No. 83728-7

MADSEN, C.J. (concurring)—I concur in the result reached by the lead opinion. The majority in *Ongom v. Department of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006), incorrectly determined that due process requires proof by clear, cogent, and convincing evidence when the State seeks to revoke an occupational license. *Id*. at 144-49 (Madsen, J., dissenting). I agree that it must be overruled.

But *Ongom* rested on *Bang D. Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001), which was also incorrectly decided. However, instead of overruling *Nguyen*, the lead opinion distinguishes it on the basis that the license at issue in *Nguyen* was a *professional* license. Lead opinion at 24. This distinction finds no support in our precedent or that of the United States Supreme Court. It will have the unfortunate effect of turning the selection of standards of proof for licensure deprivations into ad hoc, occupation-specific value judgments about the nature of the private interest at stake. Rather than adopting an unjustifiable distinction to preserve an incorrectly decided case, we should overrule *Nguyen* as well.

ANALYSIS

The legislature has found that the State's interest in protecting the health and

welfare of children is "paramount over the right of any person to provide care" to children. RCW 43.215.005(4)(c). The legislature has also determined that in proceedings in which the State seeks to deprive a person of a license to provide child care, the applicable standard of proof is the preponderance of the evidence standard. RCW 43.215.300(2). Using this standard, the Department of Early Learning revoked Kathleen Hardee's license to provide child care, finding that she had violated the conditions for maintaining her certification. The review judge, the superior court, and the Court of Appeals all found revocation well-supported by the record. *Hardee v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 48, 51, 215 P.3d 214 (2009). Nonetheless, Ms. Hardee claims that revoking her license on the basis of proof by a preponderance of the evidence denies her due process of law. Citing *Ongom* and *Nguyen*, she argues that she is entitled to proof by clear, cogent, and convincing evidence.

The preponderance standard traditionally applies in licensure revocation proceedings regardless of the occupation at issue. *Ongom*, 159 Wn.2d at 155 n.15 (Owens, J., dissenting) (citing numerous cases to this effect from other states, including *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761 (Tex. App. 2005) (ophthalmologist's medical license); *Parrish v. Ky. Bd. of Med. Licensure*, 145 S.W.3d 401 (Ky. Ct. App. 2004) (radiologist's medical license); *Snyder v. Colo. Podiatry Bd.*, 100 P.3d 496 (Colo. App. 2004) (podiatrist's medical license); *In re Smith*, 169 Vt. 162, 730 A.2d 605 (1999) (nursing license); *Ga. Bd. of Dentistry v. Pence*, 223 Ga. App. 603, 478 S.E.2d 437 (1996) (dentistry license); *In re Grimm*, 138 N.H. 42, 635 A.2d 456

(1993) (psychologist's license); *Pickett v. Utah Dep't of Commerce*, 858 P.2d 187 (Utah App. 1993) (pharmacist's license); *Boswell v. Iowa Bd. of Veterinary Med.*, 477 N.W.2d 366 (1991) (veterinarian's license)). This is true because while citizens have "some generalized due process right to choose one's field of private employment," the right of all citizens to pursue a particular occupation has always been limited, subject to "reasonable government regulation." *Conn v. Gabbert*, 526 U.S. 286, 291-92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) (citing *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889)). Consistent with the limited nature of the right, a person's interest in pursuing a particular profession is unlike the "particularly important" interests that are "more substantial than mere loss of money," which require proof by clear, cogent, and convincing evidence before someone can be deprived of them. *Addington v. Texas*, 441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).[1] We recognized this principle in the context of a challenge to the State's revocation of a taxicab driver's license when we held that "while it is clear that pursuing a lawful private profession or occupation is a protected right under the state and federal constitutions, it is equally clear that such right is not a fundamental right, requiring heightened judicial scrutiny." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006). While *Amunrud* presented a substantive due process challenge, it nevertheless demonstrates the limited nature of the

[1] These interests include parental rights (*see Santosky v. Kramer*, 455 U.S. 745, 756, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)); personal liberty (*see Addington*, 441 U.S. at 427); United States residency (*see Woodby v. Immigration & Naturalization Servs*, 385 U.S. 276, 285, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966)); and citizenship (*see Chaunt v. United States*, 364 U.S. 350, 353, 81 S. Ct. 147, 5 L. Ed. 2d 120 (1960)).

private interest one possesses in pursuing an occupation for purposes of procedural due process. *Ongom*, 159 Wn.2d at 146 (Madsen, J., dissenting).

Absent "countervailing constitutional constraints," the United States Supreme Court has found a preponderance of the evidence to be sufficient in proceedings to revoke an occupational license. *Steadman v. Sec. & Exch. Comm'n*, 450 U.S. 91, 95, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981) (requiring only preponderance to revoke a stockbroker's license).

Other jurisdictions agree that in the context of a license to practice medicine, the preponderance standard satisfies constitutional due process requirements. *See N.D. State Bd. of Med. Exam'rs v. Hsu*, 726 N.W.2d 216, 230 (2007) ("Under the *Mathews* framework for analyzing due process claims, we conclude the preponderance of evidence standard satisfies due process" in disciplinary proceedings where a physician's interest in a medical license is at stake.); *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 378, 496 S.E.2d 17 (1998) (same); *Gandhi v. State Med. Examining Bd.*, 168 Wis. 2d 299, 304-07, 483 N.W.2d 295 (1992) (same); *In re Revocation of License of Polk*, 90 N.J. 550, 560-69, 449 A.2d 7 (1982).

Although the United States Supreme Court has had occasion to consider a wide range of professions, it has never suggested that the nature of a profession affects the scope of the interest of those seeking to pursue it. *Cf. Barry v. Barchi*, 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) (protected interest in horse trainer's license); *Dent*, 129 U.S. at 121-22 (protected interest in medical license). To the contrary, the

Court has indicated that "the liberty component of the Fourteenth Amendment's Due Process Clause includes *some generalized due process right* to choose one's field of private employment." *Conn*, 526 U.S. at 291-92 (emphasis added); *cf. Dent*, 129 U.S. at 121 ("*all* vocations are open to every one on like conditions [and] [*a*]*ll* may be pursued as sources of livelihood, some requiring years of study and great learning" (emphasis added)). The Court has never suggested that a professional licensee has a greater interest in retaining his or her certification than the holder of a nonprofessional licensee. Because the constitutional right to pursue any profession is the same, the nature of the license at issue does not affect the standard of proof necessary to satisfy due process when the state seeks to revoke the license.

Unfortunately, in attempting to distinguish *Nguyen*, the lead opinion makes this exact distinction. The lead opinion says that acquiring a license to practice medicine requires greater "education" and "investment" than a license to provide child care and that physicians have greater "personal attachment" to their licenses. Lead opinion at 17. Therefore, the lead opinion reasons that a physician has a greater interest in his or her medical license than a child care provider has in his or her license to provide child care. *Id*. at 24.

The lead opinion cites no authority for its assertion that a child care provider has less "attachment" to her license. But, even if a medical license does require greater "investment" and carry greater "personal attachment" than a child care license, both licenses only entitle a licensee to pursue an occupation. *See id*. at 17. And neither

occupation affects a fundamental constitutional liberty interest. To the extent the lead opinion holds otherwise, it is inconsistent with both *Amunrud* and *Steadman*.

Moreover, a rule that distinguishes between professional and nonprofessional licenses is untenable. Licenses come in many forms, all requiring different levels of "personal investment" and with differing levels of "personal attachment." Conferring greater due process protection on some licensees and not on others on the basis of the personal investment required for acquisition of the license creates an ad hoc analysis and unpredictable results. Is an engineer entitled to proof by clear, cogent, and convincing evidence before the Board of Registered Professional Engineers may deprive him or her an engineering license? *See Nims v. Bd. of Registration for Prof'l Eng'rs & Land Surveyors*, 113 Wn. App. 499, 53 P.3d 52 (2002). What about dental hygienists or cosmetologists, whose licenses require great personal investment? Do we classify them as professionals, to which a higher standard of proof applies, or do we somehow distinguish them from physicians, despite their personal investment in their licenses? *See* RCW 18.29.021; RCW 18.16.060. A license may be every bit as necessary and important to the individual who needs it to engage in long-haul trucking as it is to one who needs it to practice law or medicine. The lead opinion acknowledges that our courts are struggling to articulate consistent standards of proof for the administrative revocation of licenses across a wide range of occupations. Lead opinion at 10-11. Far from providing helpful clarification, however, the lead opinion fails to offer any clear guidance for determining the standard of proof that will be required. Moreover, it fails to provide a

valid basis for concluding that different standards should apply in the first place.

The lead opinion's attempt to distinguish *Nguyen* rather than overrule it makes no sense. First, in *Nguyen*, the court overestimated the private interest at stake, given the limited nature of the right to pursue the particular profession. *Ongom*, 159 Wn.2d at 147-48 (Madsen, J., dissenting). This mistake undermined our application of the *Mathews* test, since we expressly recognized the private interest as our "primary concern" and as the "most important[]" factor. *Nguyen*, 144 Wn.2d at 523-26. Second, the court undervalued the weight of the governmental interest in protecting the public. The governmental interest, when considered in the balance, should have been given more weight than the license holder's individual interest. *Ongom*, 159 Wn.2d at 148 (Madsen, J., dissenting). Distinguishing *Nguyen* rather than overruling it invites courts to make the same mistakes based on the characteristics of the particular occupation at issue. This is not what due process requires, nor is it fair to those whose careers require licenses that a court may not designate as "professional."

CONCLUSION

Like *Ongom*, *Nguyen* was wrongly decided. Rather than adopting an unjustifiable distinction to save *Nguyen*, we should overrule it as well. Nevertheless, because the lead opinion finds that RCW 43.215.300(2) does not violate Ms. Hardee's due process rights, I concur in the result.

AUTHOR:
Chief Justice Barbara A. Madsen

WE CONCUR:

Justice Mary E. Fairhurst

Justice Charles W. Johnson

Justice Debra L. Stephens