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WASHINGTON STATE SUPREME COURT

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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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**CITY OF SEATTLE'S REPLY**

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## I. INTRODUCTION

This Court should decline Plaintiffs’ invitation to recognize a constitutional right for landlords “to lease property to a person of their choosing.”<sup>1</sup> Even though the FIT Rule allows landlords to craft the criteria governing that choice, Plaintiffs assert a constitutional right to deviate from their own criteria to follow a “gut check” that someone is just not “compatible.”<sup>2</sup> According to Plaintiffs, “written criteria cannot substitute for the discretion to choose a specific tenant.”<sup>3</sup> “It is this discretion to make thoughtful decisions about the people in our lives that [Plaintiffs] wish to exercise as landlords.”<sup>4</sup>

Plaintiffs mischaracterize the role implicit bias plays in those decisions, offer no valid constitutional foundation for voiding a City law intended to limit that role, and deny that the constitutional right they espouse would sweep away all antidiscrimination laws. Because Plaintiffs’ arguments fail, the City asks this Court to reverse the trial court.

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<sup>1</sup> Response at 6. *Accord id.* at 1, 11, and 12.

<sup>2</sup> *Id.* at 3–4 (“gut check”); *id.* at 12 and 14 (compatibility).

<sup>3</sup> *Id.* at 13.

<sup>4</sup> *Id.* at 4.

## II. ARGUMENT

### A. Plaintiffs' facial substantive due process claim fails.

#### 1. Federal courts employ only the "rational basis" analysis.

"Rational basis," "substantially advances," and "undue oppression" have distinct lineages and offer different levels of deference to legislative decisions. Only "rational basis" survives in federal courts.

"Rational basis" is the "most relaxed form of judicial scrutiny."<sup>5</sup> It arose in the 1920s in *Euclid* and *Nectow*, which articulated the touchstone of "clearly arbitrary and unreasonable, having no substantial relation" to the public welfare.<sup>6</sup> Federal courts have consistently recited that touchstone through today.<sup>7</sup> "Rational basis" stems from the long-held belief that, unless a plaintiff can show a law lacks a rational foundation in the public welfare, "the people must resort to the polls not the courts."<sup>8</sup>

"Substantially advances" is less deferential. Under it, the law must be more than merely rational; it must also be effective in achieving a

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<sup>5</sup> *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 223, 143 P.3d 571 (2006).

<sup>6</sup> *Nectow v. Cambridge*, 277 U.S. 183, 187–88 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

<sup>7</sup> E.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–42 (2005); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955); *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); *Yagman v. Garcetti*, 852 F.3d 859, 867 (9th Cir. 2017).

<sup>8</sup> *Williamson*, 348 U.S. at 488 (quoting *Munn v. State of Illinois*, 94 U.S. 113, 134 (1876)).

“legitimate” public purpose.<sup>9</sup> “Substantially advances” was never part of due process law—the concept is not in *Euclid* or *Nectow* (which created “rational basis”) or *Lawton* (which created “undue oppression”).<sup>10</sup> Plaintiffs cite “rational basis” authority, but mislabel it “substantially advances.”<sup>11</sup> “Substantially advances” was an error limited to, and ultimately ejected from, takings law. It emerged in *Agins*, a 1980 takings decision that mistook *Nectow* as holding that a law effects a taking if it “does not substantially advance legitimate state interests.”<sup>12</sup> In 2005, *Lingle* admitted the error, removed “substantially advances” from takings law, and explained “substantially advances” has no role in due process.<sup>13</sup> Although *Lingle* observed that *Agins* derived “substantially advances” from *Nectow*, a due process case, *Lingle* lamented that “the language [*Agins*] selected was regrettably imprecise” because it placed courts in the hazardous role of weighing testimony about a law’s efficacy.<sup>14</sup> Such

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<sup>9</sup> *Lingle*, 544 U.S. at 542. See *Nollan v. California. Coastal Comm’n*, 483 U.S. 825, 835 n.3 (1987) (distinguishing “substantially advances” from “rational basis”).

<sup>10</sup> See *Nectow*, 277 U.S. 183; *Euclid*, 272 U.S. 365; *Lawton v. Steele*, 152 U.S. 133 (1894).

<sup>11</sup> Response at 27–28.

<sup>12</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *Nectow* involved no takings claim and said nothing about advancing a governmental interest. See *Nectow*, 277 U.S. 183.

<sup>13</sup> *Lingle*, 544 U.S. at 542–45. Accord *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010) (“*Agins* was overruled by *Lingle*”).

<sup>14</sup> *Lingle*, 544 U.S. at 540, 542, and 544–55.

judicial proceedings would be “remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.”<sup>15</sup> Nodding to “rational basis,” *Lingle* buried “substantially advances” with a terse eulogy: “The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established . . . .”<sup>16</sup>

“Undue oppression” is not, as Plaintiffs contend, “simply another way of describing the ‘substantially advances’ test.”<sup>17</sup> “Undue oppression” is the least deferential analysis. It “lodges wide discretion in the court and implies a balancing of the public’s interest against those of the regulated landowner.”<sup>18</sup> Originating with *Lawton* in 1894, it is grounded in the *Lochner*-era notion that courts must “supervise” the legislature to cull “unusual and unnecessary restrictions upon lawful occupation.”<sup>19</sup> “Undue oppression” yielded to “rational basis” in the 1920s. *Goldblatt* attempted a revival in 1962 by reaching back over *Euclid* and *Nectow* to grab *Lawton*

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<sup>15</sup> *Id.* at 545.

<sup>16</sup> *Id.*

<sup>17</sup> Response at 28.

<sup>18</sup> *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 331, 787 P.2d 907 (1990).

<sup>19</sup> *Lawton*, 152 U.S. at 137. See *Amunrud*, 158 Wn.2d at 227–29 (discussing the rise, fall, and perils of the *Lochner* era).

and proclaim “undue oppression” still valid.<sup>20</sup> That revival sputtered. The following year, without mentioning *Goldblatt*, the Court rejected, as against the weight of contemporary authority, the notion that a court may “decide whether a statute bears too heavily upon [a] business and by so doing violates due process.”<sup>21</sup> And in 1968, citing a raft of “rational basis” decisions, the Court rejected an oppression-based due process claim as “requir[ing] no further consideration.”<sup>22</sup> *Goldblatt* was never a feature of federal due process law—Plaintiffs cite no instance of the U.S. Supreme Court later following it as due process authority. Instead, the Court tossed *Goldblatt* on a pile of decisions conflating due process and takings law.<sup>23</sup>

Plaintiffs mistakenly infer “rational basis” is reserved for cases involving liberty interests, while “undue oppression” applies to property claims.<sup>24</sup> No Washington or federal opinion holds “undue oppression” applies in some situations and “rational basis” in others. Plaintiffs’

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<sup>20</sup> *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

<sup>21</sup> *Ferguson v. Skrupa*, 372 U.S. 726, 728–29 (1963).

<sup>22</sup> *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R.*, 393 U.S. 129, 143 (1968). *Brotherhood* was not, as Plaintiffs assert, a decision holding only “that the plaintiffs failed to carry their claim.” Response at 28 n.2. *Brotherhood* refused to consider the claim as a matter of law because it ran counter to “rational basis” authority.

<sup>23</sup> *Lingle*, 544 U.S. at 541.

<sup>24</sup> Response at 23–27.

inference flops. They overlook case law applying “rational basis” to property interests<sup>25</sup> and miscast most decisions they cite as examples of Washington courts applying “rational basis” to liberty interests: *Bellevue School District* was a procedural due process case;<sup>26</sup> *Meyers* resolved only procedural due process and equal protection claims;<sup>27</sup> *In re Metcalf* addressed a property interest in money, not a liberty interest;<sup>28</sup> and *Amunrud* cited both property and liberty interests.<sup>29</sup> Plaintiffs’ suggestion that Washington’s “undue oppression” analysis applies only to land use regulation challenges is belied by case law applying “undue oppression” beyond land use disputes.<sup>30</sup> And *State v. Manussier* did not, as Plaintiffs

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<sup>25</sup> *E.g.*, *Dot Foods, Inc. v. State, Dept. of Revenue*, 185 Wn.2d 239, 247–50, 372 P.3d 747 (2016) (denial of tax refund); *Olympic Stewardship Foundation v. State*, 199 Wn. App. 668, 720–21, 399 P.3d 562 (2017), *rev. denied*, 189 Wn.2d 1040, 409 P.3d 1066 (2018), *cert. denied*, 2018 WL 2136650 (Oct. 1, 2018) (shoreline regulation); *Jespersen v. Clark County*, 199 Wn. App. 568, 399 P.3d 1209 (2017) (government sale of property). *Accord Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012) (land use regulation); *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) (same).

<sup>26</sup> *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 705–10, 257 P.3d 570 (2011).

<sup>27</sup> *Meyers v. Newport Cons. Joint Sch. Dist.*, 31 Wn. App. 145, 149–52, 639 P.2d 853 (1982).

<sup>28</sup> *In re Metcalf*, 92 Wn. App. 165, 177, 963 P.2d 911 (1998).

<sup>29</sup> *Amunrud*, 158 Wn.2d at 216, 219. Likewise, in *Johnson v. Washington State Department of Fish and Wildlife*, 175 Wn. App. 765, 305 P.3d 1130 (2013), which Plaintiffs cite as an example of a court applying “rational basis” to a liberty interest, the plaintiff asserted a property interest and the court found he “[a]rguably” had a liberty interest. *Id.*, 175 Wn. App. at 774–75. *See* Response at 27.

<sup>30</sup> *See* Response at 23–24. *Cf.*, *e.g.*, *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 238, 119 P.3d 325 (2005) (local improvement district assessments); *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 732–34, 57 P.3d 611

suggest, hold “rational basis” is inapplicable to property interests; it held “rational basis” does not apply to fundamental rights or situations involving a suspect class.<sup>31</sup>

Because “rational basis” is the federal analysis and “undue oppression” is dead, Plaintiffs cannot dissuade this Court from overruling its “undue oppression” case law. By ignoring the City’s arguments, Plaintiffs concede: (1) the due process texts of the U.S. and Washington Constitutions are identical; (2) this Court’s existing *Gunwall* analyses, which found no basis for an independent Washington due process analysis, are sound; (3) this Court has always professed to follow the federal due process analysis; and (4) this Court has applied one analysis to claims under both constitutions.<sup>32</sup> Even though *Amunrud* explained how “undue oppression,” by failing to defer appropriately to legislative determinations, would “strip individuals of the many rights and protections that have been achieved through the political process,” Plaintiffs mistakenly claim *Amunrud* merely attacked the dissent for

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(2002) (prisoner labor conditions); *Asarco Inc. v. Department of Ecology*, 145 Wn.2d 750, 761–63, 43 P.3d 471, 49 P.3d 128 (2002) (clean-up liability); *Rivett v. City of Tacoma*, 123 Wn.2d 573, 581–83, 870 P.2d 299 (1994) (indemnity for sidewalk injuries).

<sup>31</sup> *State v. Manussier*, 129 Wn.2d 652, 673–74, 921 P.2d 473 (1996). Cf. Response at 25–26. See *Amunrud*, 158 Wn.2d at 220–22 (state action affecting a fundamental right is subject to strict scrutiny, not “rational basis”); *Yagman*, 852 F.3d at 866–67 (economic interests raise no fundamental right).

<sup>32</sup> See Opening at 15–16, 20.

making *Lochner*-era arguments, not for invoking “undue oppression.”<sup>33</sup> Plaintiffs mischaracterize the City as citing only confusion as the harm wrought by “undue oppression”—the City explained “undue oppression” is harmful for: (1) denying legislators appropriate deference, as *Amunrud* warned; (2) sowing judicial confusion; and (3) yielding inconsistent treatment of due process claims across venues.<sup>34</sup>

## **2. Plaintiffs fail to sustain their burden under “rational basis.”**

Plaintiffs fail to prove a violation beyond a reasonable doubt under the “rational basis” analysis.<sup>35</sup> Plaintiffs cannot deny the FIT Rule is rationally steeped in an industry best practice aimed at the same problem the Rule targets and extolled by at least three landlord organizations, five real estate professionals, and two fair housing organizations, none of which the Rental Housing Association’s recent backpedaling undercuts.<sup>36</sup> The Rule’s rationality stands despite Plaintiffs’ unsurprising contention that landlords prefer best practices over government regulation.<sup>37</sup>

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<sup>33</sup> Compare *Amunrud*, 158 Wn.2d at 230 with Response at 40.

<sup>34</sup> Compare Response at 40 with Opening at 23–24.

<sup>35</sup> See *Island County v. State*, 135 Wn.2d 141, 146–47, 955 P.2d 377 (1998) (burden of proof). Because this Court conducts a *de novo* review, this Court should decline Plaintiffs’ request to remand for “rational basis” review. See *Pendergrast v. Matichuk*, 186 Wn.2d 556, 563–64, 379 P.3d 96 (2016). Cf. Response at 40.

<sup>36</sup> Compare Opening at 9–10 with Response at 5–6, 41.

<sup>37</sup> Cf. Response at 31, 37.

Plaintiffs miss the point when suggesting the Rule is irrational because implicit biases can be “positive and negative.”<sup>38</sup> That is shorthand for “favorable and unfavorable assessments,” the phrase used in the passage the City cited.<sup>39</sup> Implicit biases can be for one group (a favorable or positive pull toward an “ingroup”) or against another (an unfavorable or negative push away from an “outgroup”).<sup>40</sup> Either type of bias constitutes discrimination.<sup>41</sup> The FIT Rule rationally addresses both.

**3. Plaintiffs fail to sustain their burden even under “undue oppression.”**

Even if this Court were to apply the “undue oppression” analysis, Plaintiffs could not prove beyond a reasonable doubt that the FIT Rule denies landlords due process.

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<sup>38</sup> Cf. Response at 4, 34, 41, 45. In their terse “rational basis” argument, Plaintiffs also refer to their overbreadth-innocence argument under “undue oppression.” Response at 41. That argument holds no water for the reasons the City addresses *infra* Part II.A.3.a.

<sup>39</sup> See CP 256. See also Opening at 6 n.1.

<sup>40</sup> *E.g.*, CP 198 (implicit bias “can be positive and negative” in that it includes “favorable or unfavorable evaluations toward groups of people”); CP 238 (“ethnic groups implicitly regarded their own group most positively”); CP 240 (discussing “ingroup favoritism”); CP 257 (“We generally tend to hold implicit biases that favor our own ingroup,” although we can also hold implicit biases against our ingroup).

<sup>41</sup> Seattle Municipal Code (“SMC”) Section 14.08.020 (“discrimination” is conduct that has the effect of differentiating between individuals or groups because of race or another protected class). See Appendix.

**a) The FIT Rule uses reasonably necessary means.**

Plaintiffs abandon their argument below that a law may be attacked for overbreadth in a due process claim,<sup>42</sup> but now argue the FIT Rule is not “reasonably necessary” because it is overly broad.<sup>43</sup> Plaintiffs also abandon their contention below that the Rule forces landlords to deal with a societal problem created by others,<sup>44</sup> but now insist the Rule is not “reasonably necessary” because it reaches “innocent” landlords for whom the City lacks “individualized evidence” of implicit bias.<sup>45</sup>

This overbreadth-innocence argument lacks merit. Plaintiffs offer no authority supporting it. It is not in the text of the “undue oppression” analysis. The case law Plaintiffs cite is inapposite. *Ralph* was an equal protection case.<sup>46</sup> *Seattle v. Ford* sustained an as-applied due process challenge because the government could not show the plaintiff’s behavior—“hawking” on private property—was harmful.<sup>47</sup> In Plaintiffs’ facial challenge, implicit bias is harmful. *Seattle v. McCoy* resolved a fact-

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<sup>42</sup> Compare CP 375 (Motion) with Opening at 32 (debunking that argument).

<sup>43</sup> E.g., Response at 29–30.

<sup>44</sup> Compare CP 375 (Motion) with Opening at 31–32 (countering that contention).

<sup>45</sup> E.g., Response at 30, 31, and 34.

<sup>46</sup> *Ralph v. Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949). See Response at 29–30.

<sup>47</sup> *City of Seattle v. Ford*, 144 Wn. 107, 113–14, 257 P. 243 (1927). See Response at 30.

bound as-applied challenge to a state law used to shutter a business for a year for activity the business owner did not know of or acquiesce in.<sup>48</sup> *McCoy* applied the “undue oppression” factors (not, as Plaintiffs suggest, the “reasonably necessary” element) in a way suggesting a different result if the court had resolved a facial challenge to a law that, like the FIT Rule, merely imposed procedures on businesses to reduce a harm only those businesses could create.<sup>49</sup>

Plaintiffs’ overbreadth-innocence argument runs against authority. Even *Lawton*—source of the “undue oppression” analysis—rendered “innocence” irrelevant: “The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question . . . .”<sup>50</sup> *Lingle*—which extirpated “substantially advances” from federal takings law—flagged the hazard of what Plaintiffs ask this Court to do under “undue oppression”: determine that the government may not enact a prophylactic rule without evidence that the regulated persons would behave badly.<sup>51</sup>

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<sup>48</sup> *City of Seattle v. McCoy*, 101 Wn. App. 815, 840–43, 4 P.3d 159 (2000) . *See* Response at 30.

<sup>49</sup> *See McCoy*, 101 Wn. App. at 840–43.

<sup>50</sup> *Lawton*, 152 U.S. at 143.

<sup>51</sup> *Lingle*, 544 U.S. at 544–45.

Plaintiffs insist “the relevant question is whether all landlords inevitably exercise their discretion in a discriminatory manner.”<sup>52</sup> That cannot be the question in a facial challenge, where a court must uphold the law if it could be constitutionally applied in any one circumstance.<sup>53</sup> This Court can envision a situation involving a landlord who, but for the FIT Rule, would not rent to an applicant with an African-American- or non-white-sounding name.<sup>54</sup> Because that landlord would have no overbreadth-innocence defense in an as-applied claim against the FIT Rule, Plaintiffs may not use it to sustain their facial claim.

Plaintiffs’ demand for individualized evidence of implicit bias is oxymoronic. Because implicit biases arise without awareness or intent, “[s]tudies show that proving subjective intent is fundamentally incompatible with the way biases actually manifest physiologically.”<sup>55</sup>

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<sup>52</sup> Response at 32.

<sup>53</sup> *Washington State Republican Party v. Wash. State Pub. Disclosure Comm’n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000).

<sup>54</sup> See Rachel D. Godsil and James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. Haw. L. Rev. 313, 320 (2015) (quoting Adrian G. Carpusor and William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCHOL. 934, 943–44 (2006): “housing providers demonstrate preferences for home-seekers with “white-sounding” names”); CP 132 (citing a study in which “white-sounding” names received 50% more callbacks for jobs than those with “African-American sounding” names, even when the resumes were otherwise nearly identical).

<sup>55</sup> Equal Justice Society, Wilson Sonsini Goodrich, Rosati, *Lessons from Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias*, 11 HASTINGS RACE & POVERTY L. J. 241, 243 (2014). Accord Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J.

The Federal Fair Housing Act, by punishing disparate impact without individualized evidence of discriminatory motive, counteracts “unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”<sup>56</sup> Plaintiffs—who “do not dispute the existence of implicit bias”<sup>57</sup> and offer no response to federal and City paired tests demonstrating bias in tenancy decisions<sup>58</sup>—cannot demand individualized evidence of an unconscious state of mind.

**b) The FIT Rule is not “unduly oppressive.”**

Plaintiffs focus on two “undue oppression” factors, neither of which favors Plaintiffs’ case. The “feasibility of less oppressive solutions” favors the City. Plaintiffs overinflate the efficacy of alternatives to the FIT Rule. Laws against intentional discrimination are useless against implicit biases.<sup>59</sup> Although studies note the prospect of “debiasing” and “unlearning” training, they stress it is no panacea and is a gradual process that requires repeated practice and interventions in group settings over

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MARSHALL L. REV. 455, 505 (2007) (implicit bias exposes the limits of fault-based antidiscrimination laws). *Cf.* Response at 34, 44–45.

<sup>56</sup> See Opening at 10 (discussing *Texas Dep’t of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015)). Accord 24 C.F.R. § 100.500 (prohibiting discriminatory effect); Equal Justice Society at 243–44 (“The disparate impact standard is the only way to account for these biases and the harms they cause.”).

<sup>57</sup> Response at 4.

<sup>58</sup> See Opening at 6–7.

<sup>59</sup> Equal Justice Society at 243; Schwemm at 505. *Cf.* Response at 35.

long periods of time.<sup>60</sup> Plaintiffs gloss over the infeasibility of conducting such ongoing group training for all landlords, managers, and leasing agents involved in tenancy decisions for Seattle’s more than 30,000 rental properties comprising over 150,000 units.<sup>61</sup>

Plaintiffs cannot evade “the amount and percentage of value loss” factor. Plaintiffs try to deny its existence, asserting incorrectly that “none of the unduly oppressive factors require economic harm.”<sup>62</sup> Plaintiffs cite no example of a case striking down a law under the “unduly oppressive” factors without evidence of lost value. The one example they offer was premised on an obvious loss of value—the total loss of a business for one year—for which the court required no exact dollar figure.<sup>63</sup>

Plaintiffs attempt to substitute a generic “harm” factor for the “value loss” factor. They claim “the harm is the restriction of the right, not

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<sup>60</sup> *E.g.*, CP 257–59; Jillian Olinger, Kelly Capatosto, and Mary Ana McKay, *Challenging Race as Risk: How Implicit Bias undermines housing opportunity in America—and what we can do about it* at 71–72, 74 (Kirwin Institute, Ohio State Univ., 2016) (available at <http://kirwaninstitute.osu.edu/my-product/challenging-race-as-risk-implicit-bias-in-housing/>, accessed Oct. 20, 2018)). *Cf.* Response at 35.

<sup>61</sup> For the number of rental properties and units, see Seattle Dept. of Construction and Inspections, RENTAL REGISTRATION AND INSPECTION ORDINANCE ANNUAL REPORT at 2 (March 2018) (available at [http://www.seattle.gov/DPD/cs/groups/pan/@pan/documents/web\\_informational/p3384288.pdf](http://www.seattle.gov/DPD/cs/groups/pan/@pan/documents/web_informational/p3384288.pdf), accessed Oct. 20, 2018)).

<sup>62</sup> *Cf.* Response at 38 (citing *Guimont v. Clarke*, 121 Wn.2d 586, 610, 854 P.2d 1 (1993), which recites “the amount and percentage of value loss” factor).

<sup>63</sup> *Compare* Response at 38–39 with *McCoy*, 101 Wn. App. at 842.

necessarily monetary losses that accompany that restriction.”<sup>64</sup> They deploy that invented factor to serve circular reasoning: a law violates their rights if it is unduly oppressive; a law is unduly oppressive if it harms the property owner; and the law harms the property owner because it violates their rights.<sup>65</sup> This Court should not follow that spiral.

**B. Plaintiffs’ facial takings claim fails.**

**1. Plaintiffs tacitly concede the City prevails under the three-part federal and six-part Washington takings analyses, and fail to defend the Washington analysis.**

Plaintiffs do not question the City’s explanation of the three-part federal or six-part Washington takings analyses or contend they would win under them. Plaintiffs do not defend the Washington analysis as correct or question the City’s explanation of why it is harmful.

Instead, citing no authority, Plaintiffs suggest this Court adopted the six-part Washington analysis as an independent interpretation of the Washington Constitution to provide protection greater than the federal analysis.<sup>66</sup> Plaintiffs do not respond to case law proving this Court, when explaining regulatory takings law, believed the Washington and U.S. Constitutions provide “the same right” and vowed to “apply the federal

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<sup>64</sup> Response at 38.

<sup>65</sup> *Id.*

<sup>66</sup> Response at 20–21.

analysis to review all regulatory takings claims” no matter the constitutional source.<sup>67</sup> This Court has conducted no *Gunwall* analysis to determine whether Washington should use an independent regulatory takings analysis;<sup>68</sup> Plaintiffs offer none.

Plaintiffs ask this Court to resolve this case on *Manufactured Housing* without judging Washington’s six-part analysis.<sup>69</sup> But *Manufactured Housing* is a product of that analysis; if this Court overrules its six-part analysis case law, it overrules *Manufactured Housing*. And because Plaintiffs mount a regulatory takings claim and this Court could affirm the Superior Court on any regulatory takings theory,<sup>70</sup> it is not enough to reject *Manufactured Housing* as against the weight of Washington’s takings authority; this Court must address and reform that authority.

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<sup>67</sup> Opening at 34 (quoting *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 13, 829 P.2d 765 (1992); *Orion Corp. v. State*, 109 Wn.2d 621, 657, 747 P.2d 1062 (1987)).

<sup>68</sup> See Roger D. Wynne, *The Path Out of Washington’s Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 WASH. L. REV. 125, 177–84 (2011) (distinguishing *Gunwall* analyses of other takings questions and explaining why a *Gunwall* analysis would likely fail to provide a *post hoc* rationalization for the six-part Washington regulatory takings analysis).

<sup>69</sup> Response at 19.

<sup>70</sup> *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

**2. Even if this Court retains the six-part analysis, this Court should decline to follow *Manufactured Housing*.**

Even if this Court were to leave the six-part analysis intact, Plaintiffs cannot prevail based on *Manufactured Housing*. They cannot square: (1) the three decisions (*Guimont*, *Margola*, and *Presbytery*) holding that destruction of a “fundamental attribute” merely allows a plaintiff the opportunity to prove the regulation is a taking; with (2) the lead *Manufactured Housing* opinion’s claim that destruction of a “fundamental attribute” of property ownership is a *per se* taking.<sup>71</sup> Plaintiffs merely offer some out-of-context quotes<sup>72</sup> and an inverse condemnation decision predating the Washington regulatory takings analysis by decades.<sup>73</sup> The fact remains: this Court can follow three decisions or the lead *Manufactured Housing* opinion. This Court should follow the weight of authority.

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<sup>71</sup> See Opening at 48–49 (citing *Guimont*, 121 Wn.2d. at 595, 603 & n.6; *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 645, 854 P.2d 23 (1993); *Presbytery*, 114 Wn.2d at 333 & n.21).

<sup>72</sup> Response at 20 (suggesting *Presbytery* and *Sintra* espouse a *per se* “fundamental attribute” test). Cf. *Presbytery*, 114 Wn.2d at 333 (“if we determine that the regulation denies the owner a fundamental attribute of ownership, it then becomes necessary to determine whether the regulation effects a ‘taking’”); *Sintra*, 119 Wn.2d at 12-13 (following *Presbytery*).

<sup>73</sup> Response at 20 (citing *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664 (1960)).

Plaintiffs find no support for a *per se* “fundamental attribute” test in federal law. They cite *Kaiser Aetna*, but it resolved a claimed physical invasion, which, along with a claimed denial of the right to make some economically viable use of one’s land, constitute the only *per se* claims recognized in federal takings law.<sup>74</sup> Plaintiffs pursue neither claim. Plaintiffs invoke the “bundle of sticks” metaphor, claiming federal law recognizes the taking of a single stick, but they fail to respond to federal takings law rejecting the notion that taking even “one of the essential sticks in the bundle of property rights” constitutes a *per se* taking and holding that a regulatory takings claim must be assessed on the entire bundle, not the attribute of property ownership the regulation targets.<sup>75</sup>

Even if *Manufactured Housing* carried weight, it is distinguishable. Plaintiffs offer no reported decision finding that leasing to the person of one’s choosing is a fundamental attribute of property ownership.<sup>76</sup> Plaintiffs gain nothing from a case holding a leasehold interest is a

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<sup>74</sup> Cf. Response at 19. See *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). *Accord Lingle*, 544 U.S. at 539 (explaining the two *per se* takings claims).

<sup>75</sup> See Opening at 37 (citing *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017); *Tahoe-Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*, 535 U.S. 302, 326–27, 330–31 (2002); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496–500 (1987); *PruneYard Shopping Center v Robins*, 447 U.S. 74, 82–83 (1980); *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)). Cf. Response at 12.

<sup>76</sup> Response at 11.

property interest that cannot be confiscated without just compensation—that is a right enjoyed by the tenant, not the landlord.<sup>77</sup>

The City quoted three decisions—*Yee*, *Margola*, and *Guimont*—rejecting a right to choose one’s tenants.<sup>78</sup> Plaintiffs do not acknowledge *Guimont* and fail to distinguish *Yee* or *Margola*.<sup>79</sup> Plaintiffs try to duck *Yee* by casting it as something other than a regulatory takings case. They contend the “physical invasion” claim pressed by the *Yee* plaintiffs differs from the “regulatory takings” claim Plaintiffs now pursue.<sup>80</sup> Plaintiffs err. A “physical invasion” claim is a regulatory takings claim, not apart from it.<sup>81</sup> *Yee* did not suggest otherwise.<sup>82</sup> And it does not matter that *Yee* and *Margola* involved facts differing from the ones Plaintiffs present. *Yee*, *Margola*, and *Guimont*—even though each resolved facts distinct from

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<sup>77</sup> *Cf. id.* (citing *United States v. General Motors Corp.*, 323 U.S. 373 (1945)).

<sup>78</sup> Opening at 50-52 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 530-31 (1992); *Margola*, 121 Wn.2d at 648; *Guimont*, 121 Wn.2d at 608).

<sup>79</sup> Compare Opening at 49–52 with Response at 15–17.

<sup>80</sup> Response at 15.

<sup>81</sup> *Lingle*, 544 U.S. at 539.

<sup>82</sup> Although *Yee* said that diminishing the right to exclude might be relevant under a “regulatory taking” claim, that was shorthand for a claim under the *Penn Central* factors. *E.g.*, *Yee* at 529 (referring to the *Penn Central* factors as “necessary to determine whether a regulatory taking has occurred”) and 531 (quoting *Penn Central* as relevant to a “regulatory taking argument”). *Yee* was decided before *Lucas* added the third part of the federal regulatory takings analysis, so it made sense for *Yee* to use “regulatory taking” to distinguish the *Penn Central* factors from the sole, physical invasion *per se* element. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–32 (1992).

one another—all rejected a claimed taking by holding, as matter of law, that a landlord has no right to choose a tenant.<sup>83</sup>

Plaintiffs cannot escape the implication of their position. If a landlord has a constitutional right to select tenants, and if limiting that right is a *per se* taking under *Manufactured Housing*, antidiscrimination laws must fall. Deferring to “traditional anti-discrimination laws,” Plaintiffs profess no constitutional right to select tenants through “intentional discrimination based on a protected class.”<sup>84</sup> Taking that at face value, Plaintiffs assert the constitutional right to *unintentionally* discriminate against a protected class, which would erase long-standing laws allowing disparate impact claims without evidence of intent.<sup>85</sup> But Plaintiffs, to elude the impact of their position, may not conveniently bend their constitutional argument around certain “traditional” statutes. Statutory rights do not limit constitutional rights; the Constitution limits statutes, traditional or otherwise.<sup>86</sup> The constitutional right Plaintiffs

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<sup>83</sup> See Opening at 50–52 (quoting *Yee, Guimont, and Margola*). Cf. Response at 15–17 (trying to distinguish *Yee* and *Margola*).

<sup>84</sup> Response at 17.

<sup>85</sup> See *Texas Dep’t of Housing*, 135 S. Ct. at 2519–25 (upholding federal disparate impact law); 24 C.F.R. § 100.500 (prohibiting discriminatory effect); SMC 14.08.020 (“discrimination” includes the effect of conduct without intent). See Appendix.

<sup>86</sup> See *Belas v. Kiga*, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998) (“Constitutional provisions cannot be restricted by legislative enactments.”).

advance is a right to choose tenants. That right would gut any statute limiting that choice by barring discrimination.

**C. Plaintiffs’ “private takings” claim is superfluous and misplaced.**

Plaintiffs offer no response to the City’s arguments that their “private takings” claim is superfluous and misplaced. They just state their claim in terms demonstrating why “private takings” law is misplaced in regulatory takings—no regulation merely limiting the use of property could meet Plaintiffs’ public-use litmus test because no use-limiting regulation places property in public ownership or increases public access to it.<sup>87</sup>

**D. Plaintiffs’ facial free speech claim fails.**

**1. The FIT Rule imposes a disclosure requirement that passes muster under *Zauderer*.**

Plaintiffs neither acknowledge nor respond to the City’s argument that the FIT Rule imposes disclosure requirements that pass muster under *Zauderer*.<sup>88</sup> The City prevails under *Zauderer*.

**2. *Central Hudson* does not apply, but the City prevails under it.**

Plaintiffs fail to make *Central Hudson* stick. They invoke three decisions, none of which mentioned or applied *Central Hudson*. One

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<sup>87</sup> Compare Opening at 53–54 with Response at 22.

<sup>88</sup> See Opening at 54–55.

applied strict scrutiny to a ban on signs based on their content, and the other two voided requirements that businesses distribute government- or third party-drafted messages on controversial subjects, where the businesses disagreed with the messages.<sup>89</sup> The FIT Rule bans nothing and Plaintiffs have no quarrel with the substance of the disclosure, which they dictate.

No matter how often Plaintiffs claim otherwise, the FIT Rule does not restrict the content of landlord speech.<sup>90</sup> The Rule restricts nothing. Plaintiffs correctly note the Rule “alters” landlord speech by requiring them to provide notice of their criteria and the information an applicant must submit, but that is the essence of a *Zauderer* disclosure requirement. Plaintiffs cannot convert it to a *Central Hudson* restriction.

Even if Plaintiffs could jam the square peg of the FIT Rule into the round hole *Central Hudson*, the Rule would survive for the reasons the City outlined.<sup>91</sup> Plaintiffs fail to undermine the City’s position. The FIT Rule imposes an industry-touted best practice that directly advances the City’s interest in reducing the role of implicit bias in tenancy decisions.

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<sup>89</sup> See Response at 42–43 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Pacific Gas & Elec. Co. v. Pub. Utilities Comm’n of California*, 475 U.S. 1 (1986); *National Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018)).

<sup>90</sup> Compare Opening at 11–12, 56–57 with Response at 42–43.

<sup>91</sup> See Opening at 58–60.

When accusing the Rule of resting on “mere speculation,” Plaintiffs ignore the studies, paired testing, scholarship, and common sense—reinforced by a U.S. Supreme Court decision recognizing the role of implicit bias in housing decisions—allowing the City Council to reasonably believe implicit bias infects tenancy decisions.<sup>92</sup>

Plaintiffs maintain the Rule is underinclusive, but they misread the case law they cite for that proposition, which deals with exceptions to speech bans.<sup>93</sup> Plaintiffs voice no concern with the Rule’s exceptions for certain types of housing.<sup>94</sup> Plaintiffs just take “underinclusive” as an invitation to second-guess the balance the City Council struck—now apparently admitting landlords may include criteria that require an interview, Plaintiffs insist the Rule does not reduce implicit bias because the interview could allow the landlord to act on implicit biases.<sup>95</sup> Plaintiffs

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<sup>92</sup> See Opening at 6–9 (describing studies); *Texas Dep’t of Housing*, 135 S. Ct. at 2522 (implicit bias in housing decisions); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (government may refer to studies, anecdotes, history, consensus, or even common sense). Cf. Response at 44. The City addresses Plaintiffs’ arguments about “positive” biases, the training alternative, and “individualized evidence” *supra* Part II.A.2. Cf. Response at 45.

<sup>93</sup> Cf. Response at 45–45 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808 (9th Cir. 2013); *Metro Lights LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009)).

<sup>94</sup> The Rule exempts accessory dwelling units if the landlord resides on the property, and units a landlord limits to specific vulnerable populations. SMC 14.08.050.A.4 and 050.F. See Opening App. 1.

<sup>95</sup> Response at 46.

are incorrect. The Rule reduces—not eliminates—the role of implicit bias in tenancy decisions. This Court should provide leeway to the City Council in commercial speech, long the subject of governmental regulation,<sup>96</sup> to balance: (1) the prospect that a landlord could conduct an interview to assess particular criteria—or could in some other way observe an applicant—providing an opportunity for the landlord to act on implicit biases instead of the criteria; against (2) the limited number of interviews landlords are likely to conduct to assess criteria and the practical difficulty of enforcing a law banning interpersonal contact.

Snapping an about-face, Plaintiffs also assert the Rule is more extensive than necessary because the City could have pursued alternatives Plaintiffs deem less restrictive. They ignore authority explaining the government need not use the “least restrictive means”; it need only provide a reasonable, proportionate fit between the legislature’s means and ends.<sup>97</sup> Instead, Plaintiffs lift quotes from fact-bound, as-applied cases (including a non-binding plurality decision) involving actual bans on commercial speech.<sup>98</sup> None of those is precedent for Plaintiffs’ facial

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<sup>96</sup> See *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480–81 (1989).

<sup>97</sup> *Lorillard*, 533 U.S. at 556. See Opening at 59.

<sup>98</sup> Response at 47–48 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165 (9th Cir. 2018); *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 104 P.3d 1280 (2005)). *Mattress Outlet* split 4-1-4, with

challenge to the FIT Rule’s disclosure requirement—a law based on an industry-touted best practice that reasonably fits the goal of reducing the role of implicit bias in tenancy decisions.

### III. CONCLUSION

No landlord enjoys a constitutional right to lease property to a person of their choosing free of government regulation. In rejecting that right here, this Court should: reaffirm Washington’s intent to embrace the federal due process and takings analyses and overrule contrary case law; hold a “private takings” claim has no role in a challenge to a use regulation; and rule commercial disclosure requirements must be reviewed under *Zauderer*. The City respectfully asks this Court to apply that law, uphold the FIT Rule, and reverse the trial court.

Respectfully submitted October 23, 2018.

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no overlapping rationale. *See Lauer v. Pierce County*, 173 Wn.2d 242, 258, 267 P.3d 988 (2011) (plurality opinion is not binding).



## APPENDIX

### Definitions of “discriminate” and “discrimination” from Seattle Municipal Code Section 14.08.020:

#### 14.08.020 - Definitions

Definitions as used in this Chapter 14.08, unless additional meaning clearly appears from the context, shall have the meanings subscribed:

\* \* \* \*

“Discriminate” means to do any act which constitutes discrimination.

“Discrimination” means any conduct, whether by single act or as part of a practice, the effect of which is to adversely affect or differentiate between or among individuals or groups of individuals, because of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, honorably discharged veteran or military status, alternative source of income, participation in a Section 8 or other subsidy program, the presence of any disability, or the use of a service animal by a disabled person. “Discrimination” includes harassment, such as racial and sexual harassment, as well as harassment based on other protected classes.

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