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**SUPREME COURT OF THE STATE OF WASHINGTON**

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Christal Fields,

Petitioner,

v.

State of Washington Department of Early Learning,

Respondent.

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**BRIEF OF AMICI CURIAE LEGAL VOICE, NORTHWEST  
JUSTICE PROJECT, CIVIL SURVIVAL, THE  
INCARCERATED MOTHERS ADVOCACY PROJECT, THE  
PUBLIC DEFENDER ASSOCIATION, SURGE, AND SEIU 925**

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## **I. Introduction**

The Department of Early Learning (“DEL”) irrationally presumes that a child is safer with a person convicted of burglary five years after their conviction than with a person convicted of robbery ever. WAC 170-06-0120 (“the Rule”) imposes a permanent employment ban for certain convictions. This is an unjustified irrebuttable presumption that violates due process, gender discrimination protections, and privileges and immunities guarantees of the state and federal constitutions. Instead of protecting children, this Rule discriminates against women, people of color, and specifically women of color, who are the group most likely to be prohibited by the Rule from childcare work.

## **II. Identity and Interest of Amici Curiae**

Amici are non-profit legal and social justice organizations that work for gender and racial equality, and promote policies that mitigate the barriers that prevent people from thriving after incarceration. Individual statements of interest are set forth in Appendix A.

## **III. Statement of the Case**

Amici adopt the Appellant’s Statement of the Case.

#### **IV. Summary of Argument**

Many states, including our own, have recognized that criminal record-based laws prevent people with criminal histories from successfully reintegrating back into society.<sup>1</sup> As Ms. Fields argues, laws that create permanent employment bans – a collateral consequence imposed without sufficient attention to the harm caused – should, at the very least, be rational. Amici write separately for two purposes: to provide evidence of the disparate impact that the DEL Rule has not only on Ms. Fields, but on all women, particularly women of color; and to demonstrate that the Washington State Constitution requires heightened scrutiny of rules that harm people at the intersections of race, gender, and protected liberties like the right to pursue employment.

#### **V. Argument**

##### **A. DEL’s Rule disproportionately harms women of color.**

Women are the fastest growing incarcerated population in the United States. This country has only five percent of the world’s female population, but incarcerates 30 percent of the world’s female prisoners.<sup>2</sup>

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<sup>1</sup> For example, the Washington State Legislature has enacted restoration certificates for people with criminal records. *See* RCW 9.97.020.

<sup>2</sup> Aleks Kajstura & Russ Immarigeon, *States of Women's Incarceration: The Global Context*, Prison Policy Initiative (2011), <https://www.prisonpolicy.org/global/women>.

While incarceration is devastating regardless of the individual's gender, it comes with unique harms for women because of their already-disadvantaged position in society. Women who are or who have been incarcerated are more likely to have been physically or sexually abused.<sup>3</sup> Compared to others in society, formerly incarcerated women tend to have fewer employment opportunities, more childcare responsibilities, and were more likely to have been living in poverty before arrest.<sup>4</sup> DEL's Rule compounds these barriers by imposing an arbitrary lifetime punishment that disproportionately falls on women of color.

**1. Mass incarceration and its collateral consequences harm women of color.**

Racial disproportionality in incarceration is well documented. In Washington State, 73 percent of the state population is white, but white people make up only 60 percent of the incarcerated population.<sup>5</sup> In contrast, Black people make up only four percent of the state population

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<sup>3</sup> Melissa E. Dichter, *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update*, National Online Resource Center on Violence Against Women (July 2015), available at [http://vawnet.org/sites/default/files/materials/files/2016-08/AR\\_IncarcerationUpdate%20%281%29.pdf](http://vawnet.org/sites/default/files/materials/files/2016-08/AR_IncarcerationUpdate%20%281%29.pdf).

<sup>4</sup> Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned*, Prison Policy Initiative (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

<sup>5</sup> *Facts about Offenders in Confinement*, Dep't of Corr. Wash. State (2016), <http://www.doc.wa.gov/docs/publications/16-282-FC1.pdf>.

but are 18 percent of the prison population.<sup>6</sup> Across the country, Black women are three times more likely to spend time in prison than white women, although Black women are no more prone to criminalized behavior than white women.<sup>7</sup>

The overrepresentation of Black people in the criminal justice system is often the result of systemic prejudices.<sup>8</sup> Racial disparities start long before trial and sentencing, in the interactions between police and Black people. Historic over-policing of Black neighborhoods, higher rates of arrest and conviction, majority white juries, and disproportionately severe sentencing all contribute to this disparity.<sup>9</sup>

Indeed, Seattle has been under investigation by the Department of Justice (“DOJ”) for its pattern of racial profiling incidents.<sup>10</sup> The DOJ investigation raised questions about excessive force against minorities, over-policing, and higher rates of arrest of Black Seattleites for minor

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<sup>6</sup> *Id.*

<sup>7</sup> *Women of Color & Prisons*, Incite!, <http://www.incite-national.org/page/women-color-prisons> (last visited Mar. 20, 2018).

<sup>8</sup> Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 40-58 (2010).

<sup>9</sup> Alexander *supra* note 7.

<sup>10</sup> Investigation of the Seattle Police Department, U.S. Dep’t of Just. (Dec. 16, 2007), [https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd\\_findletter\\_12-16-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf).

offenses.<sup>11</sup> Minor misdemeanors and arrests that do not result in a conviction nonetheless add to an offender's criminal history, which in turn leads to more aggressive sentencing.<sup>12</sup>

Black girls face a unique form of discrimination.<sup>13</sup> They are more often criminalized for their reactions to sexual and physical trauma than their white counterparts, who are more frequently treated as victims and referred to child welfare and mental health systems.<sup>14</sup> This disturbing phenomenon, referred to as the “sexual abuse to prison pipeline,” shows that one of the *strongest* predictors of a Black girl entering the juvenile justice system is her status as a survivor of sexual abuse and trauma.<sup>15</sup> The same holds true for adult Black women. An overwhelming majority of

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<sup>11</sup> *Id.*

<sup>12</sup> Constitutional Rights Foundation, *The Color of Justice*, <http://www.crf-usa.org/brown-v-board-50th-anniversary/the-color-of-justice.html> (last visited Dec. 20, 2016).

<sup>13</sup> Kimberle W. Crenshaw, Priscilla Ocen, & Jyoti Nanda, *Black Girls Matter: Pushed Out, Overpoliced and Underprotected*, Center for Intersectionality and Social Policy Studies, African American Policy Forum (2015), [https://www.courts.wa.gov/content/publicUpload/MJC%20Meeting%20Materials/20150410\\_d.pdf](https://www.courts.wa.gov/content/publicUpload/MJC%20Meeting%20Materials/20150410_d.pdf).

<sup>14</sup> Malika Saada Saar, Rebecca Epstein, Lindsay Rosenthal, & Yasmin Vafa, *The Sexual Abuse to Prison Pipeline: The Girls' Story* (2015), [http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015\\_COP\\_sexual-abuse\\_layout\\_web-1.pdf](http://rights4girls.org/wp-content/uploads/r4g/2015/02/2015_COP_sexual-abuse_layout_web-1.pdf).

<sup>15</sup> Asha DuMontheir, Chandra Childers, & Jessica Milli, *The Status of Black Women in the United States*, The Institute for Women's Policy Research 122-27 (June 26, 2017), <https://iwpr.org/wp-content/uploads/2017/06/The-Status-of-Black-Women-6.26.17.pdf>.

Black women incarcerated today are victims of interpersonal violence and suffer from the effects of trauma.<sup>16</sup>

Bias in the criminal justice system also harms other women of color. For example, Native women are sent to prison at six times the rate of white women.<sup>17</sup> One 2017 study showed that Native American women are more often stopped as “suspicious persons” than any other women, while Black women and Latinas were more often stopped for alleged traffic violations.<sup>18</sup> For Latina women, incarceration rates are 1.2 times the rate of white women.<sup>19</sup> As women of color continue to be over-policed, increasing their representation in the criminal justice system, collateral consequences have destabilizing effects on communities of color.<sup>20</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System*, National Council on Crime and Delinquency, 3 (March 2009), [www.nccdglobal.org/sites/default/files/publication\\_pdf/created-equal.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf).

<sup>18</sup> Nicole Busker, et al. *American Indian women were disproportionately stopped, searched and arrested by police in Minneapolis in 2017* (Feb. 20, 2018), <https://www.minneapolisfed.org/indiancountry/research-and-articles/cicd-blog/american-indian-women-were-disproportionately-stopped-searched-and-arrested-by-police-in-minneapolis-in-2017>.

<sup>19</sup> *Fact Sheet on Justice Involved Women in 2016*, National Resource Center on Justice Involved Women (2016), <http://cjinvolvedwomen.org/wp-content/uploads/2016/06/Fact-Sheet.pdf>.

<sup>20</sup> *A Shared Sentence: the devastating toll of parental incarceration on kids, families and communities*, The Annie E. Casey Foundation 1-7 (April 2016), <http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>.

**2. DEL’s permanent childcare employment ban has a disparate economic impact on women of color.**

Incarceration is devastating to economic security – but it is particularly devastating to women of color, who already face income disparities that make them more likely to live in poverty. One of those disparities is the wage gap, which affects women of color most heavily.

Women of all races and ethnicities are paid less, for equal work, than white men.<sup>21</sup> Women in the workforce who do not have a college diploma are paid 30 percent less than men who have the same educational background.<sup>22</sup> The Washington Legislature recognized this disparity this year when it enacted the Equal Pay Opportunity Act, signed into law March 21, 2018. As the Legislature explains:

. . . despite existing equal pay laws, there continues to be a gap in wages and advancement opportunities among workers in Washington, especially women. Income disparities limit the ability of women to provide for their families, leading to higher rates of poverty among women and children.<sup>23</sup>

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<sup>21</sup> *Wage Gap State Rankings*, Nat’l Women’s Law Center (last modified Sept. 14, 2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/Wage-Gap-State-By-State-2017.pdf>.

<sup>22</sup> Anthony P. Carnevale et al., *The College Payoff*, Georgetown University Center on Education and the Workplace 10 (2011).

<sup>23</sup> H.B. 1506, 65th Leg., (2018) (enacted).

Add race, and the wage gap increases. In Washington, Black women are paid only 61.3 cents to every \$1.00 a man makes.<sup>24</sup> For women with a history of incarceration, the disparity is even worse. According to one survey, Black women who had been incarcerated were paid almost 50 percent less than women who had not been incarcerated, and 30 cents on the dollar as compared to men who had not been incarcerated.<sup>25</sup>

In addition, formerly incarcerated women are more likely to lack the educational credentials that lead to higher wage work. Approximately 40 percent of people incarcerated in the early 2000s lacked a high school diploma or its equivalent.<sup>26</sup> Of those that did complete high school, less than half attended postsecondary education for any length of time.<sup>27</sup> This lack of education serves to limit the job prospects for people with criminal records, and is reflected in the fact that formerly incarcerated women earn 42 percent less than people who were never incarcerated.<sup>28</sup>

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<sup>24</sup> *The Wage Gap for Black Women State Rankings: 2015*, National Women's Law Center (last updated Mar. 2017) <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/12/Black-Women-State-by-State.pdf>.

<sup>25</sup> Rabuy *supra* note 4.

<sup>26</sup> *Education and Correctional Populations*. U.S. Dep't of Just. 1 (Jan. 2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> Rabuy *supra* note 4.

These employment barriers are exacerbated by the fact that state and employer-imposed collateral sanctions limit the positions available to people who lack a college degree.<sup>29</sup> This case illustrates the problem. Childcare workers are 95 percent female, while construction workers are 95 percent male.<sup>30</sup> Neither career path typically requires a high school or college diploma. However, childcare workers in Washington earn an average of \$25,110 a year, while salaries for construction workers average \$45,000 a year.<sup>31</sup> Childcare workers are required to pass mandatory background checks. This is not the case for construction workers. A woman with a criminal conviction that prevents her from working with children is limited to working at jobs that do not require background checks – often at a much lower salary.

Thus, because women are the fastest growing incarcerated population, and female-dominated jobs are often low paying and regulated by collateral sanction laws, DEL’s Rule disfavors women—specifically women of color.

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<sup>29</sup> Shawn D. Bushway & Gary Sweeten, *Abolish Lifetime Bans For Ex- Felons*, 6 *Criminology & Pub. Pol* 697, 1-2 (2007).

<sup>30</sup> U.S. Census Bureau, *Full-Time, Year-Round Workers and Median Earnings in the Past 12 Months by Sex and Detailed Occupations: 2014* (2016).

<sup>31</sup> ChildCare Aware of America, *State Child Care Facts in the State of: Washington* (Oct. 2016) <http://usa.childcareaware.org/wp-content/uploads/2016/10/Washington.pdf>.

**B. This Court should apply heightened scrutiny to the DEL’s Rule, because its disparate impact on women of color violates the Washington State Constitution.**

Analyzing the barriers facing women of color is rarely presented for a court’s consideration because the dominant antidiscrimination law precludes such intersectional claims.<sup>32</sup> A complainant is forced to choose their race *or* gender as the primary cause of discrimination; however, those two identities cannot be separated.<sup>33</sup> This means that structural discrimination is likely to remain unaddressed by courts.<sup>34</sup> Absent consideration of intersectional discrimination, women of color will continue to be uniquely harmed, without remedy. The Washington Constitution, however, ensures that state action that discriminates at the intersections of race and gender is subject to heightened scrutiny.

**1. DEL’s mandatory childcare employment ban violates article I, section 12 of the Washington Constitution.**

The U.S. Equal Employment Opportunity Commission (EEOC) has cautioned employers that screening out job applicants with criminal records would cause a disparate impact based on race or ethnicity and

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<sup>32</sup> Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. Chi. Legal F., 131, 139 available at: <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>.

<sup>33</sup> Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color* 43 Stanford L. Rev. 1241 (1991).

<sup>34</sup> Crenshaw *supra* 32.

thereby could violate Title VII of the Civil Rights Act.<sup>35</sup> For the same reasons, the regulatory ban at issue here also has a disparate impact on people of color. As demonstrated below, art. I, §12 of the Washington Constitution requires courts to subject a regulation that has a disparate impact on the basis of race to a higher level of scrutiny, requiring the least drastic alternative to support a compelling state interest. This Court has already determined that art. I, §12 is subject to an independent analysis from the Equal Protection Clause of the Fourteenth Amendment.<sup>36</sup> Thus, the question of *whether* an independent analysis is needed to determine if art. I, §12 extends broader rights than its federal counterpart is resolved and is no longer subject to consideration under the six *Gunwall* criteria.<sup>37</sup> However, the Court may use the *Gunwall* criteria,<sup>38</sup> among others, to determine the scope of protection art. I, §12 affords in a given context.<sup>39</sup>

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<sup>35</sup> See EEOC Enforcement Guidance No. 915.002 on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012).

<sup>36</sup> *Grant Cty. Fire Prot. Dist., No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 805, 83 P.3d 419 (2004).

<sup>37</sup> *Madison v. State*, 161 Wn.2d 85, 94, 163 P.3d 757 (2007).

<sup>38</sup> The six *Gunwall* criteria are: (1) the textual language of the state constitution; (2) textual differences between parallel provisions of the state and federal constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) state or local concerns. *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

<sup>39</sup> *Madison v. State*, 161 Wn.2d at 95.

Under art. I, §12, the Court must first determine that there is a privilege or immunity subject to the constitutional protections. The ability to work in the occupation of one's choice is such a protected privilege.<sup>40</sup>

Art. I, §12 provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens . . . .

The text of art. I, §12 varies markedly from the federal Equal Protection Clause, which reads: "No State shall . . . deny to any person within its jurisdiction equal protection of the laws." The textual differences between the parallel provisions of the state and federal constitutions, as well as structural differences (*Gunwall* criteria one, two, and five), justify a differing application to the Rule.

Unlike the Equal Protection Clause, art. I, §12 does not require the infringement to be on a recognized fundamental right or a specifically

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<sup>40</sup> *E.g.*, *Nebbia v. New York*, 291 U.S. 502, 527-28, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (noting that the right to work in a particular profession is a protected right and subject to rational regulation); *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 n.4 (9th Cir. 1994) ("it is well-recognized that the pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations"); *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220-21, 143 P.3d 571 (2006) ("[C]ourts have repeatedly held that the right to employment is a protected interest subject to rational basis review."). *See also Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) (noting that once driver's licenses are issued, they may not be taken away without procedural due process as "their continued possession may become essential in the pursuit of a livelihood").

protected class. State regulation that imposes a class-based disqualification from the exercise of one's protected privilege to work is enough to come within art.I, §12,<sup>41</sup> even if specific choice of employment is not a fundamental right.<sup>42</sup> Moreover, art. I, § 15 of the state constitution prevents against "forfeiture of estate" based on a criminal conviction. This provision counters the common law principle that a person convicted of a felony was considered "civilly dead."<sup>43</sup> Thus, the Washington Constitution recognizes that, except in very limited situations expressly set out therein (e.g., voting),<sup>44</sup> no person or class of persons is to suffer diminishment in dignity or humanity as a result of a criminal conviction.

Washington State policy encourages and assists rehabilitation of felons, and acknowledges that the opportunity to secure employment or to pursue an occupation is an essential ingredient of rehabilitation and assuming the responsibilities of citizenship.<sup>45</sup> The Legislature does not preclude an agency from *considering* prior convictions. It states, however, that absent another provision of law to the contrary, the state will not

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<sup>41</sup> *Hanson v. Hutt*, 83 Wn.2d 195, 201, 517 P.2d 599 (1973) (finding that disqualification from unemployment benefits due to pregnancy violates article I, § 12).

<sup>42</sup> *Hardee v. State, Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011).

<sup>43</sup> *In re Walgren*, 104 Wn.2d 557, 569, 708 P.2d 380 (1985).

<sup>44</sup> *Madison v. State*, 161 Wn.2d at 94.

<sup>45</sup> RCW 9.96A.010.

disqualify a person from employment or from pursuing or engaging in any occupation or business for which a state license, permit, certificate or registration is required solely because of a prior conviction of a felony.<sup>46</sup>

Ms. Fields, a Black woman, is simply asking that she not be disqualified from employment based *solely* on a prior conviction. She is challenging the “other provision of law” – DEL’s list – that brings her situation outside the expressed state policy. Constitutional and common law history and pre-existing state law<sup>47</sup> support a more protective application of art. I, §12 to the regulatory disqualification at issue.

**2. Washington courts recognize that disparate impacts based on protected classifications may be subject to heightened scrutiny under art. I, §12.**

In *Macias v. Dept. of Labor and Industries*<sup>48</sup> this Court determined that the statutory exclusion of seasonal workers who earned less than \$150 from the workers compensation system had a disparate racial impact since 73 percent of farmworkers are of Hispanic descent. Although the decision was based on violation of the fundamental right to travel, this Court

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<sup>46</sup> RCW 9.96A.020.

<sup>47</sup> *Gunwall* criteria 3 and 4.

<sup>48</sup> *Macias v. Dept. of Labor and Industries*, 100 Wn.2d 263, 271, 275, 668 P.2d 1278 (1983).

opined that disparate impact could be analyzed under a higher level of scrutiny than rational basis.<sup>49</sup>

Similarly, in *Hanson v. Hutt*,<sup>50</sup> this Court applied heightened scrutiny to find that the pregnancy disqualification from unemployment insurance violated art. I, §12 because it had a disparate impact on women.<sup>51</sup> And in *Fusato v. Washington Interscholastic Activities Association*, the Court of Appeals applied strict scrutiny to an agency rule restricting transfer students' participation in varsity sports unless their family moved to the district with them.<sup>52</sup> Ruling on federal equal protection grounds, the court found the rule had a disparate impact on foreign students and therefore discriminated on the basis of national origin and alienage, subjecting the rule to heightened scrutiny.<sup>53</sup>

State judicial policy and local concerns (*Gunwall* criterion six) also support heightened scrutiny of classifications arising from the criminal justice system that disparately impact people of color. For example, this

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<sup>49</sup> *Id.* at 271.

<sup>50</sup> 83 Wn.2d 195, 517 P.2d 599 (1973).

<sup>51</sup> *Id.* at 198 (As explained below, the requirement that courts apply strict scrutiny to sex-discriminatory laws in Washington State has been replaced by a higher standard under the state Equal Rights Amendment – such laws are absolutely forbidden. *Marchioro v. Chaney*, 90 Wn.2d 298, 582 P.2d 487 (1978). However, this Court's application of strict scrutiny to a protected class under article I, §12 remains good law.)

<sup>52</sup> 93 Wash. App. 762, 764-65, 970 P.2d 774 (1999).

<sup>53</sup> *Id.* at 769-70.

Court created the Minority and Justice Commission to ensure that the state's justice system meets the needs of "all persons who constitute the diverse populations we serve, with particular concern for the needs of persons of color who represent various racial, ethnic, cultural and language groups."<sup>54</sup> Research presented at a Commission-sponsored symposium in 2015 demonstrated that the racial disparity in the criminal justice system flows into racial disparity in the success of re-entry:

In Washington, African Americans and American Indians are incarcerated at rates higher than the national average. Washington has also seen an increase in the proportion of the population that has been convicted of a felony offense, thus, carrying the stigma of a criminal conviction, which is exacerbated by the collateral consequences these individuals face. Additionally, criminal records are now more widely available and easily retrievable due to increased access to information through technology... Consequently, people leaving prisons and jails, as well as those contending with a criminal conviction absent incarceration, face considerable reentry challenges and barriers to success.<sup>55</sup>

The impact of criminal convictions on racial discrimination in employment and laws prohibiting such discrimination support heightened scrutiny of legislative classifications having disparate impact on the basis of race and gender under art. I, §12.<sup>56</sup> Applying such scrutiny, DEL's

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<sup>54</sup> Order Renewing the Minority & Justice Comm'n, No. 25700-B-563, 1.

<sup>55</sup> *2015 Minority and Justice Commission Annual Report* 14 (2015).

<sup>56</sup> RCW 49.60.030(1)(a).

permanent disqualification from childcare work based on a 28-year-old conviction violates art.I, §12. As Ms. Fields argues, the Rule does not withstand rational basis scrutiny. There is even less justification when heightened scrutiny applies. Given the “hybrid” situation of infringing on the privilege to engage in one’s chosen employment in combination with the disparate impact on the basis of race and gender, heightened scrutiny is required.<sup>57</sup> Because race is a suspect classification, the state must demonstrate a compelling state interest, and the method used to achieve its objective must be the least restrictive.<sup>58</sup>

The state has no compelling interest in permanently disqualifying persons with a criminal conviction for attempted robbery from childcare employment. Old convictions do not *ipso facto* create a risk for children, especially absent an exploration of the circumstances leading to the conviction and the subsequent conduct of the person convicted. Even given the state’s compelling interest in the protection of children, the

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<sup>57</sup> See *First United Methodist Church of Seattle v. Hearing Exam’r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 248, 916 P.2d 374 (1996) (a disparate impact on religious institutions posed a threat to both the free exercise of religion and free speech, it was “a ‘hybrid’ situation requiring a higher level of scrutiny”); *Macias*, 100 Wn.2d at 271 (analyzing whether heightened scrutiny is appropriate for regulation that disparately impacts racial minority and restricts the fundamental right to travel).

<sup>58</sup> *Fusato*, 93 Wn. App. at 768-69 (citing *Westerman v. Cary*, 125 Wn.2d 277, 294, 892 P.2d 1067 (1994)).

blanket ban is too broad. Rather, considering a conviction along with the opportunity to demonstrate mitigation, rehabilitation, and evidence of suitability to provide childcare would allow DEL to actually determine risk of potential harm to children.<sup>59</sup> WAC 170-06-0120 fails the test of strict scrutiny under art. I, §12.

**3. The Rule’s disparate impact on women violates the Washington State Equal Rights Amendment (ERA).**

Although the Privileges & Immunities Clause should invalidate the Rule, there is an additional reason for this Court to strike down the DEL’s application of this Rule to Ms. Fields. Under the Washington Constitution, gender-discriminatory laws are not only subjected to strict scrutiny under the state equal protection analog, the privileges and immunities clause.<sup>60</sup> They are *prohibited* by the Equal Rights Amendment, Article XXXI, § 1.

The ERA provides that “[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex. Its protection goes “beyond [that] of the equal protection guaranty under the federal constitution.”<sup>61</sup> Indeed, “[t]he ERA absolutely prohibits

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<sup>59</sup> See *In re Walgren*, 104 Wn.2d at 569 (discussing the history of increasingly restoring a convicted felon’s civil rights).

<sup>60</sup> See *Maxwell v. Dep’t of Soc. & Health Servs.*, 30 Wn. App. 591, 594, 636 P.2d 1102 (1981), (citing *Darrin v. Gould*, 85 Wn.2d 859, 868, 540 P.2d 882 (1975)).

<sup>61</sup> *State v. Burch*, 65 Wn. App. 828, 837, 830 P.2d 357 (1992), (citing *Darrin v. Gould* at 877 and *Marchioro v. Chaney*, 90 Wn.2d at 305).

discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional ‘strict scrutiny.’”<sup>62</sup>

While most ERA cases address explicit gender classifications, this Court’s analysis in *State v. Brayman* demonstrates that laws that have a disparate impact on women may also violate the ERA.<sup>63</sup> As explained above, the disparate impact of the DEL’s Rule is beyond question. It is well documented that childcare is a field dominated by women. Thus, any prohibitions on access to work in childcare are bound to fall more heavily on women. It is also beyond dispute that women, especially women of color, are currently incarcerated at unprecedented rates, and when they leave prison, they face numerous restrictions on access to work. While formerly-incarcerated men also face such consequences, they have, by virtue of gender, more access to professions that do not impose a permanent ban on people with criminal convictions.<sup>64</sup> Employment

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<sup>62</sup> *Southwest Wash. Chapter, Nat’l Elec. Contractors Ass’n v. Pierce County*, 100 Wn.2d 109, 127, 667 P.2d 1092 (1983), (citing *Darrin v. Gould* at 872).

<sup>63</sup> *State v. Brayman*, 110 Wn.2d 183, 201-204, 751 P.2d 294 (1988) (appellants argued that a blood alcohol test could result in a disproportionate number of women drivers violating the legal limit for blood alcohol level. This Court explained that the plaintiffs had not proved that the test in question actually had a disparate impact on women).

<sup>64</sup> The DEL may argue that the sexism in sorting women and men into fields like childcare versus construction is not of its making, and thus its rule is not the source of the gender disparity identified here. But DEL is responsible for ensuring that its rules do not undermine what has been identified by this Court repeatedly as a state interest of the highest order: the interest in eradicating gender discrimination against women. See *Darrin v. Gould* at 877 (“The overriding compelling state interest as adopted by the

inequities based on gender are exactly the kind of societal discrimination that the ERA was adopted to eradicate.

Ending sex discrimination is a state interest of the highest order.<sup>65</sup> This imperative is even more urgent because the disparate impact here is compounded by gender and race. The Washington Constitution can – and must – account for this double discrimination.

**VI. Conclusion**

For the foregoing reasons, Amici urges the Court to reverse the Court of Appeals decision and declare the DEL Rule invalid as a matter of state constitutional law.

Respectfully submitted this 23rd day of March, 2018.

**Legal Voice**



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Sara L. Ainsworth, WSBA #26656  
Priya J. Walia, Ohio SBA #95771

**Northwest Justice Project**



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**by** \_\_\_\_\_  
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*Attorneys for Amicus Curiae*

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people of this state in 1972 is that: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.").

<sup>65</sup> See, e.g., *Darrin v. Gould* at 877.

## **CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on March 23, 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.

DATED: this 23rd day of March, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Sara Ainsworth', with a long horizontal line extending to the right.

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Sara Ainsworth, WSBA #26656  
**LEGAL VOICE**  
907 Pine Street, #500  
Seattle, WA 98101

# Appendix A

### **Interest of Amicus Curiae**

**Legal Voice** is a regional non-profit public interest organization that works to advance the legal rights of all women and girls in the Pacific Northwest through litigation, legislative advocacy, and legal rights education. Since its founding in 1978 as the Northwest Women’s Law Center, Legal Voice has long experience advocating for legal protections for incarcerated women, including bringing cases in Washington State to protect imprisoned women’s rights to health care, equal educational opportunities, and freedom from shackling during childbirth. In addition, Legal Voice has worked to advance women’s economic security by supporting policies that help women in the workplace, including paid leave for survivors of gender-based and intimate partner violence, paid family leave, “ban the box” laws that limit pre-employment inquiries about applicants’ criminal history, pregnant workers’ rights, and equal pay. With an unprecedented number of women incarcerated in Washington State and the rest of the nation, Legal Voice is concerned that barriers to employment upon release will further harm the economic security of formerly-incarcerated women and their families.

**Northwest Justice Project (NJP)** is the largest provider of free civil legal services to low-income people in Washington. As a member of the Alliance for Equal Justice, NJP is committed to the goals of the Alliance’s Race Equity Justice Initiative (REJI). The REJI goal is to address and mitigate the impacts of structural racism within the Washington State systems of justice. NJP has also had a multi-year Strategic Advocacy Focus (SAF) on addressing systemic barriers to employment, including barriers arising from policies and actions of state agencies. This case, which addresses a mandatory barrier to employment based on an old criminal conviction is squarely within these two key initiatives. This case squarely addresses the disproportionate representation of people of color in the criminal justice system, and the ongoing and permanent barrier to employment imposed by the mandatory policy at issue in this case. NJP is uniquely situated to address the intersection of these issues.

**Surge Reproductive Justice** is a non-profit organization in Washington State working to further racial and reproductive justice by mobilizing communities and advocating for policy change. Surge stands with communities whose bodies, lives, and families have been subject to state and social control. Surge works alongside incarcerated and formerly-

incarcerated people who are trying to preserve and provide for their families despite their past convictions and time away in prison. Legal barriers to employment only add to the challenges that formerly incarcerated people face when returning to their homes and families.

**Civil Survival** is an organization formed to advance the rights of formerly incarcerated individuals. The organizational goal is to create a framework and structure within which formerly incarcerated individuals can lead and effect change through advocacy efforts. The organization teaches the community about the importance of using individual voices and experiences to educate policy makers, with the goal of breaking the cycle of homelessness and poverty. Civil Survival leads practical workshops on community organizing and offers legal educational materials to assist formerly incarcerated and other marginalized groups in navigating key areas of reentry, including the area of employment for those with prior convictions. Civil Survival's interest as amicus is in increasing employment access for formerly incarcerated individuals.

**The Public Defender Association (PDA)** advances social and racial equity and community health through reform of the criminal justice system. Grounding reform in a public health and safety framework, PDA develops new strategies and implements models that improve on conventional responses to crime and public order issues. In collaboration with community and government partners, we use policy advocacy, organizing, litigation, and public education to achieve our goals. PDA advocates on behalf of individuals who are currently or likely to be engaged by the criminal justice system. PDA has engaged in initiatives that increase reentry success for individuals engaged in the criminal justice system and PDA's interest here is in successful reentry through access to employment for those individuals.

**SEIU 925** represents early learning child care providers who are part of the 17,000 SEIU 925 members in Washington who work in education from early learning through higher education and who work in local government and non-profits. We provide quality public services to our communities across the state. Our mission is to win political and economic power for working people to advance the well-being of our members, their families and all working people.

**The Incarcerated Mothers Advocacy Project (IMAP)** is a coalition of law students, lawyers, incarcerated, formerly incarcerated, and anti-racist

organizers that provide resources and support that heal the relationships harmed by incarceration. We envision a world where families can be together & thrive, free from the prison industrial complex. We currently provide legal education and information to help prevent the separation of incarcerated and formerly incarcerated parents from their children. We believe that the incarceration of womxn, and further, the separation of incarcerated parents from their children due to incarceration, is a form of violence and reproductive oppression. We envision a day in which womxn of every color, ability, class and sexual orientation are able to help shape the policies that affect them and their families, and these rights would not only be respected but also supported. In addition, IMAP supports increasing access to resources for formerly incarcerated womxn, including access to employment.

# LEGAL VOICE

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