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CERTIFICATION FROM THE U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

IN

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

Plaintiffs,

vs.

CITY OF SEATTLE,

Defendant

CITY OF SEATTLE'S OPENING BRIEF
in Yim II

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

Unable to determine the status of Washington’s substantive due process law, U.S. District Court Judge John C. Coughenour has certified three questions to this Court. The answers are straightforward:

1. *What is the proper standard to analyze a substantive due process claim under the Washington Constitution?* This Court applies the same “rational basis” analysis long used by the U.S. Supreme Court, not the discredited *Lochner*-era “undue oppression” analysis.
2. *Is the same standard applied to substantive due process claims involving land use regulations?* Yes. Like federal courts, this Court applies the “rational basis” analysis to substantive due process claims involving land use regulations.
3. *What standard should be applied to Seattle Municipal Code § 14.09 (“Fair Chance Housing Ordinance”)?* Because the “undue oppression” analysis is invalid and Plaintiffs do not argue the Ordinance is subject to strict scrutiny, Judge Coughenour should apply the “rational basis” analysis to Plaintiffs’ Washington substantive due process claim.

Judge Coughenour’s confusion is justified. When addressing a substantive due process claim, this Court has consistently held that

Washington courts apply the federal analysis because the Washington Constitution provides protection no greater than the U.S. Constitution. Consistent with that holding, this Court has applied one analysis whether a claim arises under the Washington Constitution, the U.S. Constitution, or both. But for over two decades that one analysis was “undue oppression,” not the “rational basis” analysis used by federal courts. Although this Court rejected “undue oppression” and embraced “rational basis” in 2006, and has invoked only “rational basis” since then, this Court did not overrule its mistaken “undue oppression” case law. As this dispute proves, Washington’s “undue oppression” case law continues to sow confusion.

This Court should eliminate that confusion by overruling its decisions to the extent they invoke the “undue oppression” analysis.

The arguments in this case, *Yim II*, echo those already briefed in *Yim I*, No. 95813-1. Both cases involve a City of Seattle tenant protection law and are argued by the same counsel on behalf of essentially the same parties. This Court should take the opportunity presented by both cases to clearly align Washington with the correct federal substantive due process analysis: “rational basis.”

II. STATEMENT OF THE CASE

A. Factual background.

1. **Seattle residents with criminal histories—disproportionately people of color—face significant barriers to accessing housing.**

Approximately 30 percent of Seattle residents over the age of 18 have an arrest or conviction record and seven percent have a felony record.¹ Due to a rise in criminal background checks in the tenant screening process, people with arrest and conviction records face major barriers to accessing housing.² Sometimes landlords categorically exclude people with any prior arrest or conviction; one study found 43 percent of Seattle landlords are inclined to reject an applicant with a criminal history.³ One in five people who leaves prison becomes homeless soon thereafter.⁴

Inmates in King County are disproportionately racial minorities. For example, African Americans are 6.8 percent of the overall population of King County,⁵ but account for 36.3 percent of the King County Jail

¹ Dkt. # 33-6 at p. 57.

² Dkt. # 33-9 at p. 56.

³ Dkt. # 33-6 at p. 17.

⁴ *Id.*

⁵ Dkt. # 33-6 at p. 57.

population.⁶ Native Americans are 1.1 percent of King County’s population,⁷ but account for 2.4 percent of the King County Jail population.⁸

In 2014, 64 percent of the fair housing tests conducted by the Seattle Office for Civil Rights (“SOCR”) found incidents of different treatment based on race.⁹ This included incidents where African Americans had to undergo criminal record checks or were asked about criminal history when similarly situated whites were not.¹⁰

2. The City comprehensively analyzed the problem.

In 2010 and 2011, community organizations and residents asked the City to address barriers to rental housing and employment, including

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The rate of incarceration for Latino adults in King County is unknown because Latinos are aggregated with the white population data in the King County Jail. *Id.*

⁹ Seattle Office for Civil Rights, Press Release: *City Files Charge Against 13 Property Owners for Alleged Violations of Rental Housing Discrimination*, June 9, 2015 (“SOCR Press Release”), <https://www.seattle.gov/Documents/Departments/CivilRights/socr-pr-060915.pdf> (accessed Feb. 28, 2019). *See also* Dkt. # 33-7 at p. 1. In agreeing to a stipulated record, the parties also agreed they could cite published material, such as articles in periodicals or papers posted online. Dkt. # 24 at p. 3:9–10. The online materials cited in this brief are the same ones cited in the City’s federal court Opposition and Cross Motion. Dkt. # 33 at pp. 8–9.

¹⁰ SOCR Press Release; 2017 Seattle Office for Civil Rights Testing Program Executive Summary at 6, <https://www.seattle.gov/Documents/Departments/CivilRights/Testing/2017%20Testing%20Program%20Report%20FINAL.pdf> (accessed Feb. 28, 2019).

the use of criminal history.¹¹ One result was the passage in 2013 of what is now known as the Fair Chance Employment ordinance, which restricts the use of criminal history in employment decisions.¹²

The City also undertook a detailed process to address access to housing for people with criminal records. The City convened a 19-person Fair Chance Housing Committee (“FCH Committee”), which included a representative of Plaintiff Rental Housing Association of Washington (“RHA”).¹³ Based on recommendations from the FCH Committee and SOCR, the City’s Mayor transmitted a “fair chance housing” bill to the City Council in June 2017.¹⁴

The City Council studied the issue in meetings of its Civil Rights, Utilities, Economic Development and Arts (“CRUEDA”) Committee, which unanimously passed seven amendments to the Mayor’s bill.¹⁵ Recognizing that limiting landlords’ use of criminal histories is one

¹¹ Dkt. # 33-7 at p. 1.

¹² Ordinance 124201, http://clerk.seattle.gov/~archives/Ordinances/Ord_124201.pdf (accessed Feb. 28, 2019). *See* Seattle Municipal Code (“SMC”) 14.17.005 (indicating current title; https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.17THUSCRHIEMDE_14.17.005SHTI (accessed Feb. 28, 2019)).

¹³ Dkt. # 33-3 at pp. 37–38; Dkt. # 33-6 at p. 21.

¹⁴ Dkt. # 24 at p. 9 ¶ 26.

¹⁵ Dkt. # 24 at p. 10 ¶ 31; Dkt. # 33-12 at pp. 15–16.

strategy to increase access to housing for people with those histories, the amended bill included such other strategies as directing SOCR to conduct regular fair housing testing and launch a “Fair Housing Home” landlord training program to reduce racial bias and biases against other protected classes in tenant selection.¹⁶ The CRUEDA Committee recommended the full City Council pass the amended bill.¹⁷

3. The City adopted the Fair Chance Housing Ordinance to address the problem.

The City Council unanimously passed the Ordinance as recommended by the CRUEDA Committee.¹⁸ The law, codified as Seattle Municipal Code (“SMC”) Chapter 14.09, took effect September 22, 2017, but to provide time for City rule-making and for landlords to adjust their business practices, its operative provisions did not take effect until February 19, 2018.¹⁹

The Ordinance has several provisions, but Plaintiffs focus on the one announcing that no person may “[r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a

¹⁶ Dkt. # 33-12 at pp. 24, 61. *Accord* Dkt. # 33-7 at p. 32 (bill summary describing other initiatives to decrease bias).

¹⁷ Dkt. # 24 at p. 10 ¶ 31; Dkt. # 33-12 at p. 16.

¹⁸ Dkt. # 24 at p. 10 ¶¶ 31-32; Dkt. # 33-12 at p. 53 through Dkt. # 33-14 at p. 22.

¹⁹ Dkt. # 24 at p. 10 ¶ 33.

member of their household, based on any arrest record, conviction record, or criminal history,” with certain exceptions.²⁰ “Adverse actions” include refusing to negotiate a rental real estate transaction, denying tenancy, evicting an occupant of a dwelling unit, or applying different terms to a tenant.²¹

B. Procedural history.

Plaintiffs—three landlords and RHA—initiated this action in King County Superior Court. They seek a declaration invalidating the entire Ordinance, arguing its ban on disclosing, inquiring about, or taking an adverse action based on any arrest record, conviction record, or criminal history facially violates landlords’ rights to free speech and substantive due process under the U.S. and Washington Constitutions.²²

After the City removed this action to the U.S. District Court for the Western District of Washington, the parties briefed cross motions for summary judgment.²³ At the conclusion of that briefing, and because this

²⁰ SMC 14.09.025.A.2. Dkt. # 33-13 at p. 5. For a description of the Ordinance’s other primary provisions, *see* City’s Opp. and Cross Motion, Dkt. # 33 at pp. 11–12.

²¹ SMC 14.09.010. Dkt. # 33-12 at pp. 61–62.

²² *See generally* Pls.’ Mot. for Summ. J., Dkt. # 23. Only RHA asserts an as-applied challenge, limited to the free speech claim. Dkt. # 24 at p. 8 ¶ 18 n.2.

²³ *See generally* Dkt. #s 23, 33, 48, and 50 (parties’ briefs on cross motions).

Court had accepted direct review of *Yim I*,²⁴ the City asked the District Court to certify to this Court the question of what analysis controls Washington substantive due process claims.²⁵ Federal Judge John C. Coughenour granted the City’s motion, certifying three sub-questions.²⁶

III. CERTIFIED QUESTIONS

1. What is the proper standard to analyze a substantive due process claim under the Washington Constitution?
2. Is the same standard applied to substantive due process claims involving land use regulations?
3. What standard should be applied to Seattle Municipal Code § 14.09 (“Fair Chance Housing Ordinance”)?

IV. ARGUMENT

This Court reviews certified questions from a federal court *de novo*.²⁷ This Court should take the opportunity Judge Coughenour’s questions present to clarify that a substantive due process claim under the Washington Constitution is subject to the same “rational basis” analysis long applied by federal courts to claims under the U.S. Constitution, not the discredited *Lochner*-era “undue oppression” analysis this Court

²⁴ See *Yim v. City of Seattle*, No. 95813-1, which raises the same question as *Yim II* about the appropriate analysis to apply to a Washington substantive due process claim.

²⁵ Dkt. # 51.

²⁶ Dkt. # 54.

²⁷ *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 580, 397 P.3d 120 (2017).

mistakenly applied to Washington and federal due process claims for over two decades.

A. “Rational basis” is the proper standard to analyze a substantive due process claim under the Washington Constitution.

1. Washington follows the federal analysis: “rational basis.”

The due process clauses of the Washington and U.S. Constitutions are identical.²⁸ This Court “has repeatedly iterated that the state due process clause is coextensive with and does not provide greater protection than the federal due process clause.”²⁹ This Court reviewed the two clauses under the *Gunwall* factors and concluded they favor no independent inquiry under the Washington Constitution.³⁰ Given the

²⁸ Wash. Const. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”); U.S. Const. amend. V. (“No person shall . . . be deprived of life, liberty, or property, without due process of law”); U.S. Const. amend. XIV (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

²⁹ *Nielsen v. Washington State Department of Licensing*, 177 Wn. App. 45, 52 n.5, 309 P.3d 1221 (2013). *Accord State v. Shelton*, 194 Wn. App. 660, 666, 378 P.3d 230 (2016), *rev. denied*, 87 Wn.2d 1002, 386 P.3d 1088 (2017) (“In analyzing a substantive due process challenge, our Supreme Court has held the Washington due process clause does not afford broader protection than the Fourteenth Amendment.”).

³⁰ *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) (applying *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). *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.”).

clauses' similarity, this Court accords great weight to the analysis the U.S. Supreme Court employs to assess federal due process claims.³¹

The U.S. Supreme Court has consistently applied a “rational basis” analysis to substantive due process claims for nearly a century.³² The analysis stems from the belief that, unless a plaintiff can show a law lacks a rational foundation, “the people must resort to the polls not the courts.”³³ Under this “most relaxed form of judicial scrutiny,”³⁴ a plaintiff faces the exceedingly high burden of proving the challenged regulation advances no governmental purpose³⁵ or is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general

³¹ *Manussier*, 129 Wn.2d at 680; *Rozner*, 116 Wn.2d at 351. In the absence of a more restrictive Washington due process provision, this Court should respect the federal due process analysis and apply it without modification. See *North Carolina v. Butler*, 441 U.S. 369, 375–76 (1979) (“a state court can neither add to nor subtract from the mandates of the United States Constitution”). Accord *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 676, 231 P.2d 325 (1951) (“It scarcely needs be said that, with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of that court no matter what our private views may be.”).

³² E.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–42 (2005); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *Nectow v. Cambridge*, 277 U.S. 183, 187–88 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Accord *Yagman v. Garcetti*, 852 F.3d 859, 867 (9th Cir. 2017); *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994).

³³ *Williamson*, 348 U.S. at 488 (quoting *Munn v. State of Illinois*, 94 U.S. 113, 134 (1876)).

³⁴ *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 223, 143 P.3d 571 (2006).

³⁵ *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008).

welfare.”³⁶ A court must presume a regulation is valid; the plaintiff may overcome that presumption only by clearly showing the regulation is arbitrary and irrational.³⁷ This analysis defers “to legislative judgments about the need for, and likely effectiveness of, regulatory actions” because the U.S. Supreme Court has “long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation.”³⁸

2. Plaintiffs invoke a Nineteenth Century “undue oppression” analysis, which this Court rejected in 2006 after mistakenly embracing it for over two decades.

Asserting this Court diverges from federal courts when assessing a substantive due process claim under the Washington Constitution, Plaintiffs invoke a Nineteenth Century “undue oppression” analysis,³⁹ which this Court mistakenly embraced for over two decades before rejecting it in 2006.

Into the 1970s, this Court used the “rational basis” analysis and rejected the “undue oppression” analysis for substantive due process

³⁶ *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012).

³⁷ *Id.*

³⁸ *Lingle*, 544 U.S. at 545.

³⁹ Pls.’ Mot. for Summ. J., Dkt. # 23 at pp. 21–24; Pls. Opp. and Reply, Dkt. # 48 at pp. 32–34.

claims. In 1976, *Salstrom's Vehicles* dismissed a due process challenge by reciting a U.S. Supreme Court “rational basis” axiom: “It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”⁴⁰ Turning aside the plaintiff’s arguments, *Salstrom's Vehicles* rejected “undue oppression” as the standard: “That a statute is unduly oppressive is not a ground to overturn it under the due process clause.”⁴¹

But in the 1980s—without mentioning “rational basis” or recognizing the shift—this Court mistakenly recited “undue oppression” as the federal analysis,⁴² extoling it for lodging wide discretion in courts, not the legislature, to balance public and individual interests.⁴³ Relying on *Lawton v. Steele*—an 1894 U.S. Supreme Court decision premised on the *Lochner*-era notion that courts must “supervise” the legislature to cull “unusual and unnecessary restrictions upon lawful occupation”⁴⁴—this

⁴⁰ *Salstrom's Vehicles v. Department of Motor Vehicles*, 87 Wn.2d 686, 693, 555 P.2d 1361 (1976) (quoting *Williamson*, 348 U.S. at 487–88).

⁴¹ *Id.*

⁴² *E.g.*, *Orion Corp. v. State*, 109 Wn.2d 621, 647–48, 747 P.2d 1062 (1987); *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986); *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 477, 647 P.2d 481 (1982).

⁴³ *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 331, 787 P.2d 907 (1990).

⁴⁴ *Lawton v. Steele*, 152 U.S. 133, 137 (1894). *See, e.g.*, *Orion*, 109 Wn.2d at 647–48 (citing *Lawton*); *Cougar Business*, 97 Wn.2d at 477 (“The classic statement of the rule in *Lawton* . . . is still valid today.”). *See also Amunrud*, 158 Wn.2d at 227–29 (discussing the rise, fall, and perils of the *Lochner* era).

Court applied that analysis through three inquiries: “(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner.”⁴⁵ To aid the discretionary balancing act prompted by the third, usually determinative inquiry, this Court adopted a set of factors suggested in a 1983 law review article.⁴⁶

The “undue oppression” analysis was never an expression of a unique Washington constitutional provision—it was a misstatement of the federal analysis. Washington embraced “undue oppression” in the 1980s through case law assessing claims—often takings claims, not due process claims—raised under the U.S. Constitution alone or under the U.S. and Washington Constitutions.⁴⁷ For the next 15 years, still believing it was using the federal analysis, this Court applied “undue oppression” to claims

⁴⁵ *Presbytery*, 114 Wn.2d at 330.

⁴⁶ *Id.* at 331 (the third inquiry “will usually be the difficult and determinative one”; adopting the factors suggested by William B. Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. URB. & CONTEMP. L. 3, 33 (1983)).

⁴⁷ *See id.* at 326–28, 330–31 (takings; both constitutions); *Orion*, 109 Wn.2d at 624–26, 646–49 (takings; both); *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987) (due process; no source specified); *West Main*, 106 Wn.2d at 52 (1986) (due process; federal only); *Cougar Business*, 97 Wn.2d at 476–77 (takings; both).

under the U.S. Constitution and where the Court identified no constitutional source.⁴⁸

In 2006, this Court appeared to correct course in *Amunrud* by again recognizing “rational basis” as the proper analysis and rejecting a dissenting Justice’s use of “undue oppression” for a claim under both constitutions.⁴⁹ *Amunrud* ruled that imposing an “undue oppression” analysis “would require us to overturn nearly 100 years of case law in Washington” and return Washington law to the long-rejected *Lochner* era “in which elected legislatures were viewed as having limited power (police power) to enact laws providing for health, safety, and welfare of their citizens.”⁵⁰ Since *Amunrud*, this Court has applied only the “rational basis” analysis to substantive due process claims.⁵¹

⁴⁸ See, e.g., *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 117–18, 118 P.3d 322 (2005) (unspecified); *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 732–34, 57 P.3d 611 (2002) (unspecified); *Asarco Inc. v. Department of Ecology*, 145 Wn.2d 750, 761–63, 43 P.3d 471 (2002) (federal); *Weden v. San Juan County*, 135 Wn.2d 678, 706–07, 958 P.2d 273 (1998) (unspecified); *Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 661–67, 946 P.2d 768 (1997) (unspecified); *Robinson v. City of Seattle*, 119 Wn.2d 34, 48, 51–52, 830 P.2d 318 (1992) (federal); *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 6, 20–22, 829 P.2d 765 (1992) (federal).

⁴⁹ *Amunrud*, 158 Wn.2d at 226. See *id.* at 211 (explaining the claim was under both constitutions).

⁵⁰ *Id.* at 227–28 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

⁵¹ See, e.g., *Dot Foods, Inc. v. State, Dept. of Revenue*, 185 Wn.2d 239, 372 P.3d 747 (2016); *In re Detention of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014). Five Justices in a recent plurality decision cited *Amunrud* and “rational basis” as the appropriate analysis. *Fields v. State Department of Early Learning*, No. 95024-5, ___ Wn.2d ___, 2019 WL 759695, at *8 ¶ 37 (Gordon McCloud, J., concurring), at *15 ¶ 64 (Fairhurst, C.J., dissenting) (Feb. 21, 2019). Cf. *id.* at *2 ¶ 8 n.2 (lead opinion declining

3. This Court should overrule its case law to the extent it invokes the “undue oppression” analysis.

Although *Amunrud* embraced “rational basis” and rejected “undue oppression,” *Amunrud* did not overrule Washington’s “undue oppression” case law. This Court should do that now.

This Court reconsiders its precedent when it is incorrect and harmful, or its legal underpinnings have changed or disappeared.⁵² Washington’s “undue oppression” precedent merits reconsideration on all counts.

The “undue oppression” analysis is incorrect for the reasons *Amunrud* explained: it hearkens back to the *Lochner* era when courts failed to defer appropriately to legislative determinations of the proper balance to protect public welfare.⁵³ The U.S. Supreme Court—which Washington endeavors to follow—long ago abrogated *Lochner*⁵⁴ and

to address the substantive due process issue). Without addressing the merits of the “undue oppression” analysis, this Court rejected a stand-alone, “undue oppression” argument by factually distinguishing an earlier “undue oppression” decision. *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 254–60, 218 P.3d 180 (2009).

⁵² *W.G. Clark Constr. Co. v. Pac. NW Reg’l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014).

⁵³ *Amunrud*, 158 Wn.2d at 226–30.

⁵⁴ See *Ferguson v. Skrupa*, 372 U.S. 726, 728–31 (1963).

rejected the “undue oppression” analysis.⁵⁵ Other states decline to follow Washington’s use of “undue oppression,”⁵⁶ and the Georgia Supreme Court overruled its own “undue oppression” precedent for “rational basis” in 2003.⁵⁷

Washington’s “undue oppression” precedent is harmful. *Amunrud* explained how “undue oppression” would “strip individuals of the many rights and protections that have been achieved through the political process.”⁵⁸ As evidenced by Judge Coughenour’s questions to this Court, Washington’s dated “undue oppression” case law continues to sow confusion. Since *Amunrud*, some Washington Court of Appeals decisions

⁵⁵ *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R.*, 393 U.S. 129, 143 (1968).

⁵⁶ *Smith Inv. Co. v. Sandy City*, 342 Utah Adv. Rep. 10, 958 P.2d 245, 252 n.9 (1998); *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 289 (Minn. App. 1996).

⁵⁷ *King v. City of Bainbridge*, 276 Ga. 484, 488, 577 S.E.2d 772 (2003) (overruling *Cannon v. Coweta County*, 260 Ga. 56, 58, 389 S.E.2d 329 (1990)).

⁵⁸ *Amunrud*, 158 Wn.2d at 230.

used “rational basis,”⁵⁹ but others recited “undue oppression.”⁶⁰ Noting “confusion over the proper test to apply,” one Court of Appeals decision ducked the question by ruling the claim failed under both analyses.⁶¹

While applying “rational basis” to federal due process claims,⁶² the Ninth Circuit Court of Appeals invoked “undue oppression” when attempting to apply what it assumed incorrectly were Washington-specific due process principles to a claim under the Washington Constitution.⁶³ Depending on what version of this authority a trial court follows: a federal due process

⁵⁹ *E.g.*, *State v. Chesley*, 4 Wn. App. 2d 1024, 2018 WL 3039829, at *2 (2018, unpublished); *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d. 712, 741–42, 406 P.3d 1199 (2017), *rev. denied*, 191 Wn.2d 1001, 422 P.3d 913 (2018); *cert. petition filed* Nov. 2, 2018; *State v. Pendell*, 1 Wn. App. 2d 1064, 2018 WL 287503 (2018, unpublished); *Olympic Stewardship Foundation v. State*, 199 Wn. App. 668, 720–21, 399 P.3d 562 (2017), *rev. denied*, 189 Wn.2d 1040, 409 P.3d 1066, *cert. denied*, 139 S. Ct. 81 (2018); *Jespersen v. Clark County*, 199 Wn. App. 568, 584–85, 399 P.3d 1209 (2017); *State v. Seward*, 196 Wn. App. 579, 384 P.3d 620 (2016); *State v. Ma*, 195 Wn. App. 1036, 2016 WL 4248585 (2016, unpublished); *Shelton*, 194 Wn. App. at 666–67; *Nielsen*, 177 Wn. App. at 53; *Johnson v. Washington State Department of Fish and Wildlife*, 175 Wn. App. 765, 775–78, 305 P.3d 1130 (2013); *In re J.R.*, 156 Wn. App. 9, 18–19, 230 P.3d 1087 (2010).

⁶⁰ *E.g.*, *Klineburger v. Washington St. Dept. of Ecology*, 4 Wn. App. 2d 1077, 2018 WL 3853574, at *4–5 (2018, unpublished); *Fox v. Skagit County*, 193 Wn. App. 254, 278–79, 372 P.3d 784 (2016); *Greenhalgh v. Department of Corrections*, 180 Wn. App. 876, 892, 324 P.3d 771 (2014); *Cradduck v. Yakima County*, 166 Wn. App. 435, 446–451, 271 P.3d 289 (2012); *Bayfield Resources Co. v. Western Wash. Growth Mgmt. Hearings Bd.*, 158 Wn. App. 866, 881–888, 244 P.3d 412 (2010).

⁶¹ *Cannatronics v. City of Tacoma*, 190 Wn. App. 1005, 2015 WL 5350873, at *4 n.7 (2015, unpublished).

⁶² *E.g.*, *Samson*, 683 P.3d at 1058; *North Pacifica*, 526 F.3d at 484.

⁶³ *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1193–95 (9th Cir. 2012).

claim could be subject to “undue oppression” if filed in a state court,⁶⁴ but “rational basis” if filed in federal court,⁶⁵ and a Washington due process claim could be subject to “rational basis” in state court,⁶⁶ but “undue oppression” in federal court.⁶⁷

The legal underpinnings of “undue oppression” disappeared long ago. When embracing “undue oppression” from *Lawton*, this Court relied on *Goldblatt*, a 1962 U.S. Supreme Court decision that reads more like a takings case than a due process case and mistakenly refers to *Lawton*’s “undue oppression” analysis as the “classic statement of the rule . . . still valid today.”⁶⁸ But *Goldblatt* no longer carries value. The following year, without mentioning *Goldblatt*, the U.S. Supreme Court rejected, as against the weight of contemporary authority, the notion that a court may “decide whether a statute bears too heavily upon [a] business and by so doing violates due process.”⁶⁹ And in 1968, citing a raft of “rational basis”

⁶⁴ *E.g.*, *Greenhalgh*, 180 Wn. App. at 892.

⁶⁵ *E.g.*, *Samson*, 683 F.3d at 1058.

⁶⁶ *E.g.*, *Haines-Marchel*, 1 Wn. App. 2d. at 741–42.

⁶⁷ *E.g.*, *Laurel Park*, 698 F.3d at 1193–95.

⁶⁸ *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). For examples of this Court relying on *Goldblatt* for the *Lawton* “undue oppression” analysis, see *Presbytery*, 114 Wn.2d at 330–31; *Orion*, 109 Wn.2d at 646–47; *West Main*, 106 Wn.2d at 52; and *Cougar Business*, 97 Wn.2d at 477.

⁶⁹ *Ferguson*, 372 U.S. at 728–29.

decisions, the Court rejected an oppression-based due process claim as “requir[ing] no further consideration.”⁷⁰ *Goldblatt* was never a feature of federal due process law. The U.S. Supreme Court eventually tossed *Goldblatt* on a pile of decisions conflating due process and takings law.⁷¹ And the Colorado Supreme Court recently refused to apply *Goldblatt*, concluding it “does not reflect the [U.S.] Supreme Court’s current police power jurisprudence.”⁷²

The City casts no blame on this Court for embracing “undue oppression” during a period when the U.S. Supreme Court conflated due process and takings concepts.⁷³ But that period is over. The U.S. Supreme Court untangled due process and takings precedents in 2005, pointing to

⁷⁰ *Brotherhood*, 393 U.S. at 143.

⁷¹ *Lingle*, 544 U.S. at 541.

⁷² *Town of Dillon v. Yacht Club Condominiums Home Owners Assn.*, 2014 CO 37, 325 P.3d 1032, 1042 (Colo. 2014). *See generally id.*, 325 P.3d at 1042–43.

⁷³ *See, e.g.*, William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1081 (1980) (“Confusion over the proper role of substantive due process and over the relationship between due process and takings is a pervasive problem.”); *Orion*, 109 Wn.2d at 653 (“definitive answers, so necessary for state courts to make reasoned determinations concerning minimum federal due process requirements, remain unavailable” from the U.S. Supreme Court); *Town of Dillon*, 325 P.3d at 1043 (“For decades after *Goldblatt* was decided, the Supreme Court continued to wrestle with the relationship between regulatory takings and due process.”). *See generally* Roger D. Wynne, *The Path Out of Washington’s Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 WASH. L. REV. 125, 129–31 (2011) (tracing how the U.S. Supreme Court conflated due process and takings concepts for decades).

Goldblatt as a source of the Court’s confusion.⁷⁴ Federal law—which this Court has always endeavored to follow—is now clear. This Court should embrace it and eliminate confusion by overruling Washington’s dated “undue oppression” case law.

B. “Rational basis” applies to substantive due process claims involving land use regulations.

No Washington or federal opinion holds “undue oppression” applies in some situations and “rational basis” in others. The only line courts draw is between laws that implicate fundamental rights (which are subject to strict scrutiny, not “undue oppression”) and laws that do not (which are subject to “rational basis”).⁷⁵

Federal courts applying federal substantive due process law—which this Court has always professed to follow—use the “rational basis” analysis to assess claims involving land use regulations.⁷⁶

Any suggestion that “undue oppression” in Washington is the exclusive province of land use disputes founders on this Court’s pre-*Amunrud* decisions applying “undue oppression” beyond land use

⁷⁴ *Lingle*, 544 U.S. at 541. See also *Nollan v. California. Coastal Comm’n*, 483 U.S. 825, 835 n.3 (1987) (criticizing *Goldblatt* for assuming similar inquiries under due process and takings claims). *Accord Town of Dillon*, 325 P.3d at 1043.

⁷⁵ *Amunrud*, 158 Wn.2d at 220, 222; *Witt v. Department of Air Force*, 527 F.3d 806, 817 (2008).

⁷⁶ See, e.g., *Nectow*, 277 U.S. 185–89; *Village of Euclid*, 272 U.S. at 379–84; *Samson*, 683 F.3d 1053–56; *North Pacifica*, 526 F.3d 480–83.

regulations.⁷⁷ Since *Amunrud*, at least one lower court decision likewise applied “undue oppression” outside a land use dispute⁷⁸ and another applied “rational basis” to a land use dispute.⁷⁹

Perhaps Judge Coughenour’s question about the standard to apply to claims involving land use regulations stems from a sentence and footnote in *Amunrud* mentioning land use cases:

The dissent erroneously claims this court must *also* evaluate whether the challenged law is “unduly oppressive on individuals,” citing as primary authority, *Lawton v. Steele*, 152 U.S. 133 . . . (1894) (**an early land use case**).^{FN5}

^{FN5}As this court discussed in *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273 (1998), this additional requirement has limited applicability **even in land use cases** See also Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495 (2000) (explaining how the “oppressive” test has been used in substantive due process **land use cases** in this state and discussing its departure from federal jurisprudence, which generally applies the rational basis test discussed above).⁸⁰

⁷⁷ See, e.g., *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 238, 119 P.3d 325 (2005) (local improvement district assessments); *Viking Properties*, 155 Wn.2d at 130–31 (judicial enforcement of a private covenant); *Willoughby*, 147 Wn.2d at 732–34 (prisoner labor conditions); *Asarco*, 145 Wn.2d at 761–63 (clean-up liability); *Rivett v. City of Tacoma*, 123 Wn.2d 573, 581–83, 870 P.2d 299 (1994) (indemnity for sidewalk injuries).

⁷⁸ E.g., *Greenhalgh*, 180 Wn. App. at 881 (regulation of inmates’ personal clothing items).

⁷⁹ E.g., *Olympic Stewardship*, 199 Wn. App. at 720–21.

⁸⁰ *Amunrud*, 158 Wn.2d at 226 (emphasis added).

That passage did not preserve “undue oppression” as an analysis unique to land use cases under the Washington Constitution. First, *Amunrud* was not limited to the Washington Constitution. It decided a claim under both the U. S. and Washington Constitutions, and *Weden* (cited in *Amunrud*’s footnote) specified no constitutional basis.⁸¹ Second, *Amunrud* mistakenly cast *Lawton* as a land use case—it involved a ban on using nets to catch fish from public waters.⁸² Third, neither *Weden* nor the law review article *Amunrud* cited reported that Washington courts used “undue oppression” for land use cases and “rational basis” for others. The article’s thesis was that Washington courts should enforce “built-in constraints on the police power,” not invoke substantive due process law, which the article reported had been reborn through land use cases.⁸³ Finally, the article, written in 2000, mistakenly cast undue oppression as the reserve of land use law:

In recent years, substantive due process has been reserved to a limited number of Washington land use cases involving facts the court may have seen as egregious exercises of governmental power, that is, situations where the “undue oppression” leapt out at the judges.⁸⁴

⁸¹ *Id.* at 211; *Weden v. San Juan County*, 135 Wn.2d 678, 706–07, 958 P.2d 273 (1998).

⁸² *Lawton*, 152 U.S. at 135.

⁸³ Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 497 (2000). *See generally id.* at 513–17 (contrasting the limits of “the police power’s inherent scope” with Washington’s unique substantive due process law, which the author cast as a “response to the U.S. Supreme Court’s approach to land use takings cases”).

⁸⁴ *Id.* at 516.

That claim was incorrect at the time: at least one earlier Washington Supreme Court decision had applied the “undue oppression” analysis outside land use disputes.⁸⁵ And a string of decisions after the article disproved the claim by applying “undue oppression” beyond land use.⁸⁶

Amunrud’s point is not in a footnote’s digression about land use cases. Its point is that the “rational basis” analysis—not “undue oppression”—controls substantive due process challenges to laws that implicate no fundamental right.⁸⁷ That logic extends to all government regulations, including land use laws. The *Lochner* era is over. Any law—land use or otherwise—not affecting a fundamental right is due the deference the “rational basis” analysis accords.

C. Judge Coughenour should apply “rational basis” in this case.

Because the “rational basis” analysis controls substantive due process claims under the Washington Constitution, Judge Coughenour should apply it to Plaintiffs’ substantive due process claim against the

⁸⁵ *Rivett*, 123 Wn.2d at 581–83 (1994: indemnity for sidewalk injuries).

⁸⁶ See, e.g., *Tiffany Family Trust*, 155 Wn.2d at 238 (2005: local improvement district assessments); *Viking Properties*, 155 Wn.2d at 130–31 (2005: judicial enforcement of a private covenant); *Willoughby*, 147 Wn.2d at 732–34 (2002: prisoner labor conditions); *Asarco*, 145 Wn.2d at 761–63 (2002: clean-up liability). *Accord Greenhalgh*, 180 Wn. App. at 881 (2014: regulation of inmates’ personal clothing items).

⁸⁷ See *Amunrud*, 158 Wn.2d at 222, 227–29.

City’s Fair Chance Housing Ordinance. Plaintiffs do not argue the Ordinance is subject to strict scrutiny.⁸⁸

Even if this Court were to rule the “undue oppression” analysis applies to land use regulations, the Ordinance is not a land use regulation. The term of art in Washington is “development regulations,” which the Growth Management Act defines as “the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances”⁸⁹ This case raises no question about Plaintiffs’ ability to rent residential property consistent with City development regulations—presumably Plaintiffs comply with all regulations of the structures and type of uses allowed on their property.

⁸⁸ Plaintiffs claim the Ordinance is subject to the “undue oppression” analysis. Pls.’ Mot. for Summ. J., Dkt. # 23 at pp. 21–24; Pls. Opp. and Reply, Dkt. # 48 at pp. 32–34. Any bid for strict scrutiny would falter under case law proving the Ordinance—which merely limits the information landlords may use in making tenancy decisions—implicates no “fundamental right” within the meaning of substantive due process law. *See Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (fundamental rights are those objectively and deeply rooted in our history and tradition and implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed); *Yagman*, 852 F.3d at 866–67 (a regulation affecting only economic interests implicates no fundamental right); *Samson*, 683 F.3d at 1058 (same); *Olympic Stewardship*, 199 Wn. App. at 720 (“we are aware of no case law holding that property owners have a fundamental right to do what they wish on their property without being troubled by reasonable regulation”).

⁸⁹ RCW 36.70C.030(7).

The Ordinance regulates Plaintiffs' businesses. It affects how landlords treat prospective tenants. It is not a development regulation.

V. CONCLUSION

This Court has always professed to apply the federal analysis to substantive due process claims, and has applied the same analysis whether a claim arises under the U.S. Constitution or the identical clause of the Washington Constitution. The problem is that for over two decades this Court mistakenly believed "undue oppression" was the federal analysis. Although *Amunrud* set this Court back on the proper course in 2006 by embracing the actual federal analysis, "rational basis," this Court never overruled its "undue oppression" case law. Confusion ensued, prompting Judge Coughenour's questions.

The City respectfully asks this Court to eliminate that confusion by embracing "rational basis," overruling its decisions to the extent they invoke the "undue oppression" analysis, and conclusively restoring appropriate judicial deference to Washington substantive due process law.

Respectfully submitted March 7, 2019.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this day, I sent a copy of this document via e-mail (by agreement under RAP 18.5(a) and CR 5(b)(7)) to:

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