

FILED
SUPREME COURT
STATE OF WASHINGTON
5/31/2019 3:28 PM
BY SUSAN L. CARLSON
CLERK

Case No: 96817-9

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

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

Plaintiffs,

v.

CITY OF SEATTLE,

Defendant.

STATEMENT OF ADDITIONAL AUTHORITIES

BRIAN T. HODGES, WSBA #31976
ETHAN W. BLEVINS, WSBA #48219
Pacific Legal Foundation
255 South King Street, Suite 800
Seattle, Washington 98104
Telephone: (916) 419-7111

*Attorneys for Plaintiffs
Chong & MariLyn Yim,
Kelly Lyles, Eileen, LLC,
and Rental Housing
Association of Washington*

Plaintiffs Chong and MariLyn Yim, Kelly Lyles, Eileen, LLC, and Rental Housing Association of Washington (Yims) submit this statement of additional authorities pursuant to RAP 10.8 and *Futurewise v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 248 n.2, 189 P.3d 161 (2008) (“nothing in [RAP 10.8] limits its application to newly created law.”). This statement of additional authority is necessary to respond to the City of Seattle’s claims, raised for the first time in its reply brief, that there is no direct authority supporting six points of law argued in the Yims’ response brief.

1. In response to the City of Seattle’s claim that there is no federal caselaw since *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962), invoking the unduly oppressive test when reviewing due process challenges (*See Seattle Reply Br. at 8-9*), the Yims provide the following citations to supplemental authority:

Post-Goldblatt Cases from the U.S. Supreme Court

- “There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the [government goal].” *Haynes v. State of Wash.*, 373 U.S. 503, 519, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963).
- “[T]he Due Process Clause was intended to prevent government officials from abusing [their] power, or employing it as an instrument of oppression.” *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (internal quotes omitted).

- “[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’” *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) (quoting *DeShaney v. Winnebago County Dep’t of Social Services*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) (further quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986))).
- The Due Process Clause “serves to prevent governmental power from being ‘used for purposes of oppression.’” *Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 332 18 How. (59 U.S.) 272, 277, 15 L. Ed. 372 (1856) (discussing Due Process Clause of Fifth Amendment)).
- *E. Enterprises v. Apfel*, 524 U.S. 498, 549-50, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (Kennedy, J., concurring) (A law that forces an individual to bear a burden properly placed on other persons will violate due process.).
- *Black v. Village of Park Forest*, 20 F. Supp. 2d 1218, 1228-30 (N.D. Ill. 1998) (inspection ordinance violated due process because it did not contain limitations regarding scope of permissible searches).
- *Davis v. City of Peachtree City*, 251 Ga. 219, 220, 304 S.E.2d 701 (1983) (“[A] substantive due process analysis . . . considers both the interest of the public and the individual and whether, considering the legitimate public interests involved, there are other, less onerous means by which the public interest might be protected.”).

Pre-Goldblatt Case from the U.S. Supreme Court

- *St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63, 66-67, 40 S. Ct. 71, 64 L. Ed. 139 (1919) (A penalty will violate due process where it is “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”).

Post-Goldblatt authorities from the U.S. Supreme Court cited in related case, *Yim v. City of Seattle*, No. 95813-1

- *Stogner v. California*, 539 U.S. 607, 653, 123 S. Ct. 2446, 156 L. Ed. 2d 544 (2003) (due process protects against oppressive prosecution).
- *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453-54, 113 S. Ct. 2711, 2718, 125 L. Ed. 2d 366 (1993) (oppressive fines violate due process).
- *Heath v. Alabama*, 474 U.S. 82, 103, 106 S. Ct. 433, 88 L. Ed. 2d 387 (1985) (relentless prosecutorial action is unduly oppressive and violates due process).
- *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984) (retroactive legislation may violate due process if it is harsh and oppressive).
- *Engle v. Isaac*, 456 U.S. 107, 133, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) (oppressive shifting of the burden of proof violates due process).
- *Califano v. Boles*, 443 U.S. 282, 295, 99 S. Ct. 2767, 61 L. Ed. 2d 541 (1979) (To show a violation of the Due Process Clause of the Fifth Amendment, it is necessary to show that the plaintiff “suffers significant deprivation of a benefit or imposition of a substantial burden.”)
- *United States v. Lovasco*, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977) (oppressive delay violates the right to a speedy trial).
- *United States v. Marion*, 404 U.S. 307, 330, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971) (oppressive incarceration before trial violates due process).

Pre-Goldblatt authorities from the U.S. Supreme Court cited in related case, *Yim v. City of Seattle*, No. 95813-1

- *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 289, 31 L. Ed. 205 (1887) (“Nor can [the government], in the exercise of the police power, enact laws that are unnecessary, and that will be oppressive to the citizen.”).
- *Helvering v. City Bank Farmers Tr. Co.*, 296 U.S. 85, 90, 56 S. Ct. 70, 80 L. Ed. 62 (1935) (A tax will violate due process if it is unnecessary or inappropriate to the proposed end, unreasonably harsh or oppressive, or arbitrary.).
- *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491, 35 S. Ct. 886, 59 L. Ed. 1419 (1915) (an oppressive penalty will violate due process).

2. In response to the City of Seattle’s claim that there is no authority supporting the proposition that the right to freely alienate one’s property is a fundamental attribute of property ownership (*See Seattle Reply Br.* at 14-15), the Yims provide the following citations to supplemental authority:

Additional authority from Washington Supreme Court:

- “The right to alienate property is essential to its use and enjoyment, as well as the right to acquire it, and both are constitutional rights.” *State v. Moore*, 7 Wash. 173, 175, 34 P. 461 (1893).

Cases from the U.S. Supreme Court:

- “[P]roperty’ interests protected by the Due Process Clauses are those ‘that are secured by “existing rules or understandings.””” *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 737, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (Stevens, J., concurring) (quoting *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972))).

- It is a “fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit.” *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998).
- The right “to take, hold and dispose of property either real or personal” has long been recognized by the courts as a “fundamental right” to be protected by the Fourteenth Amendment. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 218 n.10, 105 S. Ct. 1272, 84 L. Ed. 2d 205 (1985).
- The “right of sale” is one of many protected property rights associated with the ownership of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 54, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993).
- “The prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.” *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).
- “[T]he Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.” *Civil Rights Cases*, 109 U.S. 3, 22, 3 S. Ct. 18, 27 L. Ed. 835 (1883).
- “The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. . . . ‘It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.’”

Lynch v. Household Fin. Corp., 405 U.S. 538, 552, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972).

- “[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a ‘personal’ right, whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.” *Lynch*, 405 U.S. at 552 (citations omitted).

Additional U.S. Supreme Court authorities cited in related case,
Yim v. City of Seattle, No. 95813-1

- The right to “dispose of [property] for lawful purposes” is an “essential attribute[] of property.” *Terrace v. Thompson*, 263 U.S. 197, 215, 44 S. Ct. 15, 68 L. Ed. 255 (1923).
- The right to sell one’s property “is within the protection of the Fifth and Fourteenth Amendments.” *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 192, 57 S. Ct. 139, 81 L. Ed. 109 (1936).
- A law that deprives persons of the right to sell or acquire property would be “obnoxious” to due process. *Holden v. Hardy*, 169 U.S. 366, 391, 18 S. Ct. 383, 42 L. Ed. 780 (1898).
- “[T]he right to sell [property] as an essential incident of such ownership.” *Keeler v. Standard Folding Bed Co.*, 157 U.S. 659, 664, 15 S. Ct. 738, 39 L. Ed. 848 (1895).
- The right to sell one’s property to the person of his or her choice is a fundamental element of property. *Buchanan v. Warley*, 245 U.S. 60, 80, 82, 38 S. Ct. 16, 62 L. Ed. 149 (1917).

Cases from other Jurisdictions

- “Washington courts, furthermore, ‘have consistently recognized that “the right to possess, make use or dispose of, and exclude others from property,” are “fundamental attribute[s] of property ownership.”’” *Clallam Cty. v. CBS Outdoor, Inc.*, No. 3:13-CV-05782-KLS, 2014 WL 7340994, at *11 (W.D. Wash. Dec. 23, 2014) (quoting *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000) (quoting *Guimont v. Clarke*, 121 Wn.2d 586, 595, 854 P.2d 1 (1993))).
- Recognizing that the right to “dispose of property” is a fundamental attribute of property ownership. *Tapps Brewing Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1231-32 (W.D. Wash. 2007), as amended (May 3, 2007), *aff’d sub nom. McClung v. City of Sumner*, 545 F.3d 803 (9th Cir. 2008), *withdrawn from bound volume, opinion amended and superseded on denial of reh’g*, 548 F.3d 1219 (9th Cir. 2008), and *aff’d sub nom. McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008).
- “An owner of land in fee simple generally has inherent rights to rent his or her land at any price he or she can command.” *Cienega Gardens v. United States*, 331 F.3d 1319, 1328-29 (Fed. Cir. 2003).
- “Alienability is a key tenant of ownership—it is a ‘fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit.’” *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1278 (10th Cir. 2017).
- “[P]roperty refers to both the actual physical object and the various incorporeal ownership rights in the res, such as the right[] . . . to alienate.” *First Charter Land Corp. v. Fitzgerald*, 643 F.2d 1011, 1014-15 (4th Cir. 1981).
- The right to “acquire, use, enjoy, and dispose of property” is “an original and fundamental right, existing anterior to the formation of the government itself.” *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 361-62, 853 N.E.2d 1115 (2006).

- “This court has recognized that the substantive component of the Fourteenth Amendment’s Due Process Clause forbids the government from burdening, in a constitutionally arbitrary way, an individual’s property rights.” *O’Connor v. Pierson*, 426 F.3d 187, 204 (2d Cir. 2005).
- Holding that an ordinance requiring mobile home park owners to offer tenants a right of first refusal constituted “an outright abrogation of well-recognized property rights . . . and extinguished a fundamental attribute of ownership in violation of the U.S. Constitution.” *Gregory v. City of San Juan Capistrano*, 142 Cal. App. 3d 72, 191 Cal. Rptr. 47, 58 (Ct. App. 1983) *disapproved on other grounds in Fisher v. City of Berkeley*, 37 Cal. App. 3d 644, n. 43 (1984).
- “The constitutional guaranty securing to every person the right of ‘acquiring, possessing and protecting property’ . . . includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. Any statute which interferes with this right, except in cases where the public health, morals, or safety, or the general welfare authorizes such restriction as an exercise of the police power is to the extent of such interference unconstitutional and void.” *Ex parte Quarg*, 149 Cal. 79, 80, 84 P. 766 (1906) (favorably cited by *Manufactured Hous. Communities of Washington v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000)).
- Recognizing the “right of an owner of property to use and dispose of it as he chooses.” *Laguna Royale Owners Ass’n v. Darger*, 119 Cal. App. 3d 670, 683, 174 Cal. Rptr. 136 (Ct. App. 1981).
- “The right to acquire and possess property, guaranteed by the constitution, includes the right to dispose of it, or any part of it, and for that purpose to divide it in any possible manner, either by separating it into estates for successive periods or otherwise, and to dispose of one or more of such estates.” *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 794-95, 941 P.2d 851 (1997)

(quoting *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 575, 140 P. 242 (1914)).

- “[A] person’s right of acquiring, possessing, and protecting property . . . includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain.” *Coal. of Human Advocates for K9’s & Owners v. City & Cty. of San Francisco*, No. C-06-1887 MMC, 2007 WL 641197, at *10 (N.D. Cal. Feb. 27, 2007) (internal citations omitted).
- Recognizing “the fundamental constitutional provisions for the protection of property, which includes not only the abstract legal title, but the right to use and enjoy and dispose of property.” *Brown v. City of New York*, 183 F. 888, 891 (C.C.S.D.N.Y. 1910).

3. In response to the City of Seattle’s claim that state and federal courts recognize only two levels of scrutiny—rational basis scrutiny or strict scrutiny—when reviewing due process challenges regulations that impinge on recognized rights and liberties (*See Seattle Reply Br. at 15-17*), the Yims provide the following citations to supplemental authority:

Case from Washington State Supreme Court

- “Under the minimal level of review—the ‘rational basis’ test—a law will be upheld if it is rationally related to a legitimate government purpose. *See, e.g., N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (1979). Under middle level, or ‘intermediate scrutiny’ analysis, a law is upheld if substantially related to an important government purpose. *See, e.g., United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). A law will pass the most intensive level of scrutiny, ‘strict scrutiny’ if necessary to achieve a compelling government purpose—proof the law is the least restrictive means of achieving the purpose. *See, e.g., Johnson v. California*, 543 U.S. 499, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005).” *State v. Sieyes*, 168 Wn.2d 276, 295 n.18, 225 P.3d 995 (2010).

Cases from the United States Supreme Court

- Rational basis “could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) (‘There may be narrower scope for operation of the presumption of constitutionality [i.e., narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .’).” *District of Columbia et al. v. Heller*, 554 U.S. 570, 629 n.27, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).
- “We have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty.” *Foucha v. Louisiana*, 504 U.S. 71, 93, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).
- “The Fourteenth Amendment provides that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’ We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, . . . includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’” *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (applying intermediate scrutiny); *see also id.* at 80 (Thomas, J., concurring in judgment) (arguing for the application of “strict scrutiny to infringements of fundamental rights”).
- In the context of due process, the “substantially related” test is a heightened scrutiny test. *Califano v. Westcott*, 443 U.S. 76, 88-89, 99 S. Ct. 2655, 61 L. Ed. 2d 382 (1979).
- *Washington v. Glucksberg*, 521 U.S. 702, 767 n.9, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (Souter, J., concurring) (noting that, under the Court’s due process caselaw, a right must be “fundamental before anything more than rational basis justification is required, the Court ensures that not every case will require the ‘complex balancing’ that heightened scrutiny entails.”).

Cases from Other Jurisdictions

- “The Supreme Court has ‘long eschewed . . . heightened [means-ends] scrutiny when addressing substantive due process challenges to government regulation’ *that does not impinge on fundamental rights.*” *Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008) (alterations in original) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)) (cited by *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012)).
- The Fourteenth Amendment’s Substantive Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests[.]” *McNeil v. Sherwood Sch. Dist.* 88J, 918 F.3d 700, 711 (9th Cir. 2019).
- *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014) (explaining the difference between heightened scrutiny and rational basis review in due process claims).
- *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008) (applying heightened scrutiny to a servicewoman’s due process challenge to the Air Force’s “Don’t Ask Don’t Tell” policy).
- A substantive due process challenge to a curfew statute as interfering with juveniles’ right of free movement is reviewed under intermediate scrutiny, not strict scrutiny or rational basis scrutiny. *Hutchins v. D.C.*, 188 F.3d 531, 541 (D.C. Cir. 1999); *see also Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (same).
- To uphold a government intrusion into a person’s private affairs against a due process challenge, the court “must [first] find that important governmental interests are at stake. . . . Second, the court must conclude that involuntary medication will significantly further those concomitant state interests. . . . Third, the court must conclude that [the government action] is necessary to further those interests. The court must find that any alternative [is] unlikely to achieve substantially the same results. . . .” *Witt v. Dep’t of Air Force*, 527 F.3d 806, 818-19 (9th Cir. 2008) (quoting *Sell v. United States*, 539 U.S. 166, 180-81, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003)).

- City’s installation of flower pots to block access to a resident’s neighborhood was subject to heightened scrutiny. *Townes v. City of St. Louis*, 949 F. Supp. 731 (E.D. Mo. 1996), *aff’d*, 112 F.3d 514 (8th Cir. 1997).

4. In response to the City of Seattle’s claim that there is no authority showing that federal courts apply a heightened, “substantially advances” formula when considering due process claims involving an infringement of property rights (*See* Seattle Reply Br. at 5-8), the Yims provide the following citations to supplemental authority:

Additional authority from Washington Supreme Court

- Noting that the U.S. Supreme Court had reserved the “‘substantially advances’ test . . . for substantive due process claims.” *Maytown Sand & Gravel, LLC v. Thurston Cty.*, 191 Wn.2d 392, 434 n.9, 423 P.3d 223 (2018), *as amended* (Oct. 1, 2018) (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).

Post-Lingle caselaw

- Rejecting a government argument “that no substantive due process claim ‘lies in the context of economic and property rights disputes’” after *Lingle. A Helping Hand, LLC v. Baltimore Cty., MD*, 515 F.3d 356, 369 n.6 (4th Cir. 2008) (*Lingle* “explicitly distinguished between takings and substantive due process claims in this context, noting that a challenge to a governmental action that does not ‘substantially advance[]’ legitimate government interests is a substantive due process claim[.]”)
- “*Lingle* upheld the independent validity of substantive due process claims and held that ordinances creating a transfer premium might not advance a legitimate government interest. The Court indicated that the ‘substantially advances’ test was a way to bring substantive due process claims.” *Guggenheim v. City of Goleta*, 638 F.3d 1111,

1135 (9th Cir. 2010) (the “substantially advances” test requires analysis of the regulation’s means and end).

- Recognizing that *Lingle* abrogated Ninth Circuit caselaw which had held that a due process claim based on the “substantially advances” theory is precluded by the availability of a similar tracings claim. *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007) (“*Lingle* pulls the rug out from under our rationale for totally precluding substantive due process claims based on arbitrary or unreasonable conduct. . . . Thus, the . . . rationale [for precluding due process claims] no longer applies to claims that a municipality’s actions were arbitrary and unreasonable, lacking any substantial relation to the public health, safety, or general welfare.”).
- *Franklyn Mem’l Hosp. v. Harvey*, 575 F.3d 121, 128 n.9 (1st Cir. 2009) (noting that *Lingle* identified the substantial advancement test for application in the due process context).
- *Alto Eldorado P’ship v. County of Santa Fe*, 634 F.3d 1170, 1175 (10th Cir. 2011) (A property-rights based substantial advancement challenge “is properly brought as a due process claim as decided in *Lingle*.”).
- *Rose Acre Farms v. United States*, 559 F.3d 1260, 1277 (Fed. Cir. 2009) (after *Lingle* a claim alleging that a property restriction does not substantially advance a government interest must be brought under the substantive due process doctrine).
- *Adams v. Vill. of Wesley Chapel*, 259 F. App’x 545, 550 (4th Cir. 2007) (confirming the “no substantial relation” due process test after *Lingle*).

5. In response to the City of Seattle’s claim that the U.S. Supreme Court’s use of the phrase “substantial relation” in *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928), and *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926), did not intend to establish a heightened standard of review (See Seattle

Reply Br. at 7-8), the Yims provide the following citations to supplemental authority:

Authorities from the U.S. Supreme Court

- The Court will declare a regulation unconstitutional “when it is plain and palpable that it has *no real or substantial relation* to the public health, safety, morals, or to the general welfare.” *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531, 37 S. Ct. 190, 61 L. Ed. 472 (1917) (cited by *Euclid*, 272 U.S. at 395).
- “[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has *no real or substantial relation to those objects*, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (cited by *Euclid*, 272 U.S. at 395).
- “If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, *has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.’ Upon the authority of those cases, and others that could be cited, *it is our duty to inquire . . . not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether, by its necessary or natural operation, it impairs or destroys rights secured by the constitution of the United States.*” *State of Minnesota v. Barber*, 136 U.S. 313, 320, 10 S. Ct. 862, 34 L. Ed. 455 (1890) (cited by *Jacobson*, 197 U.S. at 31).
- “If the *means employed have no real, substantial relation to public objects* which government may legally accomplish,—if they are arbitrary and unreasonable, beyond the necessities of the case,—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt.” *Chicago*,

B. & Q. Ry. Co. v. People of State of Illinois, 200 U.S. 561, 593, 26 S. Ct. 341, 50 L. Ed. 596 (1906).

- “The most important difference between heightened scrutiny and rational basis review, of course, is the required fit between the means employed and the ends served. Under heightened scrutiny, the discriminatory means must be ‘substantially related’ to an actual and important governmental interest. Under rational basis scrutiny, the means need only be ‘rationally related’ to a conceivable and legitimate state end.” *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 77, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001) (citations omitted).

6. In response to the City of Seattle’s claim that there is no authority showing that the U.S. Supreme Court’s use of the phrases “substantial relation” and “substantially advances” has any effect on the degree of scrutiny applicable to due process challenges (*See* Seattle Reply Br. at 7-8), the Yims provide the following citations to supplemental authority:

- “Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality.” *Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, ___ U.S. ___, 139 S. Ct. 361, 368, 202 L. Ed. 2d 269 (2018); *Rimini St., Inc. v. Oracle USA, Inc.*, ___ U.S. ___, 139 S. Ct. 873, 878, 203 L. Ed. 2d 180 (2019) (same).
- “[A]dverbial phrases . . . modify their respective nearby verbs[.]” *Dean v. United States*, 556 U.S. 568, 129 S. Ct. 1849, 173 L. Ed. 2d 785 (2009).
- “We are of the view, therefore, that as between the two commonly used connotations of the word ‘substantially,’ the one most naturally conveyed by the phrase before us here is not ‘justified to a high degree,’ but rather ‘justified in substance or in the main’—that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (interpreting phrase “substantially justified” in context of a sanction award).

- “‘Substantial’ is here used as an adjective to mean [] ‘real’ or ‘material[.]’” *State v. Robinson*, 20 Wn. App. 882, 884, 582 P.2d 580 (1978), *aff’d*, 92 Wn.2d 357, 597 P.2d 892 (1979) (defining the term as used in RCW 94.40.010).
- The substantially advances test requires the court to consider more than the whether a government act is rationally related to a legitimate government goal. The test also requires the court to consider facts showing inconsistent and/or oppressive treatment to determine whether the actual means employed substantially advance the government objectives. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703, 705-06, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999).
- “‘Substantially justified’ means ‘justified to a degree that could satisfy a reasonable person.’” *H & HP’ship v. State*, 115 Wn. App. 164, 171, 62 P.3d 510 (2003) (interpreting attorney fee provision of WAC 173-27-130(6)).
- “[T]he ‘substantially advances’ test [requires] a connection of some sort . . . between [the] means . . . and the intended end[.]” *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1040 (9th Cir. 2000).
- “[A] municipal ordinance is a valid exercise of the police power if it is substantially related to the public health, safety, or general welfare. So long as an ordinance realistically serves a legitimate public purpose, and it employs means that are reasonably necessary to achieve that purpose, without unduly oppressing the individuals regulated, the ordinance must survive a due process challenge.” *Atlanta Taxicab Co. Owners Ass’n v. City of Atlanta*, 281 Ga. 342, 348-49, 638 S.E.2d 307 (2006) (quoting *City of Lilburn v. Sanchez*, 268 Ga. 520, 522, 491 S.E.2d 353 (1997)).

DATED: May 31, 2019.

Respectfully submitted,

By: s/ BRIAN T. HODGES
BRIAN T. HODGES, WSBA #31976
ETHAN W. BLEVINS, WSBA #48219
Pacific Legal Foundation
255 South King Street, Suite 800
Seattle, Washington 98104
Telephone: (916) 419-7111
Email: BHodges@pacificlegal.org
Email: EBlevins@pacificlegal.org

*Attorneys for Plaintiffs
Chong & MariLyn Yim,
Kelly Lyles, Eileen, LLC,
and Rental Housing
Association of Washington*

PACIFIC LEGAL FOUNDATION - WASHINGTON

May 31, 2019 - 3:28 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96817-9
Appellate Court Case Title: Chong Yim, et al. v. City of Seattle

The following documents have been uploaded:

- 968179_State_of_Add_Authorities_20190531152628SC932377_4787.pdf
This File Contains:
Statement of Additional Authorities
The Original File Name was 968179 Yim Stmt of Addl Authorities.pdf

A copy of the uploaded files will be sent to:

- ewb@pacificlegal.org
- incominglit@pacificlegal.org
- jessicag@summitlaw.com
- katiea@summitlaw.com
- lise.kim@seattle.gov
- roger.wynne@seattle.gov
- sara.oconnor-kriss@seattle.gov

Comments:

Service will be accomplished via the Appellate Filing Portal.

Sender Name: Brien Bartels - Email: bbartels@pacificlegal.org

Filing on Behalf of: Brian Trevor Hodges - Email: bth@pacificlegal.org (Alternate Email:)

Address:
255 South King Street
Suite 800
Seattle, WA, 98104
Phone: (916) 419-7111 EXT 3521

Note: The Filing Id is 20190531152628SC932377