Case No: 96817–9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON,

Plaintiffs,

v.

CITY OF SEATTLE,

Defendant,

PLAINTIFFS' RESPONSE BRIEF

BRIAN T. HODGES, WSBA #31976
ETHAN W. BLEVINS, WSBA #48219
Pacific Legal Foundation
255 S. King Street
Seattle, Washington 98134
Telephone: (916) 419-7111

Attorneys for Plaintiffs Chong & MariLyn Yim, Kelly Lyles, Eileen, LLC, and Rental Housing Association of Washington

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Regulations

State Regulations

Seattle Regulations

Miscellaneous

Constitutions

STATEMENT OF THE ISSUES

This case presents three questions certified by the Federal District Court for the Western District of Washington:

1. What is the proper standard to analyze a substantive due process claim under the Washington Constitution?

2. Is the same standard applied to substantive due process claims involving land use regulations?

3. What standard should be applied to Seattle Municipal Code § 14.09 ("Fair Chance Housing Ordinance")?

INTRODUCTION

The Due Process Clauses of the State and Federal Constitutions guarantee more than fair process. *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). The Clauses also provide protection for those fundamental rights and liberties which are "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (citations omitted). Thus, this Court and the U.S. Supreme Court have long held that restraints on fundamental rights are subject to heightened scrutiny. *See, e.g.*, *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 219, 143 P.3d 571 (2006); *Village of Euclid v. Ambler*

Realty Co., 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926) (A restriction on owner's rights in property must substantially advance a legitimate public purpose.). The right to property is unquestionably among those fundamental rights. *See, e.g.*, *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S. Ct. 50, 73 L. Ed. 210 (1928); *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 365, 38 S. Ct. 504, 62 L. Ed. 1156 (1918).

At issue here is whether a regulation that extinguishes fundamental property rights is subject to heightened scrutiny. The answer is yes. *Goldblatt v. Town of Hempstead, N.Y.*, holds that a regulation burdening a fundamental right in property must be "reasonably necessary for the accomplishment of the [public] purpose, and not unduly oppressive upon individuals" to satisfy substantive due process. 369 U.S. 590, 594, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962) (quoting *Lawton v. Steele*, 152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894)). Because Washington's due process clause is coextensive with the Fourteenth Amendment,[1] providing no greater or lesser protection, this Court has repeatedly applied *Goldblatt* and

[1] Seattle provides no argument for departing from federal due process law. *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) ("[I]n the absence of the petitioner's [*State v.*] *Gunwall*, [106 Wash.2d 54, 720 P.2d 808 (1986)] analysis, we presume a coextensive provision.").

Lawton to hold that a restriction on a fundamental property right must (1) address a public problem, (2) tend to solve this problem, and (3) not be unduly oppressive upon the person regulated to satisfy substantive due process. *See, e.g.*, *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-31, 787 P.2d 907 (1990). Despite this test's long pedigree, the City of Seattle insists that the U.S. Supreme Court was "mistaken" when it adopted the "unduly oppressive" prong of this test. Opening Br. at 8-9, 18. And, based on that argument, the City urges this Court to abandon the heightened scrutiny test in favor of the minimal rational basis scrutiny that has previously been applied only to claims involving non-fundamental rights. That argument fails for several reasons.

This Court "is bound to follow the decisions of the Supreme Court of the United States" on questions "involv[ing] the interpretation and application of the federal constitution." *Tricon, Inc. v. King County*, 60 Wn.2d 392, 394, 374 P.2d 174 (1962); *see also State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008) ("When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings."). This Court cannot reach the City's claim that *Goldblatt* was "mistakenly" decided.

That fact, in turn, is fatal to the City's argument for minimal scrutiny because decisions of the U.S. Supreme Court "set[] a minimum floor of

protection, below which state law may not go." *Orion Corp. v. State*, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987). Thus, unless and until the U.S. Supreme Court reconsiders *Goldblatt*, a law that extinguishes a fundamental attribute of property will be subject to the unduly oppressive test. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (*Goldblatt* remains a valid due process precedent).

The City's argument that *Amunrud*, 158 Wn.2d 208, should be construed to have implicitly overruled the unduly oppressive test is likewise flawed. First, this Court will not overrule an established rule of law by implication. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) ("To do so does an injustice to parties who rely on this court to provide clear rules of law and risks increasing litigation costs and delays to parties who cannot determine from this court's precedent whether a rule of decisional law continues to be valid."). Second, to reject the unduly oppressive test in favor of a rational basis standard would require this Court to adopt a lesser protection than that guaranteed by the U.S. Constitution as interpreted by the U.S. Supreme Court, which this Court cannot do. *Orion*, 109 Wn.2d at 652. And third, the questions presented in *Amunrud* did not ask this Court to overrule the unduly oppressive test.

Finally, the City, as a party asking this Court to overturn precedent, faces a heavy burden of showing that the existing case law is both incorrect

and harmful. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). The City cannot satisfy either requirement. Washington's unduly oppressive test mirrors the test established by the U.S. Supreme Court in *Lawton* and is consistent with the federal courts' heightened "substantially advances" standard of review. There can be no confusion, moreover, where this Court and the U.S. Supreme Court both hold that a regulation of property will violate due process if it is unduly oppressive. This Court should, therefore, affirm the long line of case law requiring that a deprivation of a fundamental property right satisfy the unduly oppressive standard.

STATEMENT OF THE CASE

A. The Ban on Criminal Background Checks

The City of Seattle passed the Fair Chance Housing Ordinance in 2017 to "address barriers to housing faced by people with criminal records." *Yim v. City of Seattle*, Case No. C18-0736-JCC, Docket Entry #24 (Dkt. #24) at 9, 59.[2] The Ordinance declares it an "unfair practice for any person to . . . [r]equire disclosure, inquire about, or take an adverse action

[2] The parties agreed to stipulated facts and a stipulated record pursuant to a minute order issued by the federal court prior to summary judgment briefing. Citations to docket number 24, which was submitted to this Court upon certification, refer to Plaintiffs' Appendix which in turn relied upon the stipulated facts and record established by the parties.

against a prospective occupant, tenant, or member of their household based on any arrest record, conviction record, or criminal history."[3] SMC § 14.09.025(A)(2). "Adverse action" includes denying tenancy, evicting an occupant, or terminating a lease. *Id.* § 14.09.010.

The background check ban applies both to landlords and to organizations or individuals that provide professional screening services. The Ordinance's prohibition on inquiries about criminal history of housing applicants applies to any "person," defined as "one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives . . . [or] any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons, and any political or civil subdivision or agency or instrumentality of the City." *Id.* § 14.09.010.

The Ordinance carves out a narrow exception for adults on a sex offender registry. *See id.* § 14.09.025(A)(3). A landlord can deny tenancy

[3] The Ordinance applies regardless of the housing circumstances or the gravity, nature, or age of the offense. Even landlords who rent to vulnerable persons have limited freedom to take reasonable precautions, such as checking a sex offender registry, to protect their tenants and families. *See Griffin v. W. RS, Inc.*, 97 Wn. App. 557, 570, 984 P.2d 1070 (1999) (Landlords have a duty to protect tenants against the risk of foreseeable criminal acts of third parties by screening applicants for repeat violent and/or sexual offenses), *rev'd on other grounds by* 143 Wn.2d 81, 13 P.3d 558 (2001); *Hutchins v. 1001 Fourth Avenue Associates*, 116 Wn.2d 217, 224, 802 P.2d 1360 (1991) (same); *see also State v. Sigman*, 118 Wn.2d 442, 447, 826 P.2d 144 (1992) (Landlords may be held criminally liable for certain criminal acts of their tenants.).

based on an adult applicant's registry information if the landlord has a "legitimate business reason." *See id.* A legitimate business reason for denial must be "necessary to achieve a substantial, legitimate, nondiscriminatory interest." *Id.* § 14.09.010. The Ordinance does not offer a mechanism for obtaining a ruling from the Office of Civil Rights on whether a landlord has a legitimate business reason for taking adverse action based on a sex offense.

The Ordinance also exempts federally assisted housing. SMC § 14.09.115(B). Landlords of federally assisted housing are free to perform criminal background checks and deny tenancy based on criminal history. *Id.* The Seattle Housing Authority, a public corporation, administers federally assisted housing in the City. Seattle Housing Authority, About Us, *available at* https://www.seattlehousing.org/about-us (last visited Apr. 1, 2019).

The Ordinance's recitals claim that a criminal history does not affect a tenancy's success. *See* Dkt. #24 at 58. The City bases this assertion on research contained in the legislative file. *See id.* at 27-53. That research, however, only studied residents living in supportive housing programs. *Id.* at 43-44. Because of this narrow context, the research itself warned against applying its data to the broader housing market. *See id.* at 43.

No other jurisdiction has passed a background check ban like Seattle's. In fact, both state and federal law recognize a landlord's right to perform criminal background checks. State law requires that landlords who deny someone because of criminal history notify the tenant in writing. *See* RCW § 59.18.257(1)(c). And the Fair Credit Reporting Act exempts criminal records and tenant screening databases from security freezes for protected consumers. RCW § 19.182.230; *see also* 16 C.F.R. pt. 600, § 4(E) Public Record Information (2010) (criminal background is "information bearing on the consumer's 'personal characteristics'" for purposes of the Fair Credit Reporting Act).

Along these lines, the U.S. Department of Housing and Urban Development (HUD) recommends that public housing authorities screen for any "history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants." 24 C.F.R. § 960.203(c) (2010). And HUD mandates criminal history checks for sex offender registry and a few other narrow offenses. 24 C.F.R. § 982.553(a)(1)(ii)(C), (2)(i).

All 50 states make their criminal background databases accessible to the public and allow criminal background checks for housing. Dkt. #24 at 22-23. A robust business has grown around providing such background

services. *See id.* at 56. Research indicates that four out of five landlords regularly conduct background checks for rental applicants. *See id.* at 59.

B. Plaintiffs Have Legitimate Reasons to Inquire About and Consider Criminal History

Respondents Chong and MariLyn Yim, Kelly Lyles, and Eileen, LLC, are landlords who own and manage small rental properties in Seattle. *See id.* at 3-5. Respondent Rental Housing Association of Washington (RHA) is a membership organization that provides screening services to its members. *See id.* at 5.

Chong and MariLyn Yim own a duplex and a triplex in Seattle. *Id.* at 3. They and their three children live in one of the triplex units. *Id.* The Yims rent out the other two units in the triplex and both units in the duplex. *Id.* at 3-4. The Yims share a yard with their renters in the triplex, and the Yim children are occasionally at home alone when the renters are home. *Id.* at 3. A single woman occupies one of the two rented units in the triplex, and a couple occupies the other. *Id.* Three roommates live in one of the Yims' duplex units, and two roommates occupy the other duplex unit. *Id.* at 4. Occasionally, the duplex tenants need to find a new roommate. *Id.* Some of the new roommates were strangers to the tenants before moving in. *Id.*

Prior to the background check ban, the Yims regularly requested criminal background screening of rental applicants, including roommate

applicants. *Id.* The Yims are willing to rent to individuals with a criminal history depending on the number of convictions, the severity of the offenses, and other factors they deem relevant to the safety of the Yims, their children, and their other tenants *Id.*

Kelly Lyles is a single woman who, in addition to her own Seattle residence, owns and rents a house in the city. *Id.* Ms. Lyles understands the needs of individuals recovering from addiction and would consider an applicant who did not otherwise satisfy her screening criteria if the applicant was part of a recovery program. *Id.*

Ms. Lyles is a local artist who relies on her rental income to afford living in Seattle. *Id.* She cannot afford to miss a month's rental payment and cannot afford an unlawful detainer action to evict a tenant who fails to timely pay. *Id.* As a single woman who frequently interacts with her tenants, she considers personal safety when selecting them. *Id.* She currently rents to a Ph.D. student. *Id.* With Ms. Lyles's permission, that tenant has subleased the basement to a single, divorced woman. *Id.*

Scott Davis and his wife own and manage Eileen, LLC, through which they operate a seven-unit residential complex in the Greenlake area of Seattle. *Id.* at 5. The Davises would consider applicants with a criminal history based on the circumstances of the crime and the safety needs of other tenants. *Id.*

RHA is a nonprofit membership organization serving landlords throughout Washington. *Id.* The majority of RHA's 5,300 members own and rent residential properties in Seattle. *Id.* Most rent out single-family homes, often on a relatively short-term basis due to the landlord's work, personal, or financial needs. *Id.* Among other services, RHA screens rental applicants for its members. *Id.*

Because of the Fair Chance Housing Ordinance, the plaintiff landlords must operate in the dark with respect to rental applicants' criminal history. As a result, they cannot fulfill their moral and legal obligation to maintain a safe environment for all their tenants. *See Griffin*, 97 Wn. App. at 570 ("Here, we recognize that a residential landlord has a duty to protect its tenant against foreseeable criminal acts of third parties."), *rev'd on other grounds by* 143 Wn.2d 81. Chong and MariLyn Yim can no longer assure their tenants searching for new roommates that an applicant does not have a violent history. Nor can the Yims check whether rental applicants who would live in the same building with them and their children have a checkered past. Kelly Lyles can no longer ensure her own safety and comfort as a single woman by determining whether rental applicants have committed serious crimes. RHA, in turn, can no longer offer criminal background screening to its Seattle members.

STANDARD OF REVIEW

This Court reviews the interpretation and application of the Washington Constitution de novo. *See State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). As the certified questions above ask this Court to determine what test to apply under Article I, Section 3, of the Washington Constitution, the certified questions are subject to de novo review.

ARGUMENT

Washington's Due Process Clause, like its federal counterpart, provides both procedural and substantive protection against government deprivations of "life, liberty, or property, without due process of law."[4] *Fields v. Dep't of Early Learning*, __ Wn.2d __, 434 P.3d 999, 1003 (2019). In its substantive application (the application at issue here), due process embraces the fundamental concept that all government actions must relate to a legitimate end of government. *See Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S. Ct. 447, 72 L. Ed. 842 (1928); *Amunrud*, 158 Wn.2d at 218-19. This concept reflects the essential difference between the rule of law and arbitrary government. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). To enforce this line

[4] Wash. Const. art. I, § 3; *see also* U.S. Const. amend. V; XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

between lawful and unlawful governance, the U.S. Supreme Court has long held that decisions restricting an owner's fundamental rights in property must substantially advance a legitimate public purpose. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926); *see also Nectow*, 277 U.S. at 188.

Over the years, courts have fleshed out what the "substantially advances" standard requires in order to distinguish it from the type of minimal rational basis review appropriate only to laws that burden non-fundamental rights. *Amunrud*, 158 Wn.2d at 222. Rational basis review asks only whether a law is rationally related to a government end.[5] By contrast, the "substantially advances" standard requires that the law be sufficiently tailored to achieve its stated public purpose and be appropriate in scope so as to not place undue burdens on individuals—particularly those individuals whose conduct is not contributing to the public problem addressed by the regulation. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) (due process protects property

[5] Under the minimal rational basis test, "the challenged law must be rationally related to a legitimate state interest." *Amunrud*, 158 Wn.2d at 222. "The rational basis test is the most relaxed form of judicial scrutiny." *Id.* at 223. When applying the rational basis test, "we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994).

owners "from an unfair allocation of public burdens"); *see also Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 672 n.6, 946 P.2d 768 (1997) ("Shifting a public burden to private shoulders may also be unduly oppressive[.]"). At issue in this case is the "appropriateness" aspect of the substantially advances test, which has been described to include such considerations as whether the law is "discriminatory," imposes an "unnecessary" or "unwarranted interference with individual liberty," or is "unduly oppressive." *See Goldblatt*, 369 U.S. at 594 (asking whether a restriction is unduly oppressive); *Nebbia v. People of New York*, 291 U.S. 502, 539, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (asking whether a restriction is "discriminatory," imposes an "unnecessary" or "unwarranted interference with individual liberty"); *see also State ex rel. Rhodes v. Cook*, 72 Wn.2d 436, 439, 433 P.2d 677 (1967) (asking whether a restriction on a right was "unnecessary" to achieve a public goal); *City of Seattle v. Ford*, 144 Wn. 107, 115, 257 P. 243 (1927) (asking whether a restriction is "excessive" or would effect a de facto prohibition on a lawful activity).

I

PROPERTY DEPRIVATIONS ARE SUBJECT TO THE UNDULY OPPRESSIVE TEST

The first certified question asks what test applies to the Washington Constitution's Due Process Clause. Like most answers in the law, it

depends. Specifically, it depends on "the nature of the right involved." *Amunrud*, 158 Wn.2d at 219. When government deprives an individual of a fundamental liberty interest, such as the right to be free of involuntary confinement, then strict scrutiny applies. *See, e.g.*, *State v. Beaver*, 184 Wn. App. 235, 243, 336 P.3d 654 (2014). When government deprives someone of a fundamental property interest, the unduly oppressive test applies. *See, e.g.*, *Presbytery*, 114 Wn.2d at 330. And when government deprives someone of a non-fundamental liberty interest, like the right to pursue a particular field of employment, then rational basis applies. *Amunrud*, 158 Wn.2d at 577.

A. The Fair Chance Housing Ordinance Deprives Landlords of a Property Interest

This case involves a deprivation of fundamental property interests.[6] The Fair Chance Housing Ordinance restricts the right of each residential

[6] Seattle does not contest that the Yim plaintiffs alleged a violation of their fundamental property rights. But to avoid any potential confusion, it is necessary to briefly acknowledge that state and federal case law recognize a second class of so-called "new property," which consists of statutory entitlements and is therefore due lesser protection than traditional "old property" rights. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972); *see also Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1200 (9th Cir. 1998) ("[T]hat state law may affirmatively *create* constitutionally protected 'new property' interests in no way implies that a State may by statute or regulation *roll back* or *eliminate* traditional 'old property' rights."); *see* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev.

landlord to rent her property to a person of her own choice by declaring it unlawful to inquire into an applicant's criminal history or to deny tenancy based on an applicant's conviction record. *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000) (Landowners have a constitutionally protected and fundamental right to rent their property to whom they choose, at a price they choose.); *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 613-14, 124 P.3d 324 (2005) (recognizing a fundamental right to sell one's property to persons of one's choice); *State Farm Fire & Cas. Co. v. English Cove Ass'n, Inc.*, 121 Wn. App. 358, 365, 88 P.3d 986 (2004) (Ownership of property includes the right to "sell or otherwise dispose of property as one chooses."); *see also City of Bremerton v. Widell*, 146 Wn.2d 561, 572, 51 P.3d 733 (2002) (recognizing that a "landlord should enjoy . . . the right to exclude persons who may foreseeably cause . . . injury"). The Ordinance also implicates a landlord's right to exclude an applicant based on his or her criminal history. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179–80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (The right to exclude is a "fundamental element of the property right."); *see also Manufactured Housing*, 142 Wn.2d at 364 (recognizing the right to exclude as a

309, 329 (1993). Because this case involves traditional property rights, the "new property" entitlement approach is not at issue.

"fundamental attribute" of property ownership); *Guimont v. Clarke*, 121 Wn.2d 586, 595, 854 P.2d 1 (1993) (same).

The City does not contest that its Ordinance deprives landlords of these well-recognized rights. Instead, the City argues that the landlords lost those rights by voluntarily entering into the residential housing market. *See* Opening Br. at 25. As a matter of black-letter law, a property owner does not abandon her constitutionally secured rights solely because she chose to engage in a regulated business activity. *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2430, 192 L. Ed. 2d 388 (2015); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) ("[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."); *MS Rentals, LLC v. City of Detroit*, No. 18-10165, 2019 WL 962130, at *1 (E.D. Mich. Feb. 27, 2019) (holding rental inspection ordinance unconstitutional because "[i]t would be remarkable to apply [warrant] exception to searches of … residential properties.").

Because the Ordinance deprives landlords of the rights to alienate and exclude, the appropriate standard of review is the unduly oppressive test established by federal case law and implemented by this Court for almost a century. *See, e.g., Asarco, Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 762, 43 P.3d 471 (2002); *Christianson*, 133 Wn.2d at 661; *Guimont*,

121 Wn.2d at 609; *Robinson v. City of Seattle*, 119 Wn.2d 34, 55, 830 P.2d 318 (1992); *Presbytery*, 114 Wn.2d at 330; *Orion Corp.*, 109 Wn.2d at 646–47, 747 P.2d 1062 (1987); *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986); *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 477, 647 P.2d 481 (1982); *Remington Arms Co. v. Skaggs*, 55 Wn.2d 1, 5, 345 P.2d 1085 (1959); *City of Seattle v. Ford*, 144 Wn. 107, 111, 257 P. 243 (1927).

B. The Unduly Oppressive Test Applies to All Property Deprivations

The City's suggestion that the unduly oppressive test should be limited to claims arising from development regulations, as defined by the Growth Management Act (GMA), is baseless. *See* Opening Br. at 24 (citing RCW § 36.70C.030(7)). In truth, the rule that the government cannot constitutionally shift an undue public burden onto an individual predates the concept of zoning and development controls. *Lawton*, 152 U.S. at 137. Thus, this Court has held that a law impairing an individual's right to alienate property will violate due process "when the regulation transcends public necessity." *Remington Arms Co.*, 55 Wn.2d at 5 (invalidating a statute that fixed the price on the resale of trademarked products). This Court has also invalidated a regulation requiring homeowners to obtain a hawker's license to sell any goods on their own property based, in part, on

the conclusion that the daily license fee was excessive and would effect a de facto prohibition on an otherwise lawful activity. *Ford*, 144 Wn. at 115.

Certainly, there is an abundance of case law applying the unduly oppressive test in the land use setting.[7] *See, e.g.*, *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180 (9th Cir. 2012) (applying the unduly oppressive test to mobile-home zoning ordinances); *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997) (applying the test to Seattle's housing preservation ordinance); *Guimont*, 121 Wn.2d 586 (1993)

[7] Washington is not the only state to employ the unduly oppressive test for property deprivations. In Pennsylvania, "an exercise of the state's police power affecting a property interest" must "not [be] unduly oppressive upon individuals." *Adams Sanitation Co., Inc. v. Commw. of Pa., Dep't of Envtl. Prot.*, 552 Pa. 304, 715 A.2d 390, 395 (Pa. S. Ct. 1998) (quoting *Lawton*, 152 U.S. at 137); *see also Lester v. Dep't of Envtl. Prot.*, 153 A.3d 445, 463 (Pa. Commw. Ct. 2017) (applying unduly oppressive test to law requiring owners to close abandoned underground storage tanks). Other state courts to rely on the test in property due process cases include Ohio, Maryland, Iowa, and Illinois. *See State ex rel. Pizza v. Rezcallah*, 84 Ohio St.3d 116, 702 N.E.2d 81, 93 (Oh. 1998) ("Before the police power can be exercised to limit an owner's control of private property, it must appear that the interests of the general public require its exercise and the means of restriction must not be unduly oppressive upon individuals."); *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 414 A.2d 1246, 1250-51 (Md. 1980) (applying the unduly oppressive test to Mobile Home Park Act); *City of Monroe v. Nicol*, 898 N.W.2d 899, 903 (Iowa Ct. App. 2017) (regarding an abandoned property statute, the law must not be "unduly oppressive upon individuals") (quoting *Kasparek v. Johnson Cty. Bd. of Health*, 288 N.W.2d 511, 517 (Iowa 1980)); *Levinson v. Montgomery County*, 95 Md. App. 307, 620 A.2d 961, 967 (Md. 1993) (applying unduly oppressive test to a zoning ordinance); *City of Collinsville v. Seiber*, 82 Ill. App. 3d 719, 403 N.E.2d 90, 93 (1980) (applying unduly oppressive test to a nuisance ordinance).

(striking down a mobile-home tenant relocation ordinance under the unduly oppressive test); *Presbytery*, 114 Wn.2d 320 (1990) (applying the test to a wetlands ordinance); *West Main Assocs.*, 106 Wn.2d 47 (1986) (applying the test to an ordinance establishing the point at which development rights vested); *Cougar Business Owners Ass'n*, 97 Wn.2d 466 (1982) (applying the unduly oppressive test to a temporary emergency zoning measure); *Cradduck v. Yakima County*, 166 Wn. App. 435, 271 P.3d 289 (2012) (applying the test to development restrictions in a floodplain ordinance); *Bayfield Resources Co. v. WWGMHB*, 158 Wn. App. 866, 244 P.3d 412 (2010) (applying the test to a critical areas ordinance); *Conner v. City of Seattle*, 153 Wn. App. 673, 223 P.3d 1201 (2009) (applying the test to a permit denial); *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006) (applying the test to a county comprehensive land use plan); *City of Seattle v. McCoy*, 101 Wn. App. 815, 4 P.3d 159 (2000) (applying the unduly oppressive test to a nuisance abatement action).

Yet this Court's case law confirms the test also applies outside the context of development regulation. Recent decisions of this Court, for example, applied the unduly oppressive test to assessments and liabilities that attach to land ownership. *See, e.g.*, *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 119 P.3d 325 (2005); *Asarco*, 145 Wn.2d 750; *Rivett v. City of Tacoma*, 123 Wn.2d 573, 870 P.2d 299 (1994). Moreover,

the unduly oppressive test has applied to a variety of laws related to rental housing, such as laws imposing tenant relocation assistance or residential inspection certification. *See Robinson*, 119 Wn.2d 34 (applying the unduly oppressive test to tenant relocation assistance); *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 649-50, 854 P.2d 23 (1993) (applying the unduly oppressive test to a rental inspection ordinance); *see also Action Apartment Ass'n, Inc. v. Santa Monica*, 509 F.3d 1020, 1024-26 (9th Cir. 2007) (referring to a rent-control ordinance as a land use regulation for purposes of a substantive due process claim). Given this wide array of applications, including fees, assessments, and liability attendant to property ownership, the Fair Chance Housing Ordinance—by burdening the use and management of real property—falls within the scope of the rights protected by the unduly oppressive test.

C. The Unduly Oppressive Standard Remains a Valid Test Designed Specifically for Determining When a Deprivation of Property Violates Due Process

The City's claim that the unduly oppressive test is invalid or inapt for resolving cases involving a deprivation of a property right is baseless. In truth, the unduly oppressive test, which balances the government interest in regulating property against the impact on the owner, was specifically designed for property deprivations. *Presbytery*, 114 Wn.2d at 330-31; *see also Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 n.67 (1998)

("The [unduly oppressive test] is at least arguably the same as asking whether the government's proposed solution is roughly proportional to that part of the identified public problem that the developer's project will create or exacerbate."). As announced by *Lawton*, the test asks first whether "the interests of the public . . . require such interference; and, second [whether] the means are reasonably necessary for the accomplishment of the purpose, and [third] not unduly oppressive upon individuals." *Lawton*, 152 U.S. at 137. "In other words, 1) there must be a public problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must not be 'unduly oppressive' upon the person regulated." *Presbytery*, 114 Wn.2d at 330-31 (quoting William B. Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 Wash. U. J. Urb. & Contemp. L. 3, 20 (1983)); *see also Seeley v. State*, 132 Wn.2d 776, 819-20, 940 P.2d 604 (1997) (acknowledging that "many of the applications of the [unduly oppressive test] pertain to concerns associated with the ownership and use of real property") (Sanders, J., dissenting); *Johnson v. Washington Dep't of Fish & Wildlife*, 175 Wn. App. 765, 776-77, 305 P.3d 1130 (2013) (The unduly oppressive test is "most often applied in land use cases"); *see also* Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 Wash. L. Rev. 495, 516 (2000) (noting that the unduly oppressive test has been reserved to land use cases).

Moreover, there is nothing in the unduly oppressive test that directs courts to substitute their own policy judgment for that of the legislature. Instead, the test is specifically tailored for the property context, asking a series of questions that are wholly appropriate for judicial determination:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

Presbytery, 114 Wn.2d at 331 (quoting Stoebuck, 25 Wash. U. J. Urb. & Contemp. L. at 33). The factual nature of this inquiry dispels the City's repeated invocation to the ghost of *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).[8] Thus, both this Court and the U.S.

[8] *Lochner* held that it was within the power of the courts to "strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955). The U.S. Supreme Court rejected *Lochner* and similar cases because they allowed courts to invalidate laws based on a court's policy judgment that a law was "unwise or incompatible with some particular economic or social philosophy." *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *see also West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952) (recognizing demise of the *Lochner* line of cases).

Supreme Court continue to hold that "[t]he classic statement of the rule in *Lawton v. Steele* is still valid today," well after *Lochner* was overruled. *Goldblatt*, 369 U.S. at 594; *Guimont*, 121 Wn.2d at 609 n.10 (recognizing that the U.S. Supreme Court confirmed the continuing validity of *Lawton* and *Goldblatt*.); *see also* Stoebuck, 25 Wash. U. J. Urb. & Contemp. L. at 26 (The Court's continued reliance on *Lawton* provides "meaningful content" to substantive due process, but cannot be construed to resuscitate the repudiated rule of *Lochner*); *id.* at 32 (*Lawton*'s formulation of the unduly oppressive rule is preferable to "*Lochner v. New York* or anything like it."). Because the questions posed by the unduly oppressive test are within the ordinary fact-finding function of courts,[9] the City cannot cite a single use of the test that smacks of judicial usurpation of legislative authority. For that reason alone, the Court should reject the City's attempt to saddle this case with the opprobrium attached to *Lochner*.

The City, nonetheless, claims that *Amunrud* criticized the unduly oppressive test as a return to the *Lochner* era. *See* Opening Br. at 14. It did not; rather, the majority in dicta criticized the dissent for making arguments

[9] Indeed, in distinguishing the unduly oppressive test from *Lochner*, Professor Stoebuck argued that vague commands, such as the rule that government will violate the constitution when a regulation goes "too far," set the stage for courts to exercise the type of policy judgment allowed by *Lochner*. Stoebuck, 25 Wash. U. J. Urb. & Contemp. L. at 32-34.

reminiscent of the *Lochner* era because the dissent wanted to extend heightened scrutiny to protect a non-fundamental liberty interest, a domain long relegated to rational basis review. *Amunrud*, 158 Wn.2d at 227-28. Extending strict scrutiny to economic liberty interests would likely be a return to *Lochner*, but that hardly undermines the use of heightened scrutiny in cases implicating a fundamental liberty interest. *See Beaver*, 184 Wn. App. at 243 ("The level of review applied in a substantive due process challenge depends on the nature of the interest involved.").

The City alternatively argues that the U.S. Supreme Court has implicitly distanced itself from its express embrace of the unduly oppressive test in *Goldblatt*. This argument, however, is based on a flawed reading of three cases: *Ferguson*, 372 U.S. 726, *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968), and *Lingle*, 544 U.S. 528. *See* Opening Br. at 18-19.

In *Ferguson*, the U.S. Supreme Court overruled *Adams v. Tanner*, 244 U.S. 590, 37 S. Ct. 662, 61 L. Ed. 1336 (1917), without mentioning *Goldblatt*, which had been decided a year before *Ferguson*. *Adams* was indeed a case akin to *Lochner* because it perpetuated the notion that "it is the province of courts to draw on their views as to the morality, legitimacy, and usefulness of a particular business"—i.e., to exercise policy judgment.

See Ferguson, 372 U.S. at 728–29. The unduly oppressive test, though, has never purported to endow judges with the authority to make the kinds of policy judgments disapproved by *Ferguson*. If it did, the *Ferguson* majority would have named *Goldblatt* or *Lawton* in its long list of cases buried alongside *Lochner*. *See id.* at 729 (listing cases that followed the disapproved *Lochner* approach to due process). It is also worth noting that, as with so many of the cases the City relies on, *Ferguson* involved a non-fundamental liberty interest, where the unduly oppressive test does not typically apply. *See Amunrud*, 158 Wn.2d at 219 (The applicable standard of review depends on "the nature of the right involved.").

The City's reliance on *Brotherhood of Locomotive Firemen & Enginemen* is just as flawed. *Brotherhood* did not involve a property deprivation, and it only held that the plaintiffs failed to prove their due process claim on the facts. *Brotherhood*, 393 U.S. at 143. The case said nothing about the validity of the unduly oppressive test. *See id.*

Nor does *Lingle* support the City's argument. In that case, Chevron sued the State of Hawaii, alleging that the price cap provisions of legislation designed to lessen the oil company's share of the state's gasoline station market constituted a regulatory taking. 544 U.S. at 532-34. The trial court agreed, and granted summary judgment in favor of Chevron, concluding under *Agins v. City of Tiburon* that the statute failed to substantially advance

a legitimate public interest. *Id*. at 535-36; *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (abrogated by *Lingle*, 544 U.S. at 540-41). On review, the U.S. Supreme Court concluded that the "substantially advances a legitimate government interest" test was properly categorized as a due process test, not a regulatory takings test, because it "cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation." *Id*. at 543. *Lingle*, therefore, clarified that substantive due process and takings tests are distinct and should not be conflated. *Lingle*, 544 U.S. at 540. It did not change the kind of analysis that applies to a due process claim. *See id.* at 542 ("An inquiry of this nature has some logic in the context of a due process challenge."). Hence, *Goldblatt*'s recognition that the unduly oppressive test is valid remains good law today.

II

AMUNRUD DID NOT REPUDIATE THE UNDULY OPPRESSIVE TEST

The City argues that this Court implicitly rejected the unduly oppressive test in *Amunrud*, 158 Wn.2d 208—an unremarkable case that applied rational basis to an economic liberty claim, just as Washington courts have always done. *See, e.g.*, *Seeley*, 132 Wn.2d 776 (1997) (applying rational basis to a law prohibiting medicinal use of marijuana); *State v.*

Clinkenbeard, 130 Wn. App. 552, 123 P.3d 872 (2005) (applying rational basis to a statutory rape law); *Ramm v. City of Seattle*, 66 Wn. App. 15, 830 P.2d 395 (1992) (applying rational basis to small animal ordinance); *Berland v. Employment Sec. Dep't*, 52 Wn. App. 401, 760 P.2d 959 (1988) (applying rational basis to denial of unemployment compensation); *Meyers v. Newport Consol. Joint Sch. Dist. No. 56-415*, 31 Wn. App. 145, 639 P.2d 853 (1982) (applying rational basis to a teacher's dismissal). The City, nonetheless, argues that *Amunrud*'s application of rational basis scrutiny to a non-fundamental right represents a sea change in Washington due process law. This is a gross misunderstanding of the decision. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 36, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) ("[T]he first rule of case law as well as statutory interpretation is: Read on.").

In *Amunrud*, a taxi driver challenged a law that authorized the Department of Social and Health Services to suspend his taxi driver's license because of delinquent child support payments. *Amunrud*, 158 Wn.2d at 212-13. The primary question presented to this Court was whether his right to pursue a particular occupation constituted a fundamental liberty interest, subject to strict scrutiny. *Id*. at 219-20. *Amunrud* did not allege a property right, where the unduly oppressive test is traditionally used, and *Amunrud* never questioned the test's applicability in property cases. *Id*. Nor

did the State question the differing degrees of scrutiny available under Washington substantive due process law, as the City's argument suggests. To the contrary, the State's briefing relied on the distinction between a privilege and a fundamental right, insisting that a regulation that impairs a privilege is subject to lesser scrutiny than one that restricts a fundamental right. *See Amunrud*, Washington State Board of Appeals and Department of Social and Health Services, Supplemental Brief, 10-13 (Oct. 7, 2005) (2005 WL 3950650). The State, therefore, asked this Court to follow the well-settled rule that the degree of scrutiny applicable to a particular case will depend on the nature of the right involved, which is precisely how this Court ruled. *Amunrud*, 158 Wn.2d at 219, 222 (holding that a non-fundamental privilege is subject to rational basis scrutiny).

The City, nonetheless, argues that *Amunrud* rejected the unduly oppressive test when responding to the dissent's suggestion that the impairment of a non-fundamental economic liberty interest should be subject to heightened scrutiny. *See* Opening Br. at 14; *Amunrud*, 158 Wn.2d at 226. The City is wrong. *Amunrud*'s perfunctory treatment of the unduly oppressive test *in a different context* cannot be read to overrule a century of established precedent sub silentio. *See Lunsford*, 166 Wn.2d at 280 (This Court "will not—and should not—overrule" precedent "sub silentio."). *Amunrud* is a garden-variety rational basis case that respects the long-

standing distinction between two different due process tests—rational basis for cases involving non-fundamental liberty interests, and the unduly oppressive test for property deprivations. *Compare State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996) ("When a physical liberty interest alone is involved in a statutory classification, this court applies the deferential rational relationship test.") *with Christianson*, 133 Wn.2d at 661 (applying unduly oppressive test in the property context).

Unsurprisingly, Washington courts did not change course following *Amunrud*. Instead, they have continued to apply the unduly oppressive test to property deprivations. *See, e.g., Cradduck*, 166 Wn. App. 435 (2012); *Bayfield Resources Co.*, 158 Wn. App. 866 (2010); *Conner*, 153 Wn. App. 674 (2009). And when a due process challenge involves a non-fundamental liberty interest, courts have continued to apply rational basis. *See, e.g., Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011) (applying rational basis to due process claim that minor had a right to counsel at truancy hearing); *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 406 P.3d 1199 (2017) (applying rational basis in a due process challenge to a retail marijuana licensing regime); *Johnson*, 175 Wn. App. 765 (2013) (applying rational basis in a due process challenge to a denial of a commercial fishing license).

The City cites one case deviating from this settled pattern. *See Olympic Stewardship Foundation v. State Envt'l and Land Use Hearings Office through WWGMHB (OSF)*, 199 Wn. App. 668, 719-20, 399 P.3d 562 (2017). That decision, however, relied on the flawed conclusion that the right to build on one's property is a privilege, not a fundamental right subject to heightened scrutiny. *Id*. at 720; *but see Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"); *see also Lingle*, 544 U.S. at 540-41 (A land use regulation must "substantially advance a legitimate state interest" to satisfy due process.). That error aside, *OSF* is consistent with the many cases holding that the unduly oppressive test applies when a regulation burdens a fundamental attribute of property. *OSF*, 199 Wn. App. at 719-20.

The City also attempts to buttress the argument that *Amunrud* transformed due process law by pointing to a handful of cases that supposedly apply the unduly oppressive outside the land use context. *See* Opening Br. at 21, n.77; 23, n.86. Most of these cases, however, involved a regulation of property, so they only confirm the pattern. For instance, in *Tiffany Family Trust Corp.*, property owners challenged a special

assessment imposed on properties that stood to benefit from local improvements. 155 Wn.2d at 228. Such assessments are treated as land use regulations. *See id.* at 233-34 (2005). Oddly, the City also cites *Viking Properties, Inc. v. Holm* as another supposed outlier, though *Viking Properties* involved enforceability of a restrictive covenant relating to the use of land. 155 Wn.2d 112, 115-17, 118 P.3d 322 (2005). Thus, that case also fits the pattern of the unduly oppressive test's use in cases involving property deprivations. Another case cited by the City, *Willoughby v. Dep't of Labor and Industries*, did not involve land use, but it still fits within the context of the unduly oppressive test because *Willoughby* recognized that the government had deprived the plaintiffs of a property interest. 147 Wn.2d 725, 733, 57 P.3d 611 (2002) (recognizing that the plaintiffs "have a vested interest in these benefits").

The City also cites to *Asarco Inc. v. Dep't of Ecology*, a clean up liability case where this Court clearly treated the statute at issue as a "regulation of land," demonstrated by the fact that the Court applied a regulatory takings test as well as a due process analysis. 145 Wn.2d at 761. Likewise, *Rivett* involved a substantive due process challenge to an ordinance imposing liability for sidewalk injuries on abutting landowners. 123 Wn.2d at 580. Unsurprisingly, the Court cited the unduly oppressive test, given that indemnification to the city for sidewalk injuries was imposed

as a condition of owning property. *Id.* at 581. The City points also to *Greenhalgh v. Dep't of Corrections*, but that case again fits with the theme—the court applied the unduly oppressive test to a prisoner's claim that the government had deprived him of his property (clothing) without due process of law. 180 Wn. App. 876, 881, 324 P.3d 771 (2014). The City also turns to *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998), which involved a non-fundamental liberty interest (the right to recreate on jet skis) and expressly stated that the unduly oppressive test "simply does not apply to the present case." *Weden*, 135 Wn.2d at 707. In short, each of the cases cited by the City as using the unduly oppressive test outside the context of property deprivations or land use actually proves the rule.

The City also points out that this Court has not applied the unduly oppressive test since *Amunrud*, seeking to shore up the argument that *Amunrud* changed the state of the law. But this lack of use is not because of a principled departure from the test. Rather, the Court simply has not taken a case since *Amunrud* in which the unduly oppressive test would apply. Since *Amunrud*, this Court has issued decisions in 32 cases raising substantive due process issues. Of these, only two related to property rights: *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), which involved fines for building code violations, and *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010), which involved water rights.

In *Post*, the Court declined to address the substantive due process issue. *Post*, 167 Wn.2d at 312 n.11. And in *Lummi Indian Nation*, the Court simply held that a facial due process challenge was improper under the circumstances. *Lummi Indian Nation*, 170 Wn.2d at 267. Neither case addressed the due process test that would have otherwise applied. This case and the other *Yim* case now before the Court present this Court with its first chance to apply the unduly oppressive test after *Amunrud*. Hence, the fact that this Court has not used the unduly oppressive test since *Amunrud* has no bearing on its continuing validity.

The City also seeks to undermine the unduly oppressive test by citation to *Saltrom's Vehicles v. Dep't of Motor Vehicles*, 87 Wn.2d 686, 555 P.2d 1361 (1976). Opening Br. at 12. But, as with *Amunrud*, this Court simply applied a more lenient standard in *Salstrom's Vehicles* because that case involved a due process claim challenging a general business regulation on the basis of a non-fundamental liberty interest. 87 Wn.2d at 693. This distinction is made clear by the contemporaneous decision in *Save a Valuable Env't (SAVE) v. City of Bothell*, in which the Court held that a rezone decision was arbitrary and capricious because the government failed to consider the serious adverse consequences that its decision would have on the welfare of people living in the area, including neighboring property owners. 89 Wn.2d 862, 870, 576 P.2d 401 (1978). Later, in *West Main*

Associates, this Court cited to *SAVE* as providing support for application of the unduly oppressive test. *See West Main Assocs.*, 106 Wn.2d at 52. There is simply no support for the City's claim that Washington courts have abandoned the unduly oppressive test.

III

THE CITY HAS FAILED TO SHOW THAT THE UNDULY OPPRESSIVE TEST IS WRONG OR HARMFUL

The City ultimately asks this Court to rule that a deprivation of a fundamental property right is subject only to minimal rational basis scrutiny. To do so, however, this Court would have to overrule nearly a century of case law. Adherence to past decisions through the doctrine of stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (quotations omitted); *see also State v. Berlin*, 133 Wn.2d 541, 555, 947 P.2d 700 (1997) (Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.") (quoting *Vasquez*

v. Hillery, 474 U.S. 254, 265-66, 106 S. Ct. 617, 624, 88 L. Ed. 2d 598 (1986)). Thus, while this Court is not strictly bound by prior decisions, a litigant seeking to upend a prior case faces an arduous task. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). This Court will only revisit prior decisions upon "a clear showing that an established rule is incorrect and harmful." *Id.* (quotation omitted). Both prongs of this analysis are required. *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 727-28, 381 P.3d 32 (2016); *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011). A prior case that is merely incorrect, but not also harmful, does not meet the criteria for reversal—and vice versa. *Deggs*, 186 Wn.2d at 727-28; *Barber*, 170 Wn.2d at 864. The City cannot meet this burden.

A. The Unduly Oppressive Test Is Not a Misstatement of Federal Law

The City insists that this Court's version of the unduly oppressive test was based on a misstatement of federal law. Opening Br. at 12-13. Not true. The unduly oppressive test mirrors the test established by *Lawton* and confirmed by *Goldblatt*. The City correctly complains that federal case law, over the years, generally blended takings and due process principles. City's Opening Br. at 13. But *Lingle* clarified any resulting confusion, confirming that the "substantially advances" test remains a valid due process test and further confirming that *Goldblatt* and *Lawton* established a test applicable

to substantive due process claims involving a deprivation of property rights. *Lingle*, 544 U.S. at 541, 543; *see also Goldblatt*, 369 U.S. at 594–95 (The unduly oppressive test is "still valid today.").

The City, moreover, misrepresents that the U.S. Supreme Court uses the term "rational basis" when describing the standard of review appropriate for a deprivation of property. City's Opening Br. at 20 (citing *Nectow*, 277 U.S. 185–89; *Village of Euclid*, 272 U.S. at 379–84). In truth, in *Village of Euclid*, the Court rejected the "rational relation" test used by many state courts in favor of a heightened scrutiny test, holding that regulatory restrictions on an owner's right to use his land will violate due process if the regulations are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." 272 U.S. at 395. The Court reiterated that test two years later in *Nectow*, again requiring a showing that the regulation substantially advance a legitimate public goal. 277 U.S. at 187-88. Neither *Village of Euclid* nor *Nectow* uses the phrase "rational basis." And in the years since, the Court has consistently required that restrictions on property be subject to heightened scrutiny. *See, e.g.*, *Lingle*, 544 U.S. at 540 (A regulatory restriction on the right to use one's property "must substantially advance a legitimate state interest" to satisfy the substantive requirement of due process.); *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6, 97 S. Ct.

1932, 52 L. Ed. 2d 531 (1977) ("*Euclid* held that land-use regulations violate the Due Process Clause if they are 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"); *Nebbia*, 291 U.S. at 525 (requiring that "the means selected shall have a real and substantial relation to the objective sought to be attained.") (quoted favorably by *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)).

The federal decisions cited by the City likewise require that a land use ordinance substantially advance a legitimate government objective. *See Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012); *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) ("[T]here is a due process claim where a 'land use action lacks any substantial relation to the public health, safety, or general welfare.'") (quoting *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855-56 (9th Cir. 2007)). The substantially advances test is a form of heightened scrutiny that closely mirrors this Court's understanding of the unduly oppressive test. *Guimont*, 121 Wn.2d at 609, n.10 ("The 'unduly oppressive' analysis merely provides a structure for determining the overall reasonableness of the means used to achieve the regulation's public purpose."). Therefore, there is no disconnect between state and federal due process law.

The federal and state due process tests, both of which employ some form of intermediate scrutiny, stem from the notion that property rights are fundamental. Unlike the right to earn a living or similar interests that have been held to be non-fundamental, property rights are expressly enumerated. *See United States v. Carolene Products*, 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth."). Hence, the U.S. Supreme Court has held that the "prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). The Washington Supreme Court has directly applied this privileged status to the unduly oppressive test, explaining that the test applies when a statute deprives a person of a fundamental interest, including property. *Willoughby*, 147 Wn.2d at 733.

Finally, insofar as the City attempts to equate rational basis review with the substantially advances test, that argument fails. Unlike rational basis review, which simply asks whether a law is "rationally related" to the

government's purpose, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), the substantially advances test demands heightened scrutiny. *Lingle*, 544 U.S. at 540–41, 545; *cf. Murr v. Wisconsin*, 137 S. Ct. 1933, 1947, 198 L. Ed. 2d 497 (2017); *San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 333, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). The test is distinct from and stronger than rational basis, and the U.S. Supreme Court has distinguished between the tests: "We have required that the regulation substantially advance the legitimate interest sought to be achieved, not that the State could rationally have decided that the measure adopted might achieve the State's objective." *Nollan*, 483 U.S. at 848 n.3 (internal quotation marks and citation omitted); *see also* John D. Echeverria, *Antonin Scalia's Flawed Takings Legacy*, 41 Vt. L. Rev. 689, 696 (2017) ("[S]ubstantially advances" is "a standard that is clearly more demanding than the traditional rational basis standard under the Due Process Clause."). Indeed, the language for intermediate scrutiny in the equal protection context echoes the substantially advances test: "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988). Heightened scrutiny is markedly

different from rational basis review. This Court should reject the City's attempt to conflate the two standards.

B. The City Has Failed To Demonstrate any Harm Caused by the Unduly Oppressive Test

Even if the City had proven that the unduly oppressive test is wrong, it must still make a clear showing that the test is harmful. *Otton*, 184 Wn.2d at 678. The harm analysis required by stare decisis looks to the particular circumstances of every case. *Barber*, 170 Wn.2d at 865. The key factor, however, should be a prior precedent's "detrimental impact on the public interest." *Id.* at 865. The City's two arguments regarding harm do not make a clear showing that the unduly oppressive test has any such impact.

The City's first argument for harm is that the unduly oppressive test's "continued presence sows confusion" because courts are unclear about which due process test to apply. Opening Br. at 16. The City complains, for instance, that litigants do not know what due process test will apply to them regardless of whether they bring a federal or state claim or file in a federal or state court. *Id.* at 17–18. This argument runs contrary to the facts. As discussed above, Washington courts have had no trouble determining the appropriate substantive due process standard in the years since *Amunrud*. Moreover, this Court need not overturn a century of due process precedent to address the City's confusion. Any confusion can be

solved by reaffirming that the unduly oppressive test applies to due process claims for property deprivations.

The City's second argument for harm relies on another misreading of this Court's decision in *Amunrud*. According to the City, *Amunrud* held that the "unduly oppressive" test is harmful because it would "strip individuals of the many rights and protections that have been achieved through the political process." *See* Opening Br. at 16 (quoting *Amunrud*, 158 Wn.2d at 230). In fact, this statement in *Amunrud* was a criticism of applying heightened scrutiny to laws regulating an economic liberty, something that no party here is seeking. Courts have long applied different due process standards depending on the nature of the due process claim at issue. Application of rational basis to economic liberty claims does not, for instance, mean that courts are wrong to apply strict scrutiny in claims regarding a fundamental right. *See Glucksberg*, 521 U.S. at 720 (analyzing whether law forbidding assisted suicide implicated a fundamental liberty interest). The fact that *Amunrud* saw a form of heightened scrutiny as harmful when applied to a law authorizing the State to suspend a driver's license when the holder refuses to pay child support simply has no bearing on whether it would be harmful to apply that level of scrutiny to other interests that are acknowledged to be fundamental. Moreover, the City has failed to provide a single past example of how the unduly oppressive test—

used in Washington property cases for decades—has stripped anyone of any right or protection in a manner detrimental to the public interest. Thus, it cannot bear its burden of showing particular harm.

Ironically, the City's invitation to abandon the unduly oppressive test in favor of minimal scrutiny would, itself, cause greater harm than the current state of the law. Unlike the unduly oppressive test, federal courts have not defined the substantially advances test with much detail (hence, Seattle's repeated argument that it is the equivalent of rational basis review), which leaves courts with substantial discretion. Washington courts, however, have employed a long list of factors to consider in analyzing due process claims under the unduly oppressive test. *See Presbytery*, 114 Wn.2d at 331. The unduly oppressive test therefore offers a much more defined analysis than the amorphous substantially advances test. And the City in fact asks for something more extreme—it wants to impose a rational basis test that neither state nor federal law support. Hence, the City's proposal would not improve the state of the law.

The City must demonstrate to this Court by a clear showing that the unduly oppressive test is so harmful as to overcome the value of stare decisis. The City has failed to meet that high burden.

CONCLUSION

This Court should answer the certified questions in line with almost a century of precedent: the unduly oppressive test applies to due process claims regarding deprivations of property. This case law follows the axiomatic due process principle that different levels of scrutiny apply to different due process interests—a principle the City repeatedly ignores. The Fair Chance Housing Ordinance deprives landlords of a property interest, and therefore the unduly oppressive test applies.

DATED: April 3, 2019.

Respectfully submitted,

By: s/ BRIAN T. HODGES
BRIAN T. HODGES, WSBA #31976
ETHAN W. BLEVINS, WSBA #48219
Pacific Legal Foundation
255 S. King Street
Seattle, Washington 98134
Telephone: (916) 419-7111
Email: BHodges@pacificlegal.org
Email: EBlevins@pacificlegal.org

Attorneys for Plaintiffs Chong & MariLyn Yim, Kelly Lyles, Eileen, LLC, and Rental Housing Association of Washington

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this day, I sent a copy of this document via e-mail to:

Rodger D. Wynne, WSBA No. 23399
Sara O'Connor-Kriss, WSBA No. 41569
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Email: roger.wynne@seattle.gov
Email: sara.oconnor-kriss@seattle.gov

Jessica L. Goldman
Summit Law Group
315 5th Ave. S, Suite 1000
Seattle, WA 98104
Email: jessicag@summitlaw.com

Kimberlee L. Gunning, WSBA #35366
Hillary Madsen, WSBA #41038
Nicholas B. Allen, WSBA #42990
Columbia Legal Services
Institutions Project
101 Yesler Way, Suite 300
Seattle, WA 98104
Email: Kim.Gunning@columbialegal.org
Email: Hillary.Madsen@columbialegal.org
Email: Nick.Allen@columbialegal.org

Robert Seungchul Chang
Melissa R. Lee
Kelly Ann Mennemeier
Jeffrey Edward Bilanko
Eric Dunn
Douglas Edward Smith
Email: changro@seattleu.edu
Email: leeme@seattleu.edu
Email: Kelly.mennemeier@foster.com
Email: jbilanko@cbblegal.com
Email: edunn@nhlp.org
Email: desmith@littler.com

DATED: April 3, 2019.

By: s/ BRIAN T. HODGES

BRIAN T. HODGES, WSBA #31976
ETHAN W. BLEVINS, WSBA #48219
Pacific Legal Foundation
255 S. King Street
Seattle, Washington 98134
Telephone: (916) 419-7111
Email: BHodges@pacificlegal.org
Email: EBlevins@pacificlegal.org

Attorneys for Plaintiffs Chong & MariLyn Yim, Kelly Lyles, Eileen, LLC, and Rental Housing Association of Washington