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No. 95813-1

WASHINGTON STATE SUPREME COURT

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

Respondents,

v.

CITY OF SEATTLE,

Appellant.

**CITY OF SEATTLE’S CONSOLIDATED ANSWER TO
BRIEFS OF *AMICI CURIAE*
GOLDWATER INSTITUTE,
INSTITUTE FOR JUSTICE,
MANUFACTURED HOUSING COMMUNITIES OF
WASHINGTON,
NATIONAL APARTMENT ASSOCIATION and WASHINGTON
MULTI-FAMILY HOUSING ASSOCIATION, AND
RENTAL HOUSING ASSOCIATION OF WASHINGTON**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	1
A. <i>Amici</i> ignore federal regulatory takings law and pre- <i>Manufactured Housing</i> Washington regulatory takings law.	1
B. <i>Manufactured Housing</i> 's treatment of Washington's no- private-use clause did not sweep away preexisting regulatory takings case law under the just-compensation clause.....	4
1. The Washington Constitution has four unique takings elements—including a no-private-use clause—not in the U.S. Constitution.....	5
2. This Court need not revisit—let alone overrule— <i>Manufactured Housing</i> 's holding that Washington's no- private-use clause provides greater protection than the U.S. Constitution.....	7
3. Washington's no-private-use clause is irrelevant to whether a regulation effects a taking under the just- compensation clause.	9
4. <i>Manufactured Housing</i> did not sweep away earlier Washington regulatory takings case law under the just- compensation clause.	12
a) <i>Manufactured Housing</i> 's <i>Gunwall</i> analysis was limited to the no-private use clause; it did not discuss the regulatory takings analysis or a “fundamental attribute” element.	13
b) The lead <i>Manufactured Housing</i> opinion relied on—and did not reject— <i>Guimont</i> and other regulatory takings case law.....	17
c) MHCW and RHA would leave Washington with a one-element regulatory takings analysis.	19

C. This Court should overrule <i>Manufactured Housing</i> only to the extent it invoked regulatory takings elements not in the federal analysis.....	20
D. Even if this Court were to retain Washington’s six-part regulatory takings analysis, this Court should recognize <i>Manufactured Housing’s per se</i> “fundamental attribute” test conflicts with that analysis and federal law.....	21
1. No <i>Manufactured Housing</i> majority agreed on a rationale for a <i>per se</i> “fundamental attribute” test.	22
2. The U.S. Supreme Court does not employ a <i>per se</i> “fundamental attribute” test; other courts citing <i>Agins</i> or <i>Kaiser Aetna</i> for that test are mistaken.....	23
E. Even if this Court were to retain <i>Manufactured Housing’s per se</i> “fundamental attribute” test, landlords enjoy no fundamental right to choose their tenants free from regulation.	27
F. The illusory police-power-or-eminent-domain dichotomy Goldwater articulates is the source of two of Washington’s unique takings elements, which this Court should reject.....	29
1. The dichotomy prompted Washington’s threshold questions to spare local governments from compensation claims.	30
2. The dichotomy is illusory.	34
G. <i>Amici</i> fail to support Plaintiffs’ substantive due process claim.....	37
1. RHA fails to loosen <i>Amunrud’s</i> embrace of the “rational basis” analysis.....	37
2. The FIT Rule survives “rational basis” review despite <i>amici’s</i> mischaracterizations of the Rule and the City’s arguments.....	39
a) <i>Amici</i> cannot spin clear of literature recognizing implicit bias in tenancy decisions.	39

b) The City has always granted <i>amici</i> 's unsurprising contention that landlords prefer best practices to government regulation.	41
c) The magnitude of a regulation's impact on a property owner is irrelevant under the "rational basis" analysis.	43
d) The FIT Rule does not elevate the timing of an application above a landlord's tenancy criteria.	44
e) The FIT Rule does not require objective criteria or preclude any type of criterion, including requiring the parties to negotiate financial terms.	45
3. NAA's and RHA's arguments about the FIT Rule's efficacy are irrelevant and meritless.	45
4. Goldwater's view of Washington substantive due process law conflicts with Plaintiffs'	47
5. <i>Amici</i> advance radical, outdated views of the relationship between the legislative and judicial branches.	49
III. CONCLUSION.....	51

APPENDIX: State Constitutional Texts Cited In This Brief.

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Ackerman v. Port of Seattle</i> , 55 Wn.2d 400, 348 P.2d 664 (1960).....	29, 30
<i>Agins v. City of Tiburon</i> , 447 U.S. 255 (1980).....	23-25
<i>Amunrud v. Board of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	37, 38, 43, 50
<i>Animas Valley Sand & Gravel, Inc. v. Board of Cnty. Comm'rs of the Cnty. of La Plata</i> , 38 P.3d 59 (Colo. 2001).....	6, 11
<i>Bellevue School District v. E.S.</i> , 171 Wn.2d 695, 257 P.3d 570 (2011).....	14
<i>Briarwood, Inc. v. City of Clarksdale</i> , 766 So. 2d 73 (Miss. App. 2000).....	25
<i>Brown v. City of Seattle</i> , 5 Wash. 35, 31 P. 313 (1892)	5
<i>Brutsche v. City of Kent</i> , 164 Wn.2d 664, 193 P.3d 110 (2008).....	15, 16
<i>BSW Dev. Group v. Dayton</i> , 83 Ohio St. 3d 338, 699 N.E.2d 1271 (1998)	26
<i>Byrd v. City of Hartsville</i> , 365 S.C. 650, 620 S.E.2d 76 (2005)	11
<i>Cable Alabama Corp. v. City of Huntsville, Ala.</i> , 768 F. Supp. 1484 (N.D. Ala. 1991).....	25
<i>Cheyenne Airport Board v. Rogers</i> , 707 P.2d 717 (Wyo. 1985).....	11

<i>City of Seattle v. McCoy</i> , 101 Wn. App. 815, 4 P.3d 159 (2000).....	2
<i>Clay Cnty. ex rel. Cnty. Commission of Clay Cnty. v. Harley & Susie Bogue, Inc.</i> , 988 S.W.2d 102 (Mo. Ct. App. 1999).....	11
<i>Conger v. Pierce Cnty.</i> , 116 Wash. 27, 198 P. 377 (1921)	29, 30
<i>Cougar Bus. Owners Ass’n v. State</i> , 97 Wn.2d 466, 647 P.2d 481 (1982).....	29, 38
<i>Crown Point Dev., Inc. v. City of Sun Valley</i> , 506 F.3d 851 (9th Cir. 2007)	36
<i>Deggs v. Asbestos Corporation Ltd.</i> , 186 Wn.2d 716, 381 P.3d 32 (2016).....	21
<i>DeYoung v. Providence Med. Ctr.</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	40
<i>Eggelston v. Pierce Cnty.</i> , 148 Wn.2d 760, 64 P.3d 618 (2002).....	15, 16
<i>Ferrero Construction Co. v. Dennis Rourke Corp.</i> , 536 A.2d 1137 (Md. 1988)	25
<i>Fields v. State Department of Early Learning</i> , __ Wn.2d __, 434 P.3d 999 (2019).....	37
<i>Fisher v. City of Berkeley</i> , 37 Cal. 3d 644 (1984)	25
<i>Gore v. Beren</i> , 867 P.2d 330 (Kan. 1994).....	25
<i>Gregory v. City of San Juan Capistrano</i> , 142 Cal. App. 3d 72 (1983)	25
<i>Guimont v. Clarke</i> , 121 Wn.2d 586, 854 P.2d 1 (1993).....	<i>passim</i>

<i>Highline Sch. Dist. No. 401 v. Port of Seattle</i> , 87 Wn.2d 6, 548 P.2d 1085 (1976).....	29
<i>Hillside Terrace, L.P. ex rel. Hillside Terrace I LLC v. City of Gulfport</i> , 18 So. 3d 339 (Miss. App. 2009).....	25
<i>Hogue v. Port of Seattle</i> , 54 Wn.2d 799, 341 P.2d 171 (1959).....	6
<i>In re Detention of Reyes</i> , 184 Wn.2d 340, 358 P.3d 394 (2015).....	7
<i>In re Dyer</i> , 143 Wn.2d 384, 20 P.3d 907 (2001).....	48
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	23-25
<i>Kavanau v. Santa Monica Rent Control Bd.</i> , 941 P.2d 851 (Cal. 1997).....	25
<i>Keiffer v. King Cnty.</i> , 89 Wn 2d 369, 572 P.2d 408 (1977).....	5
<i>Kelo v. City of New London</i> , 545 U.S. 469 (2005).....	8
<i>Lawton v. Steele</i> , 152 U.S. 133 (1894).....	37-38
<i>Lingle v. Chevron U.S.A., Inc.</i> , 544 U.S. 528 (2005).....	<i>passim</i>
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	18-19, 23-24
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992).....	19, 17, 26, 35
<i>Manufactured Housing Cmtys. of Wash. v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000).....	<i>passim</i>

<i>Maple Leaf Investors, Inc. v. Dep’t of Ecology</i> , 88 Wn.2d 726, 565 P.2d 1162 (1977).....	29-30
<i>Margola Associates v. City of Seattle</i> , 121 Wn.2d 625, 854 P.2d 23 (1993).....	2, 3, 33
<i>Matter of Dependency of E.H.</i> , 191 Wn.2d 872, 427 P.3d 587 (2018).....	14
<i>Matter of the Personal Restraint of Matteson</i> , 142 Wn.2d 298, 12 P.3d 585 (2000).....	49
<i>Mugler v. Kansas</i> , 123 U.S. 623 (1887).....	<i>passim</i>
<i>Mutschler v. City of Phoenix</i> , 212 Ariz. 160, 129 P.3d 71 (Ariz. Ct. App. 2006).....	11
<i>North Pacifica LLC v. City of Pacifica</i> , 526 F.3d 478 (9th Cir. 2008)	36, 43
<i>Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass’n One, Inc.</i> , 986 So. 2d 1279 (Fla. 2008)	25
<i>Orion Corp. v. State</i> , 109 Wn.2d 621, 747 P.2d 1062 (1987).....	<i>passim</i>
<i>Presbytery of Seattle v. King Cnty.</i> , 114 Wn.2d 320, 787 P.2d 907 (1990).....	<i>passim</i>
<i>Pande Cameron & Co., Inc. v. Central Puget Sound Regional Transit Authority</i> , 610 F. Supp. 2d 1288 (W.D. Wash. 2009).....	5
<i>Paradise, Inc. v. Pierce Cnty.</i> , 124 Wn. App. 759, 102 P.3d 173 (2004).....	18
<i>Patel v. Tex. Dep’t of Licensing & Regulation</i> , 469 S.W.3d 69 (Tex. 2015).....	51
<i>Penn Cent. Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978).....	19, 23

<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393 (1922).....	12, 31, 34-36
<i>Perkins v. Bd. of Supervisors of Madison Cnty.</i> , 636 N.W.2d 58 (Iowa 2001)	25
<i>Petition of City of Seattle</i> , 96 Wn.2d 616, 638 P.2d 549 (1981).....	6
<i>Phillips v. Montgomery Cnty.</i> , 442 S.W.3d 233 (Tenn. 2014).....	11
<i>PruneYard Shopping Center v. Robins</i> , 447 U.S. 74 (1980).....	13
<i>Rains v. Dep’t of Fisheries</i> , 89 Wn.2d 740, 575 P.2d 1057 (1978).....	29
<i>Rhoades v. City of Battle Ground</i> , 115 Wn. App. 752, 63 P.3d 142 (2002).....	18
<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 830 P.2d 318 (1992).....	2, 3, 18, 33
<i>Rozner v. City of Bellevue</i> , 116 Wn.2d 342, 804 P.2d 24 (1991).....	48
<i>Samson v. City of Bainbridge Island</i> , 683 F.3d 1051 (9th Cir. 2012)	43
<i>San Francisco Apartment Association v. City and Cnty. of San Francisco</i> , 881 F.3d 1169 (9th Cir. 2018)	50
<i>Schreiner Farms, Inc. v. Smitch</i> , 87 Wn. App. 27, 940 P.2d 274 (1997).....	9
<i>Sintra, Inc. v. City of Seattle</i> , 119 Wn.2d 1, 829 P.2d 765 (1992).....	1, 2
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	2, 18

<i>State ex rel. Elsass v. Shelby Cnty. Bd. of Commrs.</i> , 751 N.E.2d 1032 (Ohio 2001)	26
<i>State ex rel. OTR v. Columbus</i> , 76 Ohio St. 3d 203, 667 N.E.2d 8, syllabus (1996)	26
<i>State v. Bassett</i> , 192 Wn.2d 67, 428 P.3d 343 (2018)	14
<i>State v. Boren</i> , 36 Wn.2d 522, 219 P.2d 566 (1950)	38
<i>State v. Brown</i> , 37 Wash. 97, 79 P. 635 (1905)	38
<i>State v. Condon</i> , 182 Wn.2d 307, 343 P.3d 357 (2015)	48
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	<i>passim</i>
<i>State v. Manussier</i> , 129 Wn.2d 652, 921 P.2d 473 (1996)	48
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992)	48
<i>State v. Ramos</i> , 187 Wn.2d 420, 387 P.3d 650 (2017)	14
<i>State v. Rossman</i> , 53 Wash. 1, 101 P. 357 (1909)	38
<i>Sterling Park, L.P. v. City of Palo Alto</i> , 310 P.3d 925 (Cal. 2013)	25
<i>Stupak-Thrall v. Glickman</i> , 988 F. Supp. 1055 (W.D. Mich. 1997)	25
<i>Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.</i> , 135 S. Ct. 2507 (2015)	47

<i>Vari-Build, Inc. v. City of Reno</i> , 596 F. Supp. 673 (D. Nev. 1984).....	25
<i>Walker v. State</i> , 48 Wn.2d 587, 295 P.2d 328 (1956).....	5
<i>Wash. Railroad & Navigation Co. v. Superior Court</i> , 155 Wash. 651, 286 P. 33 (1930)	6
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974).....	44
<i>Wonders v. Pima Cnty.</i> , 207 Ariz. 576, 89 P.3d 810 (Ariz. Ct. App. 2004).....	11

Constitutional Provisions

Ariz. Const. art. 2 § 17	10
Colo. Const. art. 2, § 14	10
S.C. Const. art. I, § 13.....	10
U.S. Const. amend. V.....	5, 9, 14, 29
Wash. Const. art. I, § 16.....	<i>passim</i>
Wash. Const. art. VIII, § 11	6
Wash. Const. art. VIII, § 8.....	6
Wyo. Const. art. 1, § 32	10
Wyo. Const. art. 1, § 33	4

Statutes

42 U.S.C. §§ 3601 et. seq.....	47
RCW 49.60.222	47

Rules and Ordinances

24 C.F.R. § 100.500	47
SMC 14.08.020	47
SMC 14.08.050	45

Other Authorities

Richard A. Epstein, <i>Missed Opportunities, Good Intentions: The Takings Decisions of Justice Antonin Scalia</i> , 6 BRIT. J. AM. LEGAL STUD. 109 (2017)	50
John M. Groen and Richard M. Stephens, <i>Takings Law, Lucas, and the Growth Management Act</i> , 16 U. PUGET SOUND L. REV. 1259 (1993)	35
Richard L. Settle, <i>Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't</i> , 12 U. PUGET SOUND L. REV. 339 (1989)	32
William B. Stoebuck, <i>A General Theory of Eminent Domain</i> 47 WASH. L. REV. 553 (1972).....	5
William B. Stoebuck, <i>Police Power, Takings, and Due Process</i> , 37 WASH. & LEE L. REV. 1057 (1980).....	32, 34, 35
Roger D. Wynne, <i>The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis</i> , 86 WASH. L. REV. 125 (2011).....	33-34

I. INTRODUCTION

This Court should be unpersuaded by the arguments offered by *amici curiae* Goldwater Institute (“Goldwater”), Institute For Justice (“IFJ”), Manufactured Housing Communities of Washington (“MHCW”), National Apartment Association and Washington Multi-Family Housing Association (collectively, “NAA”), and Rental Housing Association of Washington (“RHA”). Although *amici* see an advantage in a *per se* “fundamental attribute” regulatory takings test and the “undue oppression” substantive due process analysis, *amici* offer no valid reason why this Court should embrace those elements.

II. ARGUMENT

A. *Amici* ignore federal regulatory takings law and pre-*Manufactured Housing* Washington regulatory takings law.

Amici ignore this Court’s holding that, when assessing whether a law constitutes a regulatory taking, the U.S. and Washington Constitutions provide “the same right”¹ because “the breadth of constitutional protection under the state and federal just compensation clauses [for regulatory takings] remains virtually identical.”²

¹ *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 13, 829 P.2d 765 (1992).

² *Orion Corp. v. State*, 109 Wn.2d 621, 657, 747 P.2d 1062 (1987). See City’s Opening Brief at 34.

Amici ignore this Court’s acknowledgement that, for determining when a regulation effects a taking, “federal law is ultimately controlling”³ and this Court will “apply the federal analysis to review all regulatory takings claims,” no matter the constitutional source.⁴

Amici ignore how this Court, when shaping its approach to regulatory takings, applied one analysis no matter whether the claim was under only the U.S. Constitution or both constitutions.⁵

Amici ignore that the one analysis this Court applied was not the analysis the U.S. Supreme Court applies to regulatory takings claims under the U.S. Constitution.⁶ *Amici* neither cite *Lingle* (the U.S. Supreme Court’s seminal discussion of the federal analysis) nor question the City’s representation of the three-part federal analysis *Lingle* expounded.⁷

³ *Sintra*, 119 Wn.2d at 14.

⁴ *Orion*, 109 Wn.2d at 657. *Accord Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 333, 787 P.2d 907 (1990) (we “consider the ‘taking’ analysis used by the United States Supreme Court and by this court in *Orion*”). *See* City’s Opening Brief at 34, 40.

⁵ *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 642, 854 P.2d 23 (1993) (both); *Guimont v. Clarke*, 121 Wn.2d 586, 604, 854 P.2d 1 (1993) (both); *Robinson v. City of Seattle*, 119 Wn.2d 34, 47, 830 P.2d 318 (1992) (U.S. only); *Sintra*, 119 Wn.2d at 14 (U.S. only); *Presbytery*, 114 Wn.2d at 327–28 (both).

⁶ *Compare Guimont*, 121 Wn.2d at 602–04 with *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538–39 (2005). Most recitations of the Washington regulatory takings analysis cite *Guimont* as this Court’s takings summary *See, e.g., City of Seattle v. McCoy*, 101 Wn. App. 815, 828, 4 P.3d 159, 166 (2000) (*Guimont* “outlines the framework for analyzing regulatory takings”). *See* City’s Opening Brief at 38–39.

⁷ *See* City’s Opening Brief at 34–35 (discussing *Lingle*, 544 U.S. at 538–39, and similar federal law).

Amici ignore the six-part analysis this Court mistakenly applied to regulatory takings claims under the U.S. and Washington Constitutions.⁸ *Amici* do not question the City’s representation of that six-part analysis, including this Court’s repeated explanation that an affirmative answer to the threshold question of whether the challenged law infringes on a “fundamental attribute” of property ownership only enables the challenger to try to prove the law effects a taking under other elements of the analysis.⁹

Amici ignore the impossibility of reconciling: (1) this Court’s intent to apply the federal analysis to regulatory takings claims under the Washington Constitution; with (2) what this Court actually applied. *Amici* do not engage the City’s argument that this Court should adopt the actual federal regulatory takings analysis and overrule Washington case law—

⁸ *Margola*, 121 Wn.2d at 643–44; *Guimont*, 121 Wn.2d at 602–04; *Robinson*, 119 Wn.2d at 49–51; *Sintra*, 119 Wn.2d at 13–18; *Presbytery*, 114 Wn.2d at 331–37. See City’s Opening Brief at 38–39.

⁹ *Guimont*, 121 Wn.2d. at 595 (if a regulation “infringes upon a fundamental attribute of property ownership, further takings analysis is necessary”); *id.* at 603 (“if the regulation infringes on a fundamental attribute of ownership, the court proceeds with its taking analysis”); *id.* at 603 n.6 (“Not every infringement on a fundamental attribute of ownership will necessarily constitute a ‘taking’.”); *Margola*, 121 Wn.2d at 645 (“if the regulation infringes on a fundamental attribute of ownership, the court proceeds with its takings analysis”); *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’”); *id.* at 333 n.21 (“Not every infringement on a fundamental attribute of ownership will necessarily constitute a ‘taking’.”). See City’s Opening Brief at 48–49.

including *Manufactured Housing*—to the extent it recites an element not in the federal analysis.¹⁰

Amici ignore the City’s argument that, even if this Court were to retain a six-part regulatory takings analysis, it should not recognize the *per se* “fundamental attribute” test offered by the lead *Manufactured Housing* opinion because it is against the weight of earlier authority.¹¹

Amici line up with RHA and MHCW in brushing this all aside as “irrelevant” and “beside the point.”¹²

B. *Manufactured Housing*’s treatment of Washington’s no-private-use clause did not sweep away preexisting regulatory takings case law under the just-compensation clause.

Instead of dealing with the actual Washington analysis, or even the federal analysis, MHCW and RHA contend *Manufactured Housing* wiped the regulatory-takings-analysis slate clean, committing Washington to a one-element analysis that asks only if the challenged law destroys or deprives a property owner of a “fundamental attribute” of property ownership and transfers it to another. This false contention flows from

¹⁰ See City’s Opening Brief at 39–45. See also *id.* at 47 (extending that argument to *Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000)).

¹¹ See City’s Opening Brief at 48–49. MHCW mentions and mischaracterizes—but does not refute—the City’s argument that *Manufactured Housing*’s lead opinion, by announcing a *per se* “fundamental attribute” taking, is against the weight of earlier authority. MHCW Brief at 7, 10.

¹² See RHA Brief at 9; MHCW Brief at 15. Accord MHCW Brief at 10–11 (disparaging an “effort to turn back the clock” to a time before *Manufactured Housing*).

misreading *Manufactured Housing’s Gunwall* analysis, which was limited to Washington’s no-private-use clause.

1. The Washington Constitution has four unique takings elements—including a no-private-use clause—not in the U.S. Constitution.

The U.S. and Washington Constitutions contain nearly identical just-compensation clauses: “nor shall private property be taken for public use, without just compensation”;¹³ “[n]o private property shall be taken . . . for public . . . use without just compensation”¹⁴ But the Washington Constitution goes further, adding four elements not in its federal counterpart.¹⁵

First, Washington also requires just compensation when the government *damages* property.¹⁶ This ensures government road work does not deprive access to one’s property without compensation.¹⁷

¹³ U.S. Const. amend. V.

¹⁴ Wash. Const. art. I, § 16 (reproduced in the **Appendix**).

¹⁵ *Id.* By misquoting the City’s briefing, IFJ misrepresents the City as claiming there are no functional differences between the two constitutions’ takings provisions. *Compare* IFJ Brief at 3 *with* City’s Opening Brief at 33–34.

¹⁶ Wash. Const. art. I, § 16.

¹⁷ *See, e.g., Pande Cameron & Co., Inc. v. Cent. Puget Sound Reg’l Transit Auth.*, 610 F. Supp. 2d 1288, 1303–06 (W.D. Wash. 2009), *aff’d*, 376 F. App’x 672 (9th Cir. 2010) (applying Washington law); *Keiffer v. King Cnty.*, 89 Wn 2d 369, 372, 572 P.2d 408, 410 (1977); *Walker v. State*, 48 Wn.2d 587, 589–90, 295 P.2d 328, 330 (1956); *Brown v. City of Seattle*, 5 Wash. 35, 38–41, 31 P. 313, 314–15 (1892). *See also* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 555 n.8 (1972) (noting the presence of “or damaged” in 26 state constitutions and explaining that it was “intended to liberalize the allowance of compensation for loss of certain kinds of property rights,

Second, Washington requires the government, before taking property, to *first* pay compensation to the owner or into a court.¹⁸

Third, Washington adds a no-private-use clause: “Private property shall not be taken for private use”¹⁹ This means that, *even if the government offers compensation* under the just-compensation clause, government may not take private property only to put it to a private use.²⁰ Consistent with that clause, the Washington Constitution includes other language: identifying particular uses as “public”;²¹ exempting certain

particularly street access”). *Accord Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm’rs of the Cnty. of La Plata*, 38 P.3d 59, 63–64 (Colo. 2001) (reading the same language in the Colorado Constitution to cover only landowners whose land has been damaged by the making of public improvements abutting their lands).

¹⁸ Wash. Const. art. I, § 16

¹⁹ *Id.*

²⁰ See, e.g., *Petition of City of Seattle*, 96 Wn.2d 616, 624, 638 P.2d 549 (1981); *Hogue v. Port of Seattle*, 54 Wn.2d 799, 813, 341 P.2d 171 (1959); *State ex rel. Or.–Wash. R.R. & Navigation Co. v. Superior Court*, 155 Wash. 651, 657–58, 286 P. 33 (1930).

²¹ E.g., Wash. Const. art. I, § 16 (“[T]he taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.”); Wash. Const. art. VIII, § 8 (“The use of public funds by port districts in such manner as may be prescribed by the legislature for industrial development or trade promotion . . . shall be deemed a public use for a public purpose”); Wash. Const. art. VIII, § 11 (“The use of agricultural commodity assessments by agricultural commodity commissions in such manner as may be prescribed by the legislature for agricultural development or trade promotion and promotional hosting shall be deemed a public use for a public purpose”).

private uses from the no-private-use ban;²² and making the judiciary—not the legislature—the arbiter of what is a “private” or “public” use.²³

Finally, because Washington exempts certain private uses from its no-private-use mandate—uses “for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes”—its just-compensation clause requires compensation for any taking “for public *or private* use.”²⁴

2. This Court need not revisit—let alone overrule—*Manufactured Housing*’s holding that Washington’s no-private-use clause provides greater protection than the U.S. Constitution.

Manufactured Housing correctly held that Washington’s no-private-use clause provides greater protection to property owners than the U.S. Constitution by narrowing the reasons justifying a taking of property, even if the government offers compensation.²⁵ That holding emerged from

²² Wash. Const. art. I, § 16 (“except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes”).

²³ *Id.* (“Whenever 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”);

²⁴ *Id.* (“except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes”).

²⁵ Five justices appeared to agree on a rationale for that conclusion. *See Manufactured Housing*, 142 Wn.2d at 361 (four-justice lead opinion concluding, based on a *Gunwall* analysis, “that ‘private use’ under amended article I, section 16 is defined more literally than under the Fifth Amendment, and that Washington’s interpretation of ‘public use’ has been more restrictive”), 383–84 (Sanders, J., concurring). *See In re Detention of Reyes*, 184 Wn.2d 340, 346, 358 P.3d 394 (2015) (“A principle of law reached by a majority of

the lead opinion's *Gunwall* analysis focusing appropriately on how and why the Washington Constitution's unique no-private-use text requires actual public *use* of the taken property and defers to judges—not legislators—to determine what use is actually public.²⁶

Manufactured Housing's defense of Washington's unique no-private-use clause came into focus a few years later when the U.S. Supreme Court issued *Kelo*, which read the U.S. Constitution to authorize compensated takings that advance what a legislative body (not a court) determines to be merely a public *purpose* (not a public use).²⁷

This case presents no reason to revisit *Manufactured Housing's* correct reading of Washington's no-private-use clause as offering more protection to individuals than the U.S. Constitution. MHCW's fear of a *Kelo* boogeyman is unwarranted; the City's position does not subject Washington to *Kelo*.²⁸

the court, even in a fractured opinion, is not considered a plurality but rather binding precedent.”).

²⁶ *Manufactured Housing*, 142 Wn.2d at 356–61 (applying the factors announced in *State v. Gunwall*, 106 Wn.2d 54, 61–62, 720 P.2d 808 (1986)).

²⁷ *Kelo v. City of New London*, 545 U.S. 469, 479–83 (2005).

²⁸ See MHCW Brief at 18–20. *Accord id.* at 2, 15 (mischaracterizing the City as asking the Court to abandon its commitment to Washington's no-private-use clause).

3. Washington’s no-private-use clause is irrelevant to whether a regulation effects a taking under the just-compensation clause.

None of Washington’s four unique takings elements influences how a court should assess whether a regulation effects a taking under the just-compensation clause. This Court noted correctly that no Washington decision attaches significance to “or damaged” in regulatory takings law.²⁹ Neither Plaintiffs nor *amici* assert Washington’s pay-first or compensate-for-private-use language is relevant.

Washington’s no-private-use clause is equally irrelevant to a regulatory takings claim. Before a court can assess whether a regulation takes property for a prohibited private use under the no-private-use clause, the court must first assess whether the regulation takes property at all under the just-compensation clause.

The lead *Manufactured Housing* opinion recognized that distinction. It cited Washington and federal case law to explain its view of the “existing Washington and federal law” of regulatory takings—law applicable to a claim under “article I, section 16 of the Washington State Constitution or the Fifth Amendment of the United States Constitution.”³⁰

²⁹ *Presbytery*, 114 Wn.2d at 328 n.10. *Accord Manufactured Housing*, 142 Wn.2d at 357 & n.8 (lead opinion dismissing “or damaged” as irrelevant); *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 32, 940 P.2d 274 (1997). *See* IFJ Brief at 9 (noting “or damaged” without explaining how it advances IFJ’s argument).

³⁰ *Manufactured Housing*, 142 Wn.2d at 355.

Citing this Court’s regulatory takings case law under the just-compensation clause, the lead opinion concluded the challenged law effected a taking by depriving property owners of a fundamental attribute of property ownership and transferring it to others.³¹ Only with that question settled did the lead opinion turn to the no-private-use clause question: “We next consider whether the proposed use of the [taken] property is constitutionally permitted.”³²

Other states with no-private-use clauses likewise follow the federal regulatory takings analysis under their just-compensation clauses. Five other state constitutions retain the same no-private-use clause as the Washington Constitution.³³ Although those clauses distinguish their constitutions from the U.S. Constitution, all five states employ the federal

³¹ *Id.* at 369–70 (citing *Guimont*, 121 Wn.2d at 605 n.7). The City maintains the *Manufactured Housing* lead opinion misread earlier Washington decisions as supporting a *per se* “fundamental attribute” test. *See* City’s Opening Brief at 48–49.

³² *Id.* at 370.

³³ Ariz. Const. art. 2 § 17 (“Private property shall not be taken for private use”); Colo. Const. art. 2, § 14 (same); Mo. Const. art. 1, § 28 (same); S.C. Const. art. I, § 13(A) (same); Wyo. Const. art. 1, § 32 (same). As in the Washington Constitution, all of those no-private-use clauses are separate from their just-compensation clauses. Three states codify them in separate sections. *Compare* Colo. Const. art. 2, § 14 (no private use) *with* § 15 (just compensation). *Compare* Mo. Const. art. 1, § 26 (just compensation) *with* § 28 (no private use). *Compare* Wyo. Const. art. 1, § 32 (no private use) *with* § 33 (just compensation). Arizona (like Washington) accords each their own sentence in the same section. Ariz. Const. art. 2 § 17 (language functionally identical to Wash. Const. art. I, § 16). And South Carolina gives each a separate clause in the same sentence. S.C. Const. art. I, § 13(A) (“private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property”). The **Appendix** reproduces the text of these state constitutional provisions.

analysis when assessing a claimed regulatory taking under their just-compensation clause.³⁴ This is unsurprising because—except for Washington and two others—the “overwhelming majority” of states with a just-compensation clause similar to the federal clause apply the federal regulatory takings analysis.³⁵

Because the FIT Rule effects no regulatory taking under Washington’s just-compensation clause, there is no need to debate whether the taking would be for a prohibited private use under the no-private-use clause.³⁶

IFJ’s history lessons do nothing to entangle the no-private-use clause with the regulatory takings analysis under the just-compensation

³⁴ See, e.g., *Mutschler v. City of Phoenix*, 212 Ariz. 160, 129 P.3d 71, 72 n.1 (Ariz. Ct. App. 2006) (for regulatory takings, “the analysis of appellants’ Takings Clause claim is the same under both the Federal and Arizona Constitutions”); *Wonders v. Pima Cnty.*, 207 Ariz. 576, 89 P.3d 810, 814–16 (Ariz. Ct. App. 2004) (for regulatory takings, “Article II, § 17 of the Arizona Constitution provides like protection” to the federal takings clause); *Animas*, 38 P.3d at 63–64 (other than Colorado’s “damaged” language, which applies only to physical takings from adjacent public improvements, “this court has interpreted the Colorado takings clause as consistent with the federal clause”); *Clay Cnty. ex rel. Cnty. Comm’n of Clay Cnty. v. Harley & Susie Bogue, Inc.*, 988 S.W.2d 102, 106–07 (Mo. Ct. App. 1999); *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76, 79 n. 6 (2005) (“Takings analysis under South Carolina law is the same as the analysis under federal law.”); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 728–31 (Wyo. 1985).

³⁵ *Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 240–42 & n.10 (Tenn. 2014). See City’s Opening Brief at 40–41.

³⁶ Compare City’s Opening Brief at 53–54 (“The Rule effects no taking, obviating any inquiry into its public or private nature.”) with MHCW Brief at 13–14 (arguing over whether the public may use the property the FIT Rule allegedly takes).

clause. IFJ focuses on the Washington Constitution’s birth in 1889.³⁷ The framers of that document could not have intended to depart from federal regulatory takings law because that law did not arise until three decades later.³⁸ As IFJ notes, the framers included the no-private-use clause because they were concerned about physical appropriations of land for private use, especially by railroads and other large businesses. The framers did not express the goal advanced by IFJ and other *amici*: to shield businesses from government regulation.

4. *Manufactured Housing* did not sweep away earlier Washington regulatory takings case law under the just-compensation clause.

Without discussing earlier Washington or federal regulatory takings case law, Plaintiffs read *Manufactured Housing*’s lead opinion as articulating a *per se* “fundamental attribute” test within Washington’s regulatory takings analysis.³⁹

MHCW and RHA go further. They maintain *Manufactured Housing* swept away all prior Washington and federal regulatory takings

³⁷ IFJ Brief at 4–10.

³⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (recognizing for the first time that a regulation, if it goes “too far,” can effect a taking); *Lingle*, 544 U.S. at 537 (describing that aspect of *Pennsylvania Coal* as a “watershed” in federal takings law). The historical case law IFJ cites assessed the no-private-use clause, not regulatory takings under the just-compensation clause. See IFJ Brief at 11–15.

³⁹ See Plaintiffs’ Response Brief at 7–10.

law by finding the Washington Constitution provides greater protection than the U.S. Constitution.⁴⁰ MHCW and RHA read *Manufactured Housing's Gunwall* analysis out of context, overlook how the lead *Manufactured Housing* opinion relied on—and did not reject—earlier regulatory takings case law, and fail to understand how their position, if adopted, would leave Washington with a one-element regulatory takings analysis.

- a) ***Manufactured Housing's Gunwall* analysis was limited to the no-private use clause; it did not discuss the regulatory takings analysis or a “fundamental attribute” element.**

Although “each state has the ‘sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution,’”⁴¹ creating distinct state constitutional law is the exception, not the rule. *Gunwall* warned: “Recourse to our state constitution as an independent source for recognizing and protecting the individual rights of our citizens must spring not from pure intuition, but

⁴⁰ See MHCW Brief at 7–10; RHA Brief at 9.

⁴¹ *Gunwall*, 106 Wn.2d. at 59 (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980)).

from a process that is at once articulable, reasonable and reasoned.”⁴² This Court manifested that process in the “*Gunwall* factors.”⁴³

Because independent Washington constitutional law should be the exception, context matters when considering whether a *Gunwall* analysis of a particular constitutional provision controls a new claim under that provision.⁴⁴

Again, the context of *Manufactured Housing*’s *Gunwall* analysis was Washington’s no-private-use clause.⁴⁵ The analysis yielded a conclusion limited to that clause: “that ‘private use’ under amended article I, section 16 is defined more literally than under the Fifth Amendment, and that Washington’s interpretation of ‘public use’ has been more restrictive.”⁴⁶ The analysis explained how the Washington Constitution

⁴² *Id.* at 63. *See also id.* at 62–63 (“use independent state constitutional grounds in a given situation” only “for well founded legal reasons and not by merely substituting our notion of justice for that of . . . the United States Supreme Court”).

⁴³ *Id.* at 58, 61–62.

⁴⁴ *See, e.g., State v. Bassett*, 192 Wn.2d 67, 78–79, 428 P.3d 343 (2018) (conducting a new *Gunwall* analysis in a “particular context” of a different claim); *Matter of Dependency of E.H.*, 191 Wn.2d 872, 883–87, 427 P.3d 587 (2018) (conducting a new *Gunwall* analysis in a specific context not covered by earlier ones addressing a similar claim under the same constitutional provision); *State v. Ramos*, 187 Wn.2d 420, 453–54, 387 P.3d 650 (2017) (“Even where it is already established that the Washington Constitution may provide enhanced protections on a general topic, parties are still required to explain why enhanced protections are appropriate in specific applications.”); *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 711, 257 P.3d 570 (2011) (“context matters”).

⁴⁵ *Manufactured Housing*, 142 Wn.2d at 356–61.

⁴⁶ *Id.* at 361.

allows the government to take property only for a narrower set of reasons than the U.S. Constitution allows. But the analysis said nothing about whether the two constitutions require different approaches to determining whether a regulation takes property in the first place.

MHCW and RHA miss that point. *Manufactured Housing's Gunwall* analysis did not, as RHA claims, conclude the Washington Constitution defines a "taking" more broadly than the U.S. Constitution.⁴⁷ The analysis did not endorse a *per se* "fundamental attribute" test found nowhere in federal regulatory takings law.⁴⁸ The analysis mentioned neither "fundamental" nor "attribute."⁴⁹

MHCW gains nothing from footnotes in *Eggleston* and *Brutsche*, neither of which altered the context of *Manufactured Housing's Gunwall* analysis.⁵⁰ Neither *Eggleston* nor *Brutsche* involved a regulatory takings claim; both resolved a property owner's claim to compensation for physical property damage caused by law enforcement officials executing a search warrant.⁵¹ *Eggleston* cited neither the Washington nor federal

⁴⁷ RHA Brief at 7.

⁴⁸ Compare MHCW Brief at 7–12 with *Manufactured Housing*, 142 Wn.2d at 356–61.

⁴⁹ See *Manufactured Housing*, 142 Wn.2d at 356–61.

⁵⁰ MHCW Brief at 11 (citing *Eggleston v. Pierce Cnty.*, 148 Wn.2d 760, 64 P.3d 618 (2002), and *Brutsche v. City of Kent*, 164 Wn.2d 664, 193 P.3d 110 (2008)).

⁵¹ *Eggleston*, 148 Wn.2d at 763; *Brutsche*, 164 Wn.2d at 679–80.

regulatory takings analysis; it invoked “the principles underlying our jurisprudence” and “evidence from an 1886 Oregon Supreme Court case” to conclude that, when the Washington Constitution was adopted, “the production of evidence . . . would not have been considered a taking.”⁵² *Eggleston* pointed to *Manufactured Housing*’s conclusion that the Washington Constitution provides greater protection than the U.S. Constitution (without explaining the context of that protection) in a footnote only to support its finding that, despite *Eggleston*’s reliance on state law, no party was prejudiced by the lack of a *Gunwall* analysis.⁵³ *Brutsche* relied on *Eggleston*⁵⁴ and, in a footnote, merely rehashed *Eggleston*’s reasons for not performing a *Gunwall* analysis.⁵⁵

⁵² *Eggleston*, 148 Wn.2d at 769.

⁵³ *Id.* at 767 n.5 (“we find that the threshold function *Gunwall* performs is less necessary when we have already established a state constitutional provision provides more protection than its federal counterpart”). Oddly, the other reason *Eggleston* provided for excusing a *Gunwall* analysis was that “a satisfactory *Gunwall* analysis was provided by an amicus.” *Id.* But that *amicus curiae* focused on the import of the phrase “or damaged” in the Washington State Constitution—a phrase *Eggleston* did not invoke and the lead *Manufactured Housing* opinion dismissed as unnecessary. Compare Brief of Amicus Curiae American Civil Liberties Union of Wash., *Eggleston v. Pierce Cnty.* (No. 71296-4), 2002 WL 33003998, at *14–20 with *Manufactured Housing*, 142 Wn.2d at 353 n.4.

⁵⁴ *Brutsche*, 164 Wn.2d at 680–83.

⁵⁵ *Id.* at 680 n.11.

b) The lead *Manufactured Housing* opinion relied on—and did not reject—*Guimont* and other regulatory takings case law.

MHCW and RHA rely on footnote 7 of the lead *Manufactured Housing* opinion to claim it rejected *Guimont* and all prior Washington and federal regulatory takings case law.⁵⁶ Again, MHCW and RHA ignore the context.

Footnote 7 introduced the *Gunwall* analysis, which was limited to the no-private-use clause.⁵⁷ That footnote rejected *Guimont* and other earlier decisions to the extent they had not conducted the *Gunwall* analysis the lead *Manufactured Housing* opinion undertook: of Washington’s no-private-use clause.⁵⁸

In the context of determining whether the challenged regulation effected a taking, the lead *Manufactured Housing* opinion cited *Guimont* and earlier Washington and federal regulatory takings decisions to conclude a *per se* regulatory taking occurs if a regulation: denies all economically viable use of one’s property;⁵⁹ forces the owner to suffer a

⁵⁶ RHA Brief at 7–8 (relying on *Manufactured Housing*, 142 Wn.2d at 356 n.7); MHCW Brief at 10 (same).

⁵⁷ *Manufactured Housing*, 142 Wn.2d at 356 n.7. See *id.* at 361 (*Gunwall* analysis’s conclusion).

⁵⁸ *Id.* at 356 n.7.

⁵⁹ *Id.* at 355 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).

physical invasion;⁶⁰ is employed to enhance the value of publicly held property;⁶¹ or destroys or deprives an owner of a “fundamental attribute” of property ownership.⁶² The lead opinion relied on *Guimont* and other Washington case law for what constitutes a “fundamental attribute.”⁶³ And the lead opinion relied on *Guimont* to conclude: “The instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership.”⁶⁴ The concurring Justice correctly viewed that *Guimont*-derived rule as “the dispositive feature” of the lead opinion’s analysis.”⁶⁵

⁶⁰ *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

⁶¹ *Id.* (citing *Orion*, 109 Wn.2d at 651). An unresolved debate clouds this element of the Washington takings analysis. One member of this Court argued that the proper question initially was, and should have remained, whether the regulation is employed to enhance the value of publicly held property. *Guimont*, 121 Wn.2d at 617–20 (Utter, J., concurring). But most Washington courts recite a “seeks less to prevent a harm than to impose an affirmative public benefit” element. *E.g.*, *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 676, 935 P.2d 555 (1997) (Durham, J., concurring); *Guimont*, 121 Wn.2d at 603; *Presbytery*, 114 Wn.2d at 329–30 & n.13; *Paradise, Inc. v. Pierce Cnty.*, 124 Wn. App. 759, 770–74, 102 P.3d 173 (2004); *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 772, 63 P.3d 142 (2002).

⁶² *Manufactured Housing*, 142 Wn.2d at 355 (citing *Presbytery*, 114 Wn.2d at 330), 369 (citing *Guimont*, 121 Wn.2d at 605 n. 7). The City maintains the *Manufactured Housing* lead opinion misread earlier Washington decisions as supporting a *per se* “fundamental attribute” test. *See City’s Opening Brief* at 48–49.

⁶³ *Manufactured Housing*, 142 Wn.2d at 364 (citing *Guimont*, 121 Wn.2d at 595; *Robinson*, 119 Wn.2d at 50; *Presbytery*, 114 Wn.2d at 329–30).

⁶⁴ *Manufactured Housing*, 142 Wn.2d at 369.

⁶⁵ *Id.* at 383 (Sanders, J., concurring)

MHCW and RHA do not explain how, if the lead *Manufactured Housing* opinion swept away *Guimont* and all prior Washington and federal regulatory takings case law, the opinion also relied on that case law. RHA also does not explain why this Court should do in regulatory takings law what RHA says this Court should not do in substantive due process law: find earlier case law was overruled *sub silentio*.⁶⁶

c) MHCW and RHA would leave Washington with a one-element regulatory takings analysis.

MHCW and RHA fail to appreciate the implication of their argument. If they were right—if the lead *Manufactured Housing* opinion swept away all previous Washington and federal regulatory takings case—Washington would be left with a one-element regulatory takings analysis. The only way for a property owner to prove a regulatory taking under the Washington Constitution would be to demonstrate the type of taking in *Manufactured Housing*: destruction/deprivation and transfer of a “fundamental attribute” of property ownership. A claimant under the Washington Constitution could not invoke the *Loretto* “physical invasion” element, the *Lucas* “deprivation of all economically viable use” element, or the *Penn Central* factors—they are creatures of federal regulatory

⁶⁶ See RHA Brief at 14 (“This Court has long disfavored the *sub silentio* overruling of its precedents.”)

takings law embraced by pre-*Manufactured Housing* Washington decisions.

Unlike Plaintiffs,⁶⁷ MHCW and RHA might be so eager to prop up a *per se* “fundamental attribute” test under the Washington Constitution that they are willing to abandon all other components of Washington and federal regulatory takings law. *Manufactured Housing* provides no basis for accepting that fraught bargain.

C. This Court should overrule *Manufactured Housing* only to the extent it invoked regulatory takings elements not in the federal analysis.

The City asks this Court to overrule *Manufactured Housing*, like other Washington regulatory takings precedent, only to the extent it invokes an element of the regulatory takings analysis not in the federal analysis.⁶⁸

Amici do not quarrel with the City’s explanation of why, because the unique elements are incorrect and harmful and their legal underpinnings have disappeared, that precedent is not due protection under *stare decisis*.⁶⁹ RHA just lifts sweeping passages from *stare decisis* case

⁶⁷ See Plaintiffs’ Response Brief at 7–10 (discussing the lead *Manufactured Housing* opinion without suggesting it cut ties with earlier Washington or federal case law).

⁶⁸ See City’s Opening Brief at 38–45.

⁶⁹ See *id.*

law without acknowledging the less rigorous approach this Court takes to *stare decisis* in constitutional interpretation, where the legislative branch cannot remedy an error.⁷⁰

D. Even if this Court were to retain Washington’s six-part regulatory takings analysis, this Court should recognize *Manufactured Housing’s per se* “fundamental attribute” test conflicts with that analysis and federal law.

Even if this Court were to retain a unique, six-part regulatory takings analysis, the City urges this Court not to follow *Manufactured Housing* to the extent it misread that analysis as providing a *per se* “fundamental attribute” test at odds with the weight of prior authority.⁷¹ *Amici* do not challenge that argument.⁷²

Instead, MHCW and RHA pick a fight over whether a majority in *Manufactured Housing* agreed on a rationale for a *per se* “fundamental attribute” test, and RHA tries without success to conjure support for that test from other jurisdictions.

⁷⁰ RHA Brief at 5–6 (citing *Deggs v. Asbestos Corporation Ltd.*, 186 Wn.2d 716, 728–29, 381 P.3d 32 (2016)). *But see Deggs*, 186 Wn.2d at 730 n.10 (“We caution that *stare decisis* is applied less rigorously in the area of constitutional interpretation. This is partially for the pragmatic reason that statutes are easier to amend than constitutions.”).

⁷¹ See City’s Opening Brief at 47–49.

⁷² Blind to the City’s briefing, RHA falsely asserts the City neither criticized the lead *Manufactured Housing* opinion’s *per se* “fundamental attribute” test nor cited authority calling it into question. Compare RHA Brief at 8 with City’s Opening Brief at 40–41 (citing authority branding *Manufactured Housing’s* lead opinion an outlier), 48–49 (detailing the weight of other Washington authority against the lead opinion’s *per se* “fundamental attribute” test).

1. No *Manufactured Housing* majority agreed on a rationale for a *per se* “fundamental attribute” test.

MHCW and RHA rail against the City’s contention that the lead *Manufactured Housing* opinion’s rationale for a *per se* “fundamental attribute” represents a plurality.⁷³ RHA notes how its counsel, then a justice, referred to the lead opinion as the “majority opinion,”⁷⁴ but that cannot change the math: four justices are not a majority of a nine-justice panel.

Those four justices’ rationale was simple. They just cited *Presbytery* and *Guimont* for the (unwarranted) proposition that, under Washington case law, a law that destroys or deprives an owner of a “fundamental attribute” of property ownership is a *per se* taking.⁷⁵

Concurring, Justice Sanders “agree[d] with the majority’s *conclusion*” that the case was resolved by applying that *per se* rule,⁷⁶ but he reached that rule through a different rationale. Unlike the lead opinion, he did not find the rule already sitting in Washington case law; he teased it

⁷³ MHCW Brief at 4–7; RHA Brief at 6 & n.6. See City’s Opening Brief at 47–48.

⁷⁴ RHA Brief at 6 n.6 (citing *Manufactured Housing*, 142 Wn.2d at 398 (Talmadge, J., dissenting)). The other opinions also used “majority opinion.” E.g., *Manufactured Housing*, 142 Wn.2d at 375 (Sanders, J., concurring), 384 (Johnson, J., dissenting).

⁷⁵ *Manufactured Housing*, 142 Wn.2d at 355 (citing *Presbytery*, 114 Wn.2d at 330), 369 (citing *Guimont*, 121 Wn.2d at 605 n.7). The lead opinion added that transferring that attribute to another was relevant. *Id.* at 369–70.

⁷⁶ *Id.* at 383 (Sanders, J., concurring) (emphasis added).

from federal case law (including *Penn Central*, which the lead opinion did not cite) through a complicated analysis he ultimately summarized in terms the lead opinion did not use:

In summary, when a fundamental aspect of property is taken, however slightly, the “character of the governmental action,” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), “not only is an important factor in resolving whether the action works a taking but also is *determinative*.” *Loretto*, 458 U.S. at 426, *see also* 432, 102 S.Ct. 3164 (emphasis added).⁷⁷

Although Justice Sanders defended the lead opinion’s rationale against the dissenting justices who noted its tension with *Guimont*, he did not adopt the lead opinion’s rationale as his own.⁷⁸ This left no majority agreeing on a rationale for a *per se* “fundamental attribute” test.

2. The U.S. Supreme Court does not employ a *per se* “fundamental attribute” test; other courts citing *Agin* or *Kaiser Aetna* for that test are mistaken.

In *Lingle*, when reforming and summarizing federal regulatory takings law in 2005, the U.S. Supreme Court identified only two *per se* tests: where a regulation results in a physical invasion or deprives the

⁷⁷ *Id.* Compare *id.* at 350-75 (lead opinion not citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).)

⁷⁸ *Id.* at 380.

owner of all economically beneficial use.⁷⁹ *Amici* offer no U.S. Supreme Court or Circuit Court of Appeals decision recognizing a *per se* “fundamental attribute” test. But RHA claims state and lower federal courts employ it.⁸⁰ The decisions RHA cites fail to support that contention.

Most of the decisions RHA cites incorrectly read *Agins* or *Kaiser Aetna*—issued by the U.S. Supreme Court a quarter century before *Lingle* reformed federal regulatory takings law—as announcing a *per se* “fundamental attribute” test. In 1979, *Kaiser Aetna* found a regulation effected a taking because it destroyed the right to exclude, which *Kaiser Aetna* described as fundamental: “[W]e hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.”⁸¹ *Loretto* eventually converted *Kaiser Aetna* into the *per se* “physical invasion” test, limited to regulations that destroy the right to exclude—not covering all rights a court might deem “fundamental.”⁸² But in 1980 (and before *Loretto*), *Agins* rejected a regulatory takings claim

⁷⁹ *Lingle*, 544 U.S. at 539 (“Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes.”)

⁸⁰ RHA Brief at 8 n.10; RHA Brief at 11 n.13.

⁸¹ *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (footnote omitted).

⁸² *Loretto*, 458 U.S. at 433 (discussing *Kaiser Aetna*); *id.* at 434–35 (summarizing the *per se* “physical invasion” test).

with an offhand citation to *Kaiser Aetna* that could confuse a reader into thinking *Kaiser Aetna* spoke of *all* fundamental property attributes, not just the right to exclude: “Although the ordinances limit development, they [do not] extinguish a fundamental attribute of ownership.”⁸³

Even though *Kaiser Aetna* and *Agins* did not create a *per se* “fundamental attribute” test, the decisions RHA invokes mistakenly cite *Agins* or *Kaiser Aetna* for a *per se* “fundamental attribute” test under federal law.⁸⁴ Those citations—one in dissent, and all but one predating *Lingle*—fail to rewrite clear U.S. Supreme Court authority.

RHA gains nothing from state court decisions applying the rule against perpetuities or a statutory limit on government regulation—none involving a takings claim or uttering “fundamental.”⁸⁵

⁸³ *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (citing *Kaiser Aetna*, 444 U.S. at 179–180).

⁸⁴ *Stupak-Thrall v. Glickman*, 988 F. Supp. 1055, 1064 (W.D. Mich. 1997) (citing *Agins*); *Cable Alabama Corp. v. City of Huntsville, Ala.*, 768 F. Supp. 1484, 1508 (N.D. Ala. 1991) (citing *Agins* and *Kaiser Aetna*); *Hillside Terrace, L.P. ex rel. Hillside Terrace I LLC v. City of Gulfport*, 18 So. 3d 339, 344–45 (Miss. App. 2009) (citing *Vari-Build, Inc. v. City of Reno*, 596 F. Supp. 673, 679 (D. Nev. 1984) (citing *Agins*)); *Briarwood, Inc. v. City of Clarksdale*, 766 So. 2d 73, 82 (Miss. App. 2000) (same); *Perkins v. Bd. of Supervisors of Madison Cnty.*, 636 N.W.2d 58, 70 (Iowa 2001) (citing *Kaiser Aetna*); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 874 (Cal. 1997) (Baxter, J., dissenting, citing *Agins*); *Gregory v. City of San Juan Capistrano*, 142 Cal. App. 3d 72, 88–89 (1983) (citing *Agins*), *disapproved on other grounds*, *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 686 n.43 (1984).

⁸⁵ *Sterling Park, L.P. v. City of Palo Alto*, 310 P.3d 925, 930 (Cal. 2013); *Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Ass’n One, Inc.*, 986 So. 2d 1279, 1280–81 (Fla. 2008); *Gore v. Beren*, 867 P.2d 330, 429 (Kan. 1994); *Ferrero Construction Co. v. Dennis Rourke Corp.*, 536 A.2d 1137, 1138 (Md. 1988).

At the risk of parsing Ohio case law, the Ohio Supreme Court decision RHA cites fails to support a *per se* “fundamental attribute” test either. *Elsass* reversed a lower court for having applied regulatory takings law to a case involving no challenged regulation—it was a case of the government directly invading private property to construct drainage systems.⁸⁶ To the extent *Elsass* mentioned “fundamental attribute,” it was in *dicta* quoting a portion of Ohio’s regulatory takings analysis that did not identify destruction of a “fundamental attribute” as a *per se* taking—the passage said only that, if a property owner shows destruction of a “fundamental attribute,” the owner does not also have to prove deprivation of all economically viable uses of the land.⁸⁷ *Elsass* quoted *BSW Development Group* for that language,⁸⁸ which in turn relied on the U.S. Supreme Court in *Lucas* and the Ohio Supreme Court in *OTR*—neither of which uttered “fundamental.”⁸⁹ If Ohio embraces a *per se* “fundamental attribute” test, RHA provides no evidence.

⁸⁶ *State ex rel. Elsass v. Shelby Cnty. Bd. of Commrs.*, 751 N.E.2d 1032, 1039 (Ohio 2001) (“The standard that was used by the court of appeals for determining whether compensation to property owners is warranted is normally applicable to regulatory taking cases, which this case is not.”).

⁸⁷ *Id.* at 1037.

⁸⁸ *Id.* (quoting *BSW Dev. Group v. Dayton*, 83 Ohio St. 3d 338, 699 N.E.2d 1271, 1275 (1998)).

⁸⁹ *BSW*, 699 N.E.2d at 1275 (citing *Lucas*, 505 U.S. at 1015; *State ex rel. OTR v. Columbus*, 76 Ohio St. 3d 203, 667 N.E.2d 8, syllabus (1996)).

E. Even if this Court were to retain *Manufactured Housing’s per se* “fundamental attribute” test, landlords enjoy no fundamental right to choose their tenants free from regulation.

Insisting a *per se* “fundamental attribute” test exists, *amici* claim the “fundamental attribute” implicated by the FIT Rule is a landlord’s unfettered right to choose a tenant or to exclude tenants they do not choose.⁹⁰ *Amici* neither acknowledge nor respond to the City’s extensive briefing demonstrating “[t]his Court and the U.S. Supreme Courts reject a right to choose tenants, whether that right is couched as a right to exclude others, dispose of property, or prevent physical invasion.”⁹¹ The City will not rehash that briefing here.

Only MHCW attempts to quibble with the fact that all rental antidiscrimination laws would effect a taking if Washington were to apply a *per se* “fundamental attribute” test to a law limiting a landlord’s “right” to choose a preferred tenant or exclude a disfavored one.⁹² Even though MHCW opens its brief with: “This case concerns the fundamental right to

⁹⁰ *E.g.*, IFJ Brief at 16 (“right to *choose* who lives on their property”); MHCW Brief at 1 (“This case concerns the fundamental right to exclude others from one’s property.”); *id.* at 12 (“the ordinance destroys the owner’s right to exclude others”); NAA Brief at 8 (“The ability to choose who occupies one’s property”); RHA Brief at 10 (“the right to lease property to the person of that owner’s choosing”).

⁹¹ City’s Opening Brief at 49–52. *Accord* City’s Reply Brief at 18–20.

⁹² *Compare* MHCW Brief at 15 *with* City’s Opening Brief at 52–23 *and* City’s Reply Brief at 20–21.

exclude others from one's property."⁹³ Even though MHCW twice more identifies the "right to exclude" as the "fundamental attribute" the FIT Rule impinges.⁹⁴ And even though Plaintiffs and all other *amici* claim the "right to choose" as the "fundamental attribute" the FIT Rule assaults.⁹⁵ Despite all that, when trying to evade the fact that *per se* protection of that attribute guts antidiscrimination rental laws, MHCW claims the actual "fundamental attribute" at issue is the right to grant a right of first refusal and, because MHCW claims antidiscrimination laws do not implicate that attribute, those laws are safe from a *per se* "fundamental attribute" rule.⁹⁶ MHCW's distinction fails because antidiscrimination laws prevent landlords from offering a right of first refusal in a discriminatory manner. Whether the "fundamental attribute" is cast as a right to exclude or choose tenants or a right to withhold or grant a right of first refusal, if that attribute were protected through a *per se* rule, it would gut government's

⁹³ MHCW Brief at 1.

⁹⁴ *Id.* at 12 ("the ordinance destroys the owner's right to exclude others, which is among the 'fundamental attributes of property ownership'"), 13 ("the right to exclude is among the fundamental attributes of property").

⁹⁵ Plaintiffs' Response Brief at 1 (the FIT Rule "strips landlords of a fundamental attribute of property ownership—the right to choose to whom one will rent their property"); IFJ Brief at 16; NAA Brief at 8; RHA Brief at 10.

⁹⁶ MHCW Brief at 15.

ability to stop landlords from excluding, choosing, withholding, or granting with discriminatory intent or effect.

F. The illusory police-power-or-eminent-domain dichotomy Goldwater articulates is the source of two of Washington’s unique takings elements, which this Court should reject.

Although joining other *amici* in ignoring pre-*Manufactured Housing* Washington regulatory takings law, Goldwater offers a simple-sounding dichotomy from that era: a regulation must be evaluated as an exercise of either the police power under due process law or the power of eminent domain under takings law, but not both.⁹⁷ Although that dichotomy has a deep lineage in Washington,⁹⁸ it is illusory. Because it is

⁹⁷ Goldwater Brief at 4–5.

⁹⁸ See, e.g., *Presbytery*, 114 Wn.2d at 329 (“These two constitutional theories are *alternatives* in cases where overly severe land use regulations are alleged,” so in each case, the court must “determine which of these two constitutional tests to utilize”); *Orion*, 109 Wn.2d at 646; *Cougar Bus. Owners Ass’n v. State*, 97 Wn.2d 466, 476, 647 P.2d 481 (1982) (“It is a well established principle that if a regulation is a valid exercise of the State’s police powers, it does not constitute a taking.”); *Rains v. Dep’t of Fisheries*, 89 Wn.2d 740, 745, 575 P.2d 1057 (1978) (“The critical determination under this constitutional provision is between a ‘taking’ and a regulation or restriction on the use of private property in the public interest, which is deemed to be a valid exercise of the police power of the State for which there is no right to compensation.”); *Maple Leaf Investors, Inc. v. Dep’t of Ecology*, 88 Wn.2d 726, 731, 565 P.2d 1162 (1977) (casting the issue as whether the government’s action “is a taking or damaging of private property for public use in violation of Const. art. 1, § 16, and the fifth amendment to the United States Constitution, or whether the prohibition is a valid exercise of the state police power.”); *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 408, 348 P.2d 664 (1960) (“The difficulty arises in deciding whether a restriction is an exercise of the police power or an exercise of the eminent domain power.”), *overruled on other grounds by Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976); *Conger v. Pierce Cnty.*, 116 Wash. 27, 36, 198 P. 377 (1921).

the source of Washington’s mistaken approach to regulatory takings law, this Court should reject it.

1. The dichotomy prompted Washington’s threshold questions to spare local governments from compensation claims.

The dichotomy grew from a line in *Mugler*, a 19th century U.S. Supreme Court decision seeming to suggest no exercise of the police power could effect a taking: “A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking”⁹⁹ Over three decades later, in *Conger*, this Court relied on *Mugler* to formulate Washington’s police-power-or- eminent-domain dichotomy: “Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public.”¹⁰⁰ This Court continued to recite the dichotomy as settled law, pointing to *Mugler* or *Conger*.¹⁰¹

⁹⁹ *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887).

¹⁰⁰ *Conger*, 116 Wash. at 36.

¹⁰¹ See, e.g., *Orion*, 109 Wn.2d at 646; *Cougar Bus. Owners Ass’n*, 97 Wn.2d at 476; *Rains*, 89 Wn.2d at 745; *Maple Leaf Investors*, 88 Wn.2d at 732–33; *Ackerman*, 55 Wn.2d at 408.

This line of authority collided with a separate line of federal case law that began in 1922 with *Pennsylvania Coal*, the U.S. Supreme Court decision inventing federal regulatory takings law with this axiom: “The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁰² This axiom left courts asking how a governmental action could simultaneously be: (1) *both* an exercise of the police power *and* a taking, as suggested by *Pennsylvania Coal*; and (2) *only* an exercise of the police power *or* the eminent domain power—but not both—as suggested by *Mugler*.

The Washington takings analysis emerged from an effort to resolve that apparent conundrum. In 1987, *Orion* took stock of how Washington courts had addressed the problem. *Orion* cast *Mugler* and its progeny as holding that “an exercise of the police power protective of the public, health, safety, or welfare cannot be a taking requiring compensation” and concluded that the tension between that holding and *Pennsylvania Coal* rendered federal takings law ambiguous¹⁰³ and left local governments uncertain about whether their land use regulations would be deemed a taking (for which compensation would be required) or a violation of due

¹⁰² *Pennsylvania Coal*, 260 U.S. at 415. See *Lingle*, 544 U.S. at 537 (describing this aspect of *Pennsylvania Coal* as a “watershed” in federal takings decisions).

¹⁰³ *Orion*, 109 Wn.2d at 645–46.

process (for which the remedy would be mere invalidation of the regulation).¹⁰⁴ *Orion* warned that the risk of paying compensation for a takings claim chills needed land use regulations.¹⁰⁵ *Orion* reported that, to resolve this apparent problem, Washington courts had shielded local government from the specter of takings claims by effectively allowing the government to absorb a disappointing substantive due process loss that would at least preclude an expensive takings loss.¹⁰⁶

But *Orion* recognized this position put Washington at odds with federal law: “Certain aspects of our state regulatory takings doctrine appear to conflict with federal analysis. We believe whatever differences exist result from our willingness to expressly recognize the role of substantive due process.”¹⁰⁷ *Orion* declined to follow prior Washington takings case law precisely because that law had departed from federal law;

¹⁰⁴ *Id.* at 649.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 650–51. Accord Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339, 368–69 (1989) (noting that the difference between compensation for a taking and invalidation for due process motivated *Orion* “to make a precise determination of the relative applicability of due process and taking limitations”); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1097 (1980) (pre-*Orion*, advocating use of substantive due process and its invalidation remedy as an “escape hatch” against takings claims seeking damages).

¹⁰⁷ *Orion*, 109 Wn.2d at 657.

Orion applied the federal takings analysis to reduce confusion and because the federal analysis might provide individuals broader protection.¹⁰⁸

Nevertheless, as this Court constructed and refined the Washington analysis through 1993, this Court assumed *Orion* had harmonized Washington and federal takings law,¹⁰⁹ committing Washington to a regulatory takings analysis premised on the *Mugler* police-power-or eminent-domain dichotomy and designed to shield government from takings compensation claims.

This explains the two unique elements of the Washington analysis existing when this Court finalized that analysis in 1993: the “fundamental attribute” and “seeks less to prevent a harm” threshold questions.¹¹⁰ This

¹⁰⁸ *Id.* (“[I]n order to avoid exacerbating the confusion surrounding the regulatory takings doctrine, and because the federal approach may in some instance provide broader protection, we will apply the federal analysis to review all regulatory takings claims, including *Orion*’s.”)

¹⁰⁹ 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, 146–50, 153–155 (2011) (discussing how the Washington takings analysis evolved from *Presbytery* through *Margola*). That this Court thought it was following federal law is proven by decisions applying Washington’s six-part analysis (or earlier versions of it) to regulatory takings claims under the U.S. Constitution. *E.g.*, *Margola*, 121 Wn.2d at 642; *Guimont*, 121 Wn.2d at 604; *Robinson*, 119 Wn.2d at 47; *Sintra*, 119 Wn.2d at 14; *Presbytery*, 114 Wn.2d at 327–28.

¹¹⁰ The U.S. Supreme Court did not jettison the “substantially advances” element from federal regulatory takings law until 2005. *Lingle*, 544 U.S. at 540–48. Since then, “substantially advances” has been the third unique element in the Washington analysis.

Court adopted those questions “[t]o determine which of these constitutional tests to utilize”—takings or substantive due process.¹¹¹

The good news is that structuring Washington’s takings analysis to divert claims into substantive due process law allowed this Court to relieve the perceived tension between *Mugler* (and its supposed holding that a valid exercise of the police power cannot be a taking) and *Pennsylvania Coal* (and its observation that an exercise of the police power can be a taking if it goes “too far”).

2. The dichotomy is illusory.

The bad news is that no tension exists between *Mugler* and *Pennsylvania Coal*, rendering the police-power-or-eminent-domain dichotomy illusory and undercutting the foundation of Washington’s threshold questions.

Mugler is effectively a dead letter. Because *Mugler* resolved a due process claim, it provides a weak takings precedent.¹¹² Had any tension

¹¹¹ *Presbytery*, 114 Wn.2d at 329. *Accord Guimont*, 121 Wn.2d at 593–94. *See Presbytery*, 114 Wn.2d at 332–33 (“No compensation (which properly belongs with a ‘taking’ analysis) is warranted in the face of a due process violation. Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body Accordingly, many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a “taking” formula.”) (paragraph break omitted).

¹¹² *See Mugler*, 123 U.S. at 657. *Accord id.* at 657–64. *See Wynne*, 86 WASH. L. REV. at 157–58 (explaining why *Mugler*’s foray into takings was arguably *dicta* and why later passages of *Mugler* relieve any tension with *Pennsylvania Coal*).

existed between *Mugler*'s diversion into takings law and *Pennsylvania Coal*'s announcement that a police power regulation may constitute a taking if it goes "too far," one would expect *Pennsylvania Coal* to have distinguished *Mugler*. But *Pennsylvania Coal* did not even cite *Mugler*. *Lucas*—the 1992 U.S. Supreme Court decision adding "deprivation of all economically beneficial uses" as a *per se* takings element—rejected an argument that *Mugler* provided a police-power shield against takings claims; *Lucas* cast *Mugler* as an example of a regulation merely affecting property values without depriving the owner of all economically beneficial uses.¹¹³

Pennsylvania Coal controls. *Lingle*—the 2005 decision ridding the federal takings analysis of the "substantially advances" element—called *Pennsylvania Coal* a "watershed decision" in takings law, but did not mention *Mugler*.¹¹⁴

Because *Mugler*'s weak precedent plays no meaningful role in federal takings law, no foundation exists for the *Mugler*-inspired police-power-or-eminent-domain dichotomy motivating Washington's threshold

¹¹³ *Lucas*, 505 U.S. at 1022, 1026 n.13. *See id.* at 1009–10, 1020–22 (reversing a lower court that relied on *Mugler*). Accord John M. Groen and Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1284–85 (1993) (recognizing *Lucas* as *Mugler*'s death knell).

¹¹⁴ *Lingle*, 544 U.S. at 537.

questions. Government action may be a valid exercise of the police power (and survive a due process challenge) even if, as cautioned by *Pennsylvania Coal*, it goes “too far” and constitutes a taking. As federal courts recognize, the same action can violate neither, one, or both constitutional provisions.¹¹⁵

As *amicus curiae* Washington State Association of Municipal Attorneys (“WSAMA”) notes, local governments do not need the *Mugler*-inspired protection this Court offered through Washington’s threshold questions, especially where, as here, the government faces a claim only for declaratory relief, not compensation.¹¹⁶

Recognizing the police-power-or-eminent-domain dichotomy as illusory—and why that undercuts the foundation of two unique Washington regulatory takings elements—underscores why this Court should overrule case law to the extent it invokes those unique elements.

¹¹⁵ E.g., *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484–85 (9th Cir. 2008); *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007).

¹¹⁶ WSAMA Brief at 11–16.

G. Amici fail to support Plaintiffs’ substantive due process claim.

1. RHA fails to loosen *Amunrud*’s embrace of the “rational basis” analysis.

RHA mistakenly suggests this Court’s recent resolution of *Fields* preserved the “undue oppression” analysis *Amunrud* rejected.¹¹⁷ None of the three *Fields* opinions mentioned “undue oppression.” Although the four-justice lead opinion did not reach the substantive due process claim,¹¹⁸ the one-justice concurrence and four-justice dissent cited *Amunrud* for the “rational basis” analysis governing substantive due process claims.¹¹⁹

RHA mistakenly asserts an *Amunrud* footnote recognized “undue oppression” applies only to “property-related cases.”¹²⁰ First, no Washington or federal court holds one substantive due process analysis applies to claims involving a property interest and another to claims involving a liberty or other non-property interest.

Second, *Lawton*, which created the “undue oppression” analysis in 1894, did not limit “undue oppression” to property interests; *Lawton*

¹¹⁷ RHA Brief at 13 (discussing *Fields v. State Department of Early Learning*, ___ Wn.2d ___, 434 P.3d 999 (2019)). See *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 25–30, 143 P.3d 571 (2006) (rejecting the “undue oppression” analysis).

¹¹⁸ *Fields*, 434 P.3d at 1002 n.2.

¹¹⁹ *Id.* at 1008 (Gordon McCloud, J., concurring), 1014 (Fairhurst, C.J., dissenting).

¹²⁰ RHA Brief at 13 (citing *Amunrud*, 158 Wn.2d at 226 n.5).

applied “undue oppression” to all government attempts at “interposing its authority in behalf of the public.”¹²¹ *Lawton*’s announcement of the “undue oppression” analysis immediately followed a list of liberty restraints—such as “the compulsory vaccination of children; the confinement of the insane . . . ; the restraint of vagrants”—that had been found constitutional.¹²² The first two Washington decisions citing *Lawton* did so not in property-related cases but in challenges to limits on the liberty interest in pursuing an occupation.¹²³

Finally, the *Amunrud* footnote merely addressed how the “undue oppression” analysis enjoyed limited applicability even in the land use cases where this Court had earlier applied it.¹²⁴ That footnote suggests no intent to preserve “undue oppression” for land use cases,¹²⁵ let alone for the broader universe of “property-related cases” RHA claims.

¹²¹ *Lawton v. Steele*, 152 U.S. 133, 137 (1894). See, e.g., *Orion*, 109 Wn.2d at 647–48 (citing *Lawton*’s “undue oppression” analysis); *Cougar Business*, 97 Wn.2d at 477 (same).

¹²² *Lawton*, 152 U.S. at 136.

¹²³ *State v. Rossman*, 53 Wash. 1, 2–3, 101 P. 357 (1909); *State v. Brown*, 37 Wash. 97, 100–01, 103–04, 79 P. 635 (1905), overruled by *State v. Boren*, 36 Wn.2d 522, 219 P.2d 566 (1950).

¹²⁴ See *Amunrud*, 158 Wn.2d at 226 n.5.

¹²⁵ See City’s Opening Brief in *Yim v. City of Seattle*, No. 96817-9 (“*Yim IP*”), at 21–23 (discussing the footnote in greater detail).

2. The FIT Rule survives “rational basis” review despite amici’s mischaracterizations of the Rule and the City’s arguments.

a) Amici cannot spin clear of literature recognizing implicit bias in tenancy decisions.

The City cites published materials from scholars and other researchers only to substantiate the existence of implicit bias in tenancy decisions.¹²⁶ NAA gains nothing from noting how those materials do not also mention first-in-time laws.¹²⁷ NAA questions one researcher’s motive, but offers no scholarship or research questioning the existence of implicit bias in tenancy decisions.¹²⁸

NAA misrepresents one study to assert housing discrimination is declining. According to NAA, that study said: “the most blatant forms of housing discrimination . . . have declined since the first national paired-testing study in 1977.”¹²⁹ But without the selective quotation, that passage supports the proposition that, although acts of conscious bias have declined, acts of implicit bias (the FIT Rule’s target) persist:

Although the most blatant forms of housing discrimination . . . have declined since the first national paired-testing study in 1977, **the forms of discrimination that persist (providing information about fewer units) raise the**

¹²⁶ City’s Opening Brief at 6–9, 58–59.

¹²⁷ NAA Brief at 1, 6.

¹²⁸ *Id.* at 6–7.

¹²⁹ *Id.* at 4 & n.5.

costs of housing search for minorities and restrict their housing options.”¹³⁰

MHCW just ignores implicit bias literature, claiming the FIT Rule is unfair to “a law-abiding owner with no discriminatory thoughts (unconscious or otherwise).”¹³¹ The literature teaches that no such person exists—we all harbor implicit biases.¹³²

RHA gains nothing from a decision finding a statute failed “rational basis” scrutiny under WA’s privileges and immunities clause.¹³³ That fact-bound decision ruled “the classification of medical malpractice claims which are subject to the eight-year statute of repose does not bear a rational relationship to the purpose of the statute.”¹³⁴ That fails to undercut the FIT Rule’s solid foundation in implicit bias research and a first-in-time approach touted as a best practice by landlord organizations and others.

¹³⁰ City’s Opening Brief at 6–7 (quoting CP 391) (emphasis added).

¹³¹ MHCW Brief at 16.

¹³² See City’s Opening Brief at 6–9.

¹³³ RHA Brief at 19 (citing *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 148–49, 960 P.2d 919 (1998)).

¹³⁴ *DeYoung*, 136 Wn.2d at 147.

b) The City has always granted *amici*'s unsurprising contention that landlords prefer best practices to government regulation.

The City invokes landlord-organization documents endorsing a first-in-time best practice for one purpose: to underscore the rational connection between the FIT Rule and the City's goal to limit the role of implicit bias in tenancy decisions. The City described those documents fairly, noted how the City Council codified that industry-endorsed best practice as a requirement through the FIT Rule, and explained the Rule is rational in part because it is based on a decision-making approach landlord organizations tout as a best practice.¹³⁵ Replying in Superior Court to complaints from Plaintiffs and RHA (appearing there as *amicus curiae* too) that RHA opposed converting a voluntary best practice into a requirement, the City noted: "The Rule's rationality stands despite Plaintiffs' unsurprising contention that landlords prefer best practices over government regulation."¹³⁶

NAA tries to support its argument by mischaracterizing the City's position: "In a breathtaking exercise of sophistry, the City of Seattle

¹³⁵ City's Opening Brief at 9–11, 18.

¹³⁶ City's Reply Brief at 7 (responding to Plaintiffs' Response Brief at 5–6, 41). *Accord* CP 506 (City responding to RHA's Superior Court *amicus curiae* brief: "RHA belabors the obvious: landlord organizations do not support the FIT Rule. The City does not claim otherwise.") (footnote omitted).

argues that ‘Landlord organizations . . . recommend first-in-time’ requirements.”¹³⁷ Without the misleading omissions, the City actually said: “Landlord organizations and others recommend first-in-time decision-making based on established criteria **as a best practice**.”¹³⁸ The City’s treatment of the best-practice documents mentioned no law or legal “requirement,” and did not suggest any landlord organization helped craft the FIT Rule.¹³⁹

RHA’s pique notwithstanding, “backpedaling” fairly describes its actions before and after the City Council passed the FIT Rule.¹⁴⁰ RHA initially echoed the industry best practice on a web page, telling its members to create a “criteria for tenant selection sheet so that it is clear to your applicants up front what you will consider as a quality tenant” and reminding landlords that “[u]sing a set criteria also helps show that you are screening all applicants alike and can help avoid claims of discrimination by applicants not granted tenancy.”¹⁴¹ But after the Council

¹³⁷ NAA Brief at 5 (citing City’s Opening Brief at 9–10). *See also id.* at 1, 6.

¹³⁸ City’s Opening Brief at 9 (emphasis added).

¹³⁹ *Id.* at 9–10.

¹⁴⁰ *See* RHA Brief at 2–3 (discussing City’s Reply Brief at 8).

¹⁴¹ CP 315.

passed the FIT Rule, RHA took down that page¹⁴² and posted a new one apparently underscoring the value of discretion in tenant selection.¹⁴³

Citing no source, RHA now backpedals further, claiming it favors first-in-time as a best practice only to break a “tie” among “equally valid” applications.¹⁴⁴

c) The magnitude of a regulation’s impact on a property owner is irrelevant under the “rational basis” analysis.

Under the “rational basis” analysis—the “most relaxed form of judicial scrutiny”¹⁴⁵—a plaintiff faces the exceedingly high burden of proving the challenged regulation advances no governmental purpose¹⁴⁶ or is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.”¹⁴⁷

RHA believes it “obvious” that the “rational basis” analysis focuses “on how that regulation impacts the legitimate property interests of the regulated landowner.”¹⁴⁸ RHA cites no court espousing that view. It

¹⁴² The City at least is unable to find it on the internet.

¹⁴³ See RHA Brief at 2–3 (citing Plaintiffs’ Response Brief at 5–6). The City is unable to access the web page via the URL cited in Plaintiffs’ Response Brief at 5 n.1.

¹⁴⁴ RHA Brief at 3.

¹⁴⁵ *Amunrud*, 158 Wn.2d at 223.

¹⁴⁶ *North Pacifica*, 526 F.3d at 484.

¹⁴⁷ *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012).

¹⁴⁸ RHA Brief at 15.

cites only a passage of a procedural due process decision involving no substantive due process claim.¹⁴⁹ Even that passage fails to suggest a due process violation is measured by the magnitude of the impact on a property owner—the quote says the touchstone of due process is governmental arbitrariness.¹⁵⁰

d) The FIT Rule does not elevate the timing of an application above a landlord’s tenancy criteria.

NAA and MHCW spin the FIT Rule as elevating the timing of rental applications over a landlord’s tenancy criteria or even an applicant’s ability to pay.¹⁵¹ But nothing in the FIT Rule prevents a landlord from converting all of their business concerns into criteria, including proof of ability to pay. Timing is subordinate to those criteria—timing comes into play only to help mitigate the role of implicit bias when choosing among applicants who satisfy those criteria. If this approach were so harmful, landlord organizations and other real estate professionals would not endorse it as a best practice.

¹⁴⁹ *Id.* (citing *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). See *Wolff*, 418 U.S. at 555–58 (resolving only a procedural due process claim).

¹⁵⁰ *Wolff*, 418 U.S. at 558 (“The touchstone of due process is protection of the individual against arbitrary action of government . . .”).

¹⁵¹ NAA Brief at 4; MHCW Brief at 16.

e) The FIT Rule does not require objective criteria or preclude any type of criterion, including requiring the parties to negotiate financial terms.

The FIT Rule imposes no substantive limit on a landlord’s criteria or minimum thresholds—just the procedural requirement to disclose and follow them.¹⁵² The criteria and thresholds need not be quantifiable or objective. They may be binary and subjective.

There is nothing to prevent a landlord from adopting criteria to ward off the Nazis and incompatible canines RHA fears will overwhelm landlords.¹⁵³ Under the FIT Rule, a landlord could require an interview¹⁵⁴ and could include criteria calling for compatibility between landlord and applicant and their pets. Nor does the Rule prevent negotiations; a criterion could be “must negotiate a set of mutually acceptable lease terms with the landlord,” with the minimum threshold being “lease terms the landlord deems acceptable.”¹⁵⁵

3. NAA’s and RHA’s arguments about the FIT Rule’s efficacy are irrelevant and meritless.

NAA and RHA borrow a page from *amicus curiae* Building Industry Association of Washington (“BIAW”) by critiquing the FIT

¹⁵² See SMC 14.08.050 (CP 335–38). See generally City’s Opening Brief at 31, 56–57.

¹⁵³ See RHA Brief at 17–19 & n.17.

¹⁵⁴ See City’s Opening Brief at 57.

¹⁵⁵ See *id.* at 31.

Rule’s efficacy.¹⁵⁶ As the City explained when answering BIAW, such critiques might be relevant under the discredited “substantially advances” analysis, but they have no place under the “rational basis” analysis controlling Plaintiffs’ claim.¹⁵⁷

RHA invents a goal for the FIT Rule—to “eliminate all landlord ‘subjectivity’”—and then attacks the Rule for not meeting it.¹⁵⁸ As the City explained, the FIT Rule’s goal is more modest: to “curb,” “address,” “reduce,” or “attempt to limit” implicit bias in tenancy decisions.¹⁵⁹ RHA provides no reason to think the FIT Rule—like the industry-touted best practice on which it is based—is not rationally related to that modest goal.

NAA claims the FIT Rules will “add to the already significant barriers to rental housing supply that exist in Seattle” without explaining how that is so or recognizing the Rule is not intended to address those barriers.¹⁶⁰ NAA also claims that underlying the FIT Rule is “the belief that apartment owners and operators are in the business of ‘not renting’

¹⁵⁶ NAA Brief at 5; RHA Brief at 15. *Accord* BIAW Brief at 1, 19.

¹⁵⁷ *See* City Answer to BIAW at 3–5. *See also* City’s Reply Brief at 2–4; City’s *Yim II* Reply Brief at 5–8.

¹⁵⁸ RHA Brief at 19. *Accord id.* at 18.

¹⁵⁹ City’s Opening Brief at 3, 5, 11, 17, 46, 55, 59. *Cf.* CP 524 (trial court using “eliminate” without foundation).

¹⁶⁰ *See* NAA Brief at 3–4. *See also* City Answer to BIAW at 6 (debunking BIAW’s claim that access to affordable housing as a rationale for the FIT Rule).

their inventory of rental homes to people,” but cites nothing to support that curious claim.¹⁶¹

NAA imagines that, in response to the FIT Rule, landlords will “simply adopt and publish more stringent screening criteria with the effect of perpetuating housing discrimination while remaining, facially, within the confines of the law.”¹⁶² Even if landlords were tempted to act as NAA imagines, they could not convert their criteria into tools of discrimination without violating federal, state, and City laws curbing practices that discriminate based on protected status through disparate impact.¹⁶³

4. Goldwater’s view of Washington substantive due process law conflicts with Plaintiffs’.

Plaintiffs concede Washington follows federal substantive due process law, or at least that no difference exists between Washington and

¹⁶¹ NAA Brief at 4.

¹⁶² *Id.* at 4–5.

¹⁶³ See, e.g., *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act, 42 U.S.C. §§ 3601 *et. seq.*); 42 U.S.C. § 3604 (preventing discrimination in the sale or rental of housing because of a protected status); 24 C.F.R. § 100.500 (“Liability may be established under the Fair Housing Act based on a practice’s discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.”); RCW 49.60.222 (outlawing discriminatory practices in real estate transactions, facilities, or services on the basis of a protected status); SMC 14.08.020 (prohibiting conduct in real estate transactions “the effect of which is to adversely affect or differentiate between or among individuals or groups of individuals” on the basis of a protected status).

federal law.¹⁶⁴ Several Plaintiffs are also plaintiffs in the companion case, *Yim II*, in which, represented by their *Yim I* counsel, they agree with the City that Washington may not depart from federal substantive due process law.¹⁶⁵ The parties' position follows this Court's decisions reviewing the Washington and federal due process provisions under the *Gunwall* factors and concluding they favor no independent substantive due process inquiry under the Washington Constitution.¹⁶⁶

Goldwater disagrees, insisting Washington not follow federal substantive due process law. Goldwater offers no *Gunwall* analysis suggesting this Court should abandon the federal "rational basis" analysis for substantive due process claims under the Washington Constitution. Instead, Goldwater turns *Gunwall* on its head to support Goldwater's demand that this Court not adopt the federal substantive due process

¹⁶⁴ Plaintiffs' Response Brief at 27–29.

¹⁶⁵ City's *Yim II* Reply Brief at 2 & n.1. See City's *Yim II* City's Opening Brief at 9–10.

¹⁶⁶ E.g., *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) (applying *Gunwall*, 106 Wn.2d at 61–62). See also *In re Dyer*, 143 Wn.2d 384, 393–94, 20 P.3d 907 (2001); *State v. Ortiz*, 119 Wn.2d 294, 302–05, 831 P.2d 1060 (1992), *disapproved of on other grounds by State v. Condon*, 182 Wn.2d 307, 343 P.3d 357 (2015). *Accord Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991) ("This court traditionally has practiced great restraint in expanding state due process beyond federal perimeters."). See City Opening Brief at 15–16.

analysis “without good reason to do so.”¹⁶⁷ Under *Gunwall*, creating distinct state constitutional law is the exception, not the default rule.¹⁶⁸

Goldwater also diverges from Plaintiffs when describing the territory to which “undue oppression” allegedly applies. Plaintiffs argue it applies to any challenge to a regulation affecting an interest in property, real or personal,¹⁶⁹ but Goldwater argues it applies only to challenges to land use regulations.¹⁷⁰ In its *Yim II* briefing, the City has already debunked the notion that a different analysis applies to land use regulations or that the FIT Rule is a land use regulation.¹⁷¹

5. *Amici* advance radical, outdated views of the relationship between the legislative and judicial branches.

This Court should look skeptically on *amici*’s radical, outdated views of substantive due process law. Citing no authority, NAA and RHA

¹⁶⁷ Goldwater Brief at 5–12. *Accord id.* at 6 (“This Court should decline . . . to simply adopt [the federal “rational basis”] test as its own without good reason.”), 9 (“It makes no more sense to follow federal jurisprudence on this matter . . . than to follow Canadian law.”).

¹⁶⁸ *Gunwall*, 106 Wn.2d. at 62–63. *Accord In Matter of the Personal Restraint of Matteson*, 142 Wn.2d 298, 310, 12 P.3d 585 (2000) (*Gunwall* “identified six nonexclusive criteria that must be addressed before we will interpret a provision of the state constitution independent of its parallel clause in the federal constitution”).

¹⁶⁹ Plaintiffs’ Response Brief at 23–27. *Accord* Plaintiffs’ *Yim II* Response Brief at 15, 33, 39.

¹⁷⁰ Goldwater Brief at 5, 13.

¹⁷¹ City’s *Yim II* Opening Brief at 20–23.

attack the FIT Rule as undermining the freedom to contract.¹⁷² The “freedom to contract” is a fixture of the *Lochner* era, which this Court rightly recognized ended in the 1930s.¹⁷³

Goldwater believes substantive due process law limits the government to curbing only activities that would amount to a nuisance.¹⁷⁴ Because no case law supports that radical notion, the only authority Goldwater offers is a passage from a law review article criticizing takings law.¹⁷⁵

Goldwater’s animus toward the “rational basis” analysis is unfounded. Goldwater decries “rational basis” review as a “legal pathology” that “expands the risk of judicial malfeasance” by “invit[ing] judges to manufacture *admittedly fictitious* justifications for a statute and then uphold real statutes based on such fictions.”¹⁷⁶ Goldwater contends “nobody really knows what the federal version of rational basis really means,” and that “the federal test fails to protect individual rights to the

¹⁷² NAA Brief at 8; RHA Brief at 16.

¹⁷³ *Amunrud* at 227–28. *Accord San Francisco Apartment Association v. City and Cnty. of San Francisco*, 881 F.3d 1169, 1180 (9th Cir. 2018) (rejecting an unsupported “liberty of contract” claim as a vestige of the *Lochner* era).

¹⁷⁴ Goldwater Brief at 15.

¹⁷⁵ *Id.* (citing Richard A. Epstein, *Missed Opportunities, Good Intentions: The Takings Decisions of Justice Antonin Scalia*, 6 BRIT. J. AM. LEGAL STUD. 109, 128 (2017)).

¹⁷⁶ *Id.* at 10, 11, 14 (emphasis in original).

extent that even the federal Constitution calls for.”¹⁷⁷ Goldwater backs none of this with authority other than a smattering of academic articles and concurring judicial opinions, including an especially flowery one from a Texas Supreme Court decision holding that a claim under Texas’s “due course” provision provides protections beyond the federal “rational basis” analysis.¹⁷⁸ Goldwater’s dim view of the “rational basis” analysis aside, “rational basis” has remained a fixture of federal law since the end of the *Lochner* era.

III. CONCLUSION

This Court has always intended to follow the regulatory takings and substantive due process analyses used by the U.S. Supreme Court. The City respectfully asks this Court to follow through on that intent by adopting those analyses as articulated by the U.S. Supreme Court and overruling Washington case law to the extent it recites incorrect analyses. That is the only path out of a situation where a respected federal judge cannot determine Washington’s substantive due process analysis¹⁷⁹ and

¹⁷⁷ *Id.* at 10, 12.

¹⁷⁸ *E.g., id.* at 4, 9, 12 (relying on *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 96–99 (Tex. 2015) (Willett, J., concurring)). *See Patel*, 469 S.W.3d at 80–87 (majority explaining the unique approach to the Texas provision).

¹⁷⁹ *Yim II* Order [Certifying Questions], Dkt. # 54 at 2 (“the Washington Supreme Court has not squarely answered what the proper standard is for a substantive due process claim”).

where this Court, when it last examined Washington’s regulatory takings analysis almost two decades ago, split 4-1-1-2-1 in an 84-page debate over the proper elements.¹⁸⁰ The federal law this Court has always intended to follow is, by contrast, a model of clarity, with no evident debate over its now-settled elements.¹⁸¹ This Court should embrace that law and resolve the confusion over Washington law.

Respectfully submitted May 28, 2019.

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¹⁸⁰ *Manufactured Housing*, 142 Wn.2d at 347–431.

¹⁸¹ RHA cites no debate at the federal level to back its warning that adopting the federal analyses would “invite uncertainty and new litigation.” RHA Brief at 2.

STATE CONSTITUTIONAL TEXTS CITED IN THIS BRIEF
(emphasis added)

Ariz. Const. art. 2 § 17: Eminent domain; just compensation for private property taken; public use as judicial question

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. **No private property shall be taken or damaged for public or private use without just compensation having first been made,** paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever 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.

Colo. Const. art. 2, § 14: Taking private property for private use

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes.

**Colo. Const. art. 2, § 15: Taking property for public use—
compensation, how ascertained**

Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever 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.

Mo. Const. art. 1, § 26: Compensation for property taken by eminent domain--condemnation juries--payment--railroad property

That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

Mo. Const. art. 1, 28: Limitation on taking of private property for private use--exceptions--public use a judicial question

That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a

use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.

S.C. Const. art. I, § 13(A): Taking private property . . .

Except as otherwise provided in this Constitution, **private property shall not be taken for private use** without the consent of the owner, **nor for public use without just compensation being first made** for the property. Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.

Wash. Const. art. I, § 16: Eminent domain

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. **No private property shall be taken or damaged for public or private use without just compensation having been first made,** or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever 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: Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Wyo. Const. art. 1, § 32: Eminent domain

Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.

Wyo. Const. art. 1, § 33: Compensation for property taken

Private property shall not be taken or damaged for public or private use without just compensation.

CERTIFICATE OF SERVICE

I certify that, on this day, I filed this document via the Clerk's electronic portal filing system, which should cause it to be served by the Clerk on all parties and *amici curiae*, and emailed a courtesy copy of this document to:

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