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

IN

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

*Plaintiffs,*

vs.

CITY OF SEATTLE,

*Defendant*

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**CITY OF SEATTLE'S REPLY BRIEF**  
***in Yim II***

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## I. INTRODUCTION

Plaintiffs' Response does not alter the straightforward answers to Judge Coughenour's certified questions. First, when assessing a substantive due process claim under the Washington Constitution, this Court follows federal law, under which a challenged regulation faces strict scrutiny if it implicates a fundamental right or the "rational basis" analysis if it does not. Plaintiffs find no support for inserting "substantially advances" or "undue oppression" into federal law or for their invented approach premised on every interest in real or personal property being fundamental. Second, the federal law this Court follows remains unchanged when applied to land use regulations. Finally, because Plaintiffs present no fundamental right and do not request strict scrutiny, the "rational basis" analysis applies to their claim.

## II. ARGUMENT

### **A. This Court follows federal substantive due process law, which employs only "rational basis" or strict scrutiny, not "substantially advances" or "undue oppression."**

Plaintiffs now agree with the City that the due process clauses of the Washington and U.S. Constitutions are coextensive and this Court follows federal due process law.<sup>1</sup> That law is clear: a regulation

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<sup>1</sup> Plaintiffs' Response Brief ("Resp.") at 2–3. *Accord* City's Opening Brief ("Opening") at 9–10. Plaintiffs asserted below that the Washington Constitution provides a unique approach. Pls.' Mot. for Summ. J., Dkt. # 23 at 21:10–12.

implicating a fundamental right or interest is subject to strict scrutiny; all others must survive only the deferential “rational basis” analysis.

**1. Federal courts apply strict scrutiny to a law implicating a fundamental right or interest, not one implicating only economic and property interests.**

Under strict scrutiny, a challenged law survives only if narrowly tailored to serve a compelling state interest.<sup>2</sup> Consistent with black-letter substantive due process law, Washington and federal courts apply strict scrutiny only if the challenged law implicates a fundamental right or interest.<sup>3</sup> The parties agree *Glucksberg* is the touchstone for fundamental rights: only those rights objectively and deeply rooted in our history and tradition and implicit in the concept of ordered liberty so neither liberty nor justice would exist if they were sacrificed.<sup>4</sup>

Plaintiffs present no fundamental right within the meaning of substantive due process law, just economic interests in their business as

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<sup>2</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Witt v. Department of Air Force*, 527 F.3d 806, 817 (2008); *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 220, 143 P.3d 571 (2006).

<sup>3</sup> *E.g.*, *Amunrud*, 158 Wn.2d at 220, 222; *Glucksberg*, 521 U.S. at 720–21; *Witt*, 527 F.3d at 817. *See, e.g.*, Ronald D. Rotunda & John E. Nowak, *PRINCIPLES OF CONSTITUTIONAL LAW* § 11.4 at 270–71 (5th ed. 2016); Jerome A. Barron & C. Thomas Dienes, *CONSTITUTIONAL LAW* at 260–61 (8th ed. 2010). As in case law, the City uses “right” and “interest” synonymously in this context. Some suggest the U.S. Supreme Court has not clearly employed strict scrutiny in decisions involving fundamental rights. *E.g.* Rotunda & Nowak at 271. Because no party requests strict scrutiny, this case presents no opportunity to explore strict scrutiny or its variants.

<sup>4</sup> *Glucksberg*, 521 U.S. at 720–21. *See* Resp. at 1; Opening at 24 n.88.

landlords and perhaps property interests in their rental property. For substantive due process purposes, the U.S. Supreme Court in the modern era has found no fundamental property right<sup>5</sup> and lower federal courts and Washington courts hold laws affecting only property or economic interests implicate no fundamental right.<sup>6</sup> Plaintiffs cite no decision to the contrary.

**2. In all other situations, federal courts apply “rational basis,” with its roots in *Euclid* and *Nectow*.**

Where a challenged law implicates no fundamental right or interest, federal courts apply the “rational basis” analysis.<sup>7</sup> The parties agree “rational basis” is the most deferential form of judicial scrutiny—a court does not probe the law’s efficacy, but merely determines whether the government could have harbored a rational reason for adopting the law.<sup>8</sup>

Plaintiffs acknowledge the “rational basis” analysis, but deny its

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<sup>5</sup> See, e.g., Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENVTL. L.J. 247, 272 n.101 (2015); Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 735 (2003); Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 555 (1997).

<sup>6</sup> E.g., *Yagman v. Garcetti*, 852 F.3d 859, 866–67 (9th Cir. 2017); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012); *Olympic Stewardship Foundation v. State*, 199 Wn. App. 668, 399 P.3d 562 (2017), *rev. denied*, 189 Wn.2d 1040, 409 P.3d 1066, *cert. denied*, 139 S. Ct. 81 (2018).

<sup>7</sup> E.g., *Yagman*, 852 F.3d at 866–67; *Samson*, 683 F.3d at 1058; *Witt*, 527 F.3d at 817; *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 66 (1994). *Accord Amunrud* 158 Wn.2d at 220, 222.

<sup>8</sup> See Resp. at 13 n.5; Opening at 10–11.

roots in *Euclid* and *Nectow*.<sup>9</sup> Plaintiffs are mistaken. *Euclid* and *Nectow* determined a law would survive a substantive due process challenge if it was not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>10</sup> Federal courts—like this Court—have expressed this foundational concept in several forms that ask if the law is rationally related (or, in *Euclid*’s negative parlance, if it is not “clearly arbitrary and unreasonable, having no substantial relation”) to some legitimate governmental interest (or, as in *Euclid*, to the “public health, safety, morals, or general welfare”), all of which fall under the “rational basis” label.<sup>11</sup> Federal courts continue to cite *Euclid* and

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<sup>9</sup> See, e.g., Resp. at 37 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379–84 (1926), and *Nectow v. Cambridge*, 277 U.S. 183, 185–89 (1928)).

<sup>10</sup> *Euclid*, 272 U.S. at 395; *Nectow*, 277 U.S. at 187–188. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–41 (2005) (describing *Euclid* as “historic”).

<sup>11</sup> See, e.g., *U.S. v. Comstock*, 560 U.S. 126, 151 (2010) (Kennedy, J., concurring) (“The phrase ‘rational basis’ most often is employed to describe the standard for determining whether legislation that does not proscribe fundamental liberties nonetheless violates the Due Process Clause.”); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“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.”); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943) (“power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting”); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (“rests upon some rational basis within the knowledge and experience of the legislators”); *United States v. Blodgett*, 872 F.3d 66, 69 (1st Cir. 2017); *Reyes v. North Tex. Tollway Auth.*, 861 F.3d 558, 561 (5th Cir. 2017); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013); *Witt*, 527 F.3d at 817; *Blue Martini Kendall, LLC v. Miami Dade County*, 816 F.3d 1343, 1351 (11th Cir. 2016). *Accord Amunrud*, 158 Wn.2d at 222; *Seeley v. State*, 132 Wn.2d 776, 795, 940 P.2d 604 (1997); *In re Metcalf*, 92 Wn. App. 165, 176, 963 P.2d 911 (1998).

*Nectow* as the source of the “rational basis” analysis.<sup>12</sup>

Plaintiffs misread *Euclid* and *Nectow*. They claim *Euclid* “rejected the ‘rational relation’ test used by many state courts,” but *Euclid* cited that test favorably amid state court decisions *Euclid* followed to sustain a zoning regulation.<sup>13</sup> Plaintiffs also contend *Nectow* required a showing that a regulation “substantially advances” a legitimate public goal, but no variant of “advance” appears in *Nectow*, which merely repeated *Euclid*’s deferential “substantial *relation*” language.<sup>14</sup>

### **3. Federal courts do not apply “substantially advances.”**

The parties agree the “substantially advances” analysis is less deferential than the “rational basis” analysis, but Plaintiffs mistakenly insist federal courts use “substantially advances” to resolve substantive due process claims.<sup>15</sup>

“Substantially advances” was an error limited to, and ultimately ejected from, federal takings law. It emerged in *Agins*, a 1980 takings

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<sup>12</sup> *E.g.*, *Greater Chicago Combine and Center, Inc. v. City of Chicago*, 431 F.3d 1065, 1071 (7th Cir. 2005); *Kim v. United States*, 121 F.3d 1269, 1273–74 (9th Cir. 1997); *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997); *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1211 (10th Cir. 2009).

<sup>13</sup> *See* Resp. at 37. *But see Euclid*, 272 U.S. at 390–95.

<sup>14</sup> *See* Resp. at 37. *But see Nectow*, 277 U.S. at 187–88 (emphasis added).

<sup>15</sup> *See* Resp. at 39–41 (noting the difference). *Accord* City’s Opp. and Cross Mot. Dkt. # 33, at page 28:13–16 (same). *But see* Resp. at 12–14, 36–40.

decision that mistook *Euclid* and *Nectow* as holding that a law effects a taking if it “does not substantially advance legitimate state interests.”<sup>16</sup> Correcting both of *Agins*’s errors, *Lingle* in 2005: (1) held “substantially advances,” which *Agins* derived from due process precedents, had no place in the federal takings analysis; and (2) explained “substantially advances” has no place in substantive due process law either.<sup>17</sup> Plaintiffs overlook that second point. *Lingle* warned of the hazards of putting courts in the position of assessing a law’s efficacy, citing two “rational basis” decisions for the “well established” substantive due process test:

The *Agins* formula [of “substantially advances”] can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, **it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited.** Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. To resolve [plaintiff’s] takings claim, **the District Court was required to choose between the views of two opposing economists** as to whether Hawaii’s rent control statute would help to [achieve the law’s goals]. **We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process**

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<sup>16</sup> *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *Nectow* involved no takings claim and said nothing about advancing a governmental interest. See *Nectow*, 277 U.S. 183.

<sup>17</sup> *Lingle*, 544 U.S. at 540–45.

**challenges to government regulation. See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-125 . . . (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 730-732 . . . (1963). The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.<sup>18</sup>**

Despite this passage, Plaintiffs misread *Lingle* as ruling “substantially advances” is a legitimate substantive due process analysis.<sup>19</sup>

Plaintiffs offer no federal decision applying “substantially advances” to a substantive due process claim. They just cite “rational basis” case law and assert it is “substantially advances.” Although “substantial” appears in both analyses, asking whether a law has no “substantial relation” to a legitimate public purpose differs from asking whether it “substantially advances” that purpose.

None of the federal or Washington decisions Plaintiffs cite applies “substantially advances.”<sup>20</sup> Again, *Euclid* and *Nectow* are the font of the “rational basis” analysis; neither mentioned any version of “advance,” suggested courts should weigh a law’s efficacy, or cast the level of scrutiny as “heightened.”<sup>21</sup> *Nebbia*, *Samson*, and *State ex rel. Rhodes* were

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<sup>18</sup> *Lingle*, 544 U.S. at 544–45 (emphasis added). See *Exxon*, 437 U.S. at 124–25 (“bears a reasonable relation to the State’s legitimate purpose”); *Ferguson*, 372 U.S. at 730–32.

<sup>19</sup> See, e.g., Resp. at 31, 37.

<sup>20</sup> See Resp. at 1–2, 13–14, 38.

<sup>21</sup> See generally *Euclid*, 272 U.S. 365; *Nectow*, 277 U.S. 183.

likewise “rational basis” decisions never mentioning “substantially advances.”<sup>22</sup> *Amunrud* distinguished “rational basis” from strict scrutiny, not from “substantially advances.”<sup>23</sup> *Goldblatt* and *Christianson* never mentioned “substantially advances”; to the extent they discussed substantive due process, they used “undue oppression.”<sup>24</sup> *Ford* was a *Lochner*-era case questioning the necessity of a law’s purpose, not whether the law would advance that purpose.<sup>25</sup> And *Koontz* was a takings “exactions” case that mentioned no due process analysis, let alone “substantially advances.”<sup>26</sup>

#### **4. Federal courts do not apply “undue oppression.”**

##### **a) Plaintiffs offer no federal “undue oppression” decision since the discredited *Goldblatt*.**

Plaintiffs rely only on *Goldblatt* from 1962 to assert federal courts still apply *Lawton*’s 1894 “undue oppression” analysis to substantive due process claims.<sup>27</sup> They offer no other federal decision invoking “undue

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<sup>22</sup> *Nebbia v. People of New York*, 291 U.S. 502, 525 (1934); *Samson*, 683 F.3d at 1058; *State ex rel. Rhodes v. Cook*, 72 Wn.2d 436, 433 P.2d 677 (1967).

<sup>23</sup> *Amunrud*, 158 Wn.2d at 220.

<sup>24</sup> *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 661–67, 946 P.2d 768 (1997).

<sup>25</sup> *City of Seattle v. Ford*, 144 Wn. 107, 114, 257 P. 243 (1927).

<sup>26</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

<sup>27</sup> See *Goldblatt*, 369 U.S. at 594 (“The classic statement of the rule in *Lawton* . . . is still valid today”); *Lawton v. Steele*, 152 U.S. 133, 137 (1894); Resp. at 2–4, 23–27.

oppression” since *Goldblatt*.<sup>28</sup> *Goldblatt* cannot sustain the weight Plaintiffs put on it.

Plaintiffs cannot run from post-*Goldblatt* U.S. Supreme Court decisions rejecting “undue oppression” even though they do not mention *Goldblatt*. In 1963, *Ferguson* provided a non-exclusive list of then-discredited decisions premised on the notion—at the core of “undue oppression”—that courts could “decide whether a statute bears too heavily upon that business and by so doing violates due process.”<sup>29</sup> *Brotherhood* was not a fact-bound decision; it rejected a due process claim as a matter of law, citing *Ferguson* and other “rational basis” decisions to hold that the lower court and appellees were wrong to invoke the “undue oppression” analysis.<sup>30</sup> In 1976, this Court cited only *Brotherhood* for the blunt legal conclusion: “That a statute is unduly oppressive is not a ground to overturn it under the due process clause.”<sup>31</sup>

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<sup>28</sup> Plaintiffs suggest incorrectly that *Action Apartment Ass’n, Inc. v. Santa Monica*, 509 F.3d 1020, 1024–26 (9th Cir. 2007), invoked “undue oppression.” See Resp. at 21. It addressed only “rational basis” challenges. *Action*, 509 F.3d at 1026.

<sup>29</sup> See Resp. at 25. But see *Ferguson v. Skrupa*, 372 U.S. 726, 728–29 (1963).

<sup>30</sup> See Resp. at 26. But see *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R.*, 393 U.S. 129, 143 (1968) (“we think, with all due deference to appellees and the District Court, that these contentions require no further consideration”).

<sup>31</sup> *Salstrom’s Vehicles v. Department of Motor Vehicles*, 87 Wn.2d 686, 693, 555 P.2d 1361 (1976).

Plaintiffs misread *Lingle* as confirming *Goldblatt*.<sup>32</sup> *Lingle* never mentioned “undue oppression” and cited *Goldblatt* only to explain how *Agins* erred by importing due process case law into the regulatory takings analysis when those concepts were comingled.<sup>33</sup> And given Plaintiffs also claim *Lingle* confirmed the “substantially advances” analysis,<sup>34</sup> this Court should reject their assertion that *Lingle* endorsed “undue oppression” too.

Plaintiffs offer no response to the U.S. Supreme Court’s criticism of *Goldblatt* for assuming similar inquiries under due process and takings claims or the Colorado Supreme Court’s refusal to apply *Goldblatt* as inconsistent with U.S. Supreme Court jurisprudence.<sup>35</sup>

This Court faces a choice: follow one federal decision from 1962 saying “undue oppression” is the “classic statement of the rule . . . still valid today” (*Goldblatt*) or *Lingle* and scores of other federal decisions since *Euclid* and *Nectow* confirming that, absent a fundamental right or

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<sup>32</sup> Resp. at 4, 36–37.

<sup>33</sup> *Lingle*, 544 U.S. at 541.

<sup>34</sup> Resp. at 36–37.

<sup>35</sup> See City Opening at 19–20 (citing *Nollan v. California. Coastal Comm’n*, 483 U.S. 825, 835 n.3 (1987), and *Town of Dillon v. Yacht Club Condominiums Home Owners Assn.*, 2014 CO 37, 325 P.3d 1032, 1042 (Colo. 2014)).

interest, the valid rule is “rational basis.”<sup>36</sup> This Court should follow the weight of authority.<sup>37</sup>

**b) Plaintiffs misrepresent Washington’s treatment of the “undue oppression” analysis.**

Finding no support for “undue oppression” in federal law, Plaintiffs turn to, and misrepresent, Washington law. Plaintiffs claim this Court has applied *Lawton*’s “undue oppression” analysis for almost a century,<sup>38</sup> but that analysis has an on-again-off-again history in Washington. This Court initially cited *Lawton* as authority for four

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<sup>36</sup> In a footnote, Plaintiffs try and fail to marshal case law from other states to prop up the “undue oppression” analysis. Resp. at 19 n.7. They overlook courts in Utah and Minnesota specifically declining to follow Washington’s use of “undue oppression” and the Georgia Supreme Court overruling its own “undue oppression” precedent for “rational basis” in 2003. See City Opening at 16. Plaintiffs gain nothing from: an Ohio decision applying “undue oppression” to a unique state constitutional provision, *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 702 N.E.2d 81, 93 (1998); an Illinois decision applying state statutory limits (not constitutional) on the police power (not substantive due process), *City of Collinsville v. Seiber*, 82 Ill. App. 3d 719, 403 N.E.2d 90, 93 (1980); an Iowa takings decision not mentioning due process, *City of Monroe v. Nicol*, 898 N.W.2d 899, 901, 903 (Iowa Ct. App. 2017); or Pennsylvania decisions addressing takings claims or intermingled takings and due process claims. *Lester v. Dep’t of Env’tl. Prot.*, 153 A.3d 445, 463 (Pa. Commw. Ct. 2017) (“intertwined substantive due process and ‘taking’ claims”); *Adams Sanitation Co., Inc. v. Commw. of Pa., Dep’t of Env’tl. Prot.*, 552 Pa. 304, 715 A.2d 390, 395 (1998) (takings only). In an opinion issued after the one Plaintiffs cite, Maryland’s highest court clarified it follows federal substantive due process law. *Prince George’s County v. Ray’s Used Cars*, 398 Md. 632, 922 A.2d 495, 500 n.5 (2007).

<sup>37</sup> Cf. Resp. at 3 (trying to prop up *Goldblatt* by noting this Court is bound by U.S. Supreme Court precedent).

<sup>38</sup> Resp. at 17–18, 29, 35, 41, 44.

decades during the *Lochner* era.<sup>39</sup> But for the next 45 years—from 1936 through 1981—no majority opinion of this Court cited “undue oppression” as the analysis applicable to substantive due process claims.<sup>40</sup> Without noting the change, this Court reactivated “undue oppression” in 1982 and used it until rejecting it in *Amunrud* in 2005.<sup>41</sup>

Plaintiffs try but fail to evade *Amunrud*. Its rejection of “undue oppression” is not “perfunctory” *dicta*; the majority explained its rationale by detailing over three pages why the dissent should not have invoked “undue oppression.”<sup>42</sup> Plaintiffs defy *Amunrud*’s text by insisting *Amunrud* did not: reject the “undue oppression” analysis; criticize that analysis as a return to the *Lochner* era; or cast that analysis as harmful.<sup>43</sup> Plaintiffs cling to the fact that *Amunrud* did not overrule Washington’s

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<sup>39</sup> E.g., *City of Seattle v. Proctor*, 183 Wn. 293, 298, 48 P.2d 238 (1935); *City of Seattle v. Ford*, 144 Wn. at 111–12; *State v. Brown*, 37 Wn. 97, 101, 79 P. 635 (1905), overruled by *State v. Boren*, 36 Wn.2d 522, 219 P.2d 566 (1950).

<sup>40</sup> Plaintiffs allege *Remington Arms Co. v. Skaggs*, 55 Wn.2d 1, 5, 345 P.2d 1085 (1959), invoked “undue oppression,” but it does not mention “oppression” or cite *Lawton*. See Resp. at 18. Plaintiffs also note this Court in 1986 cited a 1978 decision for “undue oppression.” Resp. at 34–35 (citing *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986) (citing *Save a Valuable Env’t (SAVE) v. City of Bothell*, 89 Wn.2d 862, 870, 576 P.2d 401 (1978))). But *SAVE* involved no due process claim and never mentioned “undue oppression.”

<sup>41</sup> Compare *Cougar Business Owners Ass’n v. State*, 97 Wn.2d 466, 477, 647 P.2d 481 (1982), with *Amunrud*, 158 Wn.2d at 226–29.

<sup>42</sup> Compare *Amunrud*, 158 Wn.2d at 226–29 with Resp. at 24–25, 29.

<sup>43</sup> Compare *Amunrud*, 158 Wn.2d at 226–29 with Resp. at 24, 29, 42.

“undue oppression” case law.<sup>44</sup> The City asks this Court to do so now by overruling its “undue oppression” precedents and ending the post-*Amunrud* confusion over Washington substantive due process law.

Plaintiffs cannot sever the bond *Amunrud* identified between the “undue oppression” analysis and the discredited *Lochner* era.<sup>45</sup> *Lawton*—the 1894 source of the “undue oppression” analysis—espoused the same judicial power-grab *Lochner* advocated in 1905. According to *Lawton*, courts must supervise the legislature to prevent unnecessary laws:

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.<sup>46</sup>

*Lochner* reinforced this paternalism, exhorting courts to root out unnecessary laws by posing this question:

Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?<sup>47</sup>

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<sup>44</sup> Resp. at 4, 29.

<sup>45</sup> See Resp. at 23–24. *But see Amunrud*, 158 Wn.2d at 227–30.

<sup>46</sup> *Lawton*, 152 U.S. at 137.

<sup>47</sup> *Lochner v. New York*, 198 U.S. 45, 56 (1905).

Even the scholar Plaintiffs rely on to unhitch *Lawton* from *Lochner* described *Lochner* as the “fullest bloom” of *Lawton* and explained “undue oppression” is broad enough to include *Lochner*.<sup>48</sup> The “undue oppression” factors this Court imported from that scholar in 1990—nearly a century after *Lawton*—cannot wash the stain of *Lochner* from the “undue oppression” analysis.<sup>49</sup> When importing those factors, this Court echoed *Lochner*’s jurist-centric posture by extolling the “undue oppression” analysis as lodging wide discretion in courts, not the legislature, to balance public and individual interests.<sup>50</sup>

**5. Plaintiffs invent an approach premised on all interests in personal or real property constituting fundamental rights.**

Departing from black-letter federal substantive due process law, Plaintiffs offer their own approach and try to bend authority to fit it. This failed attempt is premised on the novel assertion that every interest in property, real or personal, is a fundamental right subject to heightened scrutiny. The Court of Appeals rejected that assertion in *Olympic*

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<sup>48</sup> See Resp. at 22–25 (relying on William B. Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. URB. & CONTEMP. L. 3 (1983)); Stoebuck at 24, 32.

<sup>49</sup> See Resp. at 24; *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 331, 787 P.2d 907 (1990) (adopting the factors suggested by Stoebuck at 33).

<sup>50</sup> *Presbytery*, 114 Wn.2d at 331.

*Stewardship*, which this Court declined to review last year.<sup>51</sup> The Yims’ counsel then peddled the same assertion to the U.S. Supreme Court in a petition for *certiorari* in *Olympic Stewardship*, which that Court denied last fall.<sup>52</sup> The assertion gains no currency from repetition.

**a) Plaintiffs claim a law implicating any real or personal property interest necessarily implicates a fundamental right and deserves the “undue oppression” analysis.**

This Court follows federal substantive due process law, which features just one fork in the road: if a challenged law implicates a fundamental right or interest, this Court applies strict scrutiny; otherwise, this Court applies the “rational basis” analysis.<sup>53</sup>

Not according to Plaintiffs. They invent their own taxonomy, dividing substantive due process claims into three categories: (1) strict scrutiny applies to laws implicating a fundamental liberty interest; (2) “rational basis” applies to laws implicating a non-fundamental liberty interest; and (3) “undue oppression” applies to laws implicating a

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<sup>51</sup> *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”), *rev. denied*, 189 Wn.2d 1040.

<sup>52</sup> *Olympic Stewardship*, Petition for Writ of *Cert.*, No. 17-1517, 2018 WL 2131600 at 15–18; *Olympic Stewardship*, 139 S. Ct. 81 (2018) (denying the petition).

<sup>53</sup> *Amunrud*, 158 Wn.2d at 220. To get to that fork, a plaintiff must first show the challenged law implicates some liberty or property interest. *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (1998); *Johnson v. Washington State Department of Fish and Wildlife*, 175 Wn. App. 765, 774, 305 P.3d 1130 (2013).

fundamental property interest.<sup>54</sup> This approach omits laws implicating a non-fundamental property interest.

That is because Plaintiffs assert every property interest is fundamental. They believe substantive due process analyses “stem from the notion that property rights are fundamental.”<sup>55</sup> “The right to property,” they assert, “is unquestionably among those fundamental rights” protected by due process guarantees.<sup>56</sup> This is why Plaintiffs insist “undue oppression” applies to any “regulation of property” and any “deprivation of property.”<sup>57</sup> Any interest in real or personal property is fundamental for Plaintiffs, even an inmate’s interest in what a Department of Corrections regulation deemed “excess or unauthorized personal clothing items.”<sup>58</sup> Plaintiffs cite no example of a property interest they view as non-fundamental.

Plaintiffs essentially modify the federal approach to substantive due process law by inserting a threshold fork in the road. If the challenged

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<sup>54</sup> Resp. at 15.

<sup>55</sup> *Id.* at 39.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *E.g., id.* at 5, 44.

<sup>58</sup> *Id.* at 33 (fitting into Plaintiffs’ approach *Greenhalgh v. Department of Corrections*, 180 Wn. App. 876, 892, 324 P.3d 771 (2014)). *See Greenhalgh*, 180 Wn. App. at 881 (describing the challenged regulation).

law implicates any interest in real or personal property, it is subject to the “undue oppression” analysis. Otherwise, the law implicates only a liberty interest and the analysis proceeds to the next fork: a fundamental liberty interest is subject to strict scrutiny and a non-fundamental liberty interest is subject to the “rational basis” analysis.

Inconsistencies plague Plaintiffs’ approach. It makes no room for the “substantially advances” analysis, which Plaintiffs insist is a cornerstone of federal substantive due process law.<sup>59</sup> Plaintiffs gloss that over by asserting “substantially advances” mirrors “undue oppression.”<sup>60</sup> Even Plaintiffs do not believe that—they later highlight differences between the analyses, arguing that courts enjoy more discretion under “substantially advances” than “undue oppression.”<sup>61</sup> The analyses are different: “substantially advances” asks whether a law is effective at achieving the government’s goal; “undue oppression” invites the court to rebalance public and private interests.<sup>62</sup>

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<sup>59</sup> Resp. at 12–14, 36–40.

<sup>60</sup> *Id.* at 5, 38.

<sup>61</sup> *Id.* at 43. That argument is likewise plagued by inconsistency. To Judge Coughenour, Plaintiffs asserted that the “undue oppression” factors—which they now assert limit a court’s discretion—can be set aside because they merely provide a structure for determining the overall reasonableness of the means used to achieve a law’s public purpose. Pls.’ Opp. to XMSJ & Reply, Dkt. # 48 at 35:11–17.

<sup>62</sup> Compare *Lingle*, 544 U.S. at 542 (criticizing “substantially advances”) with *Presbtery*, 114 Wn.2d at 311 (describing “undue oppression”).

Plaintiffs’ approach also contradicts at least three other approaches they offered Judge Coughenour. First, Plaintiffs divided the landscape into claims under the Washington Constitution (to which “undue oppression” applies) and U.S. Constitution (subject to the “substantially advances” analysis).<sup>63</sup> Second, they distinguished a “general business regulation” (subject to “rational basis”) from a law “not directly impairing a fundamental property or liberty interest” (subject to “undue oppression”).<sup>64</sup> Finally, Plaintiffs maintained the line is between land use disputes (subject to “undue oppression”) and other cases (presumably subject to “rational basis”).<sup>65</sup>

**b) No authority supports Plaintiffs’ approach.**

The crucial problem for Plaintiffs’ approach is a dearth of authority. Plaintiffs cite no court articulating their approach, even though they insist courts follow it implicitly. “Undue oppression,” born in *Lawton* in 1894, was not “specifically designed for property deprivations,” as Plaintiffs claim.<sup>66</sup> *Lawton* does not limit “undue oppression” to property—

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<sup>63</sup> Pls.’ Opp. to XMSJ & Reply, Dkt. # 48 at 30–32. *See especially id.* at 32:6–7 (“the ‘unduly oppressive’ test is the current state of due process law under the Washington Constitution”).

<sup>64</sup> *Id.* at 32–33.

<sup>65</sup> *Id.* at 32:8–9; 34 n.7; Pls.’ Opp. to City’s Mot. to Certify a Question to the Wash. Supreme Ct., Dkt. # 52 at 5–7.

<sup>66</sup> *See Resp.* at 21–22.

it applies to all government attempts at “interposing its authority in behalf of the public.”<sup>67</sup> *Lawton*’s announcement of the “undue oppression” analysis immediately follows 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.<sup>68</sup> The first two Washington decisions citing *Lawton* did so in challenges to limits on the liberty interest in pursuing an occupation.<sup>69</sup> Although the modern “undue oppression” factors this Court grafted onto *Lawton* a century later are tailored to property interests, they came from a scholar attempting to untangle the confusion of regulatory takings (implicating only property) and substantive due process.<sup>70</sup>

The decisions Plaintiffs cite do not support their premise that all property rights are fundamental. Plaintiffs assert *Fuentes* and *Willoughby* espoused “the notion that property rights are fundamental,” but *Fuentes* was a procedural due process decision that identified no fundamental right

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<sup>67</sup> *Lawton*, 152 U.S. at 137.

<sup>68</sup> *Id.* at 136.

<sup>69</sup> *State v. Rossman*, 53 Wn. 1, 2–3, 101 P. 357 (1909); *State v. Brown*, 37 Wn. at 100–01, 103–04.

<sup>70</sup> See *Presbytery*, 114 Wn.2d at 331 (adopting the factors from *Stoebuck* at 33); *Stoebuck* at 20–23 (describing the confusion), 33 (offering the factors).

and *Willoughby* did not mention “fundamental.”<sup>71</sup> Plaintiffs fare no better with *Manufactured Housing*’s lead opinion, which resolved a takings claim and found no fundamental “right to property.”<sup>72</sup> *Washington ex rel. Seattle Title* applied the “rational basis” analysis and never mentioned “fundamental.”<sup>73</sup> *McCoy* addressed a “fundamental right” only to compensation for damages caused by constructing a railway in front of one’s property and had no occasion to opine on whether all property interests are fundamental rights.<sup>74</sup>

Plaintiffs mischaracterize other decisions. *Euclid* and *Nectow* do not support Plaintiffs’ claim that a law implicating a fundamental right in property must pass the “substantially advance” analysis, let alone “undue oppression”; those decisions applied the “rational basis” analysis and

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<sup>71</sup> Resp. at 39 (citing *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972), and *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 733, 57 P.3d 611 (2002)). *But see Fuentes*, 407 U.S. at 80–81; *Willoughby*, 147 Wn.2d at 733.

<sup>72</sup> See Resp. at 1–2 (citing *Manufactured Housing Cmty. of Wash. v. State*, 142 Wn.2d 347, 363–65, 13 P.3d 183 (2000)). If Plaintiffs intend to rely on the lead *Manufactured Housing* opinion’s discussion of the three “fundamental attributes of property ownership” in takings law, that only proves not all attributes of property ownership are fundamental. *See Manufactured Housing*, 142 Wn.2d at 364.

<sup>73</sup> See Resp. at 1–2 (citing *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928)).

<sup>74</sup> See Resp. at 1–2 (citing *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 365 (1918)). *But see McCoy*, 247 U.S. at 362–64, 356–66.

never mentioned “fundamental.”<sup>75</sup> *Goldblatt*, which likewise never uttered “fundamental,” cannot fit Plaintiffs’ claim that heightened scrutiny applies to fundamental property rights.<sup>76</sup> Plaintiffs cannot duck *Salstrom*’s rejection of “undue oppression” by claiming *Salstrom*’s merely resolved a challenge to “a general business regulation on the basis of a non-fundamental liberty interest”—*Salstrom*’s rejected “undue oppression” as a matter of law and did not mention “liberty” or any variant of “fundamental.”<sup>77</sup> Plaintiffs cite *Bellevue School Dist.* and *Johnson* as examples of courts applying “rational basis” to a challenge involving a nonfundamental liberty interest, but *Bellevue School Dist.* was a procedural due process case and *Johnson* did not commit to whether the challenged law implicated a liberty or property interest.<sup>78</sup>

Plaintiffs cast and try to distinguish *Amunrud* as limited to a liberty interest, but *Amunrud* did not commit to whether the interest presented

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<sup>75</sup> See Resp. at 13 (citing *Euclid*, 272 U.S. at 395; *Nectow*, 277 U.S. at 188). *But see Euclid*, 272 U.S. at 395; *Nectow*, 277 U.S. at 187–88.

<sup>76</sup> See Resp. at 2 (citing *Goldblatt*, 369 U.S. at 594).

<sup>77</sup> See Resp. at 34 (citing *Salstrom*’s, 87 Wn.2d at 693). *But see Salstrom*’s at 693.

<sup>78</sup> See Resp. at 30 (citing *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011); *Johnson*, 175 Wn. App. 765). *But see Bellevue Sch. Dist.*, 171 Wn.2d at 704 (procedural due process); *Johnson*, 175 Wn. App. at 774–75 (the plaintiff asserted a property interest and the court found he arguably had a liberty interest).

was liberty or property.<sup>79</sup> *Amunrud* noted the “well settled” procedural due process law finding a driver’s license is property and the “well established” substantive due process law finding licenses create liberty or property interests.<sup>80</sup> What mattered in *Amunrud* is what matters in federal substantive due process law: whether the implicated right is fundamental, not whether it is a liberty or property right.<sup>81</sup>

#### **6. Plaintiffs misapply *stare decisis*.**

Invoking *stare decisis* to save “undue oppression,” Plaintiffs overlook Washington case law reconsidering precedent when its legal underpinnings have changed or disappeared and applying *stare decisis* less rigorously when interpreting the Constitution than statutes.<sup>82</sup> Judge Coughenour’s questions and the other evidence of confusion the City detailed belie Plaintiffs’ claim that courts have had “no trouble” determining the proper standard, and *Amunrud*’s text disproves Plaintiffs’

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<sup>79</sup> See Resp. at 24–25, 27, 29–30, 42.

<sup>80</sup> *Amunrud*, 158 Wn.2d at 216, 219.

<sup>81</sup> *Id.* at 220.

<sup>82</sup> *Digges v. Asbestos Corporation Ltd.*, 186 Wn.2d 716, 730 n.10, 381 P.3d 32 (2016) (constitutional law context); *W.G. Clark Constr. Co. v. Pac. NW Reg’l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014) (changed or disappeared).

attempt to deny this Court has identified the harm to our system of government implicit in the *Lochner*-era “undue oppression” analysis.<sup>83</sup>

**B. Federal law controls challenges to land use regulations.**

Because this Court follows federal substantive due process law, and because that law has applied the “rational basis” analysis to land use disputes from *Euclid* through today, this Court should apply that analysis to claims against land use regulations.<sup>84</sup> Plaintiffs cannot escape that simple truth. They just insist against reality that those federal decisions actually applied the “substantially advances” analysis (which they suggest is “undue oppression” in disguise) and offer examples of this Court’s land use decisions from when this Court mistakenly applied the “undue oppression” analysis to practically all federal and Washington substantive due process claims, land use or otherwise.<sup>85</sup>

**C. The “rational basis” analysis controls Plaintiffs’ claim.**

Plaintiffs’ claim to a fundamental right is superfluous. They do not request strict scrutiny, which would provide the only reason under federal and Washington law to assess a fundamental right. Even if Plaintiffs’

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<sup>83</sup> Compare Resp. at 41–42 with *Amunrud*, 158 Wn.2d at 230 and City’s Opening at 15–18.

<sup>84</sup> E.g., *Euclid*, 272 U.S. at 379–84; *Samson*, 683 F.3d 1053–56.

<sup>85</sup> Resp. at 19–20 (also noting a federal land use decision applying “undue oppression” on the mistaken assumption it was unique to the Washington Constitution).

invented approach became law, a claim to a fundamental property right would be moot because any interest in real or personal property would be fundamental *per se*.

Still, to be clear, the “rational basis” analysis applies because the Ordinance implicates no fundamental right.<sup>86</sup> At most, the Ordinance implicates landowners’ economic and property interests, to which courts apply the “rational basis” analysis.<sup>87</sup> Again, for substantive due process purposes, the U.S. Supreme Court has never found a fundamental property right and other federal and Washington courts expressly hold economic and property interests are not fundamental.<sup>88</sup> Plaintiffs cite no decision holding a landlord has a right, fundamental or otherwise, “to rent her property to a person of her own choice,” and cannot evade regulatory takings case law denying any such right.<sup>89</sup>

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<sup>86</sup> Compare Resp. at 16 (alleging the City does not contest this) with City’s Opening at 24 n.88 (contesting this).

<sup>87</sup> *E.g.*, *Yagman*, 852 F.3d at 866–67; *Samson*, 683 F.3d at 1058; *Halverson v. Skagit County*, 42 F.3d 1257, 1261–62 (9th Cir. 1994); *Olympic Stewardship*, 199 Wn. App. at 720.

<sup>88</sup> *E.g.*, Schwartz at 272 n.101; Alexander at 735; Krotoszynski at 555; *Yagman*, 852 F.3d at 866–67; *Samson*, 683 F.3d at 1058; *Olympic Stewardship*, 199 Wn. App. at 720.

<sup>89</sup> Compare Resp. at 15–18 with *Yim v. City of Seattle*, No. 95813-1 (“*Yim I*”) City of Seattle’s Opening Brief at 49–52 and *Yim I* City of Seattle’s Reply at 18–21.

### III. CONCLUSION

This Court has always intended to follow federal substantive due process law. The City respectfully asks this Court to answer Judge Coughenour's questions consistent with that intent:

1. *What is the proper standard to analyze a substantive due process claim under the Washington Constitution?*  
The same analysis used by federal courts: strict scrutiny if the challenged law implicates a fundamental right or interest; otherwise "rational basis."
2. *Is the same standard applied to substantive due process claims involving land use regulations?* Yes, just as in federal courts.
3. *What standard should be applied here?* "Rational basis," because as a matter of federal and Washington substantive due process law, the challenged Ordinance implicates no fundamental right.

The City also respectfully asks this Court to remove the source of Judge Coughenour's confusion by overruling Washington substantive due process law to the extent it invokes the "undue oppression" analysis, which has no place in federal law.

Respectfully submitted April 15, 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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**SEATTLE CITY ATTORNEY'S OFFICE - GOVERNMENT AFFAIRS**

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