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A T T O R N E Y / C L I E N T P R I V I L E G E D A D V I C E M E M O R A N D U M

DATE: March 28, 2022

TO: Monica Alexander, Executive Director
Criminal Justice Training Commission

FROM: Alicia O. Young, Deputy Solicitor General
Alexia Diorio, Assistant Attorney General

SUBJECT: Application of E2SSB 5051, Section 9 (RCW 43.101.105) to Certification Decisions Based on Events Preceding its Effective Date

I. Issue

RCW 43.101.105, as amended by Engrossed Second Substitute Senate Bill (E2SSB) 5051 (effective July 25, 2021), authorizes and in some cases requires the Criminal Justice Training Commission (CJTC) to deny or revoke officer certification for certain enumerated reasons, including when an officer has been convicted of certain offenses or terminated from employment for specified reasons. In circumstances where the conviction or termination from employment (or other basis for revocation) occurred prior to the amendment's effective date, you ask whether the CJTC could apply the law as amended or whether the statute only applies to bases for revocation that occurred on or after the effective date of SB 5051.

II. Short answer

While this question is difficult to answer, we believe the best reading of the statute is that the Legislature intended the CJTC to base future certification decisions on the criteria enumerated in RCW 43.101.105 as amended, even if some or all of the events meeting the criteria for revocation occurred prior to the effective date of the amendment. The Legislature's use of past tense language with respect to the enumerated bases for revocation, removal of prior date parameters, and omission of new date restrictions all suggest the Legislature intended the

criteria in RCW 43.101.105 to apply to any future certification decision, regardless of when the underlying misconduct occurred.

We do not believe this would result in a retroactive application of the statute, because the precipitating event for the statute's application is a certification decision, and the statute as amended applies only to future certification decisions. But even if this reading did result in retroactive application, we believe there are sufficient indicia of legislative intent to overcome any presumption against construing a statute to apply retroactively. The only reason to stray from the Legislature's expressed intent would be if the contemplated application were unconstitutional. The case law on when a statute is retroactive and when it impermissibly retroactively interferes with substantive rights is at times unclear, and whether application of this statute to prior acts of misconduct is constitutional may come down to whether a court views this as prospective regulation of a profession or retroactive punishment. While this analysis may depend on the circumstances of any particular challenge, we believe in the vast majority of cases that the constitution would permit certification decisions that are based on events that preceded SB 5051's effective date, particularly if the CJTC's decisions are prospectively-focused on an officer's present and future qualifications to serve.

While we believe that the reading outlined above is the best interpretation of the statute, we acknowledge that there is some risk a court could disagree, or that a court could find that applying the statute based on past conduct is unconstitutional.

III. Statutory and Regulatory Background

The Criminal Justice Training Commission (CJTC) is a statewide agency that certifies peace and corrections officers and provides training and education. *See generally* RCW 43.101. In 2021, passage of Engrossed Second Substitute Senate Bill 5051 (SB 5051), Chapter 323, Laws of 2001, significantly altered and broadened the standards under which the CJTC may take action to deny, suspend, or revoke an officer's certification. SB 5051 went into effect on July 25, 2021. Your inquiry focuses on the effect of Section 9 of SB 5051, which authorizes and in some cases requires the CJTC to deny, suspend, or revoke certification of officers. Section 9 is codified at RCW 43.101.105, which was first passed in 2001.

Prior to SB 5051, RCW 43.101.105 did not require the CJTC to deny[1] or revoke certification, but allowed it to do so in six situations, after written notice and a hearing. Former RCW 41.101.105 (2020). Unlike the former statute, which only specified permissive bases for revocation (using the term "may"), SB 5051 creates two new categories: those where the CJTC

[1] With one caveat: the previous version of the statute stated that the commission shall deny certification to any applicant who has lost his or her certification as a result of a break in service of more than twenty-four consecutive months if that applicant failed to comply with the requirements set forth in RCW 43.101.080(19) and 43.101.095(2). Former RCW 43.101.105, Sec. 3 (2). SB 5051 does not amend that language so this requirement exists in the current version of the statute. RCW 43.101.105(5).

must deny or revoke certification, and those where the CJTC *may* deny, suspend, or revoke certification or require remedial training.[2] All of the bases for revocation in the previous version of the law are reincorporated in SB 5051 as either categories where the CJTC *must* deny or revoke, or where the CJTC *may* deny, suspend, or revoke. SB 5051 also adds several new bases to deny, revoke, or suspend certification. The amendments more clearly state that illegal use of force and failure to intervene in illegal use of force are included in such misconduct. RCW 43.101.105(2)(b), (2)(c), and (3)(e). Other examples of these new categories include sexual harassment, discrimination, affiliation with extremist organizations, and patterns of conduct showing disregard for the rights of others, that fail to meet ethical and professional standards, or jeopardizes public trust in law enforcement. RCW 43.101.105(3)(f), (h), (i), (j)(ii), and (j)(iv).

An additional change is the elimination of the requirement that an officer was "discharged for disqualifying misconduct," which applied to most revocation proceedings conducted under the old standard. RCW 43.101.105(d) (2020); RCW 43.101.010(8) (2020).While there still remains a requirement that an officer be terminated or separated for some categories of misconduct, for most categories officers no longer need to be discharged or terminated by their agency before the CJTC can investigate and initiate the hearings process. RCW 43.101.105(2)(b), (c), and (d).

IV. Analysis

You originally asked whether SB 5051 is "retroactive." We start by noting that whether a statute applies retroactively is a confusing area of the law. Generally, Washington courts addressing a question like this start with the presumption that statutes apply prospectively, unless there is legislative intent to the contrary. *In re Estate of Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31 (2013). This presumption is just a starting point, and the next step is to look at the language of the statute and the legislative history to ascertain legislative intent. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 267, 285 P.3d 854 (2012); *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992) (intent regarding retroactivity "may also be gleaned from other sources, including from legislative history"). We do this in section A. Here, while it is a very close call, we think the better reading of the statute is that it does indicate the legislature intended the CJTC to consider prior acts of misconduct when engaging in future revocation actions, though as we will explain, that does not necessarily result in a retroactive application of the statute. However, we recognize that if the CJTC does consider those previous acts of misconduct in current revocation decisions, this may lead to legal challenges. In Section B, we walk through some potential arguments that officers could raise, and suggest a strategy that the CJTC can take to mitigate the risk of those claims if it does decide to consider previous acts of misconduct.

[2] In addition, the CJTC may now also "require mandatory retraining or placement on probation for up to two years, or both." RCW 43.101.105(4).

A. SB 5051 likely authorizes and in some circumstances requires the CJTC to consider conduct that occurred prior to its effective date

When interpreting and applying a statute, the primary objective is to ascertain and give effect to the Legislature's intent. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). Accordingly, we start by examining the plain language of RCW 43.101.105 as amended. If the meaning of the statute is clear, we "must assume the Legislature meant exactly what it said and apply the statute as written." *Univ. of Washington v. City of Seattle*, 188 Wn.2d 823, 832, 399 P.3d 519 (2017). "If a statute is ambiguous, we may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 306, 268 P.3d 892 (2011). We also consider whether any rules of construction mandate a particular reading of an ambiguous statute. *See Utter v. Building Industry Ass'n of Wash.*, 182 Wn.2d 398, 434-435, 341 P.3d 953 (2015). A statute is ambiguous when it is susceptible to two or more reasonable interpretations. *State v. Gray*, 174 Wn.2d 920, 927, 280 P.3d 1110 (2012).

Examining the plain language, legislative history, and principles of construction here, we conclude that the Legislature probably intended the CJTC to apply SB 5051 to consider events that predate SB 5051 in making all future certification decisions.

1. Statutory language

SB 5051 does not include any explicit statement of retroactivity or prospectivity. However, the language of the statute indicates that the legislature intended for the CJTC to consider acts of misconduct that occurred prior to SB 5051's passage when making future certification decisions.

The plain language of SB 5051 implies that it looks back in time without limitation. The CJTC must deny or revoke an officer's certification if the officer "*has been* convicted of" certain criminal offenses. RCW 43.101.105(2)(a) (emphasis added).[3] The CJTC must also deny or revoke certification if the officer "*has bee*n terminated or otherwise separated" by their employing agency for several offenses. RCW 43.101.105(2)(b)-(d) (emphasis added). These sections indicate that the CJTC must revoke an officer's certification if it learns that an officer *has experienced an adverse action in the past*, even if the conviction or termination occurred before the bill's passage. Similarly, the CJTC may deny, suspend, or revoke certification for a number of other categories, most of which also use past tense language. The statute uses words like "failed to timely meet," "was previously," "falsified or omitted," "interfered with," "engaged in," "committed," "has used," and "has been found." If the legislature intended for the CJTC to consider events that only occurred following passage of SB 5051, it likely would have used language like "fails to timely meet," "is," "falsifies or omits," "interferes with," "engages in," "commits," "uses," and "is found." For example, the Legislature used present-condition language

[3] With the caveat that a) the offense was not disclosed at the time the officer applied for certification or b) the offense occurred when the officer was certified and the officer was not pardoned (and the officer wasn't a juvenile at the time of the offense). RCW 43.101.105(2)(a).

in Section 9(2)(e), which requires revocation when the officer "*[i]s* prohibited from possessing weapons by state or federal law or by a permanent court order entered after a hearing." RCW 43.101.105(2)(e) (emphasis added). The Legislature could have also specified a temporal parameter instructing the CJTC to only consider acts occurring after a specified date, but it did not. The past tense language of SB 5051 implies a look back period, and the legislation does not limit how far the CJTC should look back.

Courts have consistently held that a legislature's use of a verb tense is significant in construing statutes. *Carr v. U.S.*, 560 U.S. 438, 447-48 (2010) (citing cases and determining a sex offender travel restriction statute did not apply to sex offenders convicted prior to the statute's effective date in part because of the present tense used in the statute); *U.S. v. Wilson*, 503 U.S. 329, 333 (1992) (citing cases and determining that the past tense terms "was imposed" and "has spent" could include credits for time spent in detention prior to the start of a defendant's sentence). Thus, in *Johnston v. Beneficial Management Corp. of America*, 85 Wn.2d 637, 641-42, 538 P.2d 510 (1975), the Court decided that a statute creating a new right to bring private damages suits for violations of the Consumer Protection Act was intended to apply only prospectively to transactions entered into after its effective date, in part because it was "couched in language expressed in the present and future tenses rather than the past tense." In *Matter of Dependency of D.L.B.*, the Washington Supreme Court analyzed an amendment to the child dependency statutes, which requires a court to consider additional factors "[i]f the parent is incarcerated" before terminating a parent's rights. 186 Wn.2d 103, 114, 376 P.3d 1099 (2016). The court stated that "the legislature's use of the present tense . . . appears to have been intentional." *Id.* at 117; *see also Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993) ("the presumption in favor of prospectivity is strengthened when the Legislature, as here, uses only present and future tenses in drafting the statute") (citation omitted).

By the same logic, the use of past tense in RCW 43.101.105, especially compared to other provisions of RCW 43.101 that use the present tense, indicates the legislature's intent to look back at previous acts of misconduct. *See also Wrigley v. State*, 195 Wn.2d 65, 75, 455 P.3d 1138 (2020) ("This consistent use of past tense and the term "instances" indicate that the legislature intended the reports to be based on existing conduct, not on future speculation"). The plain language of RCW 43.101.105 indicates the Legislature's intent that the CJTC consider all previous relevant convictions and employment terminations in future certification decisions. Similarly in *Hughes v. Board of Architectural Examiners*, the California Supreme Court determined that a section allowing the state Board to suspend or revoke the license of an architect who is *guilty of or commits* a specified act "suggests by that language that the acts or omissions constituting such grounds may have occurred prior to as well as following licensure." 17 Cal.4th 763, 777, 952 P.2d 641 (1998).

Second, RCW 43.101.105 applies to both active officers *and* applicants. RCW 43.101.105(2)-(3). The fact that RCW 43.101.105 treats applicants and existing officers equally suggests that the legislature saw no distinction in the way the CJTC should view the prior acts of both applicants and existing officers. In other words, if the legislature was concerned that

existing officers should not have their previous acts of misconduct considered, they may have written the statute separately for existing officers, rather than combining their treatment with applicants.

One aspect of RCW 43.101.105 that may indicate the Legislature did not intend to base future certification decisions on misconduct predating the amendment is that the statute states that the CJTC may deny, suspend, or revoke certification in order to "help prevent misconduct, enhance peace officer and corrections officer accountability through the imposition of sanctions commensurate to the wrongdoing *when misconduct occurs*, and enhance public trust and confidence in the criminal justice system." RCW 43.101.105(1) (emphasis added). "When misconduct occurs" may indicate a desire to react to acts of misconduct in close temporal proximity after they occur, and not long after the fact. However, this may also simply indicate the legislature's intent to impose sanctions for bad acts, rather than no consequence at all. Given the other language in the statute, it still appears that the legislature intended the CJTC to consider acts of misconduct prior to SB 5051's passage.

2. Legislative History

In addition to the plain language of RCW 43.101.105, the legislative history may be instructive as to whether the bill was intended to include prior acts of misconduct. *Spokane Cty. v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 461-62, 430 P.3d 655 (2018). Generally, the legislative history does not include much discussion of whether SB 5051 would include conduct prior to the effective date of the legislation. However, the legislature chose to remove some time restrictions that were in the statute before it was amended. Previously, RCW 43.101.105(1)(d) gave the CJTC authority to deny or revoke certification when "[t]he peace officer has been discharged for disqualifying misconduct, the discharge is final, *and some or all of the acts or omissions forming the basis for the discharge proceedings occurred on or after January 1, 2002*." Former RCW 43.101.105(1)(d) (2011) (emphasis added).[4] Similarly, the statute formerly stated that "*[a]fter July 24, 2005*, the commission shall deny certification to any applicant who has lost his or her certification as a result of a break in service …." RCW 43.101.105(2) (emphasis added).[5] That date was also removed in SB 5051.

The fact that the previous version of the statute had temporal limitations that were removed in 2021 is telling. A court may find that the legislature purposefully removed these start dates, or at least was aware that they existed and chose not to include new ones, suggesting it intended for the amended provisions to include acts that happened in the past. *Matter of Dependency of D.L.B.*, 186 Wn.2d at 118 ("These differences in wording . . . indicate that the legislature knew how to direct the termination court . . . but chose not to do so"). The fact that former RCW 43.101.105(1)(d), addressing misconduct, included a date that was later removed is

[4] Available at http://lawfilesext.leg.wa.gov/biennium/2011-12/Pdf/Bills/Session%20Laws/House/1567-S.SL.pdf?cite=2011%20c%20234%20%C2%A7%203. January 1, 2002 was the effective date of the relevant language, *see* Laws of 2001, Ch. 167, § 3(4), so the Legislature expressed its clear intent to base revocations under that provision only when the underlying events occurred after its effective date.
[5] July 2, 2005, was the effective date of this language. Laws of 2005, Ch. 434, § 3(2).

particularly persuasive, as SB 5051 expands conditions for decertification along similar lines (including criminal offenses, different forms of misconduct, etc.). In *In re Estate of Haviland*, the court examined "slayer statutes" that disinherit those who financially abuse vulnerable adults. The court found significant the fact that the legislature did not specify an effective date for financial abuse amendments, particularly given that other provisions within the same legislation did. 177 Wn.2d 68, 75, 301 P.3d 31 (2013) ("these provisions demonstrate that the legislature is capable of expressing a triggering event . . . its decision not to do so here further supports broad application of the abuser statutes").

One other minor, though possibly noteworthy section of SB 5051 is in Section 8, which addresses offers of employment and requirements for officers. Section 8 specifically requires background checks for "Any applicant who has been offered a conditional offer of employment as a peace officer or reserve officer or offered a conditional offer of employment as a corrections officer after July 1, 2021." RCW 43.101.095(2)(a). This is additional evidence that the legislature knew how to impose temporal limitations, and chose not to with respect to bases for denial or revocation.

3. Additional Construction Aids

We also consider two rules of statutory construction that could aid us in resolving any ambiguity in the statute.

a. The presumption against retroactive application

First, there is sometimes said to be a presumption against applying a statute retroactively. *In re Estate of Haviland*, 177 Wn.2d at 75; *Seven Hills, LLC v. Chelan County*, 198 Wn.2d 371, 403, 495 P.3d 778 (2021) (citing *Macumber v. Shafer*, 96 Wn.2d 568, 570 (1981)). But the application we are contemplating here is not necessarily a "retroactive" application that would even trigger this presumption. Additionally, despite the presumption, a statute will, nonetheless, apply retroactively if that is the Legislature's intent or if the statute is remedial. *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002).

We should first acknowledge that our contemplated application of SB 5051 is not necessarily retroactive, because the statute applies to future acts, i.e., certification decisions. "A statute operates prospectively [rather than retroactively] when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to enactment." *In re Burns*, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997). The precipitating event of a statute "is fundamentally an inquiry into legislative intent." *SEIU Local 925 v. Dep't of Early Learning*, 194 Wn.2d 546, 555, 450 P.3d 1181 (2019) (*DEL*). But that intent should be evaluated "in light of relevant constitutional interests," including "ex post facto clause protections and vested rights," and "elementary considerations of fairness." *Id*. at 556. In identifying the precipitating event, we look at the "activity the challenged provisions regulate." *In re Burns*, 131 Wn.2d. at 112. In *In re Burns*, the triggering event for a medical assistance recipient whose estate was required to pay back medical assistance was the acceptance

of benefits, because the statute created and regulated a debt at that point in time. *Id*. at 113. In *DEL*, the triggering event was the agency's release of records (rather than the date of the request), because the purpose of the amendment to the Public Records Act was to regulate the agency's obligation to actually release the records. 194 Wn.2d at 556.[6]

Here, RCW 43.101.105 regulates the CJTC's evaluation of an officer's present and future certification. While it may relate to events that predate the statute's amendment, the amendments to RCW 43.101.105 have the intent and effect of governing the actions the CJTC takes on future certification decisions. RCW 43.101.105 has no effect on the officer's *prior* certification, conviction, or employment status. Rather, it governs the CJTC's prospective decision about an officer's present and future qualification as an officer. Thus, a change in the law that impacts only future certification decisions is arguably not a retroactive change, even if it relates to prior convictions or terminations.

Like in *Dep't of Early Learning*, where the legislation was focused on the *release* of public records, or in *Haviland*, where the statute's application depended on the probate process, Section 9 of SB 5051 is focused on the CJTC's ability to deny, revoke, or suspend certification, including the procedural requirements behind these actions. In *Haviland*, the filing of a petition challenging distribution during the probate process was what triggered the application of the statute; here, the CJTC's decision to commence a revocation action is where SB 5051's provisions become relevant. While the revocation proceeding may be based on prior acts, just like the prior abuse in *Haviland*, those prior acts are not the focus of the statute. The legislation as a whole is focused on CJTC's ability to train and certify officers, including by requiring extensive background checks. The focus is on ensuring officers are presently fit for duty, which may include ensuring that they have not committed certain bad acts in the past.

Additionally, courts have seen previous acts of misconduct as evidence of present or future fitness for positions like peace officers. *See, e.g.*, *Cuff v. Dep't of Pub. Safety Standards & Training*, 345 Or. 462, 471, 198 P.3d 931 (2008) ("it is difficult of conceive of any viable way to evaluate a person's present moral fitness without considering the person's past conduct"); *Hughes*, 17 Cal.4th at 787. The past tense language of SB 5051 supports this reading. As the court stated in *Haviland*, Washington case law "demonstrates that the proper triggering even is that which the statute intends to regulate." *Id.* at 78. The statute regulates peace officer certification standards—not acts of misconduct that officers may have committed.

[6] Several other cases explore what it means for a "triggering event" to occur after passage of legislation, even though it may be related to events that existed prior to the new legislation. *See, e.g.*, *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992) (the retirement of a judge with pending cases, not the fact that a case is pending, was the triggering event in a constitutional amendment authorizing a retiring judge to hear cases pending before retirement); *Aetna Life Ins. Co.*, 83 Wn.2d at 535 (liquidation order was the precipitating event for act that required insurers to become members of a guaranty association if another insured received a liquidation order, rather than the insolvency or previous receipt of premiums); *State v. Scheffel*, 82 Wn.2d 872, 878-79, 514 P.2d 1052 (1973) (defendants' accrual of a third violation under the Habitual Traffic Offenders Act was the triggering event, not the two convictions they received prior to the effective date of the Act); *In re Estate of Haviland*, 177 Wn.2d at 74 (probate process was the triggering event for slayer statute's prohibition on inheritance to financial abusers).

The contrary argument would be that SB 5051 has a retroactive effect because it imposes new legal consequences based on actions that were already complete before the amendment. *See In re Pers. Restraint of Flint*, 174 Wn.2d 539, 547-48, 277 P.3d 657 (2012) ("A statute has retroactive effect if . . . [its] application increases liability for past conduct or imposes new duties or disabilities with respect to completed transactions.") (citations omitted). Courts tend to decline to apply statues retroactively when they create new civil penalties. *Adcox*, 123 Wn.2d at 30 (declining to apply a statute retroactively because it created new civil penalties for noncomplying hospitals); *Johnston*, 85 Wn.2d at 642. Retroactive imposition of punitive damages, for example, raises "a serious constitutional question" that counsels against retroactive application. *Landgraf*, 511 U.S. at 281. The argument here would be that the triggering event is the conviction or termination itself, which is later the basis for denial or revocation of officer certification.

But this analysis misses several important steps: the individual must first seek or be certified as an officer, and the CJTC must decide to take action on that certification. RCW 43.101.105 is not self-executing in the sense that as soon as the officer commits an act of misconduct, a legal consequence under the statute results. The conviction or termination only becomes relevant in a later proceeding, because the officers have subjected themselves to CJTC's regulation of the profession by seeking or maintaining certification.[7] A certification decision is not a modification or extension of a criminal sentence or an enhanced employment disciplinary action. Additionally, as expanded upon later, certification decisions are not primarily penalties or punishment.

To some extent, whether it is a "retroactive application" of SB 5051 to base certification decisions on prior bad acts may come down to whether a court views the CJTC's revocation decisions under the statute as retroactive, and a punitive response to those bad acts, or forward-looking regulation to maintain the integrity of the profession and protect the public. While RCW 43.101.105 does use words like "sanction," and "penalties," it also states the Legislature's intent to "help prevent misconduct, enhance peace officer and corrections officer accountability," and "enhance public trust and confidence in the criminal justice system," suggesting the primary objective of the certification statutes is to regulate the profession and determine prospective qualification for the protection of the public. RCW 41.101.105(2).

Even if the effect of the amendment was retroactive, the fact that there is a presumption against interpreting a statute retroactively is only a starting point. The presumption is really just another way of saying that we need to ascertain the legislature's intent when determining the meaning and application of a statute. "A statutory amendment will be applied retroactively" if "intended by the Legislature to apply retroactively" and "constitutionally permissible under the circumstances." *Barstad*, 145 Wn.2d at 536-37. As explained above, our best reading of the statute is that the Legislature intended to authorize and in some circumstances require the CJTC to consider events occurring before SB 5051's effective date when it makes prospective

[7] There must be some limiting principle on what constitutes a "new legal consequence" to a conviction, because one can contemplate all sorts of collateral consequences that may otherwise follow a conviction or termination and not raise constitutional concerns, such as disqualification from future jobs.

certification decisions. Thus, as long as there are no constitutional problems with applying the amendment in this manner, the legislature's intent should govern whether the amendment does, in fact, apply to events predating the amendment, regardless of whether this application is a retroactive application. *Id*.

Finally, the presumption against retroactivity can also be overcome if the statute is remedial. *Kellogg v. National Railroad Passenger Corp.*, 2022 WL 552605, *6, 504 P.3d 796 (Wash. Supr. Ct. 2022) (citing *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 223, 173 P.3d 885 (2007)). [8] An amendment is remedial "when it relates to practice, procedure or remedies, and does not affect a substantive or vested right." *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 462, 832 P.2d 1303 (1992). There could be an argument that SB 5051 is remedial given the overarching intent of the statute to promote public trust and enhance the integrity, effectiveness, and professionalism of peace officers and correction officers. *See* RCW 43.101.020, .021, .105; *see also Hughes*, 17 Cal.4th at 786-87. Regardless of whether the statute indicates an intent to apply retroactively, or applies retroactively because it is remedial, the next question to ask is whether a retroactive reading would raise any constitutional concerns.

b. Courts will, if possible, construe the statute so that it is constitutional

The second applicable principle of statutory construction is that, whenever possible, courts construe a statute to render it constitutional. *State v. Watkins*, 191 Wn.2d 530, 535, 423 P.3d 830 (2018) (citation omitted). Accordingly, if the statute is ambiguous and interpreting it to apply to acts of misconduct that occurred prior to its effective date would render it unconstitutional, that would mandate interpreting the statute so that it does not apply to such acts of misconduct, if possible. But because we believe it is constitutional to read SB 5051 to require consideration of past conduct in making certification decisions, this principle has no impact here.

We now turn to address legal challenges that we anticipate might be made to the CJTC's certification decisions if they are based on events that occurred before SB 5051 became effective.

B. Potential Legal Challenges

Legal challenges—and their probability of success—are hard to predict in this context, especially in the form of as-applied challenges that might depend on specific facts about how SB 5051 might affect a particular officer. Here, we outline several claims that officers might bring in response to revocation decisions under SB 5051. Ultimately, we believe that if the CJTC considers prior acts of misconduct by officers when considering revocation decisions under SB 5051, the statute will be constitutional as applied.

[8] Statutory amendments will also be applied retroactively if "curative." *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461 (1992). This is unlikely to apply here, as an amendment is curative "only if it clarifies or technically corrects an ambiguous statute." *Id.*

1. Substantive Due Process

The most obvious constitutional provision applicable to restrictions on professional certifications is the due process clause of the federal and state constitutions. The right to pursue a trade or occupation is a liberty interest protected by the federal and state due process clauses. *Fields v. Dep't of Early Learning*, 193 Wn.2d 36, 53, 434 P.3d 999, 1008 (2019). Similarly, a professional license is a property interest protected by due process. *Hardee v. State, Dep't of Social & Health Services*, 172 Wn.2d 1, 8-9, 256 P.3d 339 (2011).[9] Neither are fundamental rights, so both are subject to reasonable government regulation. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006); *Yim v. City of Seattle*, 194 Wn.2d 682, 688-89, 451 P.3d 694 (2019) (as amended). Due process has both a procedural and substantive component. The procedural component requires notice and an opportunity to be heard to guard against erroneous deprivation when the state seeks to deprive a person of a protected interest. *Yim*, 194 Wn.2d at 688-89. The substantive component in the context of non-fundamental interests "'protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.'" *Id*. (quoting *Amunrud*, 158 Wn.2d at 216). The inquiry involves determining whether the challenged regulations are rationally related to a legitimate state interest. *Amunrud*, 158 Wn.2d at 222.

The primary challenge we would anticipate here is an argument that revoking an officer's certification based on events that occurred prior to their designation as "bases for revocation" unreasonably deprives the officer of a property or liberty interest. This challenge involves two inquiries. First, whether each basis for revocation has a rational relationship to the state's interests, such as promoting public trust and confidence in every aspect of the criminal justice system, and enhancing the integrity, effectiveness, and professionalism of peace officers and correction officers. *See* RCW 43.101.020, .021, .105. Second, whether it is reasonable to base revocation decisions on events that occurred prior to the time that they were specified as bases for revocation. *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (for a retroactive statute to "meet the test of due process" it must be "justified by a rational legislative purpose") (discussing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)). Your request for advice requires us to focus on the second inquiry, so we only briefly address the first.

First, it is reasonable to base certification decisions on the events identified in RCW 43.101.105 as amended, because they all involve some type of misconduct, which is relevant to evaluate an officer's present fitness for duty. *See* RCW 43.101.020, .021, .105 (the intent of SB 5051 is to enhance the integrity, effectiveness, and professionalism of peace officers and correction officers).

[9] We do not need to get into whether a law enforcement certification is a "professional license" or a different kind of license/certification that may be entitled to less procedural protection because it does not require the level of investment that a medical license does. *See Hardee*, 172 Wn.2d at 10-15. That distinction is primarily relevant in a procedural due process analysis, and here, we are addressing a substantive due process claim. You have not asked us specifically about the constitutionality of the CJTC's revocation procedures, and we assume for the purposes of this advice that they are constitutionally sufficient.

Second, it is reasonable to look back at previous acts of misconduct, and fair to do so, because the majority of the new categories leading to potential revocation in SB 5051 all involve acts that were previously illegal and/or against police department policy. Prior to SB 5051, RCW 43.101.105 did not require the CJTC to deny or revoke certification, but allowed it to do so in six situations. SB 5051 creates two new categories: those where the CJTC *must* deny or revoke, and those where the CJTC *may* deny, *suspend*, or revoke. Some of the situations in the previous version of the bill are reincorporated as categories where the CJTC *must* deny or revoke, and some are reincorporated as situations where the CJTC *may* deny, suspend, or revoke. This is one substantive change from a due process perspective: previously, the CJTC was not *required* to take action and so officers may be more likely to face a particular consequence now than they were in the past.

SB 5051 also adds new categories where the CJTC may or must deny, suspend, or revoke certification. While difficult to verify, arguably all of them were either a) illegal under existing law prior to 5051 or b) likely to have been prohibited by police department policies. Some of the new categories likely involve conduct that would have violated the law prior to SB 5051's passage. These are where an officer has used an illegal use of force, engaged in fraud or perjury, is prohibited from possessing weapons, committed sexual harassment, used their position for personal gain through fraud or misrepresentation, engaged in prejudice or discrimination, committed a felony, violated the constitutional rights of others, and engaged in unsafe practices indicating a willful or wanton disregard for the safety of persons or property. The remaining categories were likely against existing police department policies.[10] These are where an officer failed to intervene or report another officer's use of force, engaged in a use of force that violated department policy, failed to meet ethical and professional standards, was suspended or discharged for misconduct, or voluntarily surrendered their certification as an officer.

The illegality or wrongfulness of acts committed in the past may matter when considering due process concerns. For example, the Oregon Supreme Court considered a case where an officer argued it was impermissibly retroactive to "consider evidence of conduct that was not grounds for revocation when he committed it." *Cuff*, 345 Or. at 474. The court disagreed, stating that the officer's "argument might be persuasive if petitioner plausibly could contend that he did not have any reason to believe that his conduct in purchasing and using illegal drugs . . . fell below minimum standards for public safety officers at the time that he committed it . . . [but] Petitioner cannot do so." *Id.*

Accordingly, if officers were already on notice that their actions could lead to adverse consequences, it is harder to argue they did not have sufficient notice of the potential for CJTC action, or that the outcome would be fundamentally unfair from a due process perspective. Moreover, officers never had a protected right to engage in any of the conduct that now subjects them to potential revocation.

[10] There is one additional category which requires CJTC action where the officer "has affiliation with one or more extremist organizations." We interpret this as a present condition, so this particular condition would not raise retroactivity or due process concerns.

To conclude, these bases for revocation have a rational relationship to the state's interests by promoting public trust and confidence in every aspect of the criminal justice system, and enhancing the integrity, effectiveness, and professionalism of peace officers and correction officers. Furthermore, it is reasonable to base revocation decisions on events that occurred in the past because these events relate to an officer's ongoing fitness for duty. Additionally, given that the new bases for revocation were previously illegal and/or against police department policy, this may mitigate any due process or fairness concerns.

2. Infringement on a Vested Right

We also consider whether the "vested rights doctrine" is implicated here. "The vested rights doctrine is a constitutional protection for property rights . . . It protects private citizens against legislative takings and impairment of contracts." *DEL*, 194 Wn.2d at 553. "A statute may not be given retrospective effect, regardless of the intention of the legislature, where the effect would be to interfere with vested rights." *Washington State Association of Counties v. State*, 502 P.3d 825, 835 (2022) (WSAC) (quoting *Gillis v. King County*, 42 Wn.2d 373, 376, 255 P.2d 546 (1953) (internal quotation marks omitted)). This doctrine likely does not apply here because (1) as explained earlier, we believe application of SB 5051 in future certification decisions is not retroactive, and (2) there is no vested right to either engage in the misconduct that that could lead to revocation or keep perpetual certification in a profession.

a. SB 5051 Applies Only to Future Certification Decisions, So it is Not Likely to be Considered Retroactive

As noted earlier, it is not clear that applying SB 5051 in the manner we have been contemplating would be a retroactive application at all, because the statute applies to certification decisions made after SB 5051's enactment. Put another way, nothing about SB 5051 would allow the CJTC to withdraw or amend certification decisions it made prior to SB 5051. When the CJTC is making a certification decision under SB 5051, it is deciding whether the officer is presently and in the future entitled to certification under the applicable law.

b. Officers Do Not Have a Vested Right to Continued Certification

Regardless of what the triggering event is, revoking certifications based on past acts of misconduct would not likely interfere with vested rights, because Washington courts have never held that there is a vested right to perpetual certification in a profession under the standards in effect when one is first certified.

A "vested right" is not just any legally-recognized interest or right. "[A] vested right must be definite, as opposed to an assumed expectation that one will be able to exercise a certain privilege in the future." *WSAC*, 502 P.3d at 836. "A retroactive amendment does not infringe a vested right merely because it disappoints expectations." *DEL*, 194 Wn.2d at 553 (citing *Omega Nat'l Ins. Co. v. Marquardt,* 115 Wn.2d 416, 433, 799 P.2d 235 (1990) ("A party has no vested right in the continuation of existing statutory law.")).

Vested rights are based on ownership of contracts and property. *Gillis*, 42 Wn.2d at 376. Courts that find a vested right often do so in the context of land use. *See, e.g.*, *Seven Hills, LLC*, 198 Wn.2d at 403. Even in that context, a possible benefit from certain property ownership may be a "mere expectancy" of property in the future, rather than a vested right. *Gillis*, 42 Wn.2d at 376. Generally, rights contingent upon some future action occurring are not yet vested. *Haviland*, 117 Wn.2d at 79 (where widow's right in her deceased husband's property was not vested because it depended on the outcome of probate).

Outside of the property and contract contexts, vested rights are more tenuous. In *DEL*, the court held that a public records act request does not created a "vested right." 194 Wn.2d at 553. Likewise, counties did not have a vested right to full reimbursement from the State for ballot box expenses. *WSAC*, 502 P.3d at 836. In *Citizens Against Mandatory Bussing v. Palmason*, the court determined that parents did not have a vested right to send their children to neighborhood public schools. 80 Wn.2d 445, 453, 495 P.2d 657 (1972). That "right existed only because it was given to them by the school authorities. Axiomatically, the authority which gives the right may take it away." *Id.* at 452. "It is fundamental that no one can have a vested right in any general rule of law or policy of legislation which entitles him to insist that it remain unchanged for his benefit." *Id.* (citations omitted). Furthermore, "no one has a vested right to be protected against consequential injuries . . . resulting from the exercise of public powers." *Id.* (citation omitted).

While officers have a protected property interest in their certifications, they likely do not have a vested right in the sense that the right is not subject to reasonable regulation. First, Washington courts have never held that a professional certification is a vested right. Second, the majority of rights that are vested are based on the ownership of land and physical property. Third, a professional certification is not "definite" but rather an expectation that one will be able to serve as an officer in the future. There is no fixed ownership of the certification, because officers understand that the legislature regulates their certifications. Like in *Palmason*, where the right to send children to neighborhood schools came from school district policies, officers' certifications are dependent upon the policies and priorities set by the legislature, and in turn the CJTC. Because certifications under state law are subject to continuing and changing regulations, officers do not have a vested right in their certifications remaining "unchanged for [their] benefit." *Palmason*, 80 Wn.2d at 452. Additionally, any argument that officers have a vested right to commit bad acts under the protection of their certifications may face additional scrutiny. *See Landgraf*, 511 U.S. at 297 (Justice Blackmun, dissenting) ("there is no such thing as a vested right to do wrong").

Looking outside of Washington, we are aware of one Florida state court decision that held that a statute mandating revocation of educator certificates based on enumerated convictions could not apply to a conviction that occurred before the statute's enactment. *See Presmy v. Smith*, 69 So.3d 383 (Fla. Dist. Ct. App. 2011). The Florida appellate court decided that there was no indication of legislative intent to apply the amendment to convictions that predated it, and that such application would also be an unconstitutional infringement on the teacher's vested property interest in his educator certification. 69 So.3d at 387. But other courts come to a different

conclusion. *See, e.g.*, *Ficarra v. Dep't of Regulatory Agencies, Div. of Ins.*, 849 P.2d 6, 21 (Colo. 1993); *Dep't of Health & Mental Hygiene v. VNA Hospice of Md.*, 176 Md.App. 475, 933 A.2d 512, 491 (2007) (vacated on other grounds by 406 Md. 584, 961 A.2d 557 (Md. Ct. Spec. App. 2008)) ("a professional license, though having certain property rights, is not an absolute vested right, but only a conditional right which is subordinate to the police power of the State to protect and preserve the public health") (citations and internal quotation marks omitted); *Missouri Real Estate Com'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. Ct. App. 2010) ("we cannot conclude that a professional license of any kind represents a vested right"). For example, in *Hughes*, the California Supreme Court determined that while many professions and vocations have a "fundamental vested right" to continue in that activity, this vested right "does not affect the due process analysis." 17 Cal.4th at 789-90. The court concluded that while a licensee with a vested right is "entitled to a higher standard of review or other procedural protections . . . [this] does not compel the conclusion that the particular licensing board must limit disciplinary actions only to conduct occurring after licensure." *Id.* at 790. The court then concluded that

> The general right to engage in a trade, profession or business is subject to the power inherent in the state to make necessary rules and regulations respecting the use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order and safety; such regulations do not deprive owners of property without due process of law . . . No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control under the police powers.

Id. (citation and quotation marks omitted). Although the individual in the case had certain procedural protections consistent with a protected interest because of his status as a licensee, he did not possess a substantive vested right to continue to pursue his occupation. *Id.*

Accordingly, even if officers did have a vested right to their certification in some sense, this does not mean they have a vested right to perpetual certification, nor do they have the right to stay certified when qualifications change. There is no question that the legislature can regulate vested rights prospectively. "Municipalities can regulate or even extinguish vested rights by exercising the police power reasonably and in furtherance of a legitimate public goal." *W. Main Associates v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986), *partially abrogated by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019); *see also Edmonds Shopping Ctr. Associates v. City of Edmonds*, 117 Wn. App. 344, 360–61, 71 P.3d 233 (2003) ("Any vested right Dykes may have had was extinguished with the passage of Ordinance 3328."); *Safeway Inc. v. City & Cty. of San Francisco*, 797 F. Supp. 2d 964, 970 (N.D. Cal. 2011) (upholding regulation that impaired claimed "vested rights" in permits to operate pharmacies and sell tobacco); *Bordenelli v. United States*, 233 F.2d 120, 125 (9th Cir. 1956) (no vested right in liquor license); *Jow Sin Quan v. Washington State Liquor Control Bd.*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966) (same). In fact, in the context of a right to one's profession, courts have held that while the pursuit of an occupation or profession is a protected liberty interest, that right is subject to reasonable government regulation. *Franceschi*, 887 F.3d at 938 (citing *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999)). Regulations on entry into a profession are constitutional if they have a

rational connection with the applicant's fitness or capacity to practice the profession. *Dittman v. Cal.*, 191 F.3d 1020 (9th Cir. 1999).

The CJTC can help mitigate the risk of challenges to revocations based on prior misconduct by focusing its reasoning on the prospective reasons for the officer certification requirements. Thus, rather than view a revocation as punishment for a prior act or a sanction, a revocation is a present determination of an officer's present and future fitness for duty. *See, e.g.*, *Cuff*, 345 Or. at 471.

To conclude, SB 5051 likely applies prospectively, with the triggering event being when the CJTC commences a revocation action. Even though the statute may be connected to prior acts of misconduct, the focus of the statute is the certification and continuing fitness of officers, rather than punishing those preexisting acts. Even if the statute was retroactive, it would not likely infringe upon a protected right. Officers do have a constitutionally-protected interest in maintaining their certifications, but it is not a vested right to permanent and ongoing certification without modification. Such ongoing certification is subject to reasonable legislation that furthers a legitimate public goal, which SB 5051 likely does.

3. Ex Post Facto Clause

We anticipate that a challenge may be raised under the Ex Post Facto Clause of the Washington and federal constitutions. The Ex Post Facto Clause "'forbids the application of any new punitive measure to a crime already consummated.'" *State v. Schmidt*, 100 Wn. App. 297, 300, 996 P.2d 1119, 1121 (2000), *as amended* (June 16, 2000) (quoting *Kansas v. Hendricks*), *aff'd,* 143 Wn.2d 658, 23 P.3d 462 (2001), *as amended* (May 30, 2001), *as amended on denial of reconsideration* (July 13, 2001). It applies "exclusively to penal statutes." *Id*. Courts consider several questions in determining whether a statute potentially invokes the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. 84, 1140, 92 (2003). Courts first consider whether the legislature meant to establish civil or criminal proceedings. *Id.* If the intention of the legislature was to impose criminal punishment, then the ex post facto clause applies. *Id.* However, even if the legislature's intention was to enact a regulatory scheme that is civil and non-punitive, the court further examines whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. *Id.* If that is the case, the Ex Post Facto Clause will also apply. *See id.*

First, SB 5051 is civil, not criminal. Even so, an officer convicted of a crime identified in RCW 43.101.105(2) prior to its effective date might argue that the mandatory revocation premised on certain convictions is a new punitive measure tied to a crime already consummated. They might also point to language such as "misconduct," "penalties" or "sanctions" in RCW 43.101.105 to argue that the certification revocation statutes are punitive. But such a challenge would not be likely to succeed under the Ex Post Facto Clause because the certification statutes are civil, regulatory, and primarily intended to accomplish non-punitive purposes, such as promoting public trust and confidence in every aspect of the criminal justice system, and enhancing the integrity, effectiveness, and professionalism of peace officers and correction

officers. *See* RCW 43.101.020, .021, .105. Indeed, as the United States Supreme Court stated in *De Veau v. Braisted*:

> The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, *such as the proper qualifications for a profession.*

363 U.S. 144, 160 (1960) (emphasis added).

V. Conclusion

In conclusion, there is evidence in the text of SB 5051 and the legislative history to indicate that the legislature intended for the CJTC to consider prior acts of misconduct when engaging in future revocation decisions. Applying the statute in this way would likely be constitutional. Due process concerns are mitigated by the fact that the legislation has compelling reasons to consider prior acts, and given that the new bases for revocation in SB 5051 were already previously illegal and/or against police department policy. Considering these prior acts probably does not make the statute retroactive; more likely, a court would determine that the statute operates prospectively but takes into account acts that occurred in the past. Even if a court were to determine that the statute is retroactive, the statute would still likely survive constitutional challenges. Statutes may be applied retroactively so long as they do not infringe upon a vested right, and while officers do have a protected property interest in their certifications, this is not a vested right to avoid reasonable regulation. Finally, an Ex Post Facto Clause claim would likely fail because the statute is not criminal in nature.

While we believe that the CJTC probably can apply RCW 43.101.105 as amended to misconduct that occurred prior to the amendment's effective date, there is real potential for such action to be struck down by a reviewing court. This could occur either because the court determines that such an application of the amendment would be retroactive and that there is not sufficient indication that the legislature intended retroactive application of these amendments, or because the court determines that such an application violates the Constitution.

Please note that this is not a formal opinion of the Attorney General, but expresses our carefully considered legal opinion. Our conclusions are based upon the facts summarized herein and current law. If either changes, our analysis or conclusions may change.