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SUPREME COURT

**STATE OF WISCONSIN
SUPREME COURT**

CREE, INC.,

Petitioner-Respondent-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant, and

DERRICK PALMER,

Respondent-Appellant.

**DISTRICT: II
APPEAL No. 2019AP001671
Racine County Circuit Court Case No. 19-CV703
The Honorable Michael J. Piontek Presiding**

NONPARTY BRIEF OF LEGAL ACTION OF WISCONSIN, INC.

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STATEMENT OF INTEREST OF THE AMICI

Legal Action of Wisconsin (LAW) is Wisconsin's largest civil legal aid firm, with a focus on serving individuals experiencing poverty. Many of LAW's clients are unemployed, irregularly employed, or employed in a job that pays less than a living wage, in part, because they have a conviction record. LAW also regularly represents crime victims, including domestic violence and sex trafficking survivors, whose victimization has resulted in convictions. Both client groups often seek LAW's help managing the collateral consequences of their records. LAW has thus had an unparalleled opportunity to observe the long-term correlation between conviction records and individual economic distress.

State and national statistics provide the larger context for our clients' experience—demonstrating the link between criminal records and economic inequality. By 2018, an estimated 1.4 million people had criminal records in Wisconsin.¹ The FBI's criminal database has records for nearly 1/3 of American adults with ten to twenty thousand names being added each day.² Conviction with and without subsequent incarceration have a life-long impact on earnings.³ People who have spent time in prison suffer the greatest losses, with their subsequent annual earnings reduced by an

¹ Wisconsin Policy Forum, *A Fresh Start: Wisconsin's Atypical Expungement Law and Options for Reform* (June 2018), https://wispolicyforum.org/wp-content/uploads/2018/06/FreshStart_FullReport.pdf.

² Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, Wall Street J., Aug. 18, 2014.

³ Terry-Ann Craigie et al, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, Brennan Center for Justice (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal>

average of 52 percent.⁴ A misdemeanor conviction reduces annual earnings by an average of 16 percent.⁵

In Wisconsin, the collateral consequences of conviction records extend beyond those convicted of crimes. As of 2021, there were 227 municipal courts in Wisconsin, each regularly issuing non-traffic tickets for civil offenses that closely resemble criminal offenses. The resulting civil convictions are “convictions” for the purposes of Wis. Stat. §§ 111.31(1) and 111.32(3).

LAW is aware that this Court’s interpretation of statutes is not driven by public policy concerns; however, LAW urges the Court to consider the impact this case will have on crime victims, people of color, and the millions of Wisconsin residents with criminal and non-criminal conviction records.

I. While Cree frames its position as necessary to protect survivors, it is neither evidence-based nor reflective of survivors’ complex interests.

Cree’s position is simple: male batterers tend to use violence to achieve power or solve problems and that tendency is “likely to recur in the work setting.” (Cree Br. at 31). That position is not supported by research. Nor does it reflect survivors’ complex interests in conviction record discrimination.

⁴ *Id.*

⁵ *Id.*

Cree attempts to bolster its theory that domestic battery is substantially related to any job involving contact with women with Dr. Hanusa's testimony. However, Hanusa conceded he had not compiled statistical information on how often domestic offenders commit acts of workplace violence. (R. 122:230–32). Hanusa likely failed to provide such evidence because it does not exist. In a survey of relevant literature, researchers found only one study “examining the relationship between a criminal record and the propensity to commit workplace crimes or engage in inappropriate workplace behavior” and it showed “individuals with criminal convictions were *less likely* than other workers to be involved in fighting or stealing at work.”⁶ Workplace criminal conduct cannot be accurately inferred from general recidivism rates as “criminal offenses committed in the workplace are a very small subset of all offenses.”⁷ Hanusa's testimony is not only anecdotal, but lacks any basis in existing scholarship. Thus, LIRC correctly found this testimony “unhelpful.”

Cree implies its “elements only” version of the substantial relationship test is necessary to protect victims, but this protectionist rhetoric is rooted in gross simplifications about survivor needs and interests in employment discrimination. This employment discrimination does not just impact the batterer; it reverberates throughout their community, depriving children and survivors of financial support.⁸ Lack of employment

⁶ Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 Am. Bus. L.J. 201, 207 (2013).

⁷ *Id.*

⁸ The literature on the economic consequences of domestic violence on survivors is immense. For a brief overview, see Cynthia Hess & Alona Del Rosario, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors' Education*,

opportunities and decreased earning potential are among the strongest predictors of recidivism.⁹ Economic hardship increases the frequency and severity of domestic violence.¹⁰ Unemployment increases the risk of homicide in domestically violent relationships by fourfold and is the biggest predictor of murder in abusive relationships.¹¹ An employer may intend to punish the abuser when rescinding an employment opportunity, but the abuser's partner, children and community are punished as well.

Finally, domestic violence and sex trafficking survivors are sometimes convicted of crimes and municipal convictions arising from their victimization.¹² In the most extreme cases, victims who fight back are convicted of violent crimes or offenses with domestic abuse modifiers.¹³ Under the "elements only" substantial relationship test, those victims would

Careers, and Economic Security, Institute for Women's Policy Research (Oct. 24, 2018), <https://iwpr.org/iwpr-publications/report/dreams-deferred-a-survey-on-the-impact-of-intimate-partner-violence-on-survivors-education-careers-and-economic-security/>

⁹ Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc., 937, 939 (2003).

¹⁰ Katie Kent & Darald Hanusa, *Treating Perpetrators of Domestic Violence*, Wisconsin Public Radio (May 11, 2021), <https://www.wpr.org/shows/treating-perpetrators-domestic-violence>

¹¹ Jacquelyn Campbell et al, *Risk Factors for Femicide in Abusive Relationships*, AJPH (July 2003), <https://ajph.aphapublications.org/doi/10.2105/AJPH.93.7.1089>.

¹² Jane Sandusky, *The Criminal Legal System Response to Domestic Violence: Questions and Debate*, National Clearinghouse for the Defense of Battered Women, pp 19 (Feb. 2020), (reporting that more than 71% of incarcerated women have been victims of domestic violence. *Id.* at 18-19. Advocates suggest that survivors are often criminalized, especially when they not fit our preconceived notion of a "legitimate" victim—usually a white, middle-class woman. *Id.* at 8 and 11).

¹³ A New York study from 2005 indicates that two-thirds of women incarcerated for killing someone close to them had been abused by that person. Victoria Law, *When Abuse Victims Commit Crimes*, The Atlantic, May 21, 2019. Racial disparities are prevalent in domestic violence and criminalization of victims: "[b]lack women experience domestic violence at a higher rate than white women and are imprisoned at nearly twice the rate." *Id.*

face employment discrimination on the same grounds that Cree applied in this case.

II. The Court's Decision Will Affect Millions of People with Criminal and Civil Conviction Records.

The precise number of people convicted of criminal offenses in Wisconsin is not readily available through any report. However, available statistics establish that any law which affects criminal record employment discrimination will impact more than a million Wisconsin residents. In 2020, over 95,000 criminal cases were opened in Wisconsin and over 65,000 criminal cases were disposed.¹⁴ Tens of thousands of new criminal convictions are attached to individuals each year in the state.

This Court's decision will also affect the many Wisconsinites with civil municipal offense convictions. In 2019, state municipal courts handled over 75,000 non-traffic ordinance adult violations.¹⁵ There were 14,840 non-traffic citations filed in Milwaukee Municipal Court in 2019 alone.¹⁶ Many of these cases likely resulted in convictions because of the legal and social treatment of municipal cases. In civil ordinance cases, indigent defendants have no right to counsel, court appearance is generally optional, translation rights are limited, and defendants can be found guilty for missing a single court date. Wis Stat. §§ 800.035(9); 885.37; 885.38. Because success at trial generally involves a minimum of three court

¹⁴ Caseload Summary by Responsible Court Official, Statewide Report (Jan. 8, 2021), <https://www.wicourts.gov/publications/statistics/circuit/docs/caseloadstate20.pdf>

¹⁵ Municipal Statistics Summary, Year: 2019, <https://www.wicourts.gov/publications/statistics/municipal/docs/caseload19.pdf>

¹⁶ Milwaukee Municipal Court Charges Filed by Statute/Ordinance (Jan. 20, 2020), <https://city.milwaukee.gov/ImageLibrary/User/municourt/ChargesFiled2019byCode.pdf>.

appearances, defendants with money may simply pay a ticket to avoid the cost of lost work or childcare.

The current substantial relationship test does not differentiate between municipal forfeiture offenses and criminal offenses, despite the different levels of procedural protection provided to defendants in those cases. While civil convictions often do not appear on CCAP, the DOJ collects information on many civil offenses. Wis. Stat. § 165.83(2)(b). These conviction records become part of the DOJ's archive and are available to the public on the Crime Information Bureau's criminal history report. Most entry-level applications request information about prior convictions.¹⁷ Employers can and do ask about civil convictions and applicants must answer those questions like any other record query.¹⁸

Many LAW clients with conviction records struggle for years, even decades, to find jobs or advance in their chosen careers. A criminal or arrest record decreases employability, even before the applicant has the chance to interview. Easily accessible criminal records are used as a screening mechanism by employers: 50% of employers are unwilling to consider qualified applicants based on their criminal record.¹⁹ Research shows that

¹⁷ Pager, *supra* note 9, at 951.

¹⁸ Based on LAW's experience; *see* Pager, *supra* note 9, at 951; *see also* Christopher Uggen et al, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 Am. Soc'y Crim. 627, 633 (2014).

¹⁹ Pager *supra* note 9, at 956; *see also* Samuel K. Baier, *Reducing Employment Barriers for People with Criminal Records*, 46 J. Corp. L. 219, 222 (2020).

individuals with criminal or arrest records earn lower wages, are more likely to live in poverty, and are generally deemed less employable.²⁰

People of color experience a heightened form of record-based employment discrimination—which they often describe as part of a continuum of racial discrimination. This statistical reality led the Equal Employment Opportunity Commission to conclude “national data supports that criminal record exclusions have a disparate impact based on race and national origin.”²¹ Research has repeatedly shown that a record’s stigma disproportionately harms people of color. For example, a Wisconsin-based study in 2003 showed that employers considered white people with criminal records more employable than Black people without criminal records.²² A 2014 study showed similar results for misdemeanor arrests without charges: white applicants with an arrest record were more employable than black applicants without any arrests.²³ Collateral consequences of convictions are “disproportionately concentrated by race, gender, and poverty status, especially affecting black men”; as a result, criminal records “may be a significant contributor to racial disparities in employment and other socioeconomic outcomes.”²⁴ Therefore, any change

²⁰ Fields, *supra* note 2.

²¹ *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, U.S. Equal Emp’t Opportunity Comm’n, Apr. 25, 2012, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

²² Pager, *supra* note 9, at 959-960.

²³ Uggen, *supra* note 18, at 637.

²⁴ J.J. Prescott & Sonja Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 2461, 2471. (2020)

in Wisconsin's substantial relationship test will likely to have the most profound effect on people of color with criminal records.

III. The Substantial Relationship Test Should Include an Easily Ascertainable Fact Inquiry, Including Consideration of Conviction Severity and Time Since Conviction.

This Court has never held that an analysis of the circumstances of an offense is limited to the statutorily defined elements of the crime. WFEA was enacted to encourage merit-based employment and licensure decisions while minimizing the roles of bias and prejudice. In 1977, the law was amended to add arrest and conviction records as prohibited bases for employment discrimination. WFEA also created exceptions to this rule, relevant in this case: employers can deny employment to individuals convicted of offenses if “the circumstances” of the offense “substantially relate to the circumstances of the particular job or licensed activity.” Wis. Stat. § 111.335(3)(1).

The defense to conviction record discrimination changed significantly between the law's 1977 amendment and the late 1980s. After 1977, LIRC began developing a “substantial relationship” test that was individualized to a certain degree, weighing multiple factors including the job in question, the offense, the “length of time since conviction, number and seriousness of offenses, high moral requirements of certain jobs, evidence of rehabilitation, and mitigating circumstances of an offense.” *Milwaukee Cty. v. Lab. & Indus. Rev. Comm'n*, 139 Wis. 2d 805, 898, 407 N.W.2d 908, (1987). In the early 1980s, the Wisconsin Supreme Court

decided two licensing cases which unsettled LIRC's existing application of Wis. Stat. § 111.335(3)(1). *Lyndon Station. L. Enft Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 305 N.W.2d 89 (1981); *Gibson v. Transportation Comm'n*, 106 Wis. 2d 22, 315 N.W.2d 346 (1982). Those cases involved the interaction between occupational licensing requirements and WFEA's prohibition against conviction record discrimination. That framework is important to understanding the balance struck by the Court in these seminal decisions. There is an inherent tension between the State's regulation of conduct to protect its citizens and WFEA's focus on protecting individuals from employment discrimination.

The Court first addressed this tension in *Lyndon Station. Lyndon Station*, 101 Wis. 2d 472. In *Lyndon*, the Court harmonized LESB's decision with the WFEA by holding that the officer's conviction was substantially related to the position the Village had hired him for. *Id.* at 475–76. To the extent that *Lyndon Station* announced a new rule, it is only that the nature of the offense may be so obviously related to the job that the substantial relationship test can be satisfied without factual inquiry.

The Court expanded on this idea in *Gibson. Gibson*, 106 Wis. 2d 22. The majority in *Gibson* found that the circumstances of Gibson's conviction, *inferred* from the elements of his offense, substantially related to the circumstances of employment Gibson sought, affirming DOT's license refusal. *Id.* at 28–29. Despite that move to a more formalistic model of inquiry, the majority opinion stressed that factual circumstances may still be relevant. *Id.* at 28.

In 1987, the Supreme Court first applied this new version of the test to private employment. *Milwaukee Cty.*, 139 Wis. 2d 805. In the process, the Court justified its limited construction of the term “circumstances” by considerations of public policy and business necessity. The majority opinion found a substantial relationship at a high level of abstraction. However, the court still insisted that fact-finding beyond element identification would be important in some cases. *Id.* at 825.

Cree’s assertion that LIRC’s modest factual inquiry is prohibited by *Lyndon Station, Gibson*, and *Milwaukee County* is incorrect. If this Court accepts Cree’s invitation to rethink the current formulation of the test, it should consider further tethering—rather than completely untethering—the substantial relationship test to relevant, easily ascertainable facts.

The severity of charge and conviction date are examples of relevant, easily ascertainable facts that might be considered in applying the substantial relationship test. Currently, an employer may treat a non-criminal battery and felony battery conviction the same way, despite the differences in the procedural and legal protections afforded in criminal and civil cases. Similarly, date of conviction is a fact relevant to generalizations about propensity. A twenty-year-old conviction is difficult to reconcile with anything but a propensity for desisting from that type of criminal activity.²⁵

The Court has repeatedly held that fact-finding is appropriate in certain circumstances. If the Court accepts Cree’s invitation to remove modest fact-finding from the substantial relationship test, the negative

²⁵ See *Hickox*, *supra* note 6, at 246.

consequences could be felt across the state, most notably, amplifying the racially disparate collateral consequences of convictions and destabilizing families desperate for financial security.²⁶ If the Court chooses to clarify rather than abandon existing precedent, it could plainly state that easily ascertainable facts, like age of conviction and severity of the offense, are part of the circumstances of the offense.

IV. Conclusion

The parties' briefs focus on the particulars of the law as it has been and should be, applied to Palmer. However, the Court's decision in this case will have a profound impact on employability all throughout Wisconsin. If the Court adopts Cree's "elements only" application of the substantial relationship test, the collateral consequences of conviction records will intensify, impacting the millions of Wisconsinites with felony, misdemeanor, and civil convictions. The analysis dissolves into an affirmation that the character trait most associated with any conviction is "criminality." Under Cree's test, it will be easier to discriminate against those with conviction records and that discrimination will exacerbate the

²⁶ The elements test is neither objective nor racially neutral. Decades of scholarship establishes that, even after controlling for other facts, racism "permeates" the criminal justice system and its supposedly neutral processes. *See generally* Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and A Solution*, 29 Cornell J.L. & Pub. Pol'y 257, 270–71 (2019); *see also* Erika Davis Frenzel & Jeremy D. Ball, *Effects of Individual Characteristics on Plea Negotiations Under Sentencing Guidelines*, 5 J. ETHNICITY IN CRIM. JUST. 59, 59 (2007). Defendants who are Black, young, and male fare especially poorly *see also* Celesta A. Albonetti, *Race and the Probability of Pleading Guilty*, 6 J. QUANTITATIVE CRIMINOLOGY 315, 331 (1990). A conviction record is thus not the result of some immutable outcome dictated inexorably by facts alleged, admitted, or proven, but is instead the product of many discretionary choices impacted by structural racism and implicit bias.

racial disparity of records-based discrimination, injuring those the WFEA purports to protect. This result is diametrically opposed to the policy announced in Wis. Stat. § 111.31.

Dated this 27 day of May, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.12(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,857 words.

Signed:

S/ Jessie L. Long

Jessie L. Long

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated May 27, 2021

Legal Action of Wisconsin
Amicus Curiae

Signed:

S/ Jessie L. Long

Jessie L. Long

CERTIFICATION AND MAILING

I hereby certify that on this day, I caused Twenty-two (22) copies of the Nonparty Motion and Brief to be deposited with a third-party commercial carrier (FedEx) for delivery to the Clerk of the Supreme Court and Court of Appeals by first class mail or other class of mail that is expeditious.

I further certify that on this day, I caused three copies of this brief and appendix, if any, to be served by third-party commercial carrier (FedEx) on a counsel of record for Petitioner, Respondent, and other interested parties. I further certify the packages were correctly addressed and postage was pre-paid.

Dated May 27, 2021

Legal Action of Wisconsin
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Signed:

S/ Jessie L. Long

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