COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2598

Cir. Ct. Nos. 2010CV2849
2010CV5258

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

LASHANA L. BUCKNER,

PLAINTIFF-APPELLANT,

V.

BRIANNE HEIDKE, COMMUNITY COORDINATED CHILD CARE, INC. (4-C), DANE COUNTY DEPARTMENT OF HUMAN SERVICES, LYNN GREEN AND REGGIE BICHA,

DEFENDANTS,

WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES,

DEFENDANT-RESPONDENT.

LASHANA L. BUCKNER,

PETITIONER,

V.

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 HIGGINBOTHAM, J. Lashana Buckner was a certified childcare provider whose certification was revoked after the legislature made changes to Wisconsin's caregiver law in 2009. As a result of the changes to the law, Buckner is permanently barred under WIS. STAT. § 48.685(5)(br) (2011-12)[1] from being a certified childcare provider because she has a felony conviction for uttering a forgery. Buckner contends that § 48.685(5)(br) is unconstitutional on equal protection and substantive due process grounds, both facially and as applied to her. We conclude that Buckner has not met her burden to prove that the statute is unconstitutional beyond a reasonable doubt. Accordingly, we affirm.

BACKGROUND

¶2 Buckner was a certified childcare provider for approximately seven years. In 2010, Buckner's childcare certification was revoked solely because of the changes that the legislature made to Wisconsin's childcare law, as set forth in 2009 Wis. Act 76. Under the changes to the law, individuals who have a conviction for certain offenses are permanently barred from being certified childcare providers. Buckner has a 1995 conviction for one such offense—uttering a forgery, a felony offense, in violation of WIS. STAT. § 943.38(2) (1995-96). The facts underlying Buckner's 1995 felony conviction are that she stole a

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

credit card and used it to purchase approximately $140 in merchandise without knowledge or consent from the credit card owner.

¶3 Buckner filed a declaratory judgment action in the Dane County Circuit Court against the Department of Children and Families (DCF) and others, seeking a declaration that WIS. STAT. § 48.685(5)(br), which permanently bars her from being certified as a childcare provider, is unconstitutional on equal protection and substantive due process grounds, both facially and as applied to her.[2] The parties filed cross-motions for summary judgment. The circuit court rejected Buckner's constitutional challenges and granted summary judgment to DCF. Buckner appeals.

DISCUSSION

¶4 In ***Jamerson v. DCF***, 2012 WI App 32, ¶¶12-17, 340 Wis. 2d 215, 813 N.W.2d 221, we explained Wisconsin's caregiver law before and after the legislature changed the law:

> State law requires individuals who run a childcare business or operate an in-home daycare of a certain size to obtain caregiver certification or licensing. WIS. STAT. §§ 48.65, 48.651(1)-(2). State law also requires that a criminal history and child abuse record search take place to determine whether an applicant for certification or licensure or an employee thereof has been found guilty of child abuse or neglect, or another serious crime related to caring for children. WIS. STAT. § 48.685. [DCF] is the agency responsible for licensing childcare providers who care for four or more persons under the age of seven for less than twenty-four hours a day. WIS. STAT. § 48.651(1).

[2] Buckner also filed an action under 42 U.S.C. § 1983 and a petition for certiorari review of an administrative decision upholding the revocation. Buckner reached a settlement agreement with DCF and others regarding those cases and voluntarily dismissed her civil rights action and petition for certiorari review.

Prior to the passage of the new caregiver law, there existed a permanent but rebuttable presumption of disqualification from licensure for individuals convicted of serious violent crimes and crimes against children. *See, e.g.*, WIS. STAT. § 48.685(4m), (5) (2007–08). Under the old law, if the background check revealed a conviction or pending charge for child abuse or a serious enumerated offense, no license or certification would be issued unless and until the individual proved that he or she had been rehabilitated and no longer posed a threat to children. *See* ***id.***

The new caregiver law revised WIS. STAT. § 48.685 by, among other things, adding a lengthy list of additional offenses for which an individual's license could be revoked and by creating two new forms of disqualification—one lasting five years and the other lasting for life. *See* 2009 Wis. Act 76, § 24. Individuals subject to the five-year bar are disqualified from licensure or certification for five years after the date that the offender completes probation or parole. *See* ***id.*** After five years, however, the disqualification disappears, and the offender is treated like any other applicant for a caregiver license. *See* ***id.*** Individuals subject to the new lifetime ban have no access to a hearing to prove rehabilitation. ***Id.***

Crimes subject to the five-year bar include: felony offenses under the Uniform Controlled Substances Act under WIS. STAT. ch. 961; substantial or aggravated battery (WIS. STAT. § 940.19(2), (4), (5) or (6)); and homicide by intoxicated use of vehicle or firearm (WIS. STAT. § 940.09), among others. *See* 2009 Wis. Act 76, § 24.

Crimes subject to the permanent bar include: theft of satellite cable programming (WIS. STAT. § 943.47(2)); theft of video service (WIS. STAT. § 943.46(2)); **[the crime at issue in this case]** forgery (WIS. STAT. § 943.38(1)-(2)); theft of telecommunications services (WIS. STAT. § 943.45(1)); theft of commercial mobile service (WIS. STAT. § 943.455(2)); and felony retail theft (WIS. STAT. § 943.50(1m)), among others. *See* 2009 Wis. Act 76, § 24; *see also* WIS. STAT. § 48.685(5)(br)3m.

Also subject to the permanent bar are offenses involving "fraudulent activity" in various realms, including: (1) as a participant in the Wisconsin Works program under WIS. STAT. §§ 49.141 to 49.161 …; (2) food stamps benefits under the food stamp program under 7

> U.S.C. §§ 2011 to 2036 …. *See* 2009 Wis. Act 76[,] § 24; *see also* WIS. STAT. § 48.685(5)(br)5.

(Emphasis added.)

¶5 In addition to the two new forms of disqualification discussed in ***Jamerson***—a five-year bar and a permanent, irrebuttable bar—there also remains a third category of disqualification—a presumptively permanent bar that is rebuttable if the individual proves that he or she is rehabilitated by clear and convincing evidence *See* WIS. STAT. § 48.685(5)(a). Offenses for which an individual may prove that he or she is rehabilitated include a finding by a governmental agency that the individual abused or neglected a child. *See* § 48.685(4m)(a)4.

¶6 On appeal, Buckner renews her constitutional challenges to WIS. STAT. § 48.685(5)(br). Whether a statute is constitutional presents a question of law subject to de novo review. ***State v. Cole***, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. Statutes are presumed to be constitutional. ***State v. Quintana***, 2007 WI App 29, ¶19, 299 Wis. 2d 234, 729 N.W.2d 776. To overcome the presumption, the party challenging the statute's constitutionality carries a heavy burden. ***State v. Smith***, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90. "It is insufficient for the party challenging the statute to merely establish either that the statute's constitutionality is doubtful or that the statute is probably unconstitutional." ***Id.*** Rather, the party must "prove that the statute is unconstitutional beyond a reasonable doubt." ***Cole***, 264 Wis. 2d 520, ¶11. This burden applies to both facial and as applied constitutional challenges. ***State v. Wood***, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63. Applying these principles, we conclude that Buckner has not met her burden to prove that § 48.685(5)(br) is unconstitutional beyond a reasonable doubt.

I. Equal Protection

A. Facial

¶7 Buckner argues that WIS. STAT. § 48.685(5)(br) is unconstitutional under the equal protection clauses of the United States and Wisconsin constitutions. "Both the Fourteenth Amendment to the United States Constitution and article I, section 1 of the Wisconsin Constitution guarantee equal protection of the laws and afford substantially the same protections."[3] ***State ex rel. Harr v. Berge,*** 2004 WI App 105, ¶5, 273 Wis. 2d 481, 681 N.W.2d 282. "Equal protection guarantees that similarly-situated persons are treated similarly." ***Id.*** "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." ***State v. Post***, 197 Wis. 2d 279, 321, 541 N.W.2d 115 (1995) (quoting another source).

¶8 "When considering an equal protection challenge to a statute, this court employs the rational basis test, unless the statute involves a suspect class or a fundamental right." ***Kohn v. Darlington Cmty. Sch.***, 2005 WI 99, ¶46, 283 Wis. 2d 1, 698 N.W.2d 794. Buckner does not seriously dispute that WIS. STAT.

[3] The due process and equal protection clauses of the United States Constitution provide: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The due process and equal protection clauses of the Wisconsin Constitution provide: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed." WIS. CONST. art. I, § 1.

§ 48.685(5)(br) does not involve a suspect class or a fundamental right. Thus, we apply the rational basis test.

¶9 We explained the rational basis test in ***Brown v. DCF***, 2012 WI App 61, ¶¶37-38, 341 Wis. 2d 449, 819 N.W.2d 827 as follows:

> In determining whether a rational basis exists, we look first to determine whether the legislature articulated a rationale for its determination. If we cannot identify any such articulated rationale, we are obligated to construct one. A statute violates equal protection only when the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy. However, the task of drawing lines between different classifications is a legislative one in which perfection is neither possible nor necessary. The fact that a statutory classification results in some inequity ... does not provide sufficient grounds for invalidating a legislative enactment. Any doubts must be resolved in favor of the reasonableness of the classification.
>
> Moreover, a state has no obligation to produce evidence to sustain the rationality of a statutory classification. Legislative choices are not subject to courtroom fact-finding and need not be supported by evidence or empirical data; rational speculation is enough. The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.

(Citations and quotation marks omitted).

¶10 In ***Brown***, we addressed a similar equal protection challenge to WIS. STAT. § 48.685, but with respect to a different offense—engaging in "fraudulent activity" while receiving public assistance. Brown's childcare license was permanently revoked after the legislature enacted § 48.685(5)(br)5., which prohibits an individual convicted of an offense constituting "fraudulent activity" while receiving public assistance from being a licensed or certified childcare

provider. ***Id.***, ¶26; WIS. STAT. § 48.685(5)(br)5.[4] Brown had a 1991 felony conviction for failing to report receipt of income at a time when she was receiving food stamps. ***Id.***, ¶¶3-5. DCF determined that the offense for which Brown was convicted constituted "fraudulent activity." ***Id.***, ¶¶6, 24, 27.

¶11 Brown argued that the statute violated the guarantee of equal protection because applying a permanent bar to individuals convicted of an offense constituting "fraudulent activity" while receiving public assistance was not rationally related to the goal of protecting children or the goal of protecting the Wisconsin Shares program from fraud. ***Id.***, ¶39. More specifically, Brown argued that the law lacked a rational basis because "it places violent offenders—such as individuals convicted of first-degree homicide—in the same category as individuals like her" and "place[s] individuals convicted of fraud of government funds in a different category than those who have defrauded" non-government entities. ***Id.***

¶12 We rejected Brown's arguments and concluded that applying a permanent bar to individuals convicted of an offense constituting fraudulent activity while receiving public assistance was "rationally related to the legitimate purpose of prohibiting individuals who dishonestly benefitted from government welfare in the past from obtaining government funding in the form of childcare subsidies." ***Id.***, ¶40. Part of the rationale for our holding was the observation that

[4] That statutory provision bars licensure for anyone convicted of "[a]n offense involving fraudulent activity as a participant in the Wisconsin Works program under ss. 49.141 to 49.161, including as a recipient of … food stamps benefits under the food stamp program under 7 USC 2011 to 2036." WIS. STAT. § 48.685(5)(br)5.

the changes to the law did not bar Brown from "ever again providing childcare. Instead, Brown remains free to provide childcare for children under terms not subject to" licensure requirements. ***Id.*** "That is to say, she can continue to provide childcare for less than four children or provide child care for children over the age of seven." ***Id.***

¶13 The parties do not dispute, and we agree, that ***Brown*** does not control this case. ***Brown*** does not address whether a rational basis exists for permanently barring an individual convicted of felony forgery from being certified as a childcare provider.

¶14 Nonetheless, we conclude, based on the logic and rationale of ***Brown***, that permanently barring an individual convicted of felony forgery from obtaining certification or licensure is rationally related to the legitimate state interest of protecting the Wisconsin Shares program from the potential for losses due to fraud. The legislature rationally could determine that an individual who has a felony forgery conviction is more likely than others to engage in fraud and therefore should not be entitled to government funding in the form of childcare subsidies. We acknowledge that felony forgery, unlike the offense at issue in ***Brown***, does not necessarily involve defrauding the government, and that Buckner's conviction did not involve defrauding the government. However, forgery involves "a lie relating to the genuineness of a document." ***State v. Davis***, 105 Wis. 2d 690, 694, 314 N.W.2d 907 (Ct. App. 1981). It is therefore rational to believe that an individual who has lied about the genuineness of a document is potentially more likely to cheat others, including government agencies, than other people, and therefore, the holding and rationale in ***Brown*** applies with equal force here.

¶15 The logic of ***Brown*** also leads us to conclude that the statute is constitutional because Buckner is not precluded from working in the childcare field as a result of her felony forgery conviction. Buckner "can continue to provide childcare for less than four children or provide child care for children over the age of seven." ***Brown***, 341 Wis. 2d 449, ¶40. Although Buckner's felony forgery conviction prevents her from receiving childcare subsidies from the government, it does not prevent her from working in the childcare field altogether.

¶16 Buckner also has an opportunity available to her that was not available to Brown. An individual convicted of an offense enumerated under WIS. STAT. § 48.685(5)(br)3m., may work in a licensed childcare facility if the individual is able to prove by clear and convincing evidence that he or she is rehabilitated.[5] One such enumerated offense is felony forgery, the offense for which Buckner was convicted. Thus, although Buckner is permanently barred from being certified as a childcare provider, Buckner may work in a licensed childcare facility if she meets her burden to prove that she is rehabilitated.

¶17 Buckner argues that WIS. STAT. § 48.685(5)(br) does not meet the criteria to satisfy the rational basis test as set forth in ***Aicher v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶58, 237 Wis. 2d 99, 613 N.W.2d 849. Those criteria are:

> (1) All classification[s] must be based upon substantial distinctions which make one class really different from another.

[5] WISCONSIN STAT. § 48.685(5)(br)3m. provides that no person who has been convicted of the following offenses, including felony forgery under WIS. STAT. § 943.38(1)-(2), may be permitted to demonstrate that he or she is rehabilitated "[e]xcept for purposes of permitting a person to be a nonclient resident or caregiver specified in sub. (1)(ag)1.a. of a child care center or child care provider." WIS. STAT. § 48.685(5)(br)3m.

> (2) The classification adopted must be germane to the purpose of the law.
>
> (3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within a class].
>
> (4) To whatever class a law may apply, it must apply equally to each member thereof.
>
> (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Id. (quoting other sources). Specifically, Buckner argues that the first and fifth criteria have not been satisfied.[6] In support, Buckner makes two primary arguments. We address and reject each argument in turn.

¶18 First, Buckner argues that there is no rational basis for applying a permanent, irrebuttable bar to an individual convicted of a crime involving dishonesty, such as felony forgery, when individuals who have convictions for other crimes involving dishonesty, as well as crimes involving violence against children, are not subject to a permanent, irrebuttable bar. In support, Buckner points out that an individual who has been found by a government agency to have abused a child is subject to a presumptively permanent bar that may be rebutted if the individual proves that he or she is rehabilitated.

¶19 The defendants respond that the legislature could rationally determine that DCF has expertise from which to determine whether an individual

[6] Buckner also argues that the second criteria is not satisfied, but fails to develop any argument on the topic. Moreover, DCF points out, and Buckner does not dispute, that only the first and fifth factors were addressed by the circuit court.

found by an agency to have committed child abuse is rehabilitated but does not have the same level of expertise from which to determine whether an individual convicted of felony forgery is rehabilitated. The defendants maintain that, because DCF generally has less expertise regarding felony forgery than it does child abuse, the legislature could reasonably substitute its judgment for DCF regarding crimes such as felony forgery. The defendants acknowledge that this does not explain why all crimes involving dishonesty are not in the same category, but points out that a classification may have a rational basis even though it is not made with "mathematical nicety" or may result in "some inequality." Buckner does not specifically address this expertise argument in her reply brief and therefore it is deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶20 Second, Buckner contends that there is no rational basis for applying a permanent bar to some crimes involving dishonesty, such as felony forgery, while applying a five-year bar to other crimes involving dishonesty, such as making, altering, or duplicating an official identification card for money or consideration, in violation of WIS. STAT. § 125.085(3)(a)2., and obtaining possession of a controlled substance by forgery, in violation of WIS. STAT. § 961.43(1)(a). We reject this argument.

¶21 Regarding the crime of making an official identification card for money, Buckner fails to acknowledge that uttering a forgery is classified as a more serious offense. Uttering a forgery is a Class H felony, whereas making an official identification card for money is a Class I felony. *See* WIS. STAT. §§ 943.38(2), 125.085(3)(a)2. Moreover, we can see a potential rational basis for this distinction. It would not be irrational to assume that at least some individuals who

make official identification cards for money are young persons attempting to help underage individuals unlawfully obtain access to alcohol and that these individuals are unlikely to reoffend, whereas individuals who utter forgeries are more likely to reoffend by continuing to utter forgeries or graduate to more serious offenses. The legislature could rationally determine that the latter category of individuals are, at least on average, more likely to defraud others than the former category of individuals.

¶22 Regarding the crime of obtaining possession of a controlled substance by forgery, we observe that a five-year ban applies to all felony crimes set forth in WIS. STAT. ch. 961, the Uniform Controlled Substances Act. The legislature did not specifically single out the crime of possessing a controlled substance by forgery. It is true that, some drug crimes, such as possessing a controlled substance by forgery, involve dishonesty. However, the legislature could rationally determine that those who have committed drug crimes are, across cases, less likely to defraud the government than those who committed felony forgery. We acknowledge that applying a permanent bar to some crimes involving dishonesty crimes but not others might result in "some inequity." ***Brown***, 341 Wis. 2d 449, ¶37 (quoting another source). However, "[t]he fact [that] a statutory classification results in some inequity … does not provide sufficient grounds for invalidating a legislative enactment." ***Id.*** (quoting another source).

¶23 In an overlapping argument, Buckner contends that WIS. STAT. § 48.685(5)(br) lacks a rational basis because two people who have engaged in exactly the same conduct may be charged by a prosecutor with two different crimes, one that results in a permanent bar and another that does not. In Buckner's view, there is no rational basis why felony forgery is placed in a different category than obtaining a controlled substance by forgery because a prosecutor has

discretion to charge an individual who obtains a controlled substance by forgery with felony forgery. Buckner maintains that, because prosecutorial discretion may determine whether an individual is charged with a crime for which a permanent, irrebuttable bar applies, the statute lacks a rational basis. We reject that argument.

¶24 Buckner does not cite to any legal authority that suggests that the legislature should have considered how a prosecutor might exercise his or her discretion in a particular case in determining which crimes are subject to a permanent, irrebuttable bar. Buckner also does not explain why the legislature should have assumed that there is gross inconsistency in criminal charging decisions. Although two individuals who have engaged in similar conduct may be charged with different crimes, the legislature was not required to place all offenses involving dishonesty in the same category in order for the statute to be facially constitutional.

¶25 In sum, we conclude that permanently barring an individual convicted of felony forgery from obtaining childcare certification is rationally related to the legitimate government interest in protecting government programs from fraud. Although the lines drawn by the legislature as to which crimes impose a permanent, irrebuttable bar are not perfect and may result in inequity in some instances, Buckner has not met her burden to negate every conceivable basis that might rationally support the constitutionality of the statute. *See* ***Brown***, 341 Wis. 2d 449, ¶38. Accordingly, we reject Buckner's facial equal protection challenge to WIS. STAT. § 48.685(5)(br).

B. As Applied

¶26 Buckner also raises an as applied equal protection challenge to the new caregiver law. Buckner argues that the law, as applied to her, denies her

equal protection because she is permanently barred from being a certified childcare provider while others who have convictions for offenses involving forgery are not permanently barred from being a certified childcare provider. Specifically, Buckner contends that an individual convicted of felony forgery, such as herself, who did not defraud the government is treated worse in this context than an individual who forges an official identification card and thus did defraud the government.

¶27 The State responds that Buckner does not raise a proper as applied challenge but rather is restating her arguments as to why the statute is facially unconstitutional. The State asserts that, to demonstrate that the statute is unconstitutional as applied to her, Buckner is required to show that she has been treated differently from other childcare providers who have felony forgery convictions, and Buckner has not made that showing here. We agree.

¶28 To prevail on an as applied challenge, Buckner must prove that WIS. STAT. § 48.685(5)(br) as applied to her is unconstitutional beyond a reasonable doubt. *See* ***Society Ins. v. LIRC***, 2010 WI 68, ¶27, 326 Wis. 2d 444, 786 N.W.2d 385. Specifically, in the context of this case, Buckner must prove that "she was treated differently from any similarly-situated childcare provider whose license was revoked under the new law." ***Brown***, 341 Wis. 2d 449, ¶43.

¶29 We cannot distinguish Buckner's as applied challenge from her facial challenge. In her as applied challenge, Buckner simply remakes her argument that the statute is unconstitutional because individuals convicted of felony forgery are treated more harshly than individuals convicted of certain other crimes involving forgery. Thus, Buckner is arguing that the statute is unconstitutional as applied to all individuals convicted of felony forgery. She

does not provide any reason or develop any argument why the statute is unconstitutional specifically as applied to her. For instance, Buckner does not point to any facts to show that she was treated differently from other childcare providers convicted of felony forgery. Because Buckner does not advance any arguments in support of her contention that the statute is unconstitutional as applied to her, we reject her as applied challenge.

II. Due Process

A. Facial

¶30 Buckner next contends that WIS. STAT. § 48.685(5)(br) is facially unconstitutional on substantive due process grounds. "The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving 'any person of life, liberty, or property without due process of law.'" ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997) (quoting U.S. CONST. amend. XIV, § 1). The threshold inquiry in determining whether a substantive due process claim has been established is whether an individual has been deprived of "a liberty or property interest protected by the Constitution." ***Id.*** "A property interest is constitutionally protected if 'state law recognizes and protects that interest.'" ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶46, 235 Wis. 2d 610, 612 N.W.2d 59 (quoting another source). "The key attribute of a constitutionally protected property interest is a 'legitimate claim of entitlement to it,' as opposed to a 'unilateral expectation' of it." ***Fazio v. Department of Employee Trust Funds***, 2005 WI App 87, ¶11, 280 Wis. 2d 837, 696 N.W.2d 563 (quoting another source). Moreover, an individual has a constitutionally protected liberty interest "to follow a trade, profession, or other calling." ***Wroblewski v. City of Washburn***, 965 F.2d 452, 455 (7th Cir. 1992) (quoting another source). However, "[i]t is the

liberty to pursue a *calling or occupation*, and not the right to a specific job, that is secured by the Fourteenth Amendment." ***Id.***

¶31 Substantive due process protects against a state act that is arbitrary, wrongful, or oppressive, regardless of the fairness of the procedures used to implement them. ***Kenosha Cnty. Dep't of Human Servs. v. Jodie W.***, 2006 WI 93, ¶39, 293 Wis. 2d 530, 716 N.W.2d 845. Where no fundamental interest is implicated, substantive due process requires that "the means chosen by the legislature to effect a valid legislative objective bear a rational relationship to the purpose sought to be achieved." ***State v. Joseph E.G.***, 2001 WI App 29, ¶13, 240 Wis. 2d 481, 623 N.W.2d 137. Thus, "[t]he analysis under both the due process and equal protection clauses is largely the same." ***State v. Quintana***, 2008 WI 33, ¶78, 308 Wis. 2d 615, 748 N.W.2d 447.

¶32 Buckner contends that WIS. STAT. § 48.685(5)(br) is facially unconstitutional because it creates an impermissible irrebuttable presumption. Buckner maintains that, pursuant to the irrebuttable presumption doctrine, the legislature is prohibited from regulating an occupation "by denying individuals convicted of non-violent dishonesty related crimes, such as forgery, all opportunity to rebut the presumption they are unfit to be licensed or certified daycare providers while providing the opportunity for case by case rebuttal to others who present an equal or greater threat."

¶33 DCF responds that the irrebuttable presumption doctrine is "widely criticized and outdated" and "does not apply to rationally-based legislation that restricts non-contractual claims to receive funds from the public treasury," such as Wisconsin Shares. According to DCF, to the extent that the irrebuttable

presumption doctrine continues to exist, Wisconsin courts have not applied the doctrine to cases, such as this, where no fundamental right is implicated.

¶34 We need not determine the applicability of the irrebuttable presumption doctrine to resolve this appeal. As we have explained, the threshold inquiry in determining whether an individual has established a violation of substantive due process is whether the individual has been denied a constitutionally protected liberty or property interest, and, as we discuss below, Buckner has not established that she has a constitutionally protected property interest in being certified as a childcare provider or that she has been denied a constitutionally protected liberty interest. Thus, WIS. STAT. § 48.685(5)(br) does not violate substantive due process as long as it bears a rational relationship to a legitimate government interest, and, as we have already concluded, the statute is rationally related to protecting the Wisconsin Shares program from fraud.

¶35 Regarding her alleged property and liberty interests, Buckner contends that WIS. STAT. § 48.685(5)(br) is unconstitutional on its face because it deprives individuals who were certified or licensed to provide daycare at the time the new law went into effect of their property and liberty interests in their "occupational credentials." Buckner argues that it is "irrational to deny individuals an opportunity to prove they should not be disqualified when their offenses are remote in time and do not involve the core purposes of an occupational regulation." In Buckner's view, it is irrational to allow an older conviction to bar certification and licensure to individuals who "have established, by their own practice that their past criminal convictions do not 'predict' their unfitness for the profession."

¶36 In response, DCF contends that Buckner and others permanently barred from certification and licensure have not been denied a constitutionally protected property or liberty interest in being a certified childcare provider. Regarding Buckner's alleged property interest, DCF argues that there is no statutory guarantee that a childcare provider's certification "will not be revoked, if he or she no longer meets [WIS. STAT.] § 48.685 requirements—whether due to statutory change[s] or otherwise." Regarding Buckner's liberty interest in pursuing an occupation, DCF contends that she has not been denied a constitutionally protected liberty interest because the revocation of her certification does not prevent her from working in her chosen profession but rather prevents her from receiving government childcare subsidies. We agree.

¶37 We first note that Buckner does not seriously argue that she has been denied a constitutionally protected liberty or property interest because she concedes that the rational basis test is the correct test to apply to this facial challenge. As we have explained, the rational basis test applies only where no fundamental interest is at stake. *See* ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶53, 333 Wis. 2d 273, 797 N.W.2d 854 ("If there is no fundamental interest, the statute's application must withstand only a rational basis review."). However, to the extent that Buckner argues that a constitutionally protected liberty or property interest has been violated, we reject that argument.

¶38 As to Buckner's alleged property interest, Buckner does not direct us to any statute that demonstrates that she is entitled to certification. Rather, a person is entitled to be a certified childcare provider only if he or she meets the requirements set forth in WIS. STAT. § 48.685. *See* WIS. STAT. § 48.651(1). Moreover, an individual's certification must be revoked if he or she has been convicted of an enumerated crime, which includes felony forgery. *See* WIS. STAT.

§ 48.651(3)(a). Although Buckner may have had an expectation that her certification would not be revoked because DCF had recertified her in the past despite her criminal conviction, Buckner does not have a "legitimate claim of entitlement to" recertification but rather a "unilateral expectation" that her certification would not be revoked and that she would be recertified. *See* ***Fazio***, 280 Wis. 2d 837, ¶11 (quoting another source).

¶39 Buckner also has not established that she has been deprived a constitutionally protected liberty interest. Although there is a constitutionally protected liberty interest in an individual pursuing an occupation, Buckner has no liberty interest in pursuing a specific job. *See* ***Wroblewski***, 965 F.2d at 455. The State correctly points out that, although Buckner is no longer certified as a childcare provider and thus is ineligible for childcare subsidies, Buckner is not prevented from working in the childcare field simply because she is not certified. As we have already explained, Buckner is free to provide childcare for fewer than four children or for children over the age of seven and also may work in a licensed childcare facility, if she proves that she is rehabilitated.

¶40 Thus, because Buckner has not been denied a constitutionally protected liberty or property interest, Buckner must demonstrate that "the application of the statute bears a rational relation to a legitimate legislative objective." ***Tammy W-G.***, 333 Wis. 2d 273, ¶53. We have already concluded that, based on the logic of ***Brown***, applying a permanent, irrebuttable bar to individuals convicted of felony forgery is rationally related to the legitimate government interest of preventing fraud to the Wisconsin Shares program. We therefore do not revisit Buckner's arguments as to why the statute does not meet the rational basis test. Accordingly, we reject Buckner's substantive due process facial challenge.

B. As Applied

¶41 Buckner argues that WIS. STAT. § 48.685 is unconstitutional as applied to her because her conviction is too remote in time and too peripheral to the core purposes of regulating childcare to disqualify her from being certified or licensed as a childcare provider. Buckner points out that, since her conviction for forgery over fifteen years ago, she has not been charged with any other crimes, much less convicted of a crime of dishonesty. Buckner asserts that the absence of any criminal convictions since her conviction for forgery, and the fact that she has been recertified several times as a child care provider, is strong evidence that her forgery conviction is a poor predictor of whether she might defraud the government.

¶42 For the most part, Buckner repeats her argument that WIS. STAT. § 48.685 is facially unconstitutional under the due process clause, which we have rejected. It is not our role to comment on the wisdom of the law change that bars a person in her circumstances from certification. However, Buckner has not demonstrated that the statute violates substantive due process as applied to her, particularly given that she may be able to work as a caregiver in a licensed childcare facility if she proves she is rehabilitated.

CONCLUSION

¶43 For all of the foregoing reasons, we affirm.

By the Court.—Order affirmed.

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