despite or because of other evidence presented. But the regulation fails on its face because DEL will 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.").

State restrictions on the right to practice a profession receive rational basis review. *Amunrud v. Bd. of Appeals*, 158 Wn. 2d 208, 220 (2006); *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 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–

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

55 (1884). Police-power regulations under the public safety rubric must have 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), citing *FDIC v. Henderson*, 940 F.2d 465, 474 (9th Cir.1991.)

In other words, 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 found unconstitutional California's cosmetology regulations even though they contained health and safety training because the 1600 required hours of training did not rationally achieve the safety objective. By contrast, 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 implement required management reforms. *Henderson*, 940 F.2d in 474.

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 Appeals*, 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 only after government presented compelling reasons ban was necessary to pressure Cuba to enact democratic reforms.) Here, DEL produced no evidence whatsoever. There is absolutely nothing in the record demonstrating that there is any connection between child safety and 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'

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

contention that the ban is not rational as it is applied to her unique facts.

DEL will argue that WAC 170-06 passes constitutional muster because public safety provides the rationale to exclude anyone with any of the 50 listed crimes. But no rational basis exists to apply a per-se bar because 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. Refusing to evaluate a candidate's 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. Ms. Fields' conviction was for a crime against an adult, not a child. It had nothing to do with childcare. And Ms. Fields has demonstrated that this was 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.

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.

The *Peake* court noted that Pennsylvania created an irrebuttable presumption that a criminal conviction barred working in childcare. As the court held, "irrebutable 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.*

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(206) 274-2800

This court should follow Pennsylvania's lead. The irrebutable presumption established fails the *Peake* test because it encroaches on Ms. Fields' liberty interest, it is not universally true because convicted felons can 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 for the same reason: DEL bars, for life, anyone convicted of attempted robbery or homicide by watercraft just as it does persons convicted of child murder or rape.

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.

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).

DEL will argue that *Mathews* and procedural due process are met because it held a hearing and allowed Ms. Fields to challenge whether she had an attempted robbery conviction, even though DEL refused to consider any evidence other than the conviction related to whether Ms.

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

Fields could safely work in a daycare center. But *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.)

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 healthcare 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.

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. But 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.

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

V. CONCLUSION

WAC 170-03-230 is unconstitutional on its face because there are 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 was for a crime against an adult, not a child. It had nothing to do with childcare. And Ms. Fields has demonstrated that this was a part of her distant past—when she was in abusive relationships, living on the streets, and addicted to drugs.

Dated: April 8, 2016.

NEWMAN DU WORS LLP

Keith Scully, WSBA No. 28677
Newman Du Wors LLP
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