Honorable Suzanne Parisien
Dept. 42
Hearing with argument February 23, 2018, 9:00 a.m.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CNA APARTMENTS, LLC, and EILEEN, LLC, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.	Case No. 17-2-05595-6 - SEA **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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RELIEF REQUESTED

Plaintiffs Chong and MariLyn Yim, Kelly Lyles, Beth Bylund, CNA Apartments, LLC, and Eileen, LLC (collectively, "Yim") request that this Court grant their motion for summary judgment and declare that City of Seattle Ordinance 125114, requiring residential landlords to offer a tenancy to the first qualified person who applies for a rental unit, violates the Takings, Due Process, and Free Expression Clauses of the Washington State Constitution. Plaintiffs additionally request a permanent injunction forbidding the City from enforcing its unconstitutional "first-in-time" rule.

INTRODUCTION

Washington's Supreme Court has held that an owner's right to sell a property interest to whom he or she chooses is a fundamental attribute of property ownership, which cannot be taken without due process and payment of just compensation. *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000). The City of Seattle, however, appropriated this right when it enacted the "first-in-time" rule, which demands that landlords accept the first qualified applicant without any opportunity to select the best potential tenant among all applicants. The City's justification for this new rule—to protect against the possibility that a rental decision may be motivated by unconscious bias—does not forgive this total taking of a fundamental attribute of property ownership.

The first-in-time rule also abridges other constitutional rights regarding property and speech. The uncompensated taking, for instance, is not for a public use as the state constitution requires. Rather, the City grants a right of first refusal—a valuable property interest—to the first qualified applicant. Regardless of any public benefit from reduced discrimination, this forced

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transfer of a property interest from one private party to another violates the state constitution. The rule also violates due process; a sweeping ban on ordinary discretion by landlords—including innocuous decisions unrelated to discrimination—is overbroad and unduly oppressive. Finally, the rule abridges free expression: it controls the content and format of landlords' commercial speech.

This radical approach to combating implicit bias wrests fundamental rights from all Seattle landlords without any individualized evidence of discriminatory practices. The City could have opted for the many non-intrusive methods for dealing with implicit bias suggested in the stipulated record. Instead, the City selected an oppressive and sweeping ban on basic discretion. The first-in-time rule is an abuse of power that violates multiple rights guaranteed by our state constitution. Plaintiffs request that the Court declare the first-in-time rule invalid and enjoin its enforcement.

STATEMENT OF FACTS[1]

The first-in-time rule

In August 2016, Seattle amended the Open Housing Ordinance to add the first-in-time rule. *See* SF ¶¶ 10-20. The rule requires landlords to "offer tenancy of [any] available unit to the first prospective occupant meeting all the screening criteria necessary for the approval of the application." SMC § 14.08.050(A)(4). Landlords must place all screening criteria in their online advertisements. *Id.* § 14.08.050(A)(1). They must then review all applications in chronological order, offering tenancy to the first applicant who satisfies the screening criteria. *Id.*

[1] This brief relies on the attached STIPULATED FACTS AND RECORD. Plaintiffs cite to the stipulated facts by the designation "SF" and a corresponding paragraph number and to the stipulated record by the designation "SR" and corresponding page number.

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§ 14.08.050(A)(2)-(4). If the applicant declines the offer, then the landlord must offer the unit to the next qualified applicant in the chronological line-up, and so on. *Id.* § 14.08.050(A)(4).

The rule deems it an "unfair practice" for a landlord to rent to someone besides the first qualified applicant. *Id.* § 14.08.050(A). Regardless of the landlord's rationale for selecting a tenant, this exercise of discretion is deemed "contrary to the public peace, health, safety and general welfare." *Compare id. with id.* § 14.08.030.

The first-in-time rule is enforced through public and private causes of action. *See id.* § 14.08.095-.187. Private individuals can sue for equitable relief and damages. *Id.* § 14.08.095(F). The Office of Civil Rights can also pursue a claim for any relief "necessary to correct the practice, effectuate the purpose of [the Open Housing Ordinance], and secure compliance therewith." *Id.* § 14.08.180(C). Additionally, a civil penalty may be assessed up to $11,000 for one unfair practice and up to $55,000 for more than two offenses. *Id.* § 14.08.185.

The first-in-time rule has a few exceptions. Accessory dwelling units, for example, are exempt. *Id.* § 14.08.050(F). Additionally, the rule does not apply to units that a landlord sets aside "to serve specific vulnerable populations." *Id.* § 14.08.050(A)(4)(a), (b). Such populations include "homeless persons, survivors of domestic violence, persons with low income, and persons referred to the owner by non-profit organizations or social service agencies." *Id.* The rule does not specify how to qualify for this exception. A central staff memo, however, indicated that the landlord must note in any advertising that the unit is only open to a specific vulnerable population to be served. *See* SR 000096.

According to the City, the first-in-time rule reflects Seattle's "longstanding commitment to race and social justice." SR 000279. The rule is meant to guard against the possibility that a

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rental decision may be motivated by implicit bias, which the City defines as an unconscious mental process that influences conduct. According to the bill's sponsor, Lisa Herbold, "even within jurisdictions with strong anti-discrimination laws, it is very important to find ways to address the role of implicit biases in order to reduce discrimination." *Id.* at 000143. The first-in-time rule is meant to be "a tool to mitigate unconscious bias" and to facilitate "greater access to housing for people in need." *Id.* at 000142.

Herbold reasoned that landlords—when left to their own judgment—might subconsciously discriminate against protected classes. *Id.* at 000143. She called the City's decision to ban landlord discretion a "transformational" means of teaching them to "unlearn the implicit associations" that might affect their judgment. *Id.*

The first-in-time rule, however, would even forbid landlord discretion with regard to legitimate factors that are wholly unrelated to a protected class. The City acknowledged the sweeping overbreadth of the rule in a June 2016 central staff memo: "Use of a first in time policy affects [] a landlord's ability to exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class." SR 000064. The memo offered no suggestion on how to address this issue.

Plaintiffs

Plaintiffs are landlords subject to the first-in-time rule. *See* SF ¶¶ 1-5. Chong and MariLyn Yim own a triplex in Seattle and live in one of the units with their minor children. *Id.* The Yims rent out the other two units. *Id.* They frequently interact with their tenants and share a yard. *Id.* Kelly Lyles is a single woman who owns and rents a home in West Seattle. *Id.* ¶ 2. Ms. Lyles is a local artist who relies on her rental income for most of her living expenses. *Id.* The Benis family

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owns a six-unit apartment building through CNA Apartments, LLC. *Id.* ¶ 3. The property serves as the primary college fund for the three Benis children. *Id.* Scott Davis—through Eileen, LLC—rents out a seven-unit apartment complex. *Id.* ¶ 4. For three years, he has rented to two young men of separate minority groups who did not satisfy his regular rental criteria when they applied. *Id.* He decided to nonetheless offer them a break because they were polite and made a good impression. *Id.*

EVIDENCE RELIED UPON

Plaintiffs rely on the STIPULATED FACTS AND RECORD filed on November 28, 2017.

STATEMENT OF ISSUES

1. **Regulatory Taking.** A taking occurs when government destroys a fundamental attribute of property ownership, including the right to exclude and the right to sell a property interest to a person of the owner's choosing. Under Seattle's first-in-time rule, landlords must offer a rental unit to the first qualified applicant. Does the first-in-time rule deprive landlords of a fundamental attribute of property ownership?
2. **Private Use.** The Washington Constitution forbids the forced transfer of a property right to a private individual, even if the transfer has a public benefit. The first-in-time rule transfers a property right—a right of first refusal—to the first qualified person to apply for a rental unit. Is the first-in-time rule a taking for private use?
3. **Due Process.** Due process requires that regulations of property must have a legitimate purpose, must pursue that purpose through reasonable means, and must not be unduly oppressive. Seattle, in order to prevent unconscious bias, imposed a blanket rule depriving

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all landlords of the discretion to choose whom to lease their property to. Does the first-in-time rule satisfy due process?

4. **Speech.** Laws that dictate how individuals advertise a good or service implicate speech rights. The first-in-time rule controls the content and means of landlord advertising. Does the first-in-time rule violate landlords' speech rights?

ARGUMENT AND AUTHORITY

I. THE FIRST-IN-TIME RULE EFFECTS A CATEGORICAL TAKING BY DESTROYING A FUNDAMENTAL ATTRIBUTE OF PROPERTY

Over the years, the Washington Supreme Court has developed several distinct tests to identify when government regulation of property goes too far and effects a regulatory taking. *Guimont v. Clarke*, 121 Wn.2d 586, 605, 854 P.2d 1 (1993); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Among those tests, the Court has held that a property owner will prove a "per se" or "categorical" taking if he or she can show that a regulation destroys one or more of the fundamental attributes of property ownership—e.g., the right to possess property, exclude others, dispose of property, or make some economically viable use of property.[2] *Guimont*, 121 Wn.2d at 602; *see also Manufactured Housing*, 142 Wn.2d at 355. In this circumstance, a taking has occurred, and no further analysis is required. *Guimont v. City of*

[2] This is not an exhaustive list. The Washington Supreme Court may recognize other rights, as it did when it incorporated the right to make some economically viable use of property in *Guimont*, 121 Wn.2d at 602 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-20, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)). Similarly, some property owners may enjoy additional rights depending on their site-specific circumstances. For example, littoral property owners may retain special rights that non-littoral property owners do not possess, because their property abuts the water. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 708, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

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Seattle, 77 Wn. App. 74, 81, 896 P.2d 70 (1995) (citing *Guimont*, 121 Wn.2d at 600). The landowner is entitled to "categorical treatment," which may include an order enjoining the regulation's enforcement. *Id.*; *Manufactured Housing*, 142 Wn.2d at 355.

The Washington Supreme Court's opinion in *Manufactured Housing* is the most recent and on-point decision regarding this "fundamental attribute" doctrine. There, a state law granted mobile-home park tenants the power to exercise a right of first refusal if the park owner decided to sell the property. *Manufactured Housing*, 142 Wn.2d at 351-52. The Court held that the law constituted a facial taking because it took "from the park owner the right to freely dispose of his or her property and [gave] to tenants a right of first refusal to acquire the property." *Id.* at 361. The right to freely dispose of property, the Court reasoned, is a fundamental attribute of property ownership, and the right of first refusal law caused a taking when it destroyed that attribute. *Id.* at 361, 364.

This categorical takings test has a long history in Washington. *See, e.g.*, *id.*; *Sintra, Inc. v. City of Seattle,* 119 Wn.2d 1, 14 n.6, 829 P.2d 765 (1992) ("[R]egulation may also be a taking if it destroys one or more of the fundamental attributes of property ownership."); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329-30, 787 P.2d 907 (1990) ("[C]ourt[s] should ask whether the regulation destroys one or more of the fundamental attributes of property ownership."). The doctrine stems from the principle that property includes a family of rights: "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself." *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960), (quoting *Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W. 513 (1921))

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abrogated on other grounds by Highline Sch. Dist. No. 401 v. Port of Seattle, 87 Wn.2d 6, 548 P.2d 1085 (1976). Indeed, both the concurring opinion and the dissenting opinion in *Manufactured Housing* acknowledged the "fundamental attribute" test. *See Manufactured Housing*, 142 Wn.2d at 407 ("Finally, a taking by enactment of a statute or regulation can be demonstrated when the government action destroys or derogates a fundamental attribute of ownership.") (Talmadge, J., dissenting); *id.* at 383 ("I therefore emphatically agree with the majority's conclusion that '[t]he instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership' and see that as the dispositive feature of the majority's analysis.") (Sanders, J., concurring) (citation omitted).

Thus, the sole question that needs to be resolved is whether the first-in-time rule—by depriving landlords of the ability to choose their tenants—has destroyed one or more fundamental attributes of property ownership.

A. The right to select a tenant in a non-discriminatory manner is a fundamental attribute of property ownership

Choosing a tenant is a fundamental attribute of property ownership. Like a sale of a fee interest, a lease is a disposition of a property interest. *Manufactured Housing* held that selecting a buyer to purchase a property interest is a fundamental attribute of property ownership. In that case, a state law required mobile-home park owners looking to sell their property to grant tenants a right of first refusal. 142 Wn.2d at 351-52. The Court held that a right of first refusal is a valuable interest in property. *Id.* at 365-66. The power to grant or withhold that right is a core aspect of the right to sell property. *Id.* at 366. And since the right to freely dispose of property is a fundamental attribute of property ownership, so too is the right to grant or withhold a right of first refusal. *Id.*

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The right to grant a right of first refusal in the context of a leasehold is just as fundamental as the right to sell fee title in *Manufactured Housing*. The sale of a leasehold is simply one more method of disposing of a property interest. A leasehold is more than a contractual right; the leasehold itself is a property interest that cannot be taken without just compensation. *See Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 303, 96 S. Ct. 910, 47 L. Ed. 2d 1 (1976). When a property owner sells this property interest, she enjoys the right to lease to whom she wishes as a fundamental attribute of property ownership. And just as in *Manufactured Housing*, the landlord has the right to grant or withhold a right of first refusal.

Indeed, the right to grant a right of first refusal is even more vital in the context of a leasehold. Unlike a property owner seeking to sell fee title, the landlord selling a leasehold retains title to the property. Thus, the landlord has a much greater interest in the identity of a lessee than a property owner seeking to sell title.

Safety, compatibility, and future liability are among these interests. The Yim family, for example, lives in one of the units of their triplex. SF ¶ 1. With young children and a shared yard, they want to feel safe with their renters. *Id.* Kelly Lyles, too, has safety concerns as a single woman. *Id.* ¶ 2. When she collects rent or visits to assess a problem, she wants to feel comfortable being in the unit with the tenant. *Id.* And landlords are not the only individuals whose safety plays a role in a rental decision. Landlords have a legal obligation to protect their tenants from foreseeable crimes committed by other tenants. *Griffin v. West RS, Inc.*, 97 Wn. App. 557, 570, 984 P.2d 1070 (1999), *rev'd on other grounds by* 143 Wn.2d 81, 13 P.3d 558 (2001); *see also Hutchins v. 1001 Fourth Avenue Associates*, 116 Wn.2d 217, 224, 802 P.2d 1360 (1991). Care in selecting tenants is a vital means of fulfilling this legal duty.

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If a mobile-home park owner has a fundamental right to decide to whom to sell, a landlord most certainly has an equivalent right in selecting a tenant. Indeed, because a landlord continues to own the leased property, the first-in-time rule burdens both the right to decide to freely dispose of property *and* the right to exclude—another fundamental attribute of property ownership. *Manufactured Housing*, 142 Wn.2d at 364. The "fundamental attribute" test therefore applies to a taking of a landlord's right to choose to whom they lease their property.

B. The first-in-time rule destroys landlords' right to choose their tenants and therefore causes a categorical taking

The first-in-time rule destroys a fundamental attribute of property ownership. The rule requires landlords to offer a unit to the first qualified applicant. SMC § 14.08.050(A)(4). This operates just like a right of first refusal. By taking the landlord's power to grant or withhold such a right, the first-in-time rule destroys "part of 'the bundle of sticks' which the *owner* enjoys as a vested incident of ownership." *Manufactured Housing*, 142 Wn.2d at 367. The rule therefore gives rise to a categorical taking.

Indeed, the first-in-time rule destroys this right even more thoroughly than the law at issue in *Manufactured Housing*. For one, the first-in-time rule is more permanent. In *Manufactured Housing*, if mobile-home tenants chose not to exercise the right of first refusal, the right to choose a buyer reverted back to the mobile-home park owner. *Id.* at 352. Not so with the first-in-time rule; landlords never regain this right. If the first applicant declines the unit, the right of first refusal passes on to the next applicant in line rather than reverting back to the landlord. *See* SMC § 14.08.050(A)(4). This is therefore a more thorough taking than the one-time right of first refusal in *Manufactured Housing*.

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Moreover, the taking worked by the first-in-time rule is less qualified than in *Manufactured Housing*. After all, the statute in *Manufactured Housing* did not categorically remove mobile-home park owners' control over to whom they sell. The choice to whom to sell was only destroyed if the mobile-home tenants took certain steps to trigger their right of first refusal. The tenants would have to organize into a qualified tenant organization, notify the mobile-home park owner of their intent to exercise the right of first refusal, and offer up 2 percent of the sale price. *Manufactured Housing*, 142 Wn.2d at 352. If they chose not to exercise the right, then the mobile-home owner would be free to sell to whomever he chose.

Here, however, the taking of a property interest—the right of first refusal—occurs without any affirmative steps taken by an applicant. The applicant does not need to notify the landlord or take any other action to enjoy a right of first refusal. The ban on landlord discretion is therefore more destructive of a fundamental attribute of property ownership than the law in *Manufactured Housing*.

C. The first-in-time rule's few caveats do not prevent a facial taking

The first-in-time rule's few concessions to landlords' interests do not redeem it. The rule, for instance, does allow landlords to set their own rental criteria. *See* SMC § 14.08.050(A). Hence, landlords can still decide whether to allow pets or the credit history required. *Cf. id.* While this allows landlords to exercise some imprecise control over the pool of qualified applicants, a clumsy filter-like general rental criteria does not substitute for the discretion to choose a specific tenant.

The ability to negotiate, for instance—a key element of the right to freely dispose of property—is extinguished by the first-in-time rule. Even if landlords can impose some limits on the pool of qualified applicants, landlords and tenants still cannot bargain for an arrangement that

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suits their interests. For example, a landlord would simply have to ignore an applicant's offer to pay higher rent if that applicant was not the first in line. Likewise, a landlord could not accept a later applicant's offer to do some repairs if the landlord dropped the monthly rent by $50, regardless of whether both landlord and tenant wanted to do business.

Likewise, safety and compatibility concerns cannot be resolved through general criteria. Qualities such as trustworthiness and friendliness require the discretion to sift through applications, meet potential tenants, and weigh the many factors at stake. Scott Davis, for instance, was glad to waive some of his general rental criteria because two young minority applicants made a good impression. SF ¶ 4. Genuine choice cannot be reduced to paper.

Indeed, the ability to use rental criteria to filter potential tenants has become even more constrained because of the recent Fair Chance Housing Ordinance. *See* Seattle City Council Bill 119015; SMC § 14.09. That Ordinance forbids landlords from asking about or considering the criminal background of housing applicants. SMC § 14.09.025(A). As a result, landlords can no longer require criminal background checks, so general rental criteria cannot address safety concerns regarding individuals with a serious criminal history.

Nor does the narrow exception for those who choose to rent to "vulnerable populations" prevent a taking. This exception can only save a landlord from the first-in-time requirement if the landlord chooses in advance to restrict the unit to vulnerable populations and advertise it as such. *Compare* SMC § 14.08.050(A)(4)(a), (b) *with* SR 000096. Thus, the exception itself deprives landlords of the same fundamental attribute of property ownership to choose a tenant because they must withdraw from renting to the general public. Hence, this exception simply allows landlords to choose their flavor of taking.

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D. Injunctive and declaratory relief are proper remedies for the uncompensated taking caused by the first-in-time rule

Both state and federal law allow injunctive and declaratory relief as remedies for an uncompensated taking. Washington courts can and do offer equitable relief in this setting. The state constitution says: "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner." Wash. Const. art. I, § 16. The Supreme Court of Washington has long interpreted this language to mean that government must pay compensation prior to a taking. *See Brown v. City of Seattle*, 5 Wn. 35, 44, 31 P. 313 (1892); *Manufactured Housing*, 142 Wn.2d at 357 (noting that a "significant difference" between the federal and state takings provisions is the state's "requirement that compensation must *first* be made"). Where an uncompensated taking occurs, the taking should be enjoined until compensation is provided. *Wandermere Corp. v. State*, 79 Wn.2d 688, 697-98, 488 P.2d 1088 (1971) ("Wandermere was entitled to an injunction . . . until such time as petitioner's damages had been ascertained and paid"); *see also*, *e.g.*, *Granat v. Keasler*, 99 Wn.2d 564, 571, 663 P.2d 830 (1983) (holding that a law against evicting houseboats from moorages was an uncompensated taking and returning full possession to the moorage owner rather than requiring compensation).

Federal courts have also long offered equitable relief for uncompensated takings. *See* Jesse Dukeminier & James E. Krier, *Property* 1219 (5th ed. 2002) ("Though one would logically expect compensation through inverse condemnation to be commonplace, for many years it was not. . . . Instead, the courts awarded declaratory or injunctive relief invalidating the regulation or its application."). The Supreme Court has continued to approve this pattern. In *Horne v. Department of Agriculture*, the Supreme Court enjoined enforcement of a regulatory taking rather than forcing

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the property owner to seek compensation after the taking occurred. 569 U.S. 513, 133 S. Ct. 2053, 2063, 186 L. Ed. 2d 69 (2013). Additionally, in Justice Stevens' separate opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 952 (2001), he noted that a "regulation that goes so 'far' that it violates the Takings Clause may give rise to an award of compensation or it may simply be invalidated as it would be if it violated any other constitutional principle." 533 U.S. at 639 n.l. He based this statement on the Court's seminal takings case *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414, 43 S. Ct. 158, 67 L. Ed. 322 (1922), in which the Court ruled that a statute taking private property without just compensation "cannot be sustained." 533 U.S. at 639 n.l; *see Lucas*, 505 U.S. at 1070 n.6 (1992) (Stevens, J., dissenting).

Both state and federal practices demonstrate that declaratory and injunctive relief are appropriate remedies for an uncompensated taking.

II. THE FIRST-IN-TIME RULE IS A PROHIBITED PRIVATE TAKING BECAUSE IT TRANSFERS A PROPERTY INTEREST FROM THE LANDLORD TO OTHER PRIVATE INDIVIDUALS

The first-in-time rule also violates the "private use" requirement. Article I, Section 16, of the state constitution says, "Private property shall not be taken for private use." This provision offers greater protection to property owners than its federal counterpart. *See Manufactured Housing*, 142 Wn.2d at 360. Indeed, our state Supreme Court has described Article I, Section 16, as an "absolute prohibition against taking private property for private use." *Id.* at 357.

A. The first-in-time rule mirrors the private use violation in *Manufactured Housing*

Manufactured Housing exemplifies the state supreme court's vigilant approach to private use. There, the mobile-home law gave "tenants a right to preempt the [mobile-home park] owner's sale to another and to substitute themselves as buyers." *Manufactured Housing*, 142 Wn.2d at 361.

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The law therefore was a private use taking because it took the right to freely dispose of property and handed a corollary right of first refusal to the tenants. *Id.* at 361-62. Rather than placing property in public hands or increasing public access, "[t]he statute's design and its effect provide a beneficial use for private individuals only." *Id.*

A taking is not for a public use just because it offers a "public benefit." *Manufactured Housing*, 142 Wn.2d at 362. "[T]he fact that the public interest may require it is insufficient if the use is not really public." *In re City of Seattle*, 96 Wn.2d 616, 627, 638 P.2d 549 (1981). The state in *Manufactured Housing* defended the right-of-first-refusal law by lauding its public benefits: preserving housing stock for the poor. *Manufactured Housing*, 142 Wn.2d at 371. The Court held that such benefits could not transform the private nature of the taking into a public one. *Id.*

The first-in-time rule is likewise a taking for private use, regardless of any public benefit. As in *Manufactured Housing*, this transfer does not place property in public ownership, nor does it increase public access. And, as in *Manufactured Housing*, the first-in-time rule offers a purported public benefit: less housing discrimination. This public benefit, however, does not overcome the reality that the rule transfers a property right to a private individual.

Indeed, the public benefit behind the first-in-time rule is far more tenuous than the public benefit in *Manufactured Housing*. In *Manufactured Housing*, the public was more direct: the right of first refusal went to the identified group of individuals that the legislature intended to help: mobile-home residents. *Id.* at 352. Here, by contrast, the first-in-time rule is meant to benefit minority groups, but the right of first refusal is bestowed on whomever happens to apply first. This disconnect between the private individual who benefits from the first-in-time rule and the group the rule intends to help only underscores the prohibited private use.

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B. Any public use at issue here is inseparable from the private use and therefore cannot redeem the first-in-time rule

The first-in-time rule is also a private use because the public purpose is inseparable from the private benefit. Even where a taking does transfer property to the public or increase public access, it can still constitute a taking for private use if private and public uses cannot be separated. For example, in *In re Seattle*, the City proposed to condemn some retail stores and replace them with a government-owned improvement project that would lease to private businesses. *In re City of Seattle*, 96 Wn.2d at 618-20. Although the public acquired the property, the Court nonetheless found a taking for private use: "If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked." *Id*. at 627. If the retail aspects of the project had been "only incidental to the public uses for which the land was condemned, a different question would be presented." *Id.* at 634.

The first-in-time rule does not separate public and private uses. Rather, private use is the vehicle through which the first-in-time rule seeks to achieve its purpose. The rule is meant to combat implicit bias by granting a private individual a right of first refusal. The first-in-time rule therefore violates the private use requirement because it intertwines the private use with the public purpose.

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III. THE FIRST-IN-TIME RULE VIOLATES DUE PROCESS BECAUSE IT IS AN UNREASONABLE AND UNDULY OPPRESSIVE BURDEN ON LANDLORDS

Due process embodies a promise that government will pursue legitimate purposes in a just and rational manner. As James Madison described it, due process forbids unjust and arbitrary deprivations of property: "[T]hat is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest." James Madison, *Property*, *reprinted in James Madison: Writings* 515 (Jack N. Rakove ed., 1999). To determine if a law violates due process, courts must address three questions:

1. Is the regulation aimed at achieving a legitimate public purpose?
2. Does the regulation use means reasonably necessary to achieving that purpose?
3. Is the regulation unduly oppressive?

Presbytery, 114 Wn.2d at 330. The first-in-time rule relies on an unreasonable and unduly oppressive means to achieve its purpose.

A. The means chosen by the City to address unconscious bias are unreasonable and overbroad

In at least two respects, the first-in-time rule is not reasonably necessary to achieving the purpose of preventing discrimination and mitigating implicit bias: (1) the City's solution to implicit bias lacks any meaningful limiting principle, and (2) the first-in-time rule suffers from extreme overbreadth.

First, the concept that government can eliminate ordinary discretion because of the City's suspicion that some people may harbor faulty unconscious mental processes has no limiting principle—it would expand the police power beyond reasonable bounds. While the City can

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regulate the use of property so as not to injure others, a law that undertakes to abolish or limit the exercise of rights beyond what is necessary to provide for the public welfare cannot be included in the lawful police power of the government. *See Ralph v. Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949). Critically, the right to regulate does not include the right to prohibit where a blanket prohibition is unnecessary. *See Seattle v. Ford*, 144 Wash. 107, 114-15, 257 P. 243 (1927). Moreover, a law is not reasonably necessary if its rationale and methodology have no meaningful limiting principle. *See Beard v. Banks*, 548 U.S. 521, 546, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006) (Scalia, J., concurring). Otherwise, the police power would no longer face restraints on the means employed to achieve legitimate government ends.

The City's theory that it can eliminate choice because of suspected implicit bias betrays the City's boundless view of its own power. The bias study cited by Councilmember Herbold and included in the Stipulated Record says that implicit bias is a part of human nature that affects behavior in a vast array of scenarios. SR 000156-57. The research explores implicit bias in settings like criminal justice, health care, employment, education, and housing. *Id.* 000152. The study summarizes findings, for instance, about implicit bias in hiring decisions. *Id.* 000180. Would the City's approach to housing also allow the government to force employers to hire the first qualified applicant and prohibit a personal interview that would reveal ethnicity or gender? As another example, the study's health-care section cites findings that Asian Americans are more likely to die from cancer than other groups, yet doctors are less likely to recommend cancer screening for Asian-American patients. *Id.* SR 000173. Could the City therefore require physicians to make cancer-screening decisions based on standardized, uniform criteria rather than individualized care? If banning landlord discretion to select a tenant is a justifiable exercise of power, then no

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constitutional barrier could prevent these and other oppressive measures. The City's means of combating implicit bias lacks any meaningful limiting principle.

The first-in-time rule is also an unreasonable means of pursuing anti-discrimination because of its sweeping overbreadth. "The overbreadth doctrine involves substantive due process and asks whether a statute not only prohibits unprotected conduct, but also reaches constitutionally protected conduct." *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 768, 63 P.3d 142 (2002); *Am. Dog Owners Ass'n v. City of Yakima*, 113 Wn.2d 213, 217, 777 P.2d 1046 (1989). This reflects a simple premise: a law cannot justly outlaw innocent, harmless behavior in its zeal to curtail a harm. *See City of Seattle v. McCoy*, 101 Wn. App. 815, 840, 4 P.3d 159 (2000) (reasoning that a law that takes property from an innocent individual to strike at a public harm raises due process concerns). Regardless of the government's virtuous intent, a means that inflicts this kind of collateral damage does not satisfy due process.

The first-in-time rule suffers from extraordinary overbreadth. Landlords renting to the general population cannot deny tenancy to the first qualified applicant for any reason. If the first qualified applicant is belligerent on the phone, the landlord must still rent to him. If the landlord sees a swastika tattooed on the first applicant's wrist when he visits the unit, the landlord still must rent to him. Likewise, even if the second qualified applicant makes a good impression and needs a break, the landlord cannot offer them the unit. Scott Davis would not have been able to offer his two minority tenants housing under this rule. *See* SF ¶ 4. In the City's rush to end implicit bias, it has also thwarted conscious goodwill.

Moreover, the law extends to scenarios where no risk of discrimination exists. The first-in-time rule applies even if the qualified applicants in the pool are all part of the same class—if, for

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instance, all the qualified applicants are heterosexual couples of the same race. *See* SMC § 14.08.030. Thus, even when discrimination against a protected class could not possibly occur, the rule nonetheless applies. City staff recognized this clear overbreadth but declined to incorporate any leniency into the law. *See* SR 000064 ("Use of a first in time policy affects [] a landlord's ability to exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class."). The first-in-time rule is not "reasonably necessary" to prevent discrimination, and it unjustly prohibits a wide swath of innocent behavior.

B. The first-in-time rule is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias

In addition, the first-in-time rule is also unduly oppressive. Washington courts have devised a list of non-exclusive factors to weigh in considering this final prong of the due-process analysis:

- On the public's side:
    - The seriousness of the public problem.
    - The extent of the landowner's contribution to the problem.
    - The degree to which the chosen means solve the problem.
    - The feasibility of alternatives.
- On the landowner's side:
    - The extent of the harm caused.
    - The extent of remaining uses.
    - The temporary or permanent nature of the law.

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- The extent to which the landowner should have anticipated the law.
- The feasibility of changing uses.

Presbytery, 114 Wn.2d at 331.

Case law applying these factors teach that regulations that penalize property owners for a societal problem not of their making tend to violate due process. For example, in *Sintra, Inc. v. City of Seattle*, landlords who wanted to convert their property to non-residential use had to replace the housing or pay an exorbitant fee. 119 Wn.2d at 15. The Washington Supreme Court held that the Ordinance was unduly oppressive because it forced a segment of society that bore no special responsibility for the problem to bear the brunt of solving it. *See id.* at 22. The Court noted that the high penalty seemed to exceed what was necessary to resolve the social ill at stake and therefore required an "improper additional step" of forcing landlords to create new housing. *Id.* at 15-16.

The first-in-time rule likewise flouts due process. Much like *Sintra*, the first-in-time rule imposes a burden on all landlords, regardless of whether or not they contribute to the problem of discrimination. Indeed, the Kirwan Institute study cited by Councilmember Herbold indicates that implicit bias is a societal problem, including housing segregation. *See* SR 000190. Yet each landlord—without any individualized evidence that they discriminate—is burdened with solving that societal problem. This "improper additional step" of sweeping all landlords into a burdensome regulatory scheme follows the same pattern as forcing landowners to create low-income housing in *Sintra*.

And the burden is a heavy one. Landlords can no longer exercise their own discretion to decide which tenant will be the best fit under the circumstances. Landlords can no longer deny tenancy to someone based on genuine and innocent judgments, such as denying tenancy because

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someone was belligerent on the phone or made the landlord feel unsafe during a visit to the unit. Nor can landlords and tenants negotiate with each other regarding criteria; what the landlord says in advance in online advertising must be the sole basis for determining whether to reject or accept an application.

The City can pursue less oppressive alternatives. Indeed, laws against intentional discrimination in housing already exist on the state, local, and federal level. *See* 42 U.S.C. § 3604 ("[I]t shall be unlawful . . . [t]o refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin"); RCW 49.60.030 (forbidding housing discrimination and adding sexual orientation and other classes); SMC § 14.08.040 (forbidding discrimination in an array of housing practices). Of course, housing discrimination may continue despite enforcement of these laws. But imperfect enforcement is an uncontroversial price to pay for a free society. *See* 4 William Blackstone, *Commentaries on the Laws of England* *352 (1768) ("[I]t is better that ten guilty persons escape, than that one innocent suffer."). The City cannot ban choice because some individuals might abuse it.

Further, less oppressive alternatives for dealing with implicit bias also exist. The study suggests training seminars, intergroup contact, and other educational approaches. SR 000190-96. Hence, through education, implicit biases "can be gradually unlearned and replaced with new mental associations." SR 000215; *see also id.* at 000217-18. The City could have initiated workshops for landlords or a training regimen imposed on landlords with a history of disparate treatment. Herbold herself lauded the "exciting" opportunity to "unlearn" our unconscious biases. SR 000143. Yet despite her enthusiasm, she instead banned landlord judgment before even

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attempting to train them to overcome their implicit biases, leaving them benighted and unable to make basic business decisions without government control.

The City's chosen means do far more harm than necessary to solve discrimination. The first-in-time rule therefore violates due process.

IV. THE FIRST-IN-TIME RULE VIOLATES LANDLORDS' SPEECH RIGHTS BY PROHIBITING ADVERTISEMENTS BASED ON CONTENT AND DICTATING HOW LANDLORDS CAN ADVERTISE

A. The first-in-time rule is subject to scrutiny as a speech regulation because it dictates how landlords communicate with prospective tenants

The first-in-time rule mandates the methods by which landlords communicate with prospective tenants and controls the content of those communications. *See* SMC § 14.08.050(A)(1)-(2). The rule must therefore face intermediate scrutiny as a commercial speech restriction. *See generally Expressions Hair Design v. Schneiderman*, __ U.S. __, 137 S. Ct. 1144, 1151, 197 L. Ed. 2d 442 (2017).

Regulations of commercial transactions burden speech rights when they force sellers to advertise in a particular fashion. For example, in *Expressions Hair Design v. Schneiderman*, the Supreme Court held that a New York law regulating price listings implicated the First Amendment. *Id.* at 1151. The law—aimed at credit-card fees and surcharges—required merchants to advertise a single price for a product. *See id*. Merchants could not, for example, list a standard price and a higher "credit surcharge" price. *See id.* at 1148. It therefore proscribed speech that the merchants wished to engage in when advertising the prices on their products. *See id.* at 1152.

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The first-in-time rule has an even greater impact on landlord speech rights than the price regulation in *Expressions Hair*. The rule dictates how landlords communicate the various criteria that must be met by applicants, and the rule necessarily forbids certain types of communication.

Under the first-in-time rule, landlords must post written notice of all rental criteria in the leasing office or at the rental property, as well as in any website advertisement of the unit. SMC § 14.08.050(A)(1). The information that must be communicated via these means is comprehensive, including all "the criteria the owner will use to screen prospective occupants and the minimum threshold for each criterion that the potential occupant must meet to move forward in the application process." *Id.* § 14.08.050(A)(1)(a). The notice must also include "all information, documentation, and other submissions necessary for the owner to conduct screening using the criteria stated in the notice." *Id.* § 14.08.050(A)(1)(b).

An application is deemed "complete" once the applicant has provided all the information stated in the mandatory notice. *Id.* The landlord must offer the unit to the first applicant who satisfies the criteria in the advertisement. *Id.* § 14.08.050(A)(4).

The first-in-time rule not only constrains the means by which landlords communicate, it also controls the content of that communication. A landlord may not post a rental on the web and say, "call to learn how to apply" or "email me for further details." Rather, the landlord must list online all information regarding how to apply and all criteria by which applications will be assessed.

The rule also controls what landlords can say about their rental criteria. Since all rental criteria must be stated in advance and landlords must screen according to the advertised criteria, flexibility in landlord advertising is forbidden. A landlord cannot, for instance, leave any rental

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criteria up to negotiation. The landlord is prohibited from stating that "pets are allowed on a case-by-case basis" or "no cats, but dogs are negotiable." Nor could a landlord renting out a building where tenants share common space state that the landlord's decision will depend on an applicant's compatibility with the other renters. The first-in-time rule forbids such communications because it requires all the information relevant to the landlord's decision up-front in the advertisement, and the landlord must screen solely based on the advertised criteria. *See* SMC § 14.08.050(A)(1), (4).

Advertisements must also list "minimum thresholds" for criteria, presumably for credit history and other quantifiable measures. *See* SMC § 14.08.050(A)(1)(a). The landlord cannot, therefore, simply say "credit history required" or "we can work with credit issues on a case-by-case basis" and then weigh the credit history against other positive or negative factors in the application. The first-in-time rule punishes any such communications with civil liability under a private cause of action or an enforcement action by the Civil Rights Office. The first-in-time rule therefore implicates landlords' speech rights.

B. The first-in-time rule fails to satisfy intermediate scrutiny

Regulations that burden commercial speech must satisfy intermediate scrutiny. The state constitution protects advertising because "society has a strong interest in preserving the free flow of commercial information." *Kitsap Cty. v. Mattress Outlet/Gould*, 153 Wn.2d 506, 512, 104 P.3d 1280 (2005).

To protect that interest, the state constitution requires that commercial speech regulations satisfy a four-part test:

- Whether the speech is about lawful activity and is not deceptive;
- Whether the government interest at stake is substantial;

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- Whether the speech restriction "directly and materially" serves that interest; and
- Whether the restriction is "no more extensive than necessary."

Id. at 513. A landlord's advertisement for a vacant unit is commercial speech because it "propose[s] a commercial transaction." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993). Because the first-in-time rule burdens that commercial speech, it must satisfy the four-part test. The first factor here is uncontroversial: the speech affected by the first-in-time rule is not inherently misleading or inevitably related to unlawful activity. The second factor—government interest—is also straightforward; the City has a legitimate interest in preventing discrimination. But the first-in-time rule founders on the last two steps: the speech restriction does not "directly and materially" advance the City's interest in stopping discrimination, and it restricts more speech than necessary.

1. The first-in-time rule does not "directly and materially" advance the City's interest in preventing discrimination because it forbids the use of landlord discretion

To satisfy this component of the commercial speech test, the City must offer more than "mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Mattress Outlet*, 153 Wn.2d at 513 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)).

Here, the first-in-time rule relies on "mere speculation" that each Seattle property owner might unconsciously discriminate against disadvantaged or minority groups. The City has offered no individualized evidence that each of the landlords subject to the first-in-time rule discriminates, consciously or unconsciously.

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Even if unconscious bias is a ubiquitous reality for all of us, that fact alone cannot justify an irrebuttable and sweeping regulation that restricts speech without any individualized evidence that the speaker is contributing to the problem of discrimination. Otherwise, the power of government to regulate decision-making because of faulty mental processes would be boundless.

Facts stipulated in the record also demonstrate the first-in-time rule's speculative nature. For example, the Kirwan Institute study says that implicit biases can be positive. SR 000156-57. Indeed, some studies indicate that our implicit biases tend to favor our own group identities, so implicit biases might favor minority groups if landlords are members of that group. *See* SR 000196-97, 215. The City has provided no evidence that all landlords are relying on implicit bias in a wholly negative fashion.

Moreover, implicit biases can be unlearned. SR 000157. Yet the City has presented no evidence that Seattle landlords have universally failed to overcome any implicit biases, nor has the City provided a way for landlords to demonstrate that they have learned to overcome or mitigate negative implicit biases. The City has chosen instead to impose a blanket rule that bans a wide swath of innocent behavior based on unsupported speculation.

2. The first-in-time rule restricts far more speech than necessary to combat discrimination

The fourth prong of the commercial-speech test—that a speech restriction should not be more extensive than necessary—looks to the means chosen to advance the City's interest. A government restricting commercial speech must shoulder the burden of demonstrating that the law is narrowly tailored to achieve its ends. *Mattress Outlet*, 153 Wn.2d at 515. The existence of less-burdensome alternatives will bear on whether the government can satisfy this standard. *Id.* For

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example, in *Mattress Outlet*, the Supreme Court examined a county sign ordinance that imposed a ban on offsite advertising without a permit. *Id.* at 509. The Court held the "total ban" to be unreasonable because the county could have satisfied its interests in aesthetics and safety with better tailored time-place-and-manner restrictions. *Id.* at 515.

The first-in-time rule is not narrowly tailored. The City conceded as much in the record when it stipulated to a staff memo stating that the "first in time policy affects [] a landlord's ability to exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class." SR 000064.

Further, the first-in-time rule restricts far more speech than necessary to achieve its purposes in stopping discrimination. It imposes sweeping advertising restrictions on all Seattle landlords, restricting their speech without any individualized suspicion of disparate treatment. It forbids valuable speech activities like case-by-case negotiation and tells landlords how to communicate their criteria.

Yet other alternatives exist that do not burden these speech interests. The City could, for instance, turn the first-in-time requirement into a remedy available to the City Hearing Examiner upon a finding that a landlord has engaged in past discriminatory practices. Or even less speech-restrictive means are available, such as the training and intergroup contact that the stipulated evidence suggests as a means to combat implicit bias. *See* SR 000190-96. Given the abundance of more narrowly tailored options available to the City, the City's decision to restrict speech cannot survive intermediate scrutiny.

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CONCLUSION

The first-in-time rule strips landlords of fundamental rights in property and speech. Yet the City could have selected among many less-oppressive alternatives. Plaintiffs respectfully request that the Court grant the motion for summary judgment, declare the first-in-time rule to be invalid, and enjoin its enforcement.

CERTIFICATION OF COMPLIANCE

I certify that the foregoing motion contains 8,155 words and complies with Local Court Rules.

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Date: December 20, 2017

By: s/ Ethan W. Blevins

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel for the City of Seattle,

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