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No. 95813-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CAN  
APARTMENTS, LLC, and EILEEN, LLC,

Respondents,

v.

CITY OF SEATTLE,

Appellant.

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**BRIEF OF *AMICUS CURIAE*  
IN SUPPORT OF APPELLANT**

**SUBMITTED BY  
TENANTS UNION OF WASHINGTON STATE**

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*Amicus Curiae*  
TENANTS UNION OF WASHINGTON STATE

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## **I. INTRODUCTION**

The Tenants Union of Washington (Tenants Union) asks this Court to overturn the lower court's ruling and uphold Seattle's First-In-Time (FIT) ordinance.

A landlord's explicit and implicit biases play a major role in the tenant selection process. Bias may affect the amount and type of information a landlord provides to prospective tenants, the fees and charges demanded, and the qualifications required. The FIT rule is a reasonable reform to limit the impact bias plays in housing decisions by requiring landlords to explicitly state and apply their own, non-discriminatory rental criteria and rent to the first applicant who meets those criteria. As many landlord trade associations recognize, FIT application screening reduces the chances that discriminatory conduct will limit access to safe, affordable, and adequate housing.

This Court and the United States Supreme Court have recognized that despite bias affecting decision-making of all kinds, identifying it in any single transaction can be extremely difficult. As discrimination has become more covert over time, courts have endorsed new reforms aimed at eradicating or mitigating the effects of conscious and unconscious bias. Newly enacted General Rule (GR) 37 is one such modern reform that addresses bias in jury selection in a new way, by eliminating proof of intent, requiring consideration of the role that implicit, unconscious biases

play in modern day decision-making and prohibiting certain types of racialized criteria from being used to disqualify prospective jurors.<sup>1</sup>

Similarly, in passing FIT, the Seattle City Council recognized that the widespread discrimination revealed in housing tests conducted in Seattle and other places required a modern, proactive approach to addressing these harms. The resulting ordinance is a reasonable legislative reform that implements existing, industry best practice. It mitigates the effects of bias in one of the most vital arenas of human need, while preserving landlords' freedom to utilize any non-discriminatory rental criteria they deem necessary. FIT is a proper exercise of legislative authority that does not violate landlords' substantive due process rights.

## **II. IDENTITY OF AMICUS**

The Tenants Union is a non-profit organization dedicated to creating housing justice through empowerment-based education, outreach, leadership development, organizing, and advocacy. Its work focuses on improving tenants' living conditions and challenging unjust and discriminatory housing policies and practices. Many Tenants Union members and other people it assists on a daily basis have suffered discriminatory treatment at the hands of some Seattle landlords. This treatment has included the denial of rental housing because of race, national origin, gender, sexual orientation, disability and familial status. Because of the discrimination it has witnessed, the Tenants Union advocated for passage of FIT on behalf of its constituents before the

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<sup>1</sup> See GR 37

Seattle City Council. The Tenants Union, its members and constituents will be injured if the trial court's decision invalidating FIT is not overturned.

### **III. STATEMENT OF THE CASE**

The Tenants Union adopts the Statement of the Case and the factual and procedural history set forth in the City of Seattle's briefing.<sup>2</sup>

### **IV. ARGUMENT**

Where people live impacts every aspect of their lives, including access to education, healthcare, economic opportunities, and social networks. Unfortunately, historic and pernicious inequities create obstacles for many people at every point in the search for safe and affordable housing. Deep and sometimes unconscious biases affect how many landlords perceive and react to prospective tenants.

Science proves that housing decisions are infected with conscious and unconscious bias, resulting in discriminatory outcomes for people who share certain immutable traits.<sup>3</sup> Housing studies from across the country also demonstrate that discrimination in its current form is so subtle and ingrained in our social structures and thought patterns that even those perpetrating or experiencing discrimination may never know it has occurred.

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<sup>2</sup> See Appellant's Br. 6-13.

<sup>3</sup> Racial discrimination in housing receives a significant amount of well-deserved attention, but discrimination against people living with disabilities, gender non-conforming or LGBTQ people, and families with children is also insidious and widespread. FIT attacks all forms of discrimination by reducing the opportunities for prospective landlords to intentionally or unintentionally discriminate against a range of people on the basis of many different immutable characteristics. See SMC 14.08.050.

As this Court and others have recognized, identifying and remedying discriminatory conduct in individual cases can be extremely difficult because of its oftentimes implicit and subtle nature. The magnitude and enduring nature of housing discrimination illustrate the limitations of traditional anti-discrimination laws in ending these illegal practices.

Like GR 37, the FIT ordinance is a new policy response that proactively mitigates both intentional and unconscious bias by reducing the likelihood that ad hoc, individualized rental decisions will result in discrimination, while also preserving landlords' freedom to require tenants to meet any non-discriminatory criteria that they may choose. FIT is a legitimate and reasonable legislative reform that addresses a widespread, serious problem in an innovative, modern way.

**A. FIT Survives Scrutiny Under Either Party's Substantive Due Process Analysis.**

As discussed in the City's opening brief, this Court is asked to decide whether to apply the modern, federal, rational basis standard or the antiquated and discredited "undue oppression" test that the landlords promote.<sup>4</sup> As discussed in detail below, FIT survives under either analysis. It advances a vital governmental interest and is not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety,

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<sup>4</sup> See Resp't Br. 15-24.

morals or general welfare.”<sup>5</sup> Furthermore, FIT uses reasonable means to achieve its purpose and places no significant burden upon landlords.<sup>6</sup>

**B. Discrimination Has Become More Difficult To Identify Over Time. Racist, Sexist Or Homophobic Views Have Not Gone Away, But Have Become More Covert, Buried Deep In Our Subconscious Minds.**

This Court has recognized the changing face of discrimination in America.

[R]acism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.<sup>7</sup>

Other jurists have also noted the insidious nature of modern day discrimination that oftentimes hides in plain sight.

A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is “sullen,” or “distant,” a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. . . [P]rosecutors' peremptories are based on their “seat-of-the-pants instincts” as to how particular jurors will vote. Yet “seat-of-the-pants instincts” may often be just another term for racial prejudice.<sup>8</sup>

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<sup>5</sup> *Yagman v. Garcetti*, 852 F.3d 859, 867 (9th Cir. 2017).

<sup>6</sup> *Presbytery of Seattle v. King Cty.*, 114 Wn.2d 320, 330–31, 787 P.2d 907 (1990) (“To determine whether the regulation violates due process, the court should engage in the classic 3–prong due process test and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner.”) (internal quotations and citations omitted).

<sup>7</sup> *State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013).

<sup>8</sup> *Batson v. Kentucky*, 476 U.S. 79, 106–07, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (Marshall, J., concurring) (internal quotations and citations omitted).

As this Court has acknowledged, implicit bias is particularly difficult to detect and address because it arises from cognitively normal patterns of thought; patterns that we all fall into unconsciously. Every day, to cope with the barrage of stimuli we encounter, our minds sort things into categories with great efficiency.<sup>9</sup> This automatic categorization allows people to respond with limited conscious attention.<sup>10</sup> As part of this natural process, people assign attitudes or emotions to those categories, which can be negative, positive, or neutral.<sup>11</sup> Categorization leads to stereotypes and biases simply because “life is too short to have differentiated concepts about everything.”<sup>12</sup>

Biases regarding certain immutable traits have become ingrained in the deepest recesses of our brains -- biases that support institutions and structures created to maintain power in the hands of only certain favored groups or individuals.<sup>13</sup> For example, many existing biases against African-Americans and in favor of white people flow from our society’s history of slavery and subsequent racially oppressive economic, political

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<sup>9</sup> Rachel D. Godsil, et al., *The Effects Of Gender Role, Implicit Bias, And Stereotype Threat On The Lives Of Women And Girls*, The Science of Equality 1, 32 (Perception Institute 2016).

<sup>10</sup> *Id.* at 31.

<sup>11</sup> *Id.* at 31-32.

<sup>12</sup> *Saintcalle*, 178 Wn.2d at 47 (quoting Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and The Peremptory Challenge*, 85 B.U. L. Rev. 155, 185 (2005)).

<sup>13</sup> William Wiecek & Judy L. Hamilton, *Beyond the Civil Rights Act of 1964: Confronting Structural Racism in the Workplace*, 74 La. L. Rev. 1095, 1095-1101 (Summer 2014); *see also Saintcalle*, 178 Wn.2d at 48 (“[S]tereotypes about ethnic groups appear as a part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of society. They are as true as tradition, and as pervasive as folklore. No person can grow up in a society without having learned the stereotypes assigned to the major ethnic groups”) (quoting Howard J. Ehrlich, *The Social Psychology of Prejudice* 35 (1973)).

and social systems.<sup>14</sup> Despite being a normal human cognitive phenomenon, when combined with the history of oppression related to certain immutable traits, implicit bias causes negative outcomes for people who share those disfavored traits.

By its very nature, unconscious bias is difficult to identify. However, even intentional discrimination can be easily hidden from view by savvy actors. “[I]t is unlikely today that [someone] would explicitly discriminate under all conditions; it is much more likely that, where discrimination occurs, it does so in the context of more nuanced decisions that can be explained based upon reasons other than illicit bias, which, though perhaps implicit, is no less intentional.”<sup>15</sup> Code words, dog whistles and euphemisms infect modern discourse, allowing those who harbor discriminatory views to modulate their voices, but promote their messages nonetheless. In such an environment, determining whether someone intends to discriminate becomes extremely difficult and in many ways pointless. Science and research prove that housing discrimination occurs even though it may not be consciously intended by the perpetrator.

To complicate matters further, bias need not be hostile. “Implicit bias can also manifest as a result of positive preferences for a group we are a part of – what social scientists call ‘in-group’ bias or preference.”<sup>16</sup> Discrimination can occur “not [only] because outgroups are hated, but because positive emotions such as admiration, sympathy, and trust are

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<sup>14</sup> Wiecek, *supra* note 13, at 1114-16.

<sup>15</sup> *Woods v. City of Greensboro*, 855 F.3d 639, 651-52 (4th Cir. 2017).

<sup>16</sup> Godsil, *supra* note 9, at 33.

reserved for the ingroup and withheld from outgroups.”<sup>17</sup> Thus, granting benefits to a favored group results in the same outcome as discriminating against a disfavored group.<sup>18</sup> A Latinx landlord who favors Latinx, heterosexual, Catholic couples unlawfully discriminates just as directly as a white landlord who refuses to rent to Black people.

Unconscious, implicit biases and conscious, yet sophisticated, bad actors make identifying and remedying unlawful discrimination often impossible. Nonetheless, research and testing proves that discrimination against people from disfavored groups is rampant in the housing market nationally and in Seattle.

**C. Studies From Across The Country Prove That, Both Intentional And Implicit, Bias Impact Housing Decisions From The First Moment Of Contact.**

“Beyond the lab, studies reveal how implicit bias manifests in real-world decisions.”<sup>19</sup> One study sought to estimate the level of discrimination that certain people experience when searching for housing.<sup>20</sup> This study reviewed landlord responses to email inquiries to determine whether a difference in treatment existed across race, gender, and sexual orientation.<sup>21</sup> Overall, same sex couples received fewer

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<sup>17</sup> Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some, Ingroup Favoritism Enables Discrimination*, *American Psychologist* 669, 670 (2014).

<sup>18</sup> Godsil, *supra* note 9, at 35.

<sup>19</sup> *Id.* at 37.

<sup>20</sup> David Schwegman, *Rental Market Discrimination Against Same Sex Couples: Evidence from an Email Correspondence Audit* (Maxwell Center for Policy Research, Syracuse University 2018).

<sup>21</sup> *Id.* at 18-19.

responses than heterosexual couples.<sup>22</sup> Non-white couples were less likely to receive emails containing positive descriptions of units, less likely to be offered to view units or schedule appointments, less likely to receive emails containing polite language or contact information, more likely to receive emails describing fees that would be charged, and more often asked about their eviction histories than were white couples.<sup>23</sup>

Another housing study compared transgender and gender non-conforming people with gender-conforming, cisgender people.<sup>24</sup> The study's findings revealed that transgender and gender non-conforming people received discriminatory treatment 61% of the time.<sup>25</sup> Notably, the testers from the transgender and gender non-conforming communities: “were (1) more likely to be quoted a higher rental price, (2) less likely to be offered a financial incentive to rent the apartment, (3) shown fewer areas than their control counterparts (e.g., storage area, laundry facilities, etc.), and (4) shown fewer apartments than their cisgender and gender-conforming counterparts[.]”<sup>26</sup> Landlords also demonstrated bias in favor of gender conforming applicants by investing greater efforts to attract them.<sup>27</sup> Because landlords' discriminatory actions were often extremely subtle, “many [] testers were not even aware that they were being treated

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<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.* at 19-20.

<sup>24</sup> Jaime Langowski, et al., *Transcending Prejudice: Gender Identity and Expression Based Discrimination in the Metro Boston Rental Housing Market* (Suffolk University 2018).

<sup>25</sup> *Id.* at 322.

<sup>26</sup> *Id.* at 335.

<sup>27</sup> *Id.* at 343.

differently from their gender-conforming and cisgender counterparts.”<sup>28</sup>

Other studies demonstrate similar subtle obstacles encountered by families with children,<sup>29</sup> and those who are deaf or hard of hearing,<sup>30</sup> or live with other disabilities.<sup>31</sup>

In sum, these studies demonstrate that when a range of interactions are carefully compared, discrimination is apparent in many of them. However, when looked at in isolation, discriminatory conduct can be extremely difficult to identify in individual transactions. Writing longer emails, using more positive language or offering incentives are subtle actions that have real world consequences. Yet, due to implicit biases, individuals on both sides of the transaction may be unaware that discrimination has occurred or landlords may effectively hide their intentional acts with obfuscation and pretextual explanations.

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<sup>28</sup> *Id.*

<sup>29</sup> Off. Pol’y Dev. & Res., U.S. Dep’t Hous. & Urb. Dev., *Discrimination Against Families with Children in Rental Housing Markets: Findings of the Pilot Study*, viii (2016), <https://www.huduser.gov/portal/sites/default/files/pdf/HDSFamiliesFinalReport.pdf>. (findings show that some landlords steer families with children into larger units with higher rents and show them fewer units)

<sup>30</sup> Off. Pol’y Dev. & Res., U.S. Dep’t Hous. & Urb. Dev., *Discrimination in the Rental Housing Market Against People who are Deaf and People who use Wheelchairs: National Study Findings* (2015), [https://www.huduser.gov/portal/sites/default/files/pdf/housing\\_discrimination\\_disability.pdf](https://www.huduser.gov/portal/sites/default/files/pdf/housing_discrimination_disability.pdf). (prospective tenants with hearing disabilities receive fewer responses and are provided less information about units. People with mobility impairments were shown fewer units, even in buildings with accessible apartments).

<sup>31</sup> Off. Pol’y Dev. & Res., U.S. Dep’t Hous. & Urb. Dev., *Rental Housing Discrimination on the Basis of Mental Disabilities: Results of Pilot Testing*, vii (2017), <https://www.huduser.gov/portal/sites/default/files/pdf/MentalDisabilities-FinalPaper.pdf>. (People with mental illness or developmental disabilities were less likely to receive a response to their inquiries; be told an advertised unit was available; be invited to contact the housing provider or inspect an available unit; and were more likely to be steered away from an advertised unit).

**D. Testing Revealed The Same Pattern Of Discriminatory Treatment In Seattle.**

Unsurprisingly, Seattle is not immune bias infecting housing decisions. In 2014 and 2015, the Seattle Office for Civil Rights (SOCR) undertook a range of tests to determine the level of discrimination that prospective tenants from a variety of different communities face.<sup>32</sup> In one set of tests, SOCR focused on race, national origin, sexual orientation, and gender identity, and in a second, on the incidence of discrimination on the basis of familial status, disability and source of income.<sup>33</sup>

The testing revealed that prospective renters from disfavored groups experienced different treatment from Seattle landlords more than half the time across all tested categories, with the exception of familial status.<sup>34</sup> More specifically, the testing showed the following:

- 64% of contacts showed different treatment based on race;
- 67% showed different treatment based on national origin;
- 63% showed different treatment based on sexual orientation;
- 67% showed different treatment based on gender identity;
- 31% showed different treatment based on familial status;
- 64% showed different treatment based on disability; and

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<sup>32</sup> See Seattle Office of Civil Rights, *2014 Fair Housing Testing Conducted by the Seattle Office for Civil Rights, Frequently Asked Questions*, <http://www.seattle.gov/civilrights/civil-rights/fair-housing/testing/2014/faq> (“2014 Testing FAQ”); see also, Seattle Office of Civil Rights, *2015 Fair Housing Testing Conducted by the Seattle Office of Civil Rights*, [http://www.seattle.gov/Documents/Departments/CivilRights/SOCR-PR-050216-Fair\\_Housing\\_Testing.pdf](http://www.seattle.gov/Documents/Departments/CivilRights/SOCR-PR-050216-Fair_Housing_Testing.pdf). (“2015 Testing FAQ”).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

- 63% showed different treatment based on Section 8 voucher status.<sup>35</sup>

Black and Latinx testers were told that criminal background and credit history checks would be required more frequently than white testers.<sup>36</sup> Other testers from disfavored communities were shown fewer amenities, provided fewer applications and brochures, shown fewer vacant units, discouraged from applying, hung up upon, or simply turned away.<sup>37</sup>

This testing proves the existence and depth of the problems that many people confront when trying to find housing in Seattle. Over 60% of rental transactions involving people of color or people living with disabilities include some type of discrimination, yet discrimination complaints, let alone findings of discrimination, occur in only the rarest of cases.<sup>38</sup> Discriminatory housing practices occur every day in Seattle, but they are rarely identified or addressed.

As these studies prove, over 50 years after passage of the federal Fair Housing Act in 1968, rental discrimination remains a significant, on-going problem in Seattle. Furthermore, this long legacy demonstrates that traditional legal tools have proven largely ineffective at combatting the impacts of bias in Seattle’s rental market.

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<sup>35</sup> *Id.*

<sup>36</sup> 2014 Testing FAQ

<sup>37</sup> *Id.*; 2015 Testing FAQ.

<sup>38</sup> The Seattle Office of Civil Rights (SOCR) brought 36 charges as a result of these two rounds of testing, even though testing turned up many more instances of discriminatory conduct. SOCR reserved charges only for those instances in which discrimination was “undeniable.” See 2015 Testing FAQ. In fact, SOCR receives only \$50,000 per year to do discrimination testing across the entire City of Seattle. *Id.* The resources devoted to stamping out housing discrimination are clearly not adequate to meet the need.

## **E. Combating Modern Day Bias Requires New Legal Tools.**

The studies discussed above demonstrate that implicit and explicit biases result in discriminatory conduct that is often very difficult to detect. Furthermore, traditional, anti-discrimination laws have been often inadequate to address these forms of covert bias. As the United States Supreme Court has noted, “[d]e jure residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country’s economic and social life.”<sup>39</sup>

Traditional anti-discrimination laws require a showing of actual intent or proof of a policy or practice that has widespread and significant discriminatory effect.<sup>40</sup> These legal requirements have rendered disparate treatment and disparate impact analyses largely ineffective in addressing the type of day-to-day, individualized, yet widespread, discrimination that the studies document.<sup>41</sup>

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<sup>39</sup> See *Texas Dept. of Housing and Community Affairs v. Inclusive Communities*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2507, 2515, 192 L.Ed.2d 514 (2015) (citing *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 14942 (1917)).

<sup>40</sup> The Federal Fair Housing Act, 42 U.S.C. § 3604, provides a cause of action for housing discrimination claims under both disparate treatment and disparate impact theories. *Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1997) (“[A] plaintiff can establish an FHA discrimination claim under a theory of disparate treatment or disparate impact[.]”)(internal citations omitted). Washington’s Law Against Discrimination, RCW 49.60.180, also allows for disparate treatment and impact claims. *Blackburn v. State*, 186 Wn.2d 250, 258, 375 P.3d 1076 (2016) (disparate treatment actionable under WLAD); *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 503, 325 P.3d 193 (2014) (“WLAD creates a cause of action for disparate impact.”).

<sup>41</sup> Cf. Wiecek, *supra* note 13, at 1149-1154 (criticizing United States Supreme Court precedent in the employment discrimination context as not appropriately attuned to realities of modern day discrimination); Pouya Bavafa, *The Intentional Targeting Test: A Necessary Alternative to The Disparate Treatment and Disparate Impact Analyses in Property Rental Discrimination*, 43 Colum. J. L. & Soc. Probs. 491 (Summer 2010)(discussing problems with using disparate treatment and disparate impact analyses in particular housing related discrimination cases); Charles A. Sullivan, *Disparate*

Moreover, traditional anti-discrimination laws, even when liability can be proven, only remedy past harms. They do little to stop future acts of discrimination. In fact, the widespread prevalence of housing discrimination, decades after it was originally declared illegal, shows the limited deterrence value of traditional, anti-discrimination laws.

This Court has recognized that explicit and implicit bias infects decision making and yet can be extremely difficult to ferret out in individual circumstances with traditional legal tools. In *State v. Saintcalle*, the Court explicitly acknowledged the impact of bias in jury selection.<sup>42</sup> The Court recognized that laws limited to rectifying “purposeful discrimination” would do little to rectify racism because “racism is often unintentional, institutional, or unconscious.”<sup>43</sup> This Court continued to grapple with the difficulty of addressing discriminatory jury selection practices under existing legal frameworks after *Saintcalle*. Notably, in *State v. Meredith*, members of the Court acknowledged that any meaningful solution would “require consideration of issues far beyond the briefing in these two cases and *legislative and social resources beyond what this court can devote*.”<sup>44</sup> Other members have advocated prohibiting the use of

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*Impact: Looking Past The Desert Palace Mirage*, 47 Wm. & Mary L. Rev. 911 (Dec. 2005) (detailing the extensive shortcomings of disparate impact and disparate treatment in addressing employment discrimination); Justin D. Cummins, *Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice*, 42 How. L. J. 455, 458 (1999) (“anti-discrimination jurisprudence addresses only certain types of discrimination, and what little discrimination it does address, it does to a reprehensibly limited extent.”)

<sup>42</sup> *Saintcalle*, 178 Wn.2d at 35.

<sup>43</sup> *Id.* at 36.

<sup>44</sup> 178 Wn.2d 180, 188, 306 P.3d 942 (2013) (Stephens, J., concurring) (emphasis added); see also *City of Seattle v. Erickson*, 188 Wn.2d 721, 736, 398 P.3d 1124 (2017) (Stephens

preemptory challenges entirely because traditional legal analyses have proven incapable of removing racial and other biases from the jury selection process.<sup>45</sup>

Similarly, the United States Supreme Court has recognized the changing face of discrimination and how difficult it can be to remedy it in individual cases using a standard that requires proof of intent.<sup>46</sup> The Court in *Inclusive Communities* acknowledged the long history of racial discrimination in housing in the United States and its current, on-going impacts.<sup>47</sup> Segregated housing patterns arose in part as a consequence of public and private decisions based in racial animus against people of color.<sup>48</sup> Racism more recently has gone underground. However, these

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J., concurring) (black-line *Batson* rule adopted by majority “is neither necessary nor particularly likely to transform the *Batson* analysis into a useful tool for combatting racial bias injury selection.”).

<sup>45</sup> *Id.* at 740 (Yu, J., concurring) (agreeing with Justice Gonzalez that preemptory challenges should be abandoned entirely because “the basic framework of *Batson* does not work, and the record in this case demonstrates the awkwardness and impracticability of the so-called *Batson* challenge.... Too many qualified persons are being excluded from jury service for no reason at all, and tinkering with court rules or issuing incremental decisions a decade at a time are unsatisfactory solutions.”).

<sup>46</sup> See *Inclusive Communities*, 135 S.Ct. at 2522 (recognizing that Congress included disparate impact as a cause of action in the federal Fair Housing Act). Other courts have also recognized how modern day discrimination makes it difficult to identify and remedy discrimination. See e.g. *Rice v. Collins*, 546 U.S. 333, 343, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (Breyer, J., concurring); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 257, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (recognizing that stereotypical notions can play a role in a mixed-motive employment discrimination case, even when the suspect comments were made by individuals who supported promoting the plaintiff); *Coombs v. Diguglielmo*, 616 F.3d 255, 264 (3d Cir. 2010) (“[O]utright prevarication by attorneys is not the only danger. It is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.”).

<sup>47</sup> *Inclusive Communities*, 135 S.Ct. at 2515-16 (“De jure residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country’s economic and social life.”).

<sup>48</sup> *Id.* at 2515 (“[V]arious practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races. Racially restrictive covenants prevented the conveyance of property to minorities, steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory

historical patterns continue to play out in current America, requiring legal strategies that reflect the complexities of modern day discrimination.

Recognition of disparate-impact liability under the FHA ... *permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.* In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.<sup>49</sup>

As both this Court and the United States Supreme Court have recognized, even after 50 years of enforcement of fair housing laws, housing discrimination continues to be a pervasive problem. That reality requires new policy initiatives that take into account the complicated nature of discrimination and proactively limit the instances in which discrimination can occur. GR 37 is one such initiative.

**F. GR 37 And FIT Address The Realities Of Modern Discrimination.**

This Court in passing GR 37 went beyond traditional anti-discrimination laws and arrived at a rule that bars preemptory challenges if an “objective observer could view race or ethnicity as a factor in the use of the preemptory challenge.”<sup>50</sup> Proof of “purposeful discrimination” is not required in order to invalidate a proposed challenge.<sup>51</sup> Instead, challenges must be reviewed with the “aware[ness] that implicit, institutional, and unconscious biases...have resulted in the unfair exclusion of potential

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lending practice, often referred to as redlining, precluded minority families from purchasing homes in affluent areas.”)(citations omitted).

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> GR 37(e)

<sup>51</sup> *Id.*

jurors in Washington State.”<sup>52</sup> Thus, lawyers must articulate more than a “hunch” or “gut instinct” before they can exclude someone from a jury.

GR 37 also prohibits certain types of criteria by which prospective jurors can be judged; criteria that have an unfortunate racialized history. For example, GR 37 prohibits a prosecutor from striking a juror for expressing a distrust of police officers or a belief that police officers engage in racial profiling.<sup>53</sup> These prohibitions do not merely punish unlawful conduct once it has occurred, but proactively stop certain types of discriminatory challenges from occurring at all.

In passing GR 37, this Court recognized how corrosive explicit and implicit bias has been in a vital area of human concern and took reasonable, quasi-legislative action to address it. Like GR 37, FIT is a well-supported, evidence-based, legislative effort to combat “unconscious prejudices and disguised animus” and address the subtle nature of modern day discrimination.

**G. The FIT Rule Meets The Rational Basis And Undue Burden Tests.**

FIT passes muster under rational basis due process analysis. It is a reasonable regulation with a substantial connection to the vital government interest in limiting the impacts of implicit and explicit bias in rental decisions. It also satisfies the undue oppression standard. FIT

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<sup>52</sup> GR 37(f)

<sup>53</sup> GR 37(h)(ii). This and other “Reasons Presumptively Invalid” under GR 37 reflect the Court’s appreciation of the realities of our racialized history and how policing and the criminal justice system as a whole are also infected with discriminatory biases. Similarly, Seattle’s Fair Chance Housing Ordinance, which this Court will be considering along with the FIT ordinance, is an attempt to address the legacy of racism in the criminal justice system that continues to limit housing options for people with criminal records.

merely replicates industry-recommended, best practices and places no burden upon landlords who remain able to utilize any non-discriminatory criteria they may wish.<sup>54</sup>

As detailed in the City’s brief, numerous landlord organizations actively advise their members to utilize First-In-Time screening and offer tenancy to the first prospective tenant who satisfies the landlord’s own, pre-existing, screening criteria.<sup>55</sup> This is a recommended practice because landlords who refuse to provide their criteria in writing and who then use “gut instinct,” “common sense” or a “hunch” in denying applications will likely face valid discrimination complaints at some point in their careers.<sup>56</sup>

Landlord organizations acknowledge what the science proves; “common sense” decisions are too often based in unconscious biases in favor of one group or in opposition to another. As Justice Marshall noted, “seat-of-the-pants instincts may often be just another term for racial

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<sup>54</sup> Seattle through its Fair Chance Housing ordinance has prohibited landlords from barring people from housing because of criminal records. As with FIT, the Seattle City Council reviewed thousands of pages of research and heard from many different stakeholders before deciding to prohibit screening criteria that have significant discriminatory outcomes. The Fair Chance Housing ordinance is another example of an appropriate and reasonable legislative effort that directly attacks discriminatory rental practices.

<sup>55</sup> See Resp’t Br. 9-10.

<sup>56</sup> While disparate treatment and disparate impact theories of liability have significant flaws, landlords who regularly utilize “hunches” to deny potential tenants face potential liability on one or both of these theories. Either such decisions are influenced by explicitly discriminatory views or they likely result in discriminatory outcomes for which no legitimate business justification can be proven. Given the undisputed scientific proof that implicit biases and unconscious prejudices too often dictate decisions, a landlord’s practice of refusing to rent to someone on a “hunch” would not withstand the type of objective, fact based scrutiny that fair housing laws require. See 24 C.F.R. § 100.500(c)(2)(landlord must prove that “the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests.”); *also*, 78 Fed. Reg. 11470 to 11471 (legitimate interest is one that “is genuine and not false[,]” “is judged on the basis of objective facts” and “must be supported by evidence and not be hypothetical or speculative.”)

prejudice.”<sup>57</sup> In passing FIT, the Seattle City Council appropriately balanced the overwhelming need to address housing discrimination against a landlord’s desire to reject applicants on a hunch.<sup>58</sup>

The FIT rule also promotes transparency in housing decisions at the earliest possible moment: before initial contact is made. The studies discussed above demonstrate that discrimination can begin immediately upon first contact between a landlord and a prospective tenant. By requiring landlords to provide their tenancy criteria in advance, FIT removes opportunities for illegal discrimination to surreptitiously infiltrate the process at its earliest stages.<sup>59</sup>

It also provides flexibility. Landlords remain free to utilize any non-discriminatory criteria they wish, charge any rent or require any fee or security deposit. They suffer no economic harm of any kind. In fact, FIT reduces the danger of economic injury from litigation that landlords would likely suffer if they deny tenants on nothing more than a “hunch”. The rule also recognizes that individual circumstances may arise where a prospective tenant needs more time to complete an application, or the landlord unexpectedly needs to make further inquiries.<sup>60</sup>

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<sup>57</sup> *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (internal citations and quotations omitted).

<sup>58</sup> *See Presbytery of Seattle*, 114 Wn.2d at 331 (“The unduly oppressive inquiry lodges wide discretion in the court and implies a balancing of the public's interest against those of the regulated landowner”.)

<sup>59</sup> SMC 14.08.050(A)(1).

<sup>60</sup> SMC 14.08.050(A)(3), (B)-(C).

## V. CONCLUSION

Implicit and explicit bias is pervasive in the search for housing. As the studies discussed above demonstrate, modern discrimination often goes unnoticed by the tenant and even the landlord. This Court and others have recognized that discrimination today is often not the blatant and bigoted actions that traditional anti-discrimination laws were designed to prevent and punish.

The FIT rule addresses these modern realities and serves a vital public purpose by limiting the chances that ad hoc, subjective decisions will result in discriminatory housing outcomes. It does so without placing any burden upon landlords who remain free to screen tenants with any non-discriminatory criteria they may wish. Accordingly, this Court should overturn the lower court's ruling and uphold the FIT ordinance.

Respectfully submitted this 26<sup>th</sup> day of April, 2019.

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