No. 51371-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ANA GARCIA; CARMEN PACHECO-JONES; and NATALYA SEMENENKO,

Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF WASHINGTON; SECRETARY OF THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondents.

BRIEF OF AMICUS CURIAE LEGAL VOICE

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I. INTRODUCTION

The Department of Social and Human Services' (DSHS) directive at issue here—effectively barring people with CPS findings of abuse or neglect from employment as caregivers to vulnerable adults—disproportionately affects women and women of color. Under the guise of protecting vulnerable adults, these policies violate both Washington's Equal Rights Amendment and Washington's Privileges & Immunities Clause. While DSHS undoubtedly has an interest in protecting vulnerable individuals, DSHS must also respect the constitutional rights of those affected by the Directive.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of *amicus* is set forth in the Motion for Leave to File Amicus Curiae Memorandum, filed with this Memorandum.

III. STATEMENT OF THE CASE

Amicus adopts the Appellant's Statement of the Case.

IV. SUMMARY OF ARGUMENT

Appellants argue that the laws creating a thirty-five-year employment ban—a collateral consequence imposed without sufficient attention to the harm caused—should, at the very least, be rational. *Amicus* writes separately for two purposes: to provide evidence of the disparate impact the DSHS directive has on women, particularly women of color;

and to demonstrate that because of that disparate impact, the Rules violate the constitutional protections of the Equal Rights Amendment and Privileges & Immunities Clause of the Washington Constitution.

V. ARGUMENT

A. The Directive Has a Disparate Impact on Women, Particularly Women of Color.

The DSHS directive under RCW 74.39A.056, RCW 26.44.031, and RCW 43.43.832 ("the Directive") disqualifies a person seeking employment as a caregiver of vulnerable adults for thirty-five years if the person has a founded finding of child abuse or neglect. This Directive has a significant and negative effect on women and women of color in particular, because caregivers of vulnerable adults are primarily women and disproportionately women of color.[1] Moreover, women of color are overrepresented in findings of child abuse and neglect as demonstrated below. The Directive thus disparately impacts women and women of color, for whom employment opportunities are already limited, and bars them from an entire field of work.

[1] "Caregivers of vulnerable adults," "caregivers," and "homecare workers' will all be used interchangeably throughout the brief. "Homecare worker" is a common term for caregivers of vulnerable adults that is used by government and labor organizations in this field.

1. Homecare Workers are Primarily Women and Women of Color.

Nationally, the homecare workforce is overwhelmingly female. Women make up 89 percent of homecare workers.[2] The gender disparity in the Washington homecare industry aligns with national figures: a 2012 analysis found that women made up 85 percent of homecare workers in Washington.[3]

The ratio of people of color in the caregiving field is similarly skewed. In 2015, African Americans made up only 12 percent of the national workforce, but 28 percent of homecare workers. Likewise, Latinos made up 17 percent of the national workforce, but 21% of homecare workers.[4] In Washington, specifically, homecare workers are disproportionately people of color. For example, although Asian/Pacific Islanders make up 7.8 percent of Washington's population they make up 14 percent of the homecare field in the state.[5]

Homecare workers are also poorer and less educated than the general workforce. Nationwide, only 18 percent of homecare workers

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[2] Paraprofessional Healthcare Inst., U.S. Home Care Workers: Key Facts 3 (Paraprofessional Healthcare Inst.).

[3] Serv. Emp. Int'l Union, 775 Washington State's Home Care Workers 2012 (Serv. Emp. Int'l Union 2012) ("SEIU").

[4] Bureau of Labor Statistics, Labor Force characteristics by race and ethnicity 2015, https://bls.gov/opub/reports/race-and-ethnicity/2015/home.htm; Key Facts, *supra*. at 3.

[5] SEIU, *supra*.

have a college degree, compared to 40 percent of all working Americans. And the median income of homecare workers is $13,800 compared to $30,530 for working Americans overall.[6] Data from Washington correlates with these figures, showing only 18 percent of caregivers have a college degree, and a third of homecare workers and their families in Washington live below the federal poverty threshold.[7]

Women of color who work in homecare are particularly likely to be low-income and lack education. For example, women of color who are homecare workers are twice as likely as their white counterparts in the homecare field to have less than a high school education, and are more likely to live in poverty and rely on public assistance.[8]

2. Women and Women of Color are More Likely to Have Founded Findings Than Men Because They are More Likely to be Subject to Intervention by the Child Welfare System.

Research shows that women and women of color are disproportionately targeted by the child welfare intervention system. Gender and race contribute to that disparity, as well as aggravating factors

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[6] Paraprofessional Healthcare Inst., U.S. Home Care Workers: Key Facts 5 (Paraprofessional Healthcare Inst. 2017); Vernon Brundage, Profile of the Labor Force by Educational Attainment 4 (Bureau of Labor Statistics 2017); Kimberly Amadeo, *Average Income in the USA by family and household*, The Balance, May 23, 2018.

[7] Ctr. for Health Workforce Stud., Home Care Aides in Washington State: Current Supply and Future Demand 1 (Univ. of Wash. 2011); SEIU, *supra*.

[8] Stephen Campbell, Racial and Gender Disparities within the Direct Care Workforce: Five Key Findings 3-4 (Paraprofessional Healthcare Inst. 2017).

that are directly linked to gender and race, such as poverty and single motherhood. For this reason, women are more likely to receive founded findings than men.[9] This is unsurprising in light of the fact that women are more likely to be primary caretakers of children than men.[10]

Additionally, founded findings of child abuse or neglect are made disproportionately by race. "Families of color are disproportionately reported for abuse and neglect, and their cases are more likely to be substantiated at investigation than white, non-Hispanic families."[11] This is despite the fact that, in general, the rate of child maltreatment among black and white families is about the same.[12] Racial bias in the child welfare system is well-documented. Research shows that "race affects the decisions to provide services and to remove" in that case workers are more likely to intervene with respect to black families, all other factors being

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[9] Child. Bureau, Child Maltreatment 2016 23 (Child. Bureau eds., 2016).

[10] In a recent survey of two parent households, approximately 60 percent say the mother plays a larger role in managing their children's schedules and activities, while just 5 percent say the father does more. Regarding care of sick children, 55 percent say the mother does more while just 4 percent say the father does more. Pew Research Ctr., *Raising Kids and Running a Household: How Working Parents Share the Load*, Pew Research Ctr., Nov. 4, 2015, http://assets.pewresearch.org/wp-content/uploads/sites/3/2015/11/2015-11-04_working-parents_FINAL.pdf. Further, of the 11 million single-parent families in the U.S., 8.5 million are single-mother families. U.S. Census Bureau, *The Majority of Children Live with Two Parents, Census Bureau Reports*, U.S. Census Bureau, Nov. 17, 2016, https://www.census.gov/newsroom/press-releases/2016/cb16-192.html.

[11] Child. Bureau, Racial Disproportionality and Disparity in Child Welfare 9 (Child. Bureau eds., 2016).

[12] Racial Disproportionality, *supra*. at 25.

equal.[13] For instance, when shown pictures of a messy living room, social workers were more likely to state that the situation warranted reporting if the child was black as opposed to white.[14]

Indeed, on a systemic level, "white, middle class family values tend to be the standard by which culturally diverse parents and families are compared."[15] Standards that emerge from this bias—such as a belief that acceptable parenting requires constant adult supervision of children, separate bedrooms for each child, and maintaining a household with a telephone—may be the norm for middle-class white families, but may be impractical for poorer families. Meanwhile, lack of adequate housing and supervision are often reasons underlying intervention by the child welfare system.[16] Research has also suggested that social workers may mislabel traditional African American methods of child supervision as neglect.[17]

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[13] Stephanie L. Rivaux et. al, *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 Child Welfare 151 (2008).

[14] Sheila D. Ards, et. al, *Racialized Perceptions and Child Neglect*, 34 Child Youth Serv. Rev. 1480 (2012).

[15] U. of C. at Berkeley, Understanding and Addressing Racial/Ethnic Disproportionality in the Front End of the Child Welfare System 3 (U.C. at Berkeley eds., 2005).

[16] Dorothy Roberts, Shattered Bond: The Color of Child Welfare 35-36 (Basic Civitas Books, 2002).

[17] Lynetta Mosby et al., Troubles in Interracial Talk About Discipline: An Examination of African American Child Rearing Narratives, 30 J. of Comp. Fam. Stud. 489, 515 (1999).

Other intersecting factors exacerbate gender and race bias in the child welfare intervention system, most notably poverty. Research has shown that reductions in assistance to needy families, if not "offset by income supplemented from earnings of food stamp benefits, are positively associated with the likelihood of having a neglect report."[18] Furthermore, poverty places families in closer proximity to social service systems, which "may further increase their exposure to mandated reporters."[19] Public service providers, such as public health clinics or buses, are more likely to report maltreatment than private providers, and poor families rely on public services far more than more affluent families.[20]

This bias impacts women and women of color disproportionately.[21] In the United States, 16 percent of women and girls live below the federal poverty line compared to 13.4 percent of men and boys.[22] Unequal pay is an exacerbating factor; in general, women make 21% less than men, and mothers make 29 percent less than fathers.[23]

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[18] Racial Disproportionality, *supra*. at 22.

[19] Child. Bureau, Racial Disproportionality and Disparity in Child Welfare 6 (Child. Bureau eds., 2016).

[20] Roberts, *supra*. at 32.

[21] Further, these poverty figures correlate with the high rates of poverty among homecare workers in particular noted earlier.

[22] Cynthia Hess & Stephanie Román, Briefing Paper 1 (Inst. For Women's Pol'y Res. eds., 2016).

[23] Nat'l Women's Law Ctr., The Wage Gap Over Time 1 (Nat'l Women's Law Ctr. 2015); Nat'l Women's Law Ctr., The Wage Gap for Mothers by Race, State by State,

Women of color face higher rates of poverty and deeper unequal pay disparities than white women: black women earn 36 percent less and Hispanic women earn 44 percent less than white men.[24] African-American children are three times more likely to live in poverty than white children.[25] In Washington, 9.8 percent of whites live in poverty while the percentage for African Americans is 23 percent. Native Americans fare even worse, with 26.8 percent living in poverty.[26] Thus, women of color face an even greater likelihood of being subject to the poverty bias in the child welfare system.

The child welfare system is also weighted against single mothers, which disproportionately impacts women of color. Single parent families face the highest rate of founded findings.[27] The majority of single-family parents are single mothers.[28] The inherent bias against poverty overlaps with single motherhood to inform the high rate of founded findings among single mothers, with women of color particularly impacted—more than

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Nat'l Women's Law Ctr., https://nwlc.org/resources/the-wage-gap-for-mothers-state-by-state-2017/ (last visited July 2, 2018).

[24] "Poverty has had a persistently strong relation to minority status in the United States." Ctr. for the Study of Social Pol'y, Disparity and Disproportionality in Child Welfare: Analysis of the Research 11 (Alliance for Racial Equity in Child Welfare, 2011).

[25] *Id*.

[26] Talk Poverty, https://talkpoverty.org/state-year-report/washington-2017-report/ (last visited Jun. 25, 2018).

[27] NIS-4, *supra*. at 12.

[28] Dawn Lee, *Single Mother Statistics*, Single Mother Guide, Jan. 10, 2018.

1 in 3 single mother families lived in poverty in 2018, with women of color faring worse than their white counterparts.[29]

Thus, the central factors of gender and race, combined with the exacerbating factors of poverty and single motherhood, explain why women, and women of color in particular, are subject to heightened intervention by the child welfare system and overrepresented in founded findings. The race and gender composition of caregivers compounded by the high rates of child welfare system intervention that women and women of color experience means that the Directive disparately impacts women and women of color.

B. The Directive Violates Washington's Equal Rights Amendment Because of Its Disparate Impact on Women.

Unlike the equal protection guarantees offered by the federal and state Constitutions, by which discriminatory laws are subjected to varying standards of review depending on the class of persons and interests impacted, Washington's Equal Rights Amendment dispenses with levels of scrutiny altogether and simply mandates that gender-discriminatory laws are *prohibited*.[30] Specifically, the ERA provides that "[e]quality of

[29] Kayla Patrick, National Snapshot: Poverty Among Women and Families: 2016 3 (Nat'l Women's Law Ctr, 2017). The poverty rate figures among single women of color are: 38.8% in black female-headed families, 40.8% in Latina female-headed families, 42.6% in Native female-headed families.

[30] *Southwest Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce County*, 100 Wn.2d 109, 127, 667 P.2d 1092 (1983).

rights and responsibility under the law shall not be denied or abridged on account of sex."[31] Its protection goes "beyond [that] of the equal protection guaranty under the federal constitution."[32] Indeed, "[t]he ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny.'"[33]

While most ERA cases address explicit gender classifications, this Court's analysis in *State v. Brayman* demonstrates that facially-neutral laws that have a disparate impact on women may also violate the ERA.[34] Indeed, in at least one other jurisdiction with a similar ERA, facially-neutral laws that have a disproportionately negative impact on women were found to violate that state's ERA.[35] The disparate impact of the

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[31] Wash. Const., Art. XXXI, § 1.

[32] *State v. Burch*, 65 Wn. App. 828, 837, 830 P.2d 357 (1992), (citing *Darrin v. Gould*, 85 Wn.2d 859, 877, 540 P.2d 882 (1975) and *Marchioro v. Chaney*, 90 Wn.2d 298, 305, 582 P.2d 487 (1978), *aff'd* 442 U.S. 191 (1979).

[33] *Southwest Wash. Chapter*, 100 Wn.2d at 127 (citing *Darrin v. Gould* at 872).

[34] *State v. Brayman*, 110 Wn.2d 183, 201-204, 751 P.2d 294 (1988) (accepting appellants' argument that a blood alcohol test that would result in a disproportionate number of women drivers violating the legal limit for blood alcohol level could violate the ERA, but finding the plaintiffs had not proved that the test in question actually had a disparate impact on women).

[35] *See Kemether v. Pennsylvania Interscholastic Ath. Ass'n*, No. 96-6986, 1999 U.S. Dist. LEXIS 17331, at *63-68 (E.D. Pa. Nov. 9, 1999) (evidence that PIAA's rule requiring officials selected for play-off games to have officiated at least 10 games had a disproportionately negative effect on women who were, in practice, systematically denied the ability to officiate 10 games, was relevant to the determination of whether the rule violated the state ERA). Although unpublished opinions have no precedential value and are not binding, they can be cited as persuasive authority for this Court's consideration. *See Crosswhite v. Wash. State Dep't of Social and Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017); GR 14.1.

Directive is well documented above, and a sweeping prohibition on access to work in the adult care field thus falls more heavily on women.[36]

C. The Directive's Disparate Impact on Women, Particularly Women of Color, Should Weigh in the Court's Analysis Under Article I, Section 12 of the Washington Constitution.

It is beyond dispute that women, especially women of color, are the subject of a disproportionate number of founded findings by DSHS. Historically, complainants have been forced to choose either their race ***or*** their gender as the primary cause of discrimination, rather than bringing claims based on the structural discrimination caused by these two intersectional identities.[37]

The Directive is a perfect example of a facially neutral provision that—in its effect—amounts to a gender- and race- based limitation on the exercise of an important liberty interest. And in addition to having a disparate, discriminatory, impact on women and women of color, the

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[36] DSHS may argue that the sexism in sorting women and men into fields like vulnerable adult care versus male-dominated fields is not of its making, and that the Directive is not the source of the gender disparity identified here. However, even though DSHS has not caused the gender disparity in this professional fields, it ***is*** nonetheless responsible for ensuring that its rules do not undermine what has been identified by the State of Washington and this Court repeatedly as a state interest of the highest order: the eradication of gender discrimination against women. *See, e.g., Darrin v. Gould* at 877 ("The overriding compelling state interest as adopted by the 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.'").

[37] 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; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stanford L. Rev. 1241 (1991).

Directive affects the important right to choose one's occupation. In combination, therefore, the discriminatory effect and the importance of the affected right implicate "fundamental rights" protected by the Privileges & Immunities Clause of the Washington Constitution. The Directive thus warrants heightened scrutiny—a standard under which it fails as unconstitutional.

1. The Directive Implicates a "Privilege" Within the Meaning of the Privileges & Immunities Clause.

The scope and application of the Privileges & Immunities Clause of the Washington Constitution ("P&I Clause") (Wash. Const. art. I, § 12) has evolved and shifted over time, most recently in the Supreme Court's fractured decision in *Ockletree v. Franciscan Health System*.[38] In that case, the Court considered whether the exclusion of religious nonprofit organizations from the definition of "employer" under the Washington Law Against Discrimination was constitutional under the P&I Clause or under the establishment clause of Wash. Const. art. I, § 11.

Five justices concluded that the exemption for religious employers constituted a "privilege" subject to heightened scrutiny under the P&I Clause.[39] A different five-justice majority concluded that the P&I Clause was not violated because (regardless of whether a "privilege" was

[38] 179 Wn.2d 769, 317 P.3d 1009 (2014).

[39] *Ockletree*, 179 Wn.2d at 806 (Wiggins, J., joining Stephens, J., *et al*.).

implicated) there was "a reasonable ground for the exemption for religious and sectarian organizations."[40] Accordingly, Section II of Justice Stephens's opinion—explaining that the Washington Constitution's P&I Clause protects those "'fundamental rights which belong to the citizens of the state by reason of such citizenship'"—constitutes the Supreme Court's most recent definition of "privileges or immunities" under the P&I Clause.[41]

"Fundamental rights" for purposes of P&I analysis are not the same as the fundamental rights guaranteed by the federal due process clause (U.S. Const. amend. XIV). They range from "prosaic" commercial rights, such as the right to sell certain products, to the more expansive "right to . . . carry on business."[42] They include the right "to acquire and hold property, and to protect and defend the same in law," to collect debts,

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[40] *Id.* (Wiggins, J., joining C. Johnson, J., *et al*.). The lead opinion expressed a (4-justice minority) view that no "privilege" was implicated, but found that even if one were, reasonable grounds existed for the distinction. Justice Wiggins, in his separate opinion, concurred with the latter conclusion only. *Id.* (Wiggins, J., joining C. Johnson, J., *et al*.).

[41] That definition expressly rejects the notion that a fundamental right must have been anticipated by the framers. The language used in the lead opinion and the characterization of Justice Stephens's opinion as a dissent—because she dissented in part from the result—has led to confusion in later application of *Ockletree*'s holding. *See, e.g.*, *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) (mistakenly citing to the four-justice plurality's definition of a privilege as "such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law."); *Int'l Franchise Ass'n v. City of Seattle*, 97 F. Supp. 3d 1256, 1284 (W.D. Wash. 2015) (same); *see also Ockletree*, 179 Wn.2d at 791-92 (Stephens, J.) (detailing the history of the court's interpretation of the P&I clause).

[42] *Id*. at 39-40.

to enforce personal rights—including by bringing claims in court. And perhaps most importantly with respect to this case, they include civil rights—including the right to "employment free from discrimination"—which rest "at the core of the sort of 'personal rights'" the court has held are fundamental.[43] Accordingly, the right to choose one's occupation free from discrimination implicates a "privilege" under the P&I Clause.

2. Heightened Scrutiny is Needed Where the Directive Disproportionately Affects Women and Women of Color With Respect to a Fundamental Right.

Here, the State has discriminated against women and women of color with respect to their fundamental civil rights—the core of the "personal rights" protected by the P&I Clause. The Directive imposes what the trial court acknowledged was "in effect a lifetime ban" on those working in an occupation that is overwhelmingly made up of women—and disproportionately women of color. And yet, the State imposes no such ban on employment in male-dominated occupations working in close proximity to vulnerable populations.[44] For this reason, the Directive

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[43] *Ockletree*, 179 Wn.2d at 795 (citing *State v. Vance*, 29 Wn. 435, 458, 70 P. 34 (1902)).

[44] For instance, state laws regulating the licensing of school bus drivers, an industry that is majority male, require criminal backgrounds checks, but allow applicants the opportunity to "establish good moral character and personal fitness despite the criminal conviction" through evidentiary showings. Bus Drivers," DATA USA, https://datausa.io/profile/soc/533020; WAC 392-144-103(8)(i). Among the "relevant considerations" to be weighed in determining whether an applicant is "[worthy] and able to serve as an authorized school bus driver," despite his criminal violations, are the "[a]ge and maturity at the time the criminal act was committed" and "[t]he degree of culpability

should be subjected to heightened scrutiny. Washington courts have acknowledged the need for such heightened scrutiny in similar situations.

a. Discriminatory, Disparate Impact Warrants Heightened Scrutiny.

Measures that apply only, or disproportionately, to a protected class are subjected to strict scrutiny. In *Hanson v. Hutt*,[45] for example, the Washington Supreme Court reviewed a statute that disqualified pregnancy as a condition eligible for unemployment insurance. While not expressly limited to women in its language, the court recognized that because "only women become pregnant," the measure was a "classification based upon sex" and was "inherently suspect and therefore must be subject to strict scrutiny."[46]

In *Macias v. Dept. of Labor and Industries*[47] this Court considered the constitutionality of a statute excluding low-paid seasonal workers from the workers compensation system. Acknowledging that the statute's disparate impact on Hispanic workers—who constituted 73% of the affected class—could justify heightened scrutiny, the court decided

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required for conviction of the crime and any mitigating factors, including motive for commission of the crime." WAC 392-144-103(8)(a)-(i).

[45] 83 Wn.2d 195, 517 P.2d 599 (1973).

[46] *Id.* at 198.

[47] *Macias v. Dept. of Labor and Industries*, 100 Wn.2d 263, 271, 275, 668 P.2d 1278 (1983).

instead to apply strict scrutiny because the fundamental right to travel was implicated.[48]

And in *Fusato v. Washington Interscholastic Activities Association,* the Court of Appeals applied strict scrutiny to an agency rule restricting transfer students' eligibility to participate in varsity sports that—while neutral on its face—had the effect of excluding foreign exchange and I-20 Visa students from participation.[49] Ruling on federal equal protection grounds, the court found the rule had a disparate impact on foreign students and was adopted with discriminatory intent on the basis of national origin and alienage, subjecting the rule to heightened/strict scrutiny.[50] The court did not expressly analyze the measure under the P&I Clause—which does not require that disparate impact be accompanied by evidence of discriminatory intent or animus.

As demonstrated above, the Directive has a disparate impact on women, as women comprise 85 percent of all homecare workers in Washington. Additionally, the Directive has a disparate impact on a subset of this protected class—women of color. Increasingly, courts are recognizing discrimination directed at intersectional identities, such as

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[48] *Id.* at 271 (the court ultimately struck down the law based on a violation of the fundamental right to travel).

[49] 93 Wn. App. 762, 764-65, 970 P.2d 774 (1999).

[50] *Id.* at 769-70.

women of color—which is termed "intersectional discrimination."[51] In *Kimble*, the federal district court found that a plaintiff established a *prima facie* case under Title VII, where he alleged discrimination on the basis of both gender and race. The court acknowledged that:

> some characteristics, such as race, color, and national origin, often fuse inextricably. Made flesh in a person, they indivisibly intermingle. The meaning of the statute is plain and unambiguous. Title VII prohibits employment discrimination based on any of the named characteristics, whether individually or in combination.[52]

The *Kimble* court expressly ruled that a discrimination claim may be "based on race and gender whether individually or in combination," because either identity—or both—may bring an individual within a protected class.[53]

Absent consideration of intersectional discrimination, women of color will continue to be uniquely harmed, without remedy. The P&I Clause, however, can provide a recourse to ensure that state action that

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[51] *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 769-70 (E.D. Wis. 2010).

[52] *Id*., quoting *Jeffers v. Thompson*, 264 F. Supp. 2d 314, 326 (D. Md. 2003); *see also, e.g., Goodwin v. Bd. of Trs. of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006) (discussing discrimination against an African-American woman regarded as a "strong black female"); *Apilado v. N. Am. Gay Amateur Ath. Alliance*, No. C10-0682, 2011 U.S. Dist. LEXIS 159575, at *8-9 (W.D. Wash. Jul. 1, 2011) (denying motion to exclude expert testimony based on intersectionality, amd finding intersectionality analyses have been admitted in "many cases").

[53] 690 F. Supp. 2d at 769-70.

discriminates at the intersections of race and gender is subject to heightened scrutiny.

b. Measures That Affect a Fundamental Right Warrant Heightened Scrutiny.

Heightened scrutiny is also appropriate where a measure affects a fundamental right. In *Amunrud v. Board of Appeals*, the Washington Supreme Court acknowledged that "pursuit of an occupation or profession is a liberty interest protected by the due process clause" but determined that it was not a fundamental right for purposes of the P&I Clause.[54] Later, however, *Ockletree* clarified that the right to be employed "free from discrimination" ***is*** a fundamental right under the P&I Clause, thus expanding (in cases where discrimination is present) the protections of the right to employment beyond those reviewed for rational basis under the due process clause.[55] In combination, therefore, the liberty interest citizens enjoy to work in the occupation of their choice, and the right to be employed free from discrimination, warrant heightened scrutiny.

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[54] *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006).

[55] *Ockletree*, 179 Wn.2d at 796 (Washington's Law Against Discrimination was enacted to codify "the provisions of the Constitution of this state concerning civil rights," and thus "freedom from discrimination is a *civil right*, not merely a statutory promise; thus "the right to be free from discriminatory employment practices is easily as fundamental as the commercial rights that our early [P&I] cases addressed") (Stephens, J.) (emphasis in original) (joined by Wiggins, J., 179 Wn.2d at 806).

Accordingly, because the Directive at issue here not only has a disparate impact on a protected class (whether that class is defined as women, or women of color), but also does so in relation to a fundamental right of state citizenship (*i.e.*, the right to be free from discrimination in seeking employment)—a situation courts recognize as a "hybrid"—the basis for applying heightened scrutiny is amplified.[56]

3. The Rules Do Not Withstand Heightened Scrutiny.

As Appellants argue, the Directive does not withstand rational basis scrutiny, let alone heightened scrutiny. Applying such scrutiny, DSHS's thirty-five-year bar on employment in the vulnerable adult care fields violates the P&I Clause because the state cannot demonstrate that the method used to achieve its objective is the least restrictive.[57]

Here, even given the state's compelling interest in the protection of vulnerable adults, the thirty-five-year bar is too broad. Rather, considering a "founded finding" along with the opportunity to demonstrate mitigation and evidence of suitability to provide home care would allow DSHS to

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[56] *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 (noting alternate bases for heightened scrutiny where regulation disparately impacts protected class and restricts fundamental right to travel).

[57] *Fusato*, 93 Wn. App. at 768-69 (citing *Westerman v. Cary*, 125 Wn.2d 277, 294, 892 P.2d 1067 (1994)).

actually determine risk of potential harm to vulnerable adults. Such a procedure would continue to protect those who require DSHS's protection, but at the same time re-open significant employment opportunities for deserving women, particularly women of color, for whom such opportunities are currently foreclosed. The Directive fails the test of strict scrutiny under Art. I, § 12 and is thus invalid.

VI. CONCLUSION

For the foregoing reasons, *Amicus* urges the Court to reverse the Court of Appeals decision and declare the DSHS Directive invalid as a matter of state constitutional law.

Respectfully submitted this July 2, 2018.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on this date, I electronically filed the foregoing with the Clerk of the Court by using the Washington State Appellate Courts' Portal, which will send a notice of electronic filing to all counsel of record.

Dated: July 2, 2018 at Seattle, Washington.

s/Kelly M. Kennedy
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