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No. 95024-5

In the
SUPREME COURT
of the
STATE OF WASHINGTON

CHRISTAL FIELDS,
Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF EARLY LEARNING,
Respondent.

REVIEW OF JUDGMENT OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I
Case No. 75406-8

BRIEF OF AMICI CURIAE
NATIONAL EMPLOYMENT LAW PROJECT AND
WASHINGTON STATE LABOR COUNCIL, AFL-CIO

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IDENTITY AND INTEREST OF AMICI CURIAE

The National Employment Law Project (“NELP”) is a non-profit legal research and advocacy organization, specializing in advancing the employment rights of people with arrest and conviction records and reducing job barriers facing workers with records. A decision upholding the Court of Appeals’ ruling and failing to adequately recognize the due process rights of applicants for occupational licenses will directly undermine NELP’s mission. NELP’s report “Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records”¹ examines state occupational licensing barriers and has been widely cited by the media and research reports. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers with records and various other issues.

The Washington State Labor Council, AFL-CIO (“WSLC”) is comprised of more than 600 local unions and represents more than 400,000 rank-and-file union members working in the state of Washington. It is widely considered to be the “voice of labor” in Washington State. WSLC works on policies that help adults with prior convictions reenter

¹ Michelle Natividad Rodriguez & Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records* (2016), <http://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/>.

society through sentence reduction for non-serious, nonviolent crimes, second chance opportunities, and other measures to reform the criminal justice system and end mass incarceration.² Here, WSLC is focused on ensuring that an individual with a thirty-year-old conviction, who has proven to well-respected members of society that she has the ability to function safely and effectively as a childcare worker, is provided her constitutionally-protected right to demonstrate to the Washington State Department of Early Learning (“DEL”) that she is qualified to work in her chosen profession, with dignity, and should not be consigned to a life bereft of the opportunity to pursue her liberty interest.

INTRODUCTION

People with arrest and conviction records form a shockingly large portion of the population both across the United States and in Washington. These individuals—disproportionately people of color—face an uphill battle when seeking work due to employer preferences and various legal restrictions. Such hiring barriers often deny people with records a means to support their families and communities. And their resulting unemployment weakens the economy and reduces public safety.

² WSLC Resolution #23 (2016), *available at* <http://www.wslc.org/2016-wslc-resolutions/#23>.

Even before submitting a single job application, people with records may find themselves barred from entering entire professions. Washington's tangle of occupational licensing laws excludes millions of residents with records from numerous desirable professions. The licensing disqualifications prescribed by the Department of Early Learning ("DEL") reveal the destructive impact of a lifetime, automatic, overbroad licensing ban on even the most dedicated of workers. Appellant Christal Fields is a qualified and committed childcare worker with a nearly 30-year-old robbery conviction. Yet even this old and unrelated conviction acts as an automatic bar to working in her chosen field. Because DEL's ban allows for no exceptions, Ms. Fields received no meaningful opportunity to argue that she poses no risk to children. In addition, because the ban is lifelong, the three decades that have passed since her conviction do not make a difference. DEL's inflexible ban merits review by this Court because hard-working people like Ms. Fields deserve to be fairly considered for professional licenses.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in Appellant's Petition for Review and the facts laid out in her Amended Supplemental Brief.

ARGUMENT

I. An Immense Segment of the Population—Disproportionately People of Color—Have Arrest or Conviction Records that Can Hinder Their Employment.

Over 70 million people—or nearly one in three U.S. adults—have an arrest or conviction record. Beth Avery, et al., Nat'l Emp't Law Project, *Fair Chance Licensing Reform* 5 (2017), <https://goo.gl/ozgupZ>. In Washington alone, an estimated 1.2 million individuals, or more than one-fifth of the state population, have a record. *Id.* at 29. Even more startling than the size of the population marked by the criminal justice system is the race disparity among these individuals. In Washington, black people are incarcerated at a rate of 1,272 per 100,000 residents—approximately six times the rate for white people.³ The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 5 tbl.1 (2016), <http://bit.ly/1ZOy1R4>. Nationally, arrests of African Americans are more than double what would be proportional to the size of the black population. *Compare* Fed. Bureau of Investigation, *Crime in the United States, 2016*, tbl. 21A (2017), <http://bit.ly/2gqjj4N> (noting 26.9 percent of 2016 arrests were of African Americans), *with* U.S. Census Bureau,

³ That number has worsened over the past fifty years; in 1968, African Americans were five times as likely as white people to be incarcerated. Janelle Jones, et al., Econ. Policy Inst., *50 Years After the Kerner Commission* 5 (2018), <https://goo.gl/6TzGZF>.

QuickFacts: United States, <http://bit.ly/2x4XU8o> (indicating that 13.3 percent of the 2016 U.S. population was African American).

Most incarcerated individuals eventually reenter their communities. In 2015, 21,939 people were released from Washington prisons. U.S. Bureau of Justice Statistics (“BJS”), *Prisoners in 2015*, at 11 tbl.7 (2016), <https://goo.gl/u8VJGx>. That number more than tripled in just fifteen years, with only 6,764 people released in 2000. *Compare id.*, with BJS, *Prisoners in 2007*, at 16 app. tbl.4 (2008), <https://goo.gl/zRNjh2>.

While it is in everyone’s interest for this large population to reenter their communities successfully, the stigma of criminal justice involvement often holds them back. What’s more, that stigma can have a lifelong impact on their job opportunities. Surveys indicate that nearly nine in ten employers perform background checks for some or all of their positions. Soc’y for Human Res. Mgmt., *Background Checking—The Use of Criminal Background Checks in Hiring Decisions* 3 (2012), <http://bit.ly/2wJxh7U>. When applicants reveal a record up front, their job prospects plummet, with the callback rate for white applicants cratering from 34 to 17 percent. Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 957–58 (2003). Employers penalize black applicants even more harshly, calling back only five percent of black applicants with a conviction record, which represents a nearly two-third reduction from

the callback rate for black applicants without a record. *Id.* Further study reveals that employers penalize women with records more severely than similarly situated men because women with records are viewed “as having committed two crimes—one against the law and one against social expectations of how women are supposed to behave.” Scott H. Decker, et al., *Criminal Stigma, Race, Gender & Employment* 56-57 (2014), <https://goo.gl/TD2CH6>.

Legal restrictions further compound the effects of employer screening by mandating background checks or disqualifying people with records from certain positions. A national inventory documents 342 laws and regulations of this kind in Washington. Council of State Gov’ts, Justice Ctr., *National Inventory of the Collateral Consequences of Conviction*, <http://bit.ly/2lFhpxP> (last visited Nov. 7, 2017) [hereinafter *CSG Inventory*].⁴

Before ever encountering barriers at the hiring stage, many people with records are screened out of entire professions at the licensing stage. Washington has the third highest rate of occupational licensure in the nation, with licensed workers comprising 30.5 percent of the workforce.

⁴ Select “Employment” from “Categories” dropdown menu, then select “Advanced Search,” and select “Washington” from “Jurisdiction” dropdown menu. Some of these restrictions are mandatory and others discretionary, but, in both cases, they frequently prevent people with records from obtaining employment.

The White House, *Occupational Licensing* 24 tbl.1 (2015), <https://goo.gl/HuRajy>. Licensing is even more pervasive in lower-income occupations that might otherwise offer entry-level work opportunities to formerly incarcerated people. Criminal justice involvement often forces people into unsteady jobs with little wage growth. Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 Am. Soc. Rev. 526, 528–29 (2002). Unfortunately, a nationwide review of 102 lower-income occupations—from security guards to dental assistants—revealed that over three-fourths require a license in Washington, which means that people with records are often denied access to those occupations. Dick M. Carpenter II, et al., Inst. for Just., *License to Work*, 21 tbl.4 (2d ed. 2017), <https://goo.gl/VkYbEp>.

Many licensing laws disqualify people with records. In Washington alone, the CSG Inventory documents 586 state-imposed occupational licensing restrictions against people with records.⁵ *CSG Inventory, supra*.⁶ These broad restrictions encroach further on the already

⁵ Among those restrictions, 360 are “permanent” disqualifications that could last a lifetime, and 217 are “mandatory/automatic” disqualifications for which licensing agencies have no choice but to reject an applicant. *CSG Inventory, supra*; see detailed instructions *infra* note 3).

⁶ Select both “Occupational and Professional Licenses and Certification” and “Business Licenses and Other Property Rights” from “Categories” dropdown menu, then select “Advanced Search” and select “Washington” from “Jurisdiction” dropdown menu. We selected both categories as the User Guide cautions that the “difference between

limited employment opportunities available to millions of Washingtonians with records,⁷ who are disproportionately people of color.⁸

II. The Public Benefits from Increased Employment Among People with Records—Not Policies that Irrationally Exclude Qualified Workers.

Barriers to work translate into an inability to provide for family members, often leaving those with records with no choice but to lean on their families for support. Nearly half of U.S. children have at least one parent with a record. Rebecca Vallas, et al., Ctr. for Am. Progress, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children* 1 (2015), <https://goo.gl/8c2BZL>. Meanwhile, a survey of family members reported that more than two-thirds of returning parents had difficulty paying child support. Tracey Lloyd, Urban Inst., *When Relatives Return* 15–16 (2009), <http://urbn.is/2iHDgnY>. One study of

professional and business licensure will not be clear, and a comprehensive search should select both categories.” See *CSG Inventory, User Guide*, Question and Answer 13, <http://bit.ly/2yLupcv>. Select “Permanent/Unspecified” from “Duration” dropdown menu for lifetime disqualifications, and select “Mandatory/Automatic” from “Types” dropdown menu for blanket disqualifications.

⁷ While no data is available on how many people are denied licenses by Washington agencies because of their records, a safe assumption is that a large number are impacted, given that over one-fifth of the state’s population has a record and nearly one-third of workers in the state have a license to do their jobs.

⁸ For a discussion of licensing bans’ disparate impact on people of color, please refer to the Petition for Review. See Pet. for Rev. 13–14. For a more detailed discussion of the issue, please refer to the amicus briefs filed by Legal Voice. See Br. of Amici Curiae Legal Voice et al. at 6–9, *Fields v. Washington Dep’t of Early Learning*, 200 Wn. App. 1027 (Ct. App. 2017); Memo. of Amici Legal Voice, et al. in Support of Pet. for Rev. 2–3.

women with felony records found that nearly two-thirds had to rely on a family member or friend for financial support eight to ten months after release. Nancy G. La Vigne, et al., Urban Inst., *Women on the Outside* 7 (2009), <http://urbn.is/2yZYmoP>. When parents are unable to work, the next generation of Washingtonians, particularly children of color, are deprived of the resources they deserve and the upward mobility they might otherwise achieve.

The employment barriers facing people with records create financial difficulties not just for individuals and their families; these barriers also undermine the overall economy. A study of 2014 data estimated that reduced employment prospects for people with records translated into a loss of about \$78 to \$87 billion in annual gross domestic product. Cherrie Bucknor & Alan Barber, Ctr. for Econ. & Policy Research, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies* 1 (2016), <https://goo.gl/h3L6wr>. By contrast, according to a 2007 analysis of Washington's criminal justice system, providing job training and employment to formerly incarcerated people reduced criminal justice costs and generated the equivalent of more than \$2,600 for each taxpayer in the state. Elizabeth K. Drake, et al., Wash. State Inst. for Pub. Policy, *Evidence-Based Public Policy Options to Reduce Crime and Criminal*

Justice Costs, 4 Victims & Offenders 170, 185 (2009). Putting formerly incarcerated people back to work significantly increases their lifetime earnings and, as a result, their contributions to the public coffers through income and sales tax payments. See Econ. League of Greater Phila., *Economic Benefits of Employing Formerly Incarcerated Individuals in Philadelphia* 8-14 (2011), <https://goo.gl/gKQpJA>.

Because employment is a crucial factor to reducing recidivism, eliminating barriers to work for people with records also enhances public safety. A 2011 study found that employment was the single most important influence on decreasing recidivism—two years after release, nearly twice as many employed people with records had avoided another brush with the law as those without jobs. Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind*, 28 Just. Q. 382, 397–98 (2011). In sum, the benefits of removing job barriers faced by people with records radiate broadly, benefiting all Washingtonians through improved safety and economic health.

III. Given the Substantial Public Interest in Removing Employment Barriers to People with Records, DEL’s Licensing Ban Should be Tailored to DEL’s Legitimate Goals and Restricted to a Defined Time Period.

The Court of Appeals forgot the axiom that “the rules of law should be . . . adaptable to the society they govern.” *State ex rel. Wash.*

State Fin. Comm. v. Martin, 62 Wn. 2d 645, 665 (1963). Ignoring real-world context and the significant implications of this case, the panel instead relied heavily on *In re Kindschi*, 52 Wn. 2d 8 (1958), a case decided long before mass incarceration beset the nation.⁹ Since the *In re Kindschi* decision in the late 1950s, the changes in the criminal justice system have helped to shape the legal landscape. After Congress outlawed race discrimination in employment via Title VII of the Civil Right Act of 1964 (“Title VII”), federal courts began to acknowledge the implications of Title VII for workers with records. *See, e.g., Green v. Mo. Pac. Railroad*, 523 F.2d 1290 (8th Cir. 1975). “Tough on crime” policies later took hold across the nation, and incarcerated populations have since skyrocketed. The Sentencing Project, *Criminal Justice Facts* (2017), <http://bit.ly/2jHETny>. Moreover, race disparities among the incarcerated population have worsened over the past fifty years. Janelle Jones, et al., Econ. Policy Inst., *50 Years After the Kerner Commission* 5 (2018), <https://goo.gl/6TzGZF>.

Policymakers in Washington and across the nation are realizing the need to address the fact that the number of people who have an arrest or conviction record that can hinder their employment and career options has

⁹ *See* Pet. for Rev. 8–9 (discussing the questionable analogy to *Kindschi*).

ballooned in recent decades. The Sentencing Project, *Criminal Justice Facts* (2017), <http://bit.ly/2jHETny>. Recognizing the importance of removing barriers to employment faced by that immense population with records, the Washington Legislature recently adopted a “ban the box” law. With the goal of increasing the chances that those with records will secure employment, the new “fair chance” legislation requires employers to remove questions about arrest and conviction history from job applicants and delay such inquiries and background checks until later in the hiring process. *See* 2d Subst. House Bill 1298 (2017-18) (signed into law by Governor Inslee on March 13, 2018); Beth Avery & Phil Hernandez, Nat’l Emp’t Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies* 18 (2018), <https://goo.gl/Wi183V>.

Because those marked by the criminal justice system are disproportionately people of color, barring people with records from employment opportunities implicates the issue of race discrimination.¹⁰ Acknowledging that automatic bans against hiring people with records may violate Title VII, the Equal Employment Opportunity Commission (“EEOC”) advises employers to avoid liability by forgoing automatic bans

¹⁰ One thing that hasn’t changed is the drastic difference between the black and white unemployment rate—the former remains double the latter, the same ratio as fifty years ago. Janelle Jones, et al., Econ. Policy Inst., *50 Years After the Kerner Commission* 3 (2018), <https://goo.gl/6TzGZF>.

and instead individually assessing job candidates with records and considering at least the nature of the offense, the nature of the job, and the time passed since the offense. EEOC, Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII, No. 915-002 (2012), <http://bit.ly/2y0HyNK>. By analogy, an automatic licensing ban like DEL's deserves caution as it ignores all nuance and needlessly excludes qualified applicants without allowing them a meaningful opportunity to demonstrate that they pose no safety risk.¹¹

Lifetime licensing bans are similarly unjustifiable: they ignore individuals' rehabilitation efforts as well as recidivism data. One notable study concluded that, six or seven years after release, the likelihood of committing an offense was only marginally higher for a formerly incarcerated person than for the general population. Megan C. Kurlycheck, et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483, 483 (2006). More recent research concluded that, after a relatively short time, ranging

¹¹ This arbitrary effect is further amplified by the overbroad coverage of DEL's ban. As highlighted by Appellant, most of the offenses listed in the ban "lack[] a rational connection" to DEL's goal of ensuring child safety. Pet. for Rev. 10; App's Am. Supp. Br. 14-15 ([T]he irrationality of DEL's lifetime ban is heightened by the inclusion of convictions that have nothing whatsoever to do with children—whether on the face of the criminal statute or in the facts of the conviction")

from three to seven years for different offenses, the probability of a new arrest for individuals with records fell even *below* the probability for the general population. *See* Alfred Blumstein & Kiminori Nakamura, *Extension of Current Estimates of Redemption Time* 37, 41 (2012), <https://goo.gl/Cbt1MF>. There is simply no empirical basis for a lifetime ban against those with a past record.

Despite over a decade of successfully caring for elders and children, Ms. Fields is forever disqualified from her chosen profession by DEL's automatic, overbroad ban. Her continuing efforts at rehabilitation are not important in this context; regardless of her skill, work ethic, and experience, Ms. Fields lacks even an opportunity to demonstrate that she is fit for her chosen occupation.

This Court has a chance to ameliorate the destructive impact of DEL's arbitrary ban. While public safety is certainly an important interest, so too is the economic security of millions of people with records and their families. Public safety does not justify DEL's harsh rule. Instead, restrictions should be tailored and time-limited in order to achieve the best outcomes for public safety.

CONCLUSION

For the forgoing reasons, Amici National Employment Law Project and Washington State Labor Council, AFL-CIO respectfully ask

the Court to hold that DEL's automatic, overbroad ban violates
Appellant's constitutional right to due process.

Respectfully submitted,

/s/ Rebecca Smith

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court of the State of Washington by using the Washington State Appellate Courts' Portal, which will send a notice of electronic filing to all counsel of record.

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NATIONAL EMPLOYMENT LAW PROJECT

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