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SUPREME COURT
STATE OF WASHINGTON
4/25/2019 4:53 PM
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Supreme Court No. 95813-1

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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

v.

CITY OF SEATTLE
Appellant.

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

IDENTITY AND INTEREST OF AMICUS 1

ISSUE OF CONCERN TO AMICUS..... 1

ARGUMENT 3

I. The History and Text of the Washington Constitution Demand Greater Protections for Private Property Than Are Offered Under the U.S. Constitution..... 4

 A. The historical context of the Constitutional Convention of 1889 required greater protections for private property. 4

 B. The text of the Constitution of 1889 evinces the framers’ intent to provide greater protections for private property. 7

II. This Court Has Long Recognized That the Washington Constitution Provides Enhanced Protections for Private Property..... 10

 A. This Court’s post-Convention cases recognized the Washington Constitution’s enhanced protections for private property. 11

 B. This Court continues to recognize the Washington Constitution’s enhanced protections for private property. 13

III. Washington’s Enhanced Property Rights Protections Are an Affirmative Good and Abandoning Them Would Invite Abuse. .. 15

 A. This case shows why Washington’s enhanced property rights protections are an affirmative good. 16

 B. *Kelo* and its aftermath show that deferring to federal takings analyses would invite rampant abuse..... 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>Barron v. Baltimore</i> , 32 U.S. 243, 8 L. Ed. 672 (1833).....	7, 8
<i>Chicago, B. & Q.R. Co. v. Chicago</i> , 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897).....	7
<i>City of Norwood v. Horney</i> , 110 Ohio St.3d 353, 853 N.E.2d 1115 (2006).....	1
<i>Dennis v. Moses</i> , 18 Wash. 537, 52 P. 333 (1898).....	8
<i>Great N. Ry. Co. v. State</i> , 102 Wash. 348, 173 P. 40 (1918).....	9
<i>Healy Lumber Co. v. Morris</i> , 33 Wash. 490, 74 P. 681 (1903)	<i>passim</i>
<i>Hogue v. Port of Seattle</i> , 54 Wn.2d 799, 341 P.2d 171 (1959).....	<i>passim</i>
<i>Kelo v. City of New London</i> , 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005)....	1, 18, 19, 20
<i>Manufactured Housing Cmty. of Wash. v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000)	<i>passim</i>
<i>Nietzel v. Spokane Int'l Ry. Co.</i> , 65 Wash. 100, 117 P. 864 (1911).....	13
<i>Petition of Seattle</i> , 96 Wn.2d 616, 638 P.2d 549 (1981)	14, 18
<i>State v. Super. Ct. of King Cty.</i> , 26 Wash. 278, 66 P. 385 (1901).....	8

<i>State v. White River Power Co.</i> , 39 Wash. 648, 82 P. 150 (1905).....	13, 17, 18
<i>VanHorne's Lessee v. Dorrance</i> , 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).....	6
<i>White Bros. & Crum Co. v. Watson</i> , 64 Wash. 666, 117 P. 497 (1911).....	18

Constitutional Provisions

U.S. Const. amend. V.....	<i>passim</i>
Wash. Const. art. I, § 1.....	7, 8
Wash. Const. art. I, § 3.....	2, 8
Wash. Const. art. I, § 16.....	<i>passim</i>
Wash. Const. art. I, § 30.....	8

Statutes

Enabling Act, ch. 180, § 4, 25 Stat. 676, 676–77 (1889).....	7
--	---

Treatises

2 William Blackstone, <i>Commentaries on the Laws of England [1765]</i> vol. II (Illinois: Univ. of Chicago Press 1979).....	8
John Locke, <i>Two Treatises of Government [1690]</i> ch. V, § 27 (London: G. Routledge 1884) (1690)	8

Other Authorities

<i>50 State Report Card: Tracking Eminent Domain Reform Since Kelo</i> 51 (Institute for Justice, Aug. 2007)	20
Adam Mossoff, <i>What Is Property? Putting the Pieces Back Together</i> , 45 Ariz. L. Rev. 371 (2003).....	8, 17

Dana Berliner, <i>Looking Back Ten Years After Kelo</i> , 125 Yale L.J. Forum 82 (2015).....	19
Dana Berliner, <i>Opening the Floodgates: Eminent Domain Abuse in the Post-Kelo World</i> (Institute for Justice, June 2006),.....	19
Dana Berliner, <i>Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain</i> (Institute for Justice, April 2002).....	19
Harry N. Scheiber, <i>Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910</i> , 33 J. Econ. Hist. 232, (1973).....	6
James Leonard Fitts, <i>The Washington Constitutional Convention of 1889</i> (1951) (unpublished Master of Arts dissertation, Univ. of Wash.) ..	6, 11
James Madison, <i>Property</i> (Mar. 29, 1792), in <i>The Founders’ Constitution</i> vol. I, ch. 16, doc. 23 (Philip B. Kurland & Ralph Lerner eds., 1987).....	8, 17
Lebbeus J. Knapp, <i>Origin of the Constitution of the State of Washington</i> , 4 Wash. Hist. Q. 227 (1913)	6
Robert F. Utter and Hugh D. Spitzer, <i>The Washington State Constitution: A Reference Guide</i> (2002).....	6, 10
Robert F. Utter, <i>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</i> , 7 U. Puget Sound L. Rev. 491 (1984).....	5, 6, 9
<i>The Journal of the Washington State Constitutional Convention 1889: with Analytical Index</i> 155 (Beverly Paulik Rosenow ed., 1999)	10, 11
Wilfred J. Airey, <i>A History of the Constitution and Government of Washington Territory</i> (1945) (unpublished Ph.D dissertation, Univ. of Wash.).....	5
William J. Brennan, <i>State Constitutions and the Protection of Individual Rights</i> , 90 Harv. L. Rev. 489 (1977).....	10

IDENTITY AND INTEREST OF AMICUS

The Institute for Justice (IJ) is a non-profit, public-interest law firm committed to defending the essential foundations of a free society, including private property rights. As part of that mission, IJ has litigated cases challenging the use of eminent domain to take private property for private use. Among those cases are *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), in which the U.S. Supreme Court infamously held that the U.S. Constitution allows government to take private property for private economic development, and *City of Norwood v. Horney*, 110 Ohio St.3d 353, 853 N.E.2d 1115 (2006), in which the Ohio Supreme Court rejected *Kelo* and held that the Ohio Constitution protects private property to a greater extent than the U.S. Constitution. IJ respectfully submits this amicus curiae brief in support of Respondents to defend this Court’s extensive jurisprudence holding that the Washington Constitution provides “enhanced protections against taking private property for private use.” *Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347, 360, 13 P.3d 183 (2000).

ISSUE OF CONCERN TO AMICUS

This case involves a Seattle ordinance that “requires . . . landlord[s] to notify prospective tenants of [their] screening criteria and offer tenancy to the first applicant meeting them.” City of Seattle’s

Opening Brief (“City’s Br.”) 1. Respondents—a group of landlords in the City of Seattle (the “City”)—contend the ordinance violates several state constitutional rights, including substantive due process and the right to own property free from private takings. Amicus is interested in the implications of the City’s response to these claims.

The City’s response goes far beyond merely defending its ordinance. The City also asks this Court to abandon its independent construction of the Washington Constitution in favor of the U.S. Supreme Court’s construction of similar (but not identical) provisions in the U.S. Constitution. First, the City asks the Court to apply a federal substantive-due-process test under Article I, Section 3 of the Washington Constitution. City’s Br. 2. Second, the City asks the Court to apply a federal takings analysis under Article I, Section 16 of the Washington Constitution (“Section 16”). *Id.*

This brief addresses the takings argument. As discussed below, Section 16 imposes an “absolute prohibition against taking private property for private use.” *Manufactured Housing*, 142 Wn.2d at 357. The City flouts this ban by taking Respondents’ “right to freely dispose of [their] property”—“a fundamentally important property right”—and “statutorily transferr[ing]” that right to their prospective tenants. *Id.* at 361 & 369–370. The City spends much of its brief avoiding this

straightforward conclusion by invoking federal regulatory takings law, which it uses to argue that no taking has occurred and that any restriction of Respondents' rights must be balanced against the City's "venerable governmental purpose." City's Br. 17 & 46.

Amicus is less concerned with the details of the City's argument than with the City's major premise: that "[t]he takings clauses of the U.S. and Washington Constitutions are functionally identical." City's Br. 33. That premise, if true, would require this Court to ignore the unique text and history of Section 16, as well as over a century's worth of jurisprudence interpreting it, and to replace them with the U.S. Supreme Court's interpretation of the federal Takings Clause. Below, Amicus explains why that would be a mistake.

ARGUMENT

This case presents the Court with a simple choice: reaffirm its commitment to over a century's worth of jurisprudence holding that Article I, Section 16 of the Washington Constitution provides "enhanced protections against taking private property for private use," *Manufactured Housing*, 142 Wn.2d at 360, or abandon that tradition in favor of the U.S. Supreme Court's less searching construction of the Fifth Amendment's Takings Clause. This brief explains why the Court should reaffirm Section 16's independence in three parts. Part I explains the unique history and

text of the Washington Constitution. Part II traces this Court’s independent construction of Section 16 through over a century’s worth of jurisprudence. Part III concludes by arguing that abandoning Section 16’s unique property rights protections invite abuse.

I. The History and Text of the Washington Constitution Demand Greater Protections for Private Property Than Are Offered Under the U.S. Constitution.

The City asks this Court to interpret Section 16 to be “functionally identical” to the Fifth Amendment’s Takings Clause. City’s Br. 33. The City asks this despite what this Court has called “significant” and “striking” differences between the two provisions, *Manufactured Housing*, 142 Wn.2d at 357—differences rooted, as Amicus will explain, in the unique history and text of the Washington Constitution.

A. The historical context of the Constitutional Convention of 1889 required greater protections for private property.

The framers of the Washington Constitution of 1889 had every reason to be concerned about the security of private property rights in the future state. On the eve of the Constitutional Convention of 1889, Washingtonians’ property appeared to be at risk—both by legislative and corporate abuses of state power and by the U.S. Supreme Court’s express refusal to subject that power to federal protection. Together, these

concerns set the stage for the adoption of a constitution designed to provide strict protections for private property.

In the 36 years between the formation of Washington Territory in 1853 and statehood in 1889, Washington’s territorial legislature displayed a level of incompetence and corruption that instilled in the framers a genuine skepticism of government power.¹ These were not the American colonists’ problems, but the unique concerns of a frontier society that had borne decades of abuse at the hands of a legislature with an inordinate share of power and few checks on its use.² The result was a government that “spent much of its time granting special acts or privileges,” including expansive charters to develop vast swaths of land, to personally or politically favored interests.³

Chief among these interests were the railroads. Washington’s late-nineteenth-century railroad boom brought with it the corrupting influence of lobbyists who specialized in obtaining favors—from monopolies to

¹ Wilfred J. Airey, *A History of the Constitution and Government of Washington Territory* 208–21 (1945) (unpublished Ph.D dissertation, Univ. of Wash.) (on file with Gallagher Law Library, Univ. of Wash.).

² *Id.* at 23–30; see also Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 498–99 (1984) (noting “the vast differences in culture, politics, experience, education, and economic status between the Northwestern framers of 1889 and the Eastern framers of the United States Bill of Rights in 1789, and the enormous differences of history and local conditions that separated the two conventions”) (notes omitted).

³ Airey, *supra* n.1, at 208–09; see also *id.* at 209–21 (surveying further abuses).

subsidies to land grabs—from territorial legislators.⁴ Meanwhile, railroads nationwide were persuading states to grant them the “despotic” power to take private property.⁵ As former Chief Justice Utter observed, “[i]t would be difficult to overestimate the social, economic, and political consequences” of these developments.⁶ Years of abuse had fostered in Washingtonians a “strong distrust of corruptible legislatures and the corporations that were believed to corrupt them,” and many of the delegates to the Convention of 1889 were sent on promises to “place strict limitations on the powers of both.”⁷ The urgent need to protect the people from “the growth and menacing attitude of this unscrupulous power” was a thus central theme of the Convention.⁸

A second major concern—one that no doubt underscored the first—was the lack of federal property rights protections. In 1833, the U.S. Supreme Court held that the Fifth Amendment restricted only the federal government—leaving state and territorial governments to self-police their

⁴ Utter, *supra* n.2, at 518–19.

⁵ *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795); see Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910*, 33 J. Econ. Hist. 232, 237 (1973) (“Devolution of the eminent-domain power upon . . . railroad companies was done in every state.”).

⁶ Robert F. Utter and Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 11 (2002).

⁷ Utter, *supra* n.2, at 519; see also James Leonard Fitts, *The Washington Constitutional Convention of 1889* 5–6 (1951) (unpublished Master of Arts dissertation, Univ. of Wash.) (on file with Gallagher Law Library, Univ. of Wash.) (noting that “distrust of the railroads and legislatures” also animated the Convention of 1878 and “extend[ed] into the Constitutional Convention of 1889”).

⁸ Lebbeus J. Knapp, *Origin of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227, 239 (1913).

use of the takings power. *See Barron v. Baltimore*, 32 U.S. 243, 8 L. Ed. 672 (1833). Given the state of Washington’s legislature and the corrupting influence of corporate interests, this was a responsibility with which the territorial government could not be trusted.⁹ The Convention of 1889 afforded Washingtonians an opportunity to remedy this troubling state of affairs—and they took it.

B. The text of the Constitution of 1889 evinces the framers’ intent to provide greater protections for private property.

The federal Enabling Act made it a condition of statehood that Washington adopt a constitution “not . . . repugnant to the Constitution of the United States and the principles of the Declaration of Independence.”¹⁰ But at least where property rights were concerned, the framers exceeded this floor, crafting a constitution that both honored the inalienable rights recognized in the Declaration of Independence and secured them with language more stringent than that of the U.S. Constitution.

The Washington Constitution of 1889 begins by recognizing that “the people”—not the government—possess “inherent” power, which they delegate to the state for the sole purpose of “protect[ing] and maintain[ing]

⁹ The U.S. Supreme Court would not incorporate the Fifth Amendment’s Takings Clause against the states until 1897. *See Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897).

¹⁰ Enabling Act, ch. 180, § 4, 25 Stat. 676, 676–77 (1889).

individual rights.”¹¹ Article I, Section 3 next declares that among these rights are “life, liberty, [and] property,” which must not be infringed “without due process of law.” These provisions ensured that, despite the U.S. Supreme Court’s decision in *Barron*, Washingtonians would enjoy *at least* the rights contemplated under the U.S. Constitution.

A central feature of these incorporated property rights was the principle—long-established at common law—that a property owner gets to choose whether to share her property with others.¹² As James Madison wrote, property is “that dominion which one man claims and exercises over the external things of the world, *in exclusion of every other individual*.”¹³ In the years immediately following the Convention, this Court made clear that the Washington Constitution promised the people of this State at least as much control over their own property.¹⁴

¹¹ Wash. Const. art. I, § 1; *see also* Wash. Const. art. I, § 30; *Dennis v. Moses*, 18 Wash. 537, 571, 52 P. 333 (1898) (explaining that state constitutions secure individuals’ pre-existing rights).

¹² *See* John Locke, *Two Treatises of Government* [1690] ch. V, § 27 (London: G. Routledge 1884) (stating that property, by its nature, “excludes the common right of other men”); 2 William Blackstone, *Commentaries on the Laws of England* [1765] vol. II (Illinois: Univ. of Chicago Press 1979) (defining property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual”); *see also* Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 *Ariz. L. Rev.* 371, 378 (2003) (noting that “right to exclude” was essential to founders’ conception of property).

¹³ James Madison, *Property* (Mar. 29, 1792), in *The Founders’ Constitution* vol. I, ch. 16, doc. 23 (Philip B. Kurland & Ralph Lerner eds., 1987), <http://presspubs.uchicago.edu/founders/documents/v1ch16s23.html> (emphasis added).

¹⁴ *See, e.g., State v. Super. Ct. of King Cty.*, 26 Wash. 278, 287, 66 P. 385 (1901) (stating, “based upon the nature of property itself,” that property is taken “whenever the lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree

But Washington’s framers would not merely adopt federal property rights principles. The looming threat of legislative and corporate abuses of the takings power required independent action. Thus, while the Fifth Amendment devotes only a single clause to the matter, Section 16 devotes several sentences to restraining the takings power:

- Section 16 declares that “[p]rivate property ***shall not be taken for private use***” (emphasis added). This categorical restriction has no comparison in the Fifth Amendment.
- Section 16 then broadens the Fifth Amendment’s injunction that “private property [shall not] be taken for public use, without just compensation,” providing that “[n]o private property shall be taken ***or damaged*** for public ***or private*** use without just compensation having ***been first made***, or paid into court” (emphasis added).
- Section 16 concludes by declaring that “[w]henever an attempt is made to take private property for a use alleged to be public, ***the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion*** that the use is public” (emphasis added). This provision has no comparison in the Fifth Amendment.

These substantive expansions on the federal Takings Clause were no accident.¹⁵ The framers were well-aware that Section 16 would have to

abridged or destroyed by . . . the exercise of the power of eminent domain”) (quotes omitted); *Great N. Ry. Co. v. State*, 102 Wash. 348, 351, 173 P. 40 (1918) (calling the “right of excluding others” an “essential element[] of ownership [that] make[s] property valuable”).

¹⁵ See Utter, *supra* n.2, at 515 (“It is reasonable to assume that the men who drafted the Washington Constitution, many of whom were lawyers, were well aware of these linguistic differences . . . and that they therefore intended to create such differences.”) (notes omitted).

bear primary responsibility for securing property rights in Washington.¹⁶ Thus, when an initial draft of Section 16 mostly mirrored its federal counterpart, it was promptly expanded until there could be no doubt that Section 16 offered a complete defense to the unique threats Washingtonians had faced.¹⁷ In other words, Washington’s framers had an opportunity to adopt a provision that would simply parrot the federal Takings Clause—and they refused.¹⁸

II. This Court Has Long Recognized That the Washington Constitution Provides Enhanced Protections for Private Property.

Despite the unique history and text of Section 16, the City asks this Court to “overrule past decisions” holding that it provides “enhanced” property rights protections, *Manufactured Housing*, 142 Wn.2d at 360, and to “apply . . . federal analyses” instead. City’s Br. 2 & 15. But this Court has repeatedly rejected such calls to abandon Washington’s unique constitutional heritage.

¹⁶ See Utter and Spitzer, *supra* n.6, at 3 (“The early constitutional history of the United States leaves no doubt that state bills of rights were never intended to be dependent on or interpreted in light of the U.S. Bill of Rights.”); accord William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501–02 (1977).

¹⁷ See *The Journal of the Washington State Constitutional Convention 1889: with Analytical Index* 155, 264–65 & 503–04 (Beverly Paulik Rosenow ed., 1999) (tracing expansion).

¹⁸ See Utter and Spitzer, *supra* n.6, at 3 (calling it “extremely unlikely that the Washington framers . . . intended that the federal Constitution and courts should have any significant role in interpreting or setting limits on the interpretation of Washington’s Constitution”).

A. This Court’s post-Convention cases recognized the Washington Constitution’s enhanced protections for private property.

In the decades immediately following the Convention of 1889, this Court repeatedly explained Section 16’s more stringent nature. This is hardly surprising, as three of the first five members of the Washington Supreme Court were delegates to the Convention and thus played some part in crafting those protections.¹⁹ Justice Dunbar, in particular—who was a member of the committee that expanded and proposed the final version of Section 16—offered crucial guidance on the distinction between “public” and “private” uses in one of the first opinions interpreting the provision: *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 P. 681 (1903).²⁰

In *Healy*, a lumber company attempted to condemn private lands and waterways for logging purposes. 33 Wash. at 496. The property owner demurred under Section 16, arguing that the company was attempting to take private property for private purposes. *Id.* at 497. The company replied that the lumbering business was of great “magnitude . . . and interest [to] this state” and promoted “the general prosperity of the commonwealth,” which it argued constituted a public use. *Id.* at 499.

This Court rejected the company’s reasoning. *Id.* at 498 & 505. According to Justice Dunbar, the notion that “‘public use’ should be

¹⁹ See Fitts, *supra* n.7, at 12.

²⁰ See *Journal*, *supra* n.17, at 264–65.

construed to be synonymous with ‘public benefit’” was a “dangerous doctrine” that would “obliterate[]” “the distinction between public policy and public use.” *Id.* at 504–05. Such a construction, he reasoned, would “leav[e] the legislative will . . . free and untrammled” and property rights “as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business.” *Id.* Justice Dunbar had no doubt that “the words ‘public use’ were not used by the framers of the Constitution in this liberal, and . . . somewhat indiscriminate, sense[.]” *Id.* at 499.

Instead, if Washingtonians were to have “reasonable security of private property—[and] much more . . . that security which the constitution guaranties,” a much stricter test was needed. *Id.* at 507.

[F]rom a consideration of all the authorities, and from our own views on construction, we are of the opinion that the use under consideration must be either a use *by the public*, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state.

Id. at 509 (emphasis added). The Court concluded that the company’s proposed logging roads, which would not actually be used *by the public*, could not qualify as a public use under this test—despite the gravity of their public benefit. *Id.* at 511.

Healy gave this Court a clear framework for honoring its duty to striking down takings for private use “without regard to any legislative assertion that the use is public.”²¹ Indeed, the Court would apply the *Healy* test several times in the years that followed to reject private takings with purported public purposes.²² And as explained below, this was only the start of the Court’s longstanding commitment to a more stringent test under Section 16.

B. This Court continues to recognize the Washington Constitution’s enhanced protections for private property.

This Court continues to follow *Healy* and its progeny. In *Manufactured Housing*, the Court took a deep dive into the text and history of Section 16 and concluded that “[t]he key differences between the Fifth Amendment and [Section 16] are significant and support a literal interpretation of ‘private use’ as employed in the Washington State Constitution.” 142 Wn.2d at 359. In so doing, the Court also reaffirmed Justice Dunbar’s more stringent test for a public use, noting that the Court

²¹ Wash. Const. art. I, § 16.

²² See, e.g., *State v. White River Power Co.*, 39 Wash. 648, 668, 82 P. 150 (1905) (rejecting company’s attempt to take land for dam and powerhouse because “[i]t will not suffice if the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation . . . [where] no right to its use or to direct its management is conferred upon the public”) (quotes omitted); *Nietzel v. Spokane Int’l Ry. Co.*, 65 Wash. 100, 114, 117 P. 864 (1911) (rejecting railroad’s attempt to take land for use by grocery store because “public use” means “a general public right to a definite use of the property, as distinguished from a use by a private individual or corporation which may prove beneficial or profitable to some portion of the public”) (quotes omitted).

has “followed a similar line of reasoning” ever since. *Id.* at 373. The Court was correct on both scores.

To start, the Court has repeatedly applied a more stringent test when the government seeks to take private property from A and give it to B to further some alleged public purpose. In *Hogue v. Port of Seattle*, for instance, the Court rejected a port’s attempt to take land and lease it to private businesses to promote economic development and prevent crime, explaining: “[This] amounts to no more than the taking of A’s property, improving [it] in accordance with a general plan, and then placing it in the hands of B,” which Section 16 forbids “[n]o matter how desirable . . . [it] may appear to be[.]” 54 Wn.2d 799, 838, 341 P.2d 171 (1959).

Then, in *Petition of Seattle*, the Court (citing *Hogue*) rejected the City of Seattle’s attempt to take private land and lease it to private shops and entrepreneurs to (again) promote economic development, reasoning: “It may be conceded that the [project] is in ‘the public interest.’ However, the fact that the public interest may require it is insufficient if the use is not really public. A beneficial use is not necessarily a public use.” 96 Wn.2d 616, 627, 638 P.2d 549 (1981).

Most recently, in *Manufactured Housing*, the Court (citing *Healy*, *Hogue*, and *Petition of Seattle*) rejected the State’s attempt to transfer a right of first refusal from mobile-home-park owners to their tenants to

preserve low-income and elderly housing, explaining: “[A]fter . . . [it] has been forcibly sold . . . no member of the public can use the park. In fact, only the park tenants can freely use it. Although preserving dwindling housing stocks for a particularly vulnerable segment of society provides a ‘public benefit,’ this public benefit does not constitute a public use.” 142 Wn.2d at 373.

Each of these decisions honors the framers’ distinct purpose adopting Section 16: ensuring that Washington’s government would never wield the power to take private property for private use.

III. Washington’s Enhanced Property Rights Protections Are an Affirmative Good and Abandoning Them Would Invite Abuse.

The City calls this Court’s commitment to an independent construction of Section 16 “incorrect and confusing.” City’s Br. 2. Respondents reply that “this Court can interpret its own state constitution as it sees fit,” and that in any case, the City has not carried its burden of showing that *Manufactured Housing* (or the extensive jurisprudence on which it stands) should be overruled. Resp’ts Br. 21. Respondents are correct—but there are additional reasons for this Court to continue applying a stricter test under Section 16, including that Washington’s test is an affirmative good and that abandoning it would invite abuse of the takings power.

A. This case shows why Washington’s enhanced property rights protections are an affirmative good.

This Court’s interpretation of Section 16 offers Washingtonians certainty—an “assur[ance] that, until our state constitution is amended, [they] may continue to own, possess, and use [their] property (for any lawful purpose) regardless of whether the state or any subdivision thereof may devise a plan for putting the property to a higher or better . . . use.” *Hogue*, 54 Wn.2d at 838. This case, which involves Respondents’ right to *choose* who lives on their property, shows how crucial that certainty is:

- For the Yims, it means the ability to ensure that tenants sharing a yard with their young children are safe and trustworthy. CP 37. Ms. Lyles, a single woman who rents out her home, shares a similar interest in deciding whether tenants are safe and trustworthy. CP 26.
- For the Benises, it meant full control over the assets that would fund their children’s college. CP 37. Ms. Bylund shares a similar interest in her assets. CP 38.
- For Mr. Davis, it means the ability to determine the character of his residential complex—including the ability to embrace tenants who would not otherwise meet his typical rental criteria. CP 38.

These choices show that a person’s “dominion” over her property is nothing if not the freedom to pursue her *own* life and happiness.²³ This is what makes property, property.²⁴

²³ Madison, *supra* n.13.

²⁴ See Mossoff, *supra* n.12, at 432 (explaining that property rights depend on “the ability of the owner to have the freedom of choice as to the uses of the property”) (quotes omitted).

Yet time and again, state and local governments have asked this Court to ignore the plain text of Section 16, and the instructions of those who drafted it, so that they might take property (or some aspect of it) from A and give it to B for a purpose they deem higher. And time and again, this Court has refused to abandon a test it deems “definite and practical,” *White River Power Co.*, 39 Wash. at 663 (quotes omitted), for one that would leave the takings power “literally . . . without limitation.” *Hogue*, 54 Wn.2d at 838.

With its argument today, the City repeats the cycle. The City seeks to transfer a right of first refusal—a key aspect of property—from Respondents to their prospective tenants in order to secure housing for certain marginalized groups. City’s Br. 7. This Court has rejected takings for private use where the alleged public benefits included economic development, crime reduction—and yes, the promotion of affordable housing for marginalized groups.²⁵ What controlled in all of those cases was not the takings’ potential to promote the general welfare, but that the properties taken would not actually be used “by the public.” *Healy*, 33 Wash. at 509. This case is no different.

²⁵ See, e.g., *Manufactured Housing*, 142 Wn.2d at 373; *Petition of Seattle*, 96 Wn.2d at 625–28; *Hogue*, 54 Wn.2d at 838; *White River Power Co.*, 39 Wash. at 668; *Healy*, 33 Wash. at 506–09.

B. *Kelo* and its aftermath show that deferring to federal takings analyses would invite rampant abuse.

Over a century ago, this Court warned against subordinating Washingtonians' property rights to the vicissitudes of the "public need":

The next step in the invasion of the right of property would be to invite the courts to measure the comparative needs of private parties, and compel a transfer to the one most needing and who might best utilize the property. . . . A doctrine so insidiously dangerous should never find lodgment in the body of the law through judicial declaration.

White Bros. & Crum Co. v. Watson, 64 Wash. 666, 671, 117 P. 497 (1911).

Just over a decade ago, the U.S. Supreme Court demonstrated the frightening consequences of such a shift in its infamous *Kelo* decision. There, the Court allowed the New London Development Corporation (a private entity) to take and bulldoze Susette Kelo's home so that her land could be used for private "economic development." 545 U.S. at 477.

Justice O'Connor dissented. In an opinion echoing this Court's repeated warnings from *Healy* on down, she declared that the majority's decision to "wash out any distinction between private and public use of property" under the U.S. Constitution had rendered "all private property . . . vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a

way the legislature deems more beneficial to the public—in the process.”
Id. at 494.

Sadly, Justice O’Connor was correct. In 2002 and 2006, Amicus compiled two separate reports documenting the extent of eminent-domain abuse nationwide. The first report identified at least 10,282 filed or threatened condemnations for private use in the five years between 1998 and 2002.²⁶ The second report identified at least 5,783 filed or threatened condemnations for private use in 2006 *alone*.²⁷ Amicus concluded that *Kelo* had “emboldened officials and developers,” given courts cover to “uphold[] projects that took the property of one party only to turn around and give it to another,” and “profoundly discouraged many owners who wanted to fight the loss of their home or business but believed, after *Kelo*, it would be hopeless to fight.”²⁸

In the years after *Kelo*, over 40 states have enacted meaningful legislative or constitutional reforms in response. Washington remains one of the few states that has failed to do so, largely because of Section 16’s “absolute prohibition against taking private property for private use,”

²⁶ Dana Berliner, *Public Power, Private Gain: A Five-Year, State-By-State Report Examining the Abuse of Eminent Domain 2* (Institute for Justice, April 2002), https://ij.org/wp-content/uploads/2015/03/ED_report.pdf.

²⁷ Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in the Post-Kelo World 2* (Institute for Justice, June 2006), <https://ij.org/wp-content/uploads/2015/04/floodgates-report.pdf>.

²⁸ *Id.* at 1; see generally Dana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L.J. Forum 82 (2015) (providing 10-year retrospective on *Kelo*’s consequences).

Manufactured Housing, 142 Wn.2d at 357.²⁹ This case affords the Court a crucial opportunity to reaffirm that prohibition. Simply put, the less searching federal tests sought by the City here—tests that made decisions like *Kelo* possible—had, and should have, no place in Washington. They would invite precisely the sort of rampant abuses the framers intended to prevent when they adopted Section 16. This Court has never tolerated such “free and untrammelled” use of the takings power, *Healy*, 33 Wash. at 505—and there is no reason to start today.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted this 25th day of April, 2019.

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²⁹ See *50 State Report Card: Tracking Eminent Domain Reform Since Kelo* 51 (Institute for Justice, Aug. 2007), https://ij.org/wp-content/uploads/2015/03/50_State_Report.pdf.

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April 25, 2019 - 4:53 PM

Transmittal Information

Filed with Court: Supreme Court
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Appellate Court Case Title: Chong and Marilyn Yim, et al. v. The City of Seattle
Superior Court Case Number: 17-2-05595-6

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