No. 83728-7

SANDERS, J.* (dissenting)—Our decision in *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001), holding that procedural due process requires clear and convincing evidence before the state can revoke a professional license, controls in this case. Because the lead opinion declines to follow this holding and unnecessarily overrules our decision in *Ongom v. Department of Health,* 159 Wn.2d 132, 148 P.3d 1029 (2006), I dissent.

I. This case is governed by *Nguyen*

In *Nguyen* we held that constitutional due process requires proof by clear and convincing evidence in a medical disciplinary proceeding before a doctor may be deprived of a medical license. 144 Wn.2d at 518. Our holding in *Nguyen* is applicable to the loss of any professional license, and a distinction based on the time and expense of obtaining a medical license relative to the lesser commitment of resources necessary to obtain another professional license is elitist and irrelevant.

While "[a]t its heart" *Nguyen* concerns a physician's license, *id.* at 522, the principles of due process upon which it relies apply to all professional licenses. Due process principles recognize that "[t]he more important the interest" at issue, "the less

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* Justice Richard Sanders is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

tolerant we are as a civilized society that it be erroneously deprived." *Id.* at 524. The nature and importance of the interest subject to a potentially erroneous deprivation determines the minimum standard of proof required by constitutional due process. *Id.* Where the interest is a monetary dispute between private parties, a preponderance of the evidence standard satisfies due process. *Id.* (citing *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). Where the interest is a potentially erroneous criminal conviction, due process requires proof beyond a reasonable doubt. *Nguyen*, 144 Wn.2d at 524. An intermediate standard of proof is appropriate "in circumstances where the interest is greater than a mere money judgment but less than a generic criminal proceeding." *Id.* at 524-25.

The clear and convincing proof standard, an intermediate standard between preponderance of the evidence and beyond a reasonable doubt, is warranted in this case because Hardee's interest in her home child care license is "greater than a mere money judgment but less than a general criminal proceeding." *Id.* What we said of Dr. Nguyen, that "[h]is professional license, his reputation, his ability to earn a living for his family are very important interests—much more important than money alone," *id.* at 526, is also very true of Kathleen Hardee.

The lead opinion distinguishes *Nguyen* on the basis of the relative time and expense necessary to obtain a medical license and on the basis of a physician's membership in a "paradigmatic" profession. Lead opinion at 16-17. The lead opinion

claims a doctor's "unique education, investment, and personal attachment" to his medical license give the doctor a "greater property interest" in that license than Hardee has in her professional license. *Id.* at 17. Hardee was a licensed home child care provider for 22 years. To obtain a home child care license, a licensee must complete at least 20 hours of training, complete college credits in child education or development, or obtain an associate or higher college degree in child education or development. WAC 170-296-1410(5)(d)(i)-(iii). A licensee must maintain current CPR (cardiopulmonary resuscitation) and first aid training, pay an annual license fee, and apply to renew the license every three years. WAC 170-296-0160, -0170, -0260. To obtain and maintain her home child care license for 22 years, Hardee made unique investments in terms of training and finances. These investments are not lessened because another professional made relatively larger investments.

Hardee's chosen profession should also not be slighted because other professions have been recognized for a longer time. *See* lead opinion at 16. Physicians' "unique role in our society," *id.*, does not lessen the unique role of a child care provider who acts as a surrogate parent for much of the day. We require specific and valued personal characteristics of the individuals to whom we entrust our children. A home child care licensee must have "[a]n understanding of how children develop socially, emotionally, physically, and intellectually"; care for children on the basis of "an understanding of each child's interests, life experiences, strengths, and needs"; and be reliable,

dependable, truthful, and ethical. WAC 170-296-0140(1)(a), (b).[1] That society does not honor these characteristics as highly as the time and money necessary to obtain a physician's license is not a reason to afford a lesser level of protection to the child care licensee.

Under the lead opinion's analysis, should a physician who paid for his education through scholarships be protected against revocation by only a preponderance standard because he has made a lesser financial investment in obtaining his license? Should a physician who received a medical degree in another country that requires fewer years of specialized education be protected by the less stringent standard because he made a lesser investment in time? By distinguishing *Nguyen* and limiting its applicability to a physician's license because of the physician's significant investment in time and money, the lead opinion forces courts to define the value of a profession before deciding which standard of evidence applies to a revocation of a professional license.

II. The *Mathews* test

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[1] These required personal characteristics belie the lead opinion's implication that Hardee's home child care license did not attach to her personally. *See* lead opinion at 16. The review judge recognized that personal characteristics, and not merely the facility in which Hardee maintained her child care business, determined Hardee's eligibility to obtain and keep her license. In her determination that Hardee's license should be revoked, the review judge determined Hardee lacked the personal characteristics to provide child care. Similarly, in the letter to Hardee revoking her license, the Department of Social and Health Services stated, "You lack the good character and judgment to continue to operate a day care facility." Clerk's Papers (CP) at 13. Surely once her license was revoked, Hardee could not move across the street and operate a facility out of another house. The revocation was based on her "personal characteristics," and any distinction based on a doctor's "personal attachment" to his medical license is inaccurate and misleading.

We follow the test set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine whether a procedure to deprive an individual of a property right satisfies constitutional due process requirements. We consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. To determine that a preponderance standard satisfies due process under the *Mathews* test, the lead opinion discounts Ms. Hardee's private interest, focuses on irrelevant procedural safeguards, and disregards the negligible increase in cost to the government posed by a heightened standard of proof. The *Mathews* test demands a clear and convincing evidence standard for Hardee.

A. Hardee's private interest

The lead opinion states, "A license for a home child care facility is not a personal interest that compels a standard of proof beyond a mere preponderance of the evidence." Lead opinion at 12. In an attempt to distinguish the loss of a child care license from the loss of a "professional license," the lead opinion claims, "Someone who loses her license but continues to feel a vocational calling to provide child care can still work in the field under the supervision of another licensed child care

provider." *Id.* at 13.

This is an incomplete analysis of Hardee's private interest for two reasons. First, this disregards the very reasons someone might wish to open a home child care center. Without her own license, Ms. Hardee loses the convenience, flexibility, and economic gain that come from operating a small business out of her home. The lead opinion ignores these consequences of Hardee's license revocation, but rather suggests she seek work as a "child care staff member." *Id.*

Second, the lead opinion ignores the stigma Hardee faces as a former home child care licensee. If Hardee does maintain a "vocational calling to provide child care," lead opinion at 13, she faces the stigma of a license revocation on any employment background check or résumé. License revocations are publicly recorded on the State's licensed child care information system, searchable by the public. *See* Wash. State Dep't of Early Learning, Child Care Check (last visited June 30, 2011), *available at* https://apps.del.wa.gov/check/checksearch.aspx. Further, while the lead opinion suggests a license revocation will not prevent Hardee from following her "vocational calling" to provide child care, a license revocation is a "negative action" that may cause the former licensee to be disqualified from providing licensed or unlicensed child care in the future. WAC 170-06-0020(9), -0070. Hardee has an important private interest in her home child care license.

B. The risk of erroneous deprivation and the probable value of additional procedural safeguards

In *Nguyen* we considered whether the presence of extensive procedural safeguards at the original administrative hearing created an acceptable risk of erroneous deprivation under the second *Mathews* factor. 144 Wn.2d at 530. Our conclusion in *Nguyen* directly applies to the case presently before us:

> The problem with this approach . . . is that none of these procedural safeguards can substitute for, nor is even relevant to, failure to impose the requisite minimum burden of proof which is specifically designed "to impress the factfinder with the importance of the decision" and thereby reduce the chance of error.

Id. (quoting *Addington*, 441 U.S. at 427). Judicial review and appellate review cannot cure an inadequate standard of proof. *Id*. The lead opinion names the procedural safeguards available to home child care providers at an administrative hearing, which we found irrelevant in *Nguyen*, but does not explain how these can remedy an inadequate standard of proof.[2]

C. The State's interest

Finally, the lead opinion inaccurately accounts for the government's interest under the *Mathews* test. Again, our decision in *Nguyen* governs our consideration of

[2] Considering the second *Mathews* factor, in *Nguyen* we also found a subjective standard of conduct increased the risk of erroneous deprivation and bolstered the need for a higher standard of proof. "[A]n elevated standard of proof militates against the possibility that the fact finder might deprive an individual of his license based solely on a few isolated incidents of unusual conduct." 144 Wn.2d at 531. The events giving rise to Hardee's license revocation proceedings were not typical of her 22 year career. The administrative law judge, concluding that the evidence did not support the allegation that Hardee allowed William unsupervised access to the child care children, called the events giving rise to the allegation a "single episode." CP at 28.

this factor where we stated, "[T]his requirement relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure for the one currently employed." *Id.* at 532. In this case, as in *Nguyen*, no substitute procedure would be required—only a heightened standard of proof within the existing procedure. Because "[a]n increased burden of proof would not have the slightest fiscal impact upon the state, . . . [i]ncreased cost is clearly not a fact or concern here." *Id.*

Rather than consider the nonexistence of any additional financial burden on the government resulting from a higher standard of proof, the lead opinion notes the government's recognized interest in protecting children. Lead opinion at 14-15. I do not dispute the State's paramount duty to promote the health and well-being of children, but the third *Mathews* factor "does not relate to the interest which the government attempts to vindicate through the procedure" in question. *Nguyen*, 144 Wn.2d at 532. Contrary to the lead opinion's analysis, the *Mathews* test considers the government's interest in efficient and economically practical hearing procedures. Because a clear and convincing standard of proof would not pose additional financial burdens, the State's interest under *Mathews* is negligible.

As Hardee has a significant private interest, the risk of erroneous deprivation under an inadequate standard of proof is high, and the State's interest in the additional burdens of imposing a higher standard of proof is low, *Mathews* dictates that the

proper standard of proof is clear and convincing evidence.

III. The State did not show by clear and convincing evidence that Hardee's license should be revoked

Because I would hold that the State must prove a violation warranting license revocation by clear and convincing evidence, I would also hold the State failed to meet its burden against Hardee. The administrative law judge (ALJ), the independent fact-finder who observed the witnesses at Hardee's license revocation hearing, found that no substantial evidence in the record supported the Department of Social and Health Services' action against Hardee's license. The ALJ observed and accepted the testimony of witnesses who attested to Hardee's fitness as a child care provider. The ALJ found nothing in the evidence to support the allegation that Hardee allowed her teenage son William unsupervised contact with the children in her care. Given the evidence, it was "clear" that during the incident in which William allegedly changed a child's diaper, Hardee was within view or hearing of William at all times. Clerk's Papers at 28. The ALJ also found no support for the allegation that another person resided at Hardee's residence in violation of her license agreement. The ALJ found, on the basis of the evidence presented at the license revocation proceeding, that Hardee's license should not have been revoked. The State's evidence against Hardee did not meet the clear and convincing standard of proof.

IV. This court should not overrule *Ongom*

"[O]verruling . . . precedent should not be taken lightly." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). "The doctrine of stare decisis 'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.'" *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Thus, our first question should be whether the rule stated in *Ongom*, that revocation of a professional license requires clear and convincing evidence, is incorrect. Clearly, because the rule stated in *Ongom* is the same rule established by *Nguyen* (a case the lead opinion does not overrule), *Ongom* is not incorrect.

Nor is the rule stated in *Ongom* harmful. The lead opinion states, "Due to the scarcity of resources, a decision that requires the State to direct more time and money towards administrative hearings can ultimately harm the very individuals the administrative proceeding was designed to protect." Lead opinion at 23.[3] But the lead

[3] For this proposition, the lead opinion cites *Mathews*, where "'the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not limited.'" Lead opinion (quoting *Mathews*, 424 U.S. at 348).

Mathews, of course, addressed the revocation of Social Security disability benefits—requiring the government to provide higher protection at a revocation hearing, thereby making it more likely a possibly undeserving petitioner would keep his benefits, reducing the funds available to deserving beneficiaries. *See Mathews*, 424 U.S. at 348 ("Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited."). The same is not true in the case of professional licenses. Requiring a higher standard of proof to a professional license-holder, thereby making it more likely a licensee would keep her respective professional license,

opinion fails to consider that due process protections provided during license revocation hearings also protect the license holder who stands to lose her livelihood. Thus, while the lead opinion at 24 acknowledges the burden of meeting a "quasicriminal standard of proof," *id*., the lead opinion ignores the quasicriminal nature of a revocation proceeding[4] and the consequences for the individual who loses her license—certainly a harm to the individual whose alleged violation must only be proved by a preponderance or just more likely than not. The lead opinion has found *Ongom* worthy of overruling only by ignoring the harm to license holders.

V. Attorney fees under the equal access to justice act

Because I would hold that Hardee prevailed in a judicial review of the Department's action, I would also hold she is entitled to attorney fees. *See* RCW 4.84.350(1).

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will not reduce the amount of professional licenses available for other licensees or applicants.

[4] *Wash. State Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983) ("A professional license revocation proceeding has been determined to be 'quasi-criminal' in nature.").

I dissent.

AUTHOR:
Richard B. Sanders, Justice Pro Tem.

WE CONCUR: