No. 95813-1

WASHINGTON STATE SUPREME COURT

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

Respondents,

v.

CITY OF SEATTLE,

Appellant.

CITY OF SEATTLE'S OPENING BRIEF

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

To counter implicit bias in tenancy decisions, landlord organizations urge their members to follow a simple practice: establish criteria and accept the first tenant who meets them. The City of Seattle codified that practice in the First-in-Time ("FIT") Rule. It requires a landlord to notify prospective tenants of the landlord's screening criteria and offer tenancy to the first applicant meeting them. The Rule does not dictate the criteria, require quantifiable or objective criteria, prevent a landlord from conducting an interview to satisfy a criterion, preclude negotiations over lease terms, or otherwise limit how a landlord may communicate with prospective tenants.

Plaintiffs, five Seattle landlords, brought this facial challenge under the Washington Constitution seeking a declaration that the FIT Rule violates landlords' substantive due process and free speech rights and amounts to a *per se* regulatory taking. The trial court invalidated the FIT Rule on cross motions for summary judgment, finding the Rule violates landlords' due process rights because it is "unduly oppressive." Relying on a fractured decision from this Court, the trial court held the Rule effects a *per se* regulatory taking because it infringes on a "fundamental attribute" of property ownership: a right to choose a tenant. The court also deemed

that taking to be for a prohibited "private use" and found the Rule unconstitutionally restricts commercial speech.

The trial court's core rulings stem from historical errors in Washington case law. When determining whether a regulation violates substantive due process guarantees or amounts to a taking of property, this Court correctly held that, because the Washington Constitution provides protection no greater than the U.S. Constitution, Washington courts must apply the federal due process and takings analyses to claims under either constitution. But this Court mistakenly invoked analyses at odds with the federal analyses. Confusion ensued.

Only this Court can remedy Washington's incorrect and confusing due process and takings analyses. The City respectfully asks this Court to recognize and apply the correct federal analyses, overrule past decisions to the extent they invoke incorrect analyses, and reverse the Superior Court. Even if this Court adheres to the incorrect analyses, this Court should reverse the trial court because the City prevails under those analyses too.

This Court should also reverse the trial court on Plaintiffs' "private takings" claim, which is superfluous and misplaced, and Plaintiffs' free speech claim, which fails under the correct, deferential analysis applied to disclosure requirements and under the inapt, less deferential analysis applied to commercial speech restrictions.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court erred in granting summary judgment to Plaintiffs, and denying it to the City, on whether the FIT Rule facially violates landlords' substantive due process rights under the Washington Constitution.

2. The trial court erred in granting summary judgment to Plaintiffs, and denying it to the City, on whether the FIT Rule facially takes landlords' property without compensation, as prohibited by the Washington Constitution.

3. The trial court erred in granting summary judgment to Plaintiffs, and denying it to the City, on whether the FIT Rule facially takes landlords' property for a "private use," as prohibited by the Washington Constitution.

4. The trial court erred in granting summary judgment to Plaintiffs, and denying it to the City, on whether the FIT Rule facially violates landlords' free speech rights under the Washington Constitution.

B. Issues Pertaining to Assignments of Error

1. This Court correctly ruled that Washington courts must apply the federal substantive due process analysis because the Washington Constitution provides protection no greater than the U.S. Constitution. But for over two decades this court recited the discredited, *Lochner*-era "undue oppression" analysis rather than the appropriate "rational basis" analysis, confusing state and federal courts. Should this Court expressly adopt the "rational basis" analysis and overrule Washington precedent to the extent it recites the "undue oppression" analysis? (Assignment of Error 1.)

2. To prove a due process claim under the "rational basis" analysis, a plaintiff must prove a regulation is clearly arbitrary and unreasonable, having no substantial relation to the public welfare. The FIT Rule addresses implicit bias in

tenancy decisions by codifying an industry-recommended best practice. Have Plaintiffs failed to prove their facial due process claim? (Assignment of Error 1.)

3. A facial due process claim under the "undue oppression" analysis requires a plaintiff to prove a regulation does not use means reasonably necessary to achieve its purpose and "unduly oppresses" property owners. Plaintiffs allege no economic harm from the FIT Rule, which codifies an industry-recommended best practice and regulates only the activity that could cause the harm. Even if the "undue oppression" analysis were still valid, have Plaintiffs failed to prove their facial due process claim? (Assignment of Error 1.)

4. This Court correctly ruled that, when deciding whether a regulation constitutes a taking, Washington courts must apply the federal takings analysis because the Washington Constitution provides protection no greater than the U.S. Constitution. But instead of reciting the three-part federal takings analysis, this Court constructed a six-part analysis. Should this Court acknowledge and adopt the correct three-part analysis and overrule Washington precedent to the extent it recites other parts? (Assignment of Error 2.)

5. Plaintiffs do not invoke the three-part takings analysis or argue the FIT Rule violates it. Have Plaintiffs failed to prove their facial takings claim? (Assignment of Error 2.)

6. Plaintiffs do not invoke Washington's six-part takings analysis or argue the FIT Rule violates it. Even if the six-part analysis were valid, have Plaintiffs failed to prove their facial takings claim? (Assignment of Error 2.)

7. Plaintiffs rely on *Manufactured Housing*, which was decided 4-1-1-2-1. *Manufactured Housing* is nonbinding and against the weight of authority. Even if this Court does not overrule *Manufactured Housing* because it is purportedly based on the six-part takings analysis, should this Court decline to follow *Manufactured Housing*? (Assignment of Error 2.)

8. *Manufactured Housing* involved a fundamental attribute of property ownership. This Court and the U.S. Supreme Court hold that landlords have no fundamental right to exclude or choose particular tenants. Even if *Manufactured Housing* controls, have Plaintiffs failed to prove their facial takings claim because the FIT Rule affects no fundamental attribute of property ownership? (Assignment of Error 2.)

9. Where a regulation effects no taking or is invalidated for being a taking, the Washington Constitution's prohibition on taking property for a "private use" is irrelevant. That prohibition is also inapplicable outside eminent domain and inverse condemnation actions. Even if Plaintiffs could prove the FIT Rule takes their property, is their "private use" claim superfluous and misplaced? (Assignment of Error 3.)

10. The deferential *Zauderer* test applies to a regulation requiring disclosures in commercial speech. The FIT Rule requires landlords to disclose their tenancy criteria; it does not restrict landlords' speech. Is Plaintiffs' free speech claim governed by *Zauderer*? (Assignment of Error 4.)

11. Under *Zauderer*, a commercial disclosure regulation is constitutional if the disclosure is of factual and uncontroversial information, and not unjustified or unduly burdensome. The FIT Rule requires landlords to disclose criteria they develop and is rationally related to the interest of curbing implicit bias in tenancy decisions. Is the FIT Rule constitutional under *Zauderer*? (Assignment of Error 4.)

12. To assess a regulation that restricts commercial speech, *Central Hudson* asks whether the restriction directly advances the government's interest and is no more extensive than necessary. The FIT Rule codifies an industry-touted best practice to curb implicit bias in tenancy decisions and reflects a reasonable fit between the City's ends and the means to accomplish them. Is the Rule constitutional even if *Central Hudson* controls? (Assignment of Error 4.)

III. STATEMENT OF THE CASE

A. Factual background.

1. Scholars and other researchers recognize implicit bias in tenancy decisions.

Implicit bias, positive and negative, arises involuntarily and without awareness or intentional control.[1] We cannot access implicit biases through introspection; they differ from known biases we may try to conceal.[2] Housing discrimination testing using pairs of equally qualified applicants—one in a protected class, the other in no protected class—consistently demonstrate this phenomenon. The U.S. Department of Housing and Urban Development ("HUD") published the results of "paired" studies in 1977, 1989, and 2000.[3] HUD's most recent results concludes that discrimination in housing persists, even if not in its most blatant forms:

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

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[1] CP 256 (Cheryl Staats, Kelly Capatosto, Robin A. Wright, and Danya Contractor, *State of the Science: Implicit Bias Review 2015* at 62 (Kirwin Institute, Ohio State Univ., 2015)).

[2] *Id.*

[3] *See* CP 391 (citing Urban Institute Metropolitan Housing and Communities Policy Center, *Discrimination in Metropolitan Housing Markets: National Results from Phase I of HDS 2000*, Exec. Summary at i – viii (Submitted to HUD, Nov. 2002) (discussing the 1977 and 1989 reports) (available at https:// www. huduser.gov/portal/publications/ hsgfin/phase1.html, accessed August 17, 2018)).

> the costs of housing search for minorities and restrict their housing options.[4]

"Paired" studies conducted for the City in 2014 showed evidence of differential treatment in over 60% of the tests.[5]

Citing such research, the Washington Community Action Network concludes implicit bias still works against marginalized communities:

> When looking for rentals, marginalized communities often face discrimination—both blatant and implicit. Whites are more likely than people of color to be told about rent incentives as well as the possibility of negotiating lease terms. Same-sex couples also face significant discrimination when trying to access housing; they are far less likely than heterosexual couples to get a response from a landlord when looking for a rental.[6]

An Ohio State University interdisciplinary research organization concludes implicit bias infects tenancy decisions even if overt bias has waned:

> The existence of unconscious bias helps to explain the persistence of housing inequality and high levels of residential segregation, despite the dismantling of racially discriminatory laws . . . . Thus while the most blatant forms of housing discrimination (redlining, restrictive covenants, refusing to meet with minority home seekers) may have been eliminated or reduced, additional policies and

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[4] *See* CP 391 (citing Urban Institute, *Housing Discrimination Against Racial and Ethnic Minorities 2012* at xi (Prepared for HUD Office of Policy Devel. and Research, June 2013) (available at https://www.huduser.gov/portal/publications/fairhsg/hsg_discrimination_2012.html, accessed August 17, 2018)).

[5] CP 56–59.

[6] CP 290 (Margaret Diddams and Xochitl Maykovich, *Seattle's Renting Crisis: Report and Policy Recommendations* at 8 (Wash. Community Action Network, July 2016)).

> strategies will be needed to create pathways to housing and opportunity free of bias.[7]

Legal scholars warn implicit bias can undermine a prospective tenant even before meeting the landlord:

> Minority home-seekers often encounter bias from the moment they begin their search if a name or voice signifies belonging to a non-dominant group. Researchers have observed: "Applicants making initial inquiries as to the availability of an apartment . . . may have their ethnicity, character, competence, and attractiveness evaluated before they ever meet their prospective landlord, and the results may be tangible in the loss of an opportunity to find suitable housing."[8]

To another legal scholar, the discouraging results of implicit bias studies suggest that, "even if the [the federal Fair Housing Act] were successful in eliminating all consciously motivated discrimination, a great deal of race-based discrimination would still occur in rental markets, practiced by landlords who are not even aware they are disfavoring minority applicants and who may see themselves as law-abiding housing providers."[9] Or put

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[7] CP 392 (citing Jillian Olinger, Kelly Capatosto, and Mary Ana McKay, *Challenging Race as Risk: How Implicit Bias undermines housing opportunity in America—and what we can do about it* at 16 (Kirwin Institute, Ohio State Univ., 2016) (available at http://kirwaninstitute.osu.edu/my-product/challenging-race-as-risk-implicit-bias-in-housing/, accessed August 17, 2018)).

[8] Rachel D. Godsil and James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. Haw. L. Rev. 313, 319 (2015) (quoting Adrian G. Carpusor and William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCHOL. 934, 937 (2006)).

[9] Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 504 (2007).

more simply, the studies "indicate that implicit biases against minorities exist and lead to disparities that simply cannot be attributed to purely economic factors."[10]

2. Landlord organizations and others recommend first-in-time decision-making based on established criteria as a best practice.

To help landlords make fair housing decisions and avoid discrimination liability, landlord organizations promote a simple best practice: establish criteria and accept the first tenant who meets them. The Washington Multi-Family Housing Association ("the professional trade association that advances the interests of the multifamily industry"[11]), on a webpage entitled *Fair Housing Best Practices*, recommends selecting tenants using a first-in-time process:

> **Accept the first qualified resident** to complete the application process and be approved. **Date and time-stamp all applications** and any supporting documentation required, when you receive it from the prospective applicant.
>
> Do not make assumptions about your residents. **Only use facts based on your screening criteria to determine whether an applicant is qualified**.[12]

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[10] Equal Justice Society, Wilson Sonsini Goodrich, Rosati, *Lessons from Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias*, 11 HASTINGS RACE & POVERTY L. J. 241, 258–59 (2014).

[11] CP 393 (citing https://www.wmfha.org/about-us, accessed Jan. 12, 2018).

[12] CP 314 (emphasis added). *See also* CP 185 (City Councilmember Herbold's website citing this page as an example of a best practice).

The Rental Housing Association of Washington ("one of the most valuable resources for independent rental owners and managers"[13]) likewise advised that an acceptable screening method is to "process one application at a time and take the first qualified tenant" and that "[u]sing a set criteria [*sic*] also helps show that you are screening all applicants alike and can help avoid claims of discrimination by applicants not granted tenancy."[14] The National Apartment Owners Association is more emphatic: "You really need to select the first qualified applicant that meets your requirements."[15]

This advice echoes recommendations from fair housing organizations[16] and other real estate professionals.[17]

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[13] CP 394 (citing https://www.rhawa.org/about-rhawa.html, accessed August 17, 2018).

[14] CP 315–16.

[15] CP 394 (citing *Best Practices for Avoiding Discrimination*, https://www.american-apartment-owners-association.org/property-management/landlord-quick-tips/fair-housing-best-practices/**,** accessed August 17, 2018).

[16] *E.g.*, CP 306 (Diddams and Maykovich, *Seattle's Renting Crisis* at 24 ("Further—as a way to overcome any implicit bias that might exist—landlords must be required to accept the first tenant to apply who meets the tenancy requirements.")); CP 131 (memo from Columbia Legal Services and Tenants Union of Washington to Andra Krazler, Aide to Councilmember Herbold at 2 (July 2016) ("First in Time creates a more objective process for landlords to use when reviewing rental applications to remove both explicit and implicit bias based on source of income status, as well as other protected classes including race and gender.")).

[17] *See, e.g.*, CP 394–95 (citing Global Verification Network, *How To Screen Tenants And Avoid Discrimination* (June 2017), http://globalverificationnetwork.com/how-screen-tenants-and-avoid-discrimination ("As a best practice, it's wise to accept the first qualified applicant for your open apartment."); MyScreeningReport.com, *Tenant Screening 101—First Come – First Serve* (July 10, 2013), http://blog.myscreeningreport.com/first-come-first-serve/ ("Best Practice – Screen Applicants

3. The FIT Rule codifies the first-in-time best practice; beyond a disclosure requirement, it does not limit what, how, or when landlords communicate with prospective tenants.

The FIT Rule attempts to limit implicit bias through first-in-time decision-making. The concept was first introduced to a City Council committee with the explanation that first-in-time decision-making is often recommended as a best practice.[18]

The FIT Rule is codified at Seattle Municipal Code ("SMC") Section 14.08.050. *See* **Appendix 1**.[19] The Rule comprises four basic components:

1. A landlord must provide notice of: "the criteria the [landlord] will use to screen prospective occupants and the minimum threshold for each criterion that the potential occupant must meet to move forward

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on a First come-First serve Basis"); Omar Barraza, *Does Your Tenant Screening Pass a Fair Housing Test?* (Jan. 2002), https://www.kingcounty.gov/~/media/exec/civilrights/documents/screen.ashx?la=en ("In general, it is safer to take applications on first-come, first-served basis."); Jennifer Chan, *How to Select From Multiple Qualified Rental Applications*, https://www.zillow.com/rental-manager/resources/multiple-qualified-rental-applications/, accessed Jan. 11, 2018 ("One way to avoid the dilemma of multiple qualified renters is to lease your unit to the first qualified applicant."); Tracey March, *Choosing Between Qualified Tenants*, https://www.allpropertymanagement.com/blog/2012/10/01/choosing-between-multiple-qualified-tenants/ ("One way to handle multiple qualified applicants is to sort the applications based on when each application was submitted, and offer the property to the first qualified applicant.")). Unless otherwise noted, all of these pages were accessed August 17, 2018.

[18] CP 106 (memo from Asha Venkataraman to Council Committee (June 14, 2016)).

[19] For context, Appendix 1 provides two other sections in reverse numerical order. One is SMC 14.08.030, which prohibits "unfair practices" as defined in SMC Chapter 14.08, including the FIT Rule. This is why the FIT Rule begins by explaining "it is an unfair practice for a person to fail to" follow the Rule. SMC 14.08.050.A. The other section is SMC 14.08.020, which defines terms used in SMC Chapter 14.08.

in the application process"; the "information, documentation, and other submissions" needed to conduct the screening; and information on how to request more time to complete an application.

2. An application is complete when it includes the required "information, documentation, and other submissions."

3. The landlord must note the date and time of each complete application.

4. The landlord must screen each application in the order completed and offer the unit to the first applicant meeting the landlord's criteria.[20]

The FIT Rule dictates only a few elements of what, how, and when a landlord communicates with a prospective tenant. What? The notice must convey the landlord's screening criteria, minimum thresholds, and information on requesting more time to apply. How? The notice must be in writing or posted in the leasing agent's office, the building where the unit is located, and the website advertising the unit (if such a website exists).[21] When? When providing similar information already required by state law.[22] Beyond those disclosure requirements, the Rule does not limit what, how, or when a landlord communicates with a prospective tenant.

[20] SMC 14.08.050.A. The Rule does not apply to units the landlord limits to specific vulnerable populations, or to accessory dwelling units (often called "mother-in-law" units) or detached accessory dwelling units (often called "back-yard cottages") if the landlord resides on the property. SMC 14.08.050.A.4 and .F.

[21] SMC 14.08.050.A.1.

[22] *Id*. *See* RCW 59.18.257(1) (requiring notice of: the types of information the landlord will access to conduct the tenant screening; the landlord's criteria that may result in

B. Procedural history.

Plaintiffs challenged the FIT Rule on March 9, 2017, and later amended their complaint to remove their as-applied challenges.[23] Invoking only the Washington Constitution, Plaintiffs contend the FIT Rule facially violates landlords' due process and free speech rights, effects a taking of landlords' property, and takes landlords' property for a private use.

The parties filed cross motions for summary judgment based on an agreed record allowing citation to other published or online material.[24] The trial court granted summary judgment to Plaintiffs on all their claims.[25] The City seeks direct review by this Court.[26]

IV. ARGUMENT

This Court reviews *de novo* a trial court's decision on cross motions for summary judgment.[27] The parties dispute no material fact and the City is entitled to judgment as a matter of law.[28] Plaintiffs cannot

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denial of the application; information about any consumer reporting agency and the tenant's rights regarding a consumer report; and whether the landlord will accept a comprehensive reusable tenant screening report).

[23] CP 1, 19.

[24] *See* CP 36 (Stipulated Facts and Record).

[25] CP 523–32 (Order).

[26] CP 521 (Notice of Appeal).

[27] *Pendergrast v. Matichuk*, 186 Wn.2d 556, 563-64 379 P.3d 96 (2016).

[28] *See* CR 56(c).

sustain their burden of proving the FIT Rule violates substantive due process guarantees or constitutes a taking—the Rule passes muster under the correct due process and takings analyses, which this Court should embrace, and even under the incorrect analyses Plaintiffs invoke. Plaintiffs "private takings" claim is superfluous and misplaced. And Plaintiffs' free speech claim fails under the proper analysis (governing disclosure requirements) or the inapt analysis Plaintiffs invoke (governing speech restrictions).

A. Plaintiffs must prove their facial due process and takings claims beyond a reasonable doubt.

Plaintiffs face a significant burden to prove their facial due process and takings claims. Out of deference to the legislative process, courts presume a law is constitutional unless the challenger proves it unconstitutional beyond a reasonable doubt:

> The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.[29]

[29] *Island County v. State*, 135 Wn.2d 141, 146–47, 955 P.2d 377 (1998).

A facial constitutional challenge poses an additional obstacle because a court must reject the claim "if there are any circumstances where the [challenged law] can constitutionally be applied."[30]

B. Plaintiffs' facial substantive due process claim fails.

1. Washington follows the federal analysis: "rational basis."

The due process clauses of the Washington and U.S. Constitutions are identical.[31] This Court "has repeatedly iterated that the state due process clause is coextensive with and does not provide greater protection than the federal due process clause."[32] This Court reviewed the two clauses under the *Gunwall* factors and concluded they do not favor an independent inquiry under the Washington Constitution.[33] Given the

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[30] *Washington State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000).

[31] Wash. Const. art. I, §3 ("No person shall be deprived of life, liberty, or property, without due process of law."); U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

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

[33] *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) (applying *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). *See also In re Dyer*, 143 Wn.2d 384, 393–94, 20 P.3d 907 (2001); *State v. Ortiz*, 119 Wn.2d 294, 302–05, 831 P.2d 1060 (1992), *disapproved of on other grounds by State v. Condon*, 182 Wn.2d 307, 343 P.3d 357 (2015). *Accord Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991)

similarity between the clauses, this Court accords great weight to the analysis the U.S. Supreme Court employs to assess federal due process claims.[34]

The U.S. Supreme Court has long applied a "rational basis" analysis.[35] Under this "most relaxed form of judicial scrutiny,"[36] a plaintiff faces the exceedingly high burden of proving the challenged regulation advances no governmental purpose[37] or is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[38] A court must presume a regulation is valid, and the plaintiff may overcome that presumption only by clearly showing

("This court traditionally has practiced great restraint in expanding state due process beyond federal perimeters.").

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

[35] *E.g., Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 487–88 (1955); *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152–54 (1938).

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

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

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

the regulation is arbitrary and irrational.[39] This analysis defers "to legislative judgments about the need for, and likely effectiveness of, regulatory actions" because the U.S. Supreme Court has "long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation."[40]

2. The FIT Rule clears "rational basis" review.

Plaintiffs cannot meet their burden under the "rational basis" analysis. The FIT Rule advances the venerable governmental purpose of curbing implicit bias in tenancy decisions. "Few state interests are more compelling than those surrounding the eradication of social disparity created by racial discrimination."[41] Courts consistently uphold antidiscrimination statutes limiting property owners' ability to choose who comes upon their property once they open it to others. As early as 1964, "the constitutionality of such state statutes [stood] unquestioned."[42] Even the trial court conceded the "FIT rule has a laudable goal of eliminating the role of implicit bias in tenancy decisions."[43]

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[39] *Id*.

[40] *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 554 (2005).

[41] *Voris v. Washington State Human Rights Comm'n*, 41 Wn. App. 283, 290 (1985).

[42] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964).

[43] CP 524 (Order).

The FIT Rule is neither arbitrary nor irrational. The Rule follows studies demonstrating implicit bias in tenancy decisions and requires a first-in-time decision-making approach touted as a best practice by landlord organizations, fair housing groups, and other real estate professionals. The Rule finds support in a U.S. Supreme Court decision recognizing value in counteracting "unconscious prejudices and disguised animus that escape easy classification as disparate treatment" under the federal Fair Housing Act.[44] The Rule also echoes this Court's recent adoption of GR 37 to address "implicit, institutional, and unconscious biases" in jury selection."[45]

3. The trial court invoked a Nineteenth Century "undue oppression" analysis, which this Court rejected in 1976, then embraced for over two decades, then rejected again in 2006.

Spurning "rational basis," the trial court invoked a Nineteenth Century "undue oppression" analysis,[46] which this Court mistakenly embraced for over two decades.

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

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[44] *Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

[45] GR 37(f).

[46] CP 527–29 (Order).

claims. In 1976, *Salstrom's Vehicles* dismissed a due process challenge by reciting a U.S. Supreme Court "rationale basis" axiom: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[47] Turning aside the plaintiff's arguments, *Salstrom's Vehicles* rejected "undue oppression": "That a statute is unduly oppressive is not a ground to overturn it under the due process clause."[48]

But in the 1980s—without mentioning "rational basis" or recognizing the shift—this Court mistakenly recited "undue oppression" as the federal analysis,[49] extoling it for lodging wide discretion in courts, not the legislature, to balance public and individual interests.[50] Relying on *Lawton v. Steele* from 1894, this Court applied that analysis through three inquiries: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to

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

[48] *Id*.

[49] *E.g.*, *Orion Corp. v. State*, 109 Wn.2d 621, 647–48, 747 P.2d 1062 (1987) (citing *Lawton v. Steele*, 152 U.S. 133 (1894)); *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 477, 647 P.2d 481 (1982) ("The classic statement of the rule in *Lawton* . . . is still valid today.").

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

achieve that purpose; and (3) whether it is unduly oppressive on the land owner."[51]

The "undue oppression" analysis was never an expression of a unique Washington constitutional provision—it was a misstatement of the federal analysis. Washington embraced "undue oppression" in the 1980s through case law assessing claims—often takings, not due process—raised solely under the U.S. Constitution, or under the U.S. and Washington Constitutions.[52] For the next 15 years, still believing it was using the federal analysis, this Court applied "undue oppression" to claims under the U.S. Constitution and where the Court identified no constitutional source.[53]

In 2006, this Court appeared to correct course in *Amunrud* by again recognizing "rational basis" as the correct analysis and rejecting a

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[51] *Presbytery,* 114 Wn.2d at 330 (citing *Lawton*).

[52] *See id.* at 326–28, 330–31 (takings; both constitutions); *Orion,* 109 Wn.2d at 624–26, 646–49 (takings; both); *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987) (due process; no source specified); *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986) (due process; federal only); *Cougar Business*, 97 Wn.2d at 476–77 (takings; both).

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

dissenting Justice's use of "undue oppression" for a claim under both constitutions.[54] *Amunrud* ruled that imposing an "undue oppression" analysis "would require us to overturn nearly 100 years of case law in Washington" and return Washington law to the long-rejected *Lochner* era "in which elected legislatures were viewed as having limited power (police power) to enact laws providing for health, safety, and welfare of their citizens."[55] Stressing the need for deference, *Amunrud* warned: "A return to the *Lochner* era would . . . strip individuals of the many rights and protections that have been achieved through the political process."[56] Since *Amunrud*, this Court has applied only the "rational basis" analysis to substantive due process claims.[57]

4. This Court should overrule its case law to the extent it invokes the "undue oppression" analysis.

Although embracing "rational basis" and rejecting "undue oppression," *Amunrud* did not overrule Washington's "undue oppression"

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

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

[56] *Id*. at 230.

[57] *See, e.g.*, *Dot Foods, Inc. v. State, Dept. of Revenue*, 185 Wn.2d 239, 372 P.3d 747 (2016); *In re Detention of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014). Without having to address the merits of the "undue oppression" analysis, the Court later rejected a stand-alone, "undue oppression" argument by factually distinguishing an earlier "undue oppression" decision. *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 254–60, 218 P.3d 180 (2009).

case law. This Court should do that now. This Court reconsiders its precedent when it is incorrect and harmful, or its legal underpinnings have changed or disappeared.[58] Washington's "undue oppression" precedent merits reconsideration on all counts.

The "undue oppression" analysis is incorrect for the reasons *Amunrud* explained: it hearkens back to the *Lochner* era when courts failed to defer appropriately to legislative determinations of the proper balance to protect public welfare.[59] The U.S. Supreme Court—which Washington endeavors to follow—long ago abrogated *Lochner*[60] and rejected the "undue oppression" analysis.[61] Other states decline to follow Washington's use of "undue oppression,"[62] and the Georgia Supreme Court overruled its own "undue oppression" precedent for "rational basis" in 2003.[63]

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

[59] *Amunrud*, 158 Wn.2d at 226–30.

[60] *See Ferguson v. Skrupa*, 372 U.S. 726, 728-31 (1963).

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

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

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

Washington's "undue oppression" precedent is harmful. Its continued presence sows confusion. Since *Amunrud*, some Washington Court of Appeals decisions used "rational basis,"[64] but others recited "undue oppression."[65] Noting "confusion over the proper test to apply," one decision ducked the question by ruling the claim failed under both analyses.[66] While applying "rational basis" to federal due process claims,[67] the Ninth Circuit Court of Appeals invoked "undue oppression" when attempting to apply what it assumed incorrectly was Washington-specific due process principles to a claim under the Washington Constitution.[68] Depending on what version of this authority a trial court follows: a federal

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[64] *E.g.*, *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d. 712, 741–42, 406 P.3d 1199 (2017); *Olympic Stewardship Foundation v. State*, 199 Wn. App. 668, 720–21, 399 P.3d 562 (2017) *rev. denied*, 189 Wn.2d 1040, 409 P.3d 1066 (2018), *petition for cert. filed* (U.S. May 4, 2018); *Jespersen v. Clark County*, 199 Wn. App. 568, 584–85, 399 P.3d 1209 (2017); *Shelton*, 194 Wn. App. at 666–67; *Nielsen*, 177 Wn. App. at 53; *Johnson v. Washington State Department of Fish and Wildlife*, 175 Wn. App. 765, 775–78, 305 P.3d 1130 (2013); *In re J.R.*, 156 Wn. App. 9, 18–19, 230 P.3d 1087 (2010).

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

[66] *Cannatonics v. City of Tacoma*, 190 Wn. App. 1005, 2015 WL 5350873 *4 n.7 (2015, unpublished).

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

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

due process claim could be subject to "undue oppression" if filed in a state court,[69] but "rational basis" if filed in federal court;[70] and a Washington due process claim could be subject to "rational basis" in state court,[71] but "undue oppression" in federal court.[72]

The legal underpinnings of "undue oppression" disappeared long ago. When embracing "undue oppression" from *Lawton*, this Court relied on *Goldblatt* from the U.S. Supreme Court in 1962, which reads more like a takings case than a due process case and mistakenly referred to *Lawton*'s "undue oppression" analysis as the "classic statement of the rule . . . still valid today."[73] But *Goldblatt* no longer carries value. Just six years later, in 1968, the Supreme Court dismissed the "undue oppression" analysis as "requir[ing] no further consideration" in due process law.[74]

The City casts no blame on this Court for initially embracing "undue oppression" during a period when the U.S. Supreme Court

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[69] *E.g.*, *Greenhalgh*, 180 Wn. App. at 892.

[70] *E.g.*, *Samson*, 683 P.3d at 1058.

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

[72] *E.g.*, *Laurel Park*, 698 F.3d at 1193–95.

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

[74] *Brotherhood*, 393 U.S. at 143. *Accord Salstrom's*, 87 Wn.2d at 693 (citing *Brotherhood*).

conflated due process and takings concepts."[75] But that period is over. The U.S. Supreme Court untangled due process and takings law in 2005, pointing to *Goldblatt* as a source of the Court's confusion.[76] Federal law—which this Court has always endeavored to follow—is now clear. This Court should embrace it.

5. The FIT Rule passes muster even under the "undue oppression" analysis.

Even if the "undue oppression" analysis were still valid, Plaintiffs could not carry their burden of proving the FIT Rule violates it. When invoking "undue oppression," Washington courts presumed legislative enactments were constitutional because plaintiffs must prove their claim beyond a reasonable doubt.[77] That burden is especially difficult here

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

[76] *Lingle*, 544 U.S. at 541. *See also Nollan v. California. Coastal Comm'n*, 483 U.S. 825, 835 n.3 (1987) (criticizing *Goldblatt* for assuming similar inquiries under due process and takings claims). *Accord Town of Dillon v. Yacht Club Condominiums Home Owners Assn.*, 2014 CO 37, 325 P.3d 1032, 1042–43 (Colo. 2014) (refusing to apply *Goldblatt*).

[77] *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135, 1140 (1999).

because courts should "consider it important that Plaintiffs have chosen to raise a *facial* challenge."[78]

No dispute exists over the first part of the "undue oppression" analysis: the Rule is aimed at achieving a legitimate public purpose.[79] Plaintiffs contested, and the trial court invoked, only the other two parts of the analysis: whether the Rule uses means reasonably necessary to achieve its purpose, and whether the Rule is unduly oppressive on landlords.[80]

a) The FIT Rule uses means reasonably necessary to achieve its purpose.

Plaintiffs cannot prove beyond a reasonable doubt that the FIT Rule fails to use means reasonably necessary to achieve its purpose. Plaintiffs claimed the City should educate landlords and enforce existing antidiscrimination laws rather than adopt the FIT Rule.[81] That is not enough to sustain Plaintiffs' burden because "[t]he mere existence of other means . . . does not establish that the means chosen were not reasonably necessary"[82] Moreover, Plaintiffs' alternatives conflict with implicit bias

[78] *Laurel Park*, 698 F.3d at 1194–95.

[79] CP 528 ¶ 17 (Order); CP 371, 380 (Plaintiffs' Motion for Summary Judgment: "Motion").

[80] CP 528–29 (Order); CP at 371–377 (Motion).

[81] CP 376 (Motion).

[82] *Margola Associates v. City of Seattle,* 121 Wn.2d 625, 649, 646, 854 P.2d 23 (1993).

research showing that discrimination is not limited to overt or even conscious discrimination, so neither applicants nor landlords—even educated ones—will necessarily perceive instances of implicit bias.

The trial court reached two legally unsupported conclusions under the "reasonably necessary" part of the test. The court claimed the FIT Rule suffers from "overbreadth."[83] But this Court dismisses any overbreadth claim not rooted in First Amendment activity and rejects the assertion that Washington's due process clause justifies extending the overbreadth doctrine beyond the First Amendment.[84] One "overbreadth" decision cited by the trial court involved no due process claim,[85] and the other ruled that no facial overbreadth claim exists outside the First Amendment context.[86]

The trial court's critique of the FIT Rule for lacking a "meaningful limiting principle" is baffling.[87] Nothing in due process jurisprudence requires a law to have a limiting principle. For the proposition that "a law

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[83] CP 528 ¶ 19 (Order).

[84] *City of Bremerton v. Widell*, 146 Wn.2d 561, 578–79, 51 P.3d 733 (2002). *Accord City of Seattle v. Montana*, 129 Wn.2d 583, 598, 919 P.2d 1218 (1996) ("The overbreadth doctrine may not be employed unless First Amendment activities are within the scope of the challenged enactment.").

[85] *American Dog Owners Ass'n v. City of Yakima*, 113 Wn.2d 213, 215, 777 P.2d 1046 (1989) (resolving an assertion that the challenged law was "unconstitutionally vague, claiming that a person of ordinary intelligence cannot reasonably tell what is prohibited").

[86] *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 768, 63 P.3d 142 (2002).

[87] *See* CP 528 ¶ 18 (Order).

is not reasonably necessary if its rationale and methodology have no meaningful limiting principle," the trial court cited a passage from a Justice Scalia concurrence in *Beard*.[88] But *Beard* was a First Amendment case involving no due process claim,[89] and the passage arose in a Justice Stevens dissent, not a Justice Scalia concurrence.[90] The dissent invoked the "limiting principle" concept to critique a lawyer's justification for a challenged law, not to suggest the law must feature a limiting principle.[91]

b) The FIT Rule, which mitigates a problem only landlords could create and does not lower property values, is not "unduly oppressive."

To aid the discretionary balancing act prompted by the "undue oppression" prong, this Court adopted a set of factors suggested by a scholar:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have

[88] *Id.* (citing "*Beard v. Banks*, 548 U.S. 521, 546…(2006) (Scalia, J., concurring)").

[89] *See Beard v. Banks*, 548 U.S. 521, 524–25 (2006).

[90] *Compare id.* at 536 (start of concurrence) *with id.* at 542 and 546 (start of, and relevant passage from, the dissent). Justice Scalia authored no opinion. He joined Justice Thomas's concurring opinion.

[91] *Beard*, 548 U.S. at 546 (Stevens, J., dissenting).

> anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.[92]

Proving the malleability of these factors, the trial court recited them and, with no analysis, concluded "the FIT rule is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias."[93] The court did not balance the factors, as this Court required.[94] The "innocence" of a practice is irrelevant. Even *Lawton*—the source of the "undue oppression" analysis—mooted "innocence": "The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question . . . ."[95]

Plaintiffs cannot carry two key factors. One court concluded "the two most important factors are the fact that the present-day effect on Plaintiffs' property values is little to none and the fact that Plaintiffs may continue to use their properties as they have been used for decades."[96] The FIT Rule does not force landlords to stop using their properties for rental units and Plaintiffs allege no impact on their property value. "It would be

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[92] *Presbytery*, 114 Wn.2d at 331 (relying on William B. Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J. URB. & CONTEMP. L. 3, 33 (1983)).

[93] CP 529 ¶ 20 (Order).

[94] *Margola*, 121 Wn.2d at 649–50.

[95] *Lawton*, 152 U.S. at 143.

[96] *Laurel Park*, 698 F.3d at 1194.

odd to conclude that an ordinance that had no economic effect on most properties was oppressive at all, let alone unduly oppressive."[97] Even if the FIT Rule imposed a direct cost on landlords, "it would be difficult to show undue oppression from the small [amount] involved here."[98]

The trial court and Plaintiffs complained the FIT Rule limits landlord discretion to dictate what matters to them in a tenant.[99] That complaint is irrelevant under the undue oppression factors and lacks factual support. Relying on a City Council staff person's memo on an initial draft of the FIT Rule legislation, the trial court incorrectly concluded: "It is undisputed, and specifically acknowledged by the City," that the Rule affects landlords' discretion.[100] Given that one legislator's statements do not dictate legislative intent, especially when the law speaks for itself,[101] neither does one legislative staff person's statements, especially when discussing language in an initial version of a bill that did

[97] *Id.* at 1195.

[98] *Margola*, 121 Wn.2d at 650.

[99] *See, e.g.*, CP 358, 375–76 (Motion); CP 524–25 ¶ 5, 528 ¶ 18 (Order).

[100] CP 524–25 ¶ 5 (Order). *See* CP 106 (Memo). Although the trial court cited nothing in the record for that finding, the trial court and Plaintiffs elsewhere identified the memo as the source. *See, e.g.* CP 358, 374, 382 (Motion); CP 465 (Plaintiffs' Response/Reply); CP 532 ¶ 27 (Order).

[101] *Watson v. City of Seattle*, 189 Wn.2d 149, 162–63, 401 P.3d 1 (2017).

not survive to the final law.[102] The Rule imposes no substantive limit on a landlord's criteria or minimum thresholds—just the procedural requirement to disclose and follow them. The criteria and thresholds need not be quantifiable or objective.[103] They may be binary and subjective. A criterion could be "no racist tattoo" with the threshold being no tattoo the landlord deems racist.[104] A criterion could be "must be good with children" or "not belligerent or threatening," with the threshold being three letters of recommendation and an interview the landlord deems sufficient.[105] A criterion could be "must negotiate a set of mutually acceptable lease terms with the landlord," with the minimum threshold being terms the landlord deems acceptable.[106]

Unwilling to balance the undue oppression factors, Plaintiffs relied primarily on *Sintra* to assert: "regulations that penalize property owners for a societal problem not of their making tend to violate due process."[107] *Sintra* is distinguishable. It was a "strictly economic," as-applied

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[102] The memo discussed a provision in the initial version that would have limited tenancy criteria to what RCW 59.18.257(1)(a)(ii) prescribes. CP 106. That provision is not in the final FIT Rule. *See* SMC 14.08.050.A.1.a (CP 335).

[103] *Cf.* CP 379 (Motion).

[104] *Cf.* CP 373 (Motion).

[105] *Cf.* CP 358–59, 375–76 (Motion).

[106] *Cf.* CP 526 ¶ 12, 532 ¶ 28 (Order).

[107] CP 375 (Motion, citing *Sintra*, 119 Wn.2d 1).

challenge to a law that combated homelessness by requiring developers to replace any low-income housing they destroyed or pay a fee that, for the challenger, amounted to $218,000 to develop a $670,000 parcel.[108] In applying the "undue oppression" factors, this Court reasoned that "[t]he economic impact on Sintra is enormous" and "Sintra's property cannot be singled out as contributing to the problem of homelessness in any pronounced way; the lack of low income housing was brought about by a great number of economic and social causes which cannot be attributed to an individual parcel of property."[109]

Plaintiffs' facial challenge differs from Sintra's as-applied challenge. Plaintiffs allege no economic impact. And who other than landlords could be responsible for bias in tenancy decisions? The FIT Rule does not upend landlords' balance sheets or force landlords to address a problem created by others. The Rule merely directs landlords to adopt procedures to address a problem no one else could cause. "It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm."[110]

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[108] *Sintra*, 119 Wn.2d at 7 n.1 and 22.

[109] *Id.* at 22.

[110] *Weden*, 135 Wn.2d at 707.

C. Plaintiffs' facial takings claim fails.

1. This Court has always professed to follow the federal takings analysis, which consists of three parts.

The takings clauses of the U.S. and Washington Constitutions are functionally identical,[111] differing only in two respects not relevant to whether a law effects a regulatory taking. First, by adding "or damaged," the Washington clause provides greater protection when ensuring government road work does not deprive access to one's property.[112] This Court noted correctly that no Washington decision attaches significance to "or damaged" in regulatory takings law.[113] Second, by adding that property may not be taken for "private use," Washington provides landowners greater protection when determining what reason justifies

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[111] *Compare* U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation") *with* Wash. Const. art. I, § 16 ("No private property shall be taken or damaged for public or private use without just compensation having been first made").

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

[113] *Presbytery*, 114 Wn.2d at 328 n.10. *Accord Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 32, 940 P.2d 274 (1997).

forced, yet compensated, government acquisition of property through eminent domain or inverse condemnation.[114]

When assessing a claim that a law constitutes a regulatory taking, the U.S. and Washington Constitutions provide "the same right"[115] because "the breadth of constitutional protection under the state and federal just compensation clauses [for regulatory takings] remains virtually identical."[116] This Court "will apply the federal analysis to review all regulatory takings claims,"[117] no matter the constitutional source.

The federal takings analysis comprises three components.[118] First, in a test associated most closely with *Loretto*, a taking occurs where the government requires an owner to suffer a permanent physical invasion of the owner's property, however minor.[119] Second, using the test announced

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[114] *See, e.g.*, *Petition of City of Seattle*, 96 Wn.2d 616, 624, 638 P.2d 549 (1981); *Hogue v. Port of Seattle*, 54 Wn.2d 799, 813, 341 P.2d 171 (1959); *State ex rel. Or.–Wash. R.R. & Navigation Co. v. Superior Court*, 155 Wn. 651, 657–58, 286 P. 33 (1930). *See also* Wynne, 86 WASH. L. REV. at 179 & n.277 (explaining how this law stemmed from three crucial differences between the U.S. and Washington takings provisions).

[115] *Sintra*, 119 Wn.2d at 13.

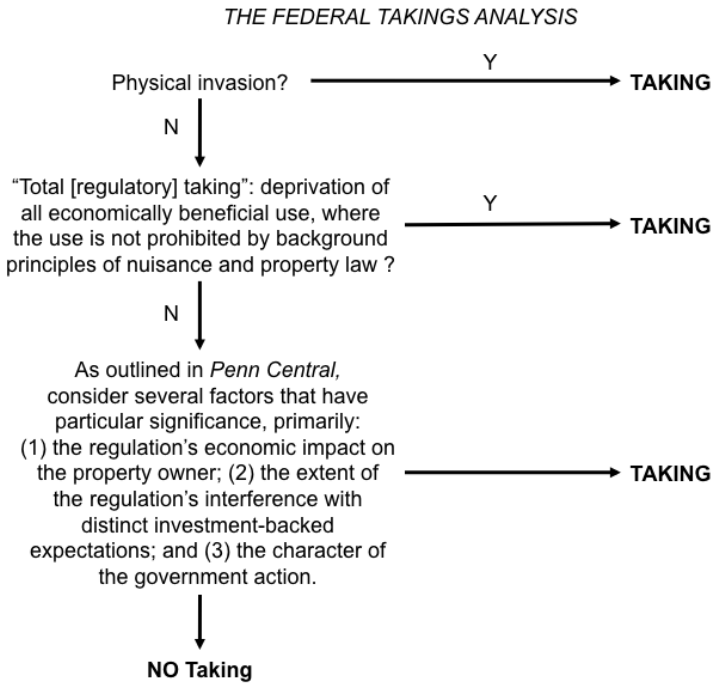
[116] *Orion*, 109 Wn.2d at 657.

[117] *Id.*

[118] *See Lingle*, 544 U.S. at 538–39. *See also* Wynne, 86 WASH. L. REV. at 132–34.

[119] *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

in *Lucas*, a government regulation takes property if it deprives an owner of all economically beneficial use.[120] Finally, if a regulation passes the first two tests, federal courts apply the *Penn Central* factors, including the economic impact of the regulation, interference with distinct investment-backed expectations, and the character of the governmental action (such as whether it is more like a physical invasion or an adjustment of the benefits and burdens of economic life to promote the common good).[121] Graphically, the federal takings analysis arranges these elements in a simple, sequential order:



[120] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 1027–32 (1992).

[121] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

2. The FIT Rule passes muster under the three-part takings analysis.

The FIT Rule is not a taking under the three-part federal analysis. The U.S. Supreme Court rejects claims that regulating the landlord-tenant relationship can amount to a taking: "This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."[122] This is especially true of a claimed *per se* taking from a regulation allegedly denying a landlord the discretion to exclude particular individuals: "Because they voluntarily open their property to occupation by others, [landlords] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals."[123]

The Rule is not a physical invasion under *Loretto*, which proscribes only regulations requiring a landlord to suffer the physical occupation of her property by a third party.[124] A landlord, by definition,

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[122] *Loretto*, 458 U.S. at 440.

[123] *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992). *Accord id.* at 528–29; *FCC v. Florida Power Corp.*, 480 U.S. 245, 251–53 (1987); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82–83 (1980).

[124] *Loretto*, 458 U.S. at 440.

has already opened her property to "invasion" by third parties. A law that limits a landlord's choice of invader is not a *Loretto* taking.[125]

The FIT Rule also fails to constitute a *Lucas* deprivation of all economically beneficial use. *Lucas* is reserved for the "extraordinary circumstance" where a regulation deprives the owner of 100% of the value of her property.[126] Plaintiffs allege no diminution in property value.

The FIT Rule clears the *Penn Central* factors. A *per se* approach—like the one Plaintiffs offer—is incompatible with *Penn Central.*[127] The Supreme Court rejects a claim that curtailing the right to exclude others—admittedly "one of the essential sticks in the bundle of property rights"—can constitute a *per se* taking.[128] Any such claim must be assessed by applying the *Penn Central* factors to the entire property, not the attribute of property ownership the regulation targets.[129] Plaintiffs' failure to demonstrate any economic loss precludes a *Penn Central* taking.[130]

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[125] *Yee*, 503 U.S. at 532; *FCC*, 480 U.S. at 252–53.

[126] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002); *Lucas*, 505 U.S. at 1017.

[127] *Tahoe-Sierra*, 535 U.S. at 321; *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988).

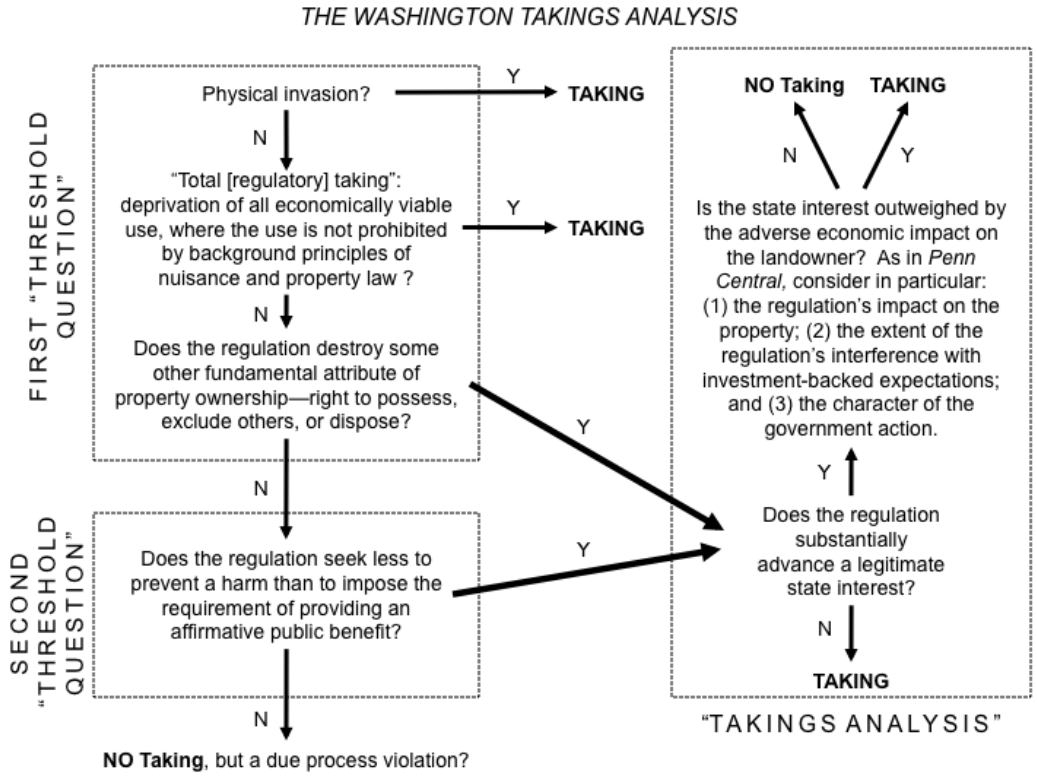
[128] *PruneYard*, 447 U.S. at 82–83.

[129] *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017); *Tahoe-Sierra*, 535 U.S. at 326–27, 330-31; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496–500 (1987); *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979).

[130] *See. e.g.*, *Laurel Park v. Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012); *Garneau v. City of Seattle*, 147 F.3d 802, 808 (9th Cir. 1998); *2910 Georgia Avenue LLC v District of Columbia*, 234 F. Supp. 3d 281, 299 (D.D.C. 2017). Neither the Ninth nor Federal

3. This Court should overrule its case law to the extent it invokes a six-part takings analysis.

Unfortunately, from 1987 through 1993, this Court misstated federal takings law as a confusing six-part analysis:



Washington's analysis begins with the *Loretto* physical-invasion and *Lucas* total-deprivation elements of the federal analysis.[131] The

Circuit Courts of Appeals knows of any case in which a court has found a *Penn Central* taking where the diminution in value was less than 50%. *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 451 (2018) (citing *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011)).

[131] *Guimont v. Clarke*, 121 Wn.2d 586, 602, 854 P.2d 1 (1993). Most recitations of the Washington analysis point to *Guimont* as this Court's takings summary *See, e.g.*, *City of Seattle v. McCoy*, 101 Wn. App. 815, 828, 4 P.3d 159, 166 (2000) (*Guimont* "outlines the

Washington analysis then adds two threshold questions: (1) does the challenged regulation infringe on some other fundamental attribute of property ownership;[132] and (2) does the regulation "seek[] less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit"?[133] Only if the answer to at least one threshold question is positive, the Washington analysis moves its "takings analysis," which begins with its third unique element: whether the regulation substantially advances a legitimate state interest.[134] A negative answer means the regulation is a taking; a positive answer leads to the federal *Penn Central* factors.[135]

As with due process, this Court should return to its original intent by restoring Washington regulatory takings law to the federal analysis. This Court should recognize the three-part federal analysis and overrule Washington case law to the extent it invokes the three extraneous elements. The Washington analysis is incorrect and harmful, and its legal

framework for analyzing regulatory takings"). *See* Wynne, 86 WASH. L. REV. at 134 n.43 (citing other examples).

[132] *Guimont*. 121 Wn.2d at 602–03. *Accord Margola,* 121 Wn.2d at 643–44.

[133] *Guimont*, 121 Wn.2d at 603. *Accord Margola*, 121 Wn.2d at 645.

[134] *Guimont*, 121 Wn.2d at 603–04.

[135] *Id.* at 604. *Accord Margola*, 121 Wn.2d at 645.

underpinnings have changed or disappeared.[136]

The Washington analysis is an incorrect recitation of federal takings law, not a declaration of independent state law. This Court applied its six-part analysis to federal claims because it believed it was invoking the federal analysis.[137] *Guimont* refused to consider a claim that the Washington Constitution provides greater protection—*Guimont* applied the six-part analysis because this Court believed it was the federal analysis.[138] Where a state constitution provides protection no greater than the U.S. Constitution, state courts should adhere to the U.S. Supreme Court's analysis.[139] Washington's approach prompted one court to recognize Washington as an outliner—one of only three states to develop its own analysis despite having a constitutional takings provision similar to the U.S. Constitution, while the "overwhelming majority" of states use

[136] *See W.G. Clark*, 180 Wn.2d at 66.

[137] *See. e.g. Margola*, 121 Wn.2d at 642, 646–49 (applying one analysis to a takings claim under the U.S. and Washington Constitutions); *Sintra*, 119 Wn.2d at 14 ("federal law is ultimately controlling"); *Orion*, 109 Wn.2d at 657 ("we will apply the federal analysis to review all regulatory takings claims").

[138] *Guimont*, 121 Wn.2d at 604.

[139] *Oregon v. Hass*, 420 U.S. at 719–20. *See Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (the U.S. Supreme Court assumes a state court believes federal law controls where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law"). *See also State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003) (given *Oregon v. Hass*, the Washington Supreme Court will use a *Gunwall* analysis to determine whether the Washington Constitution provides greater protection).

the federal analysis.[140]

Washington's takings analysis is harmful. Its "seeks less to prevent a harm" element hurts property owners by enabling a government to defeat a takings claim just by demonstrating how a challenged regulation is designed primarily to prevent a harm.[141] The "substantially advances" element hurts governments by turning a takings claim into a referendum on the challenged law's efficacy.[142]

The Washington analysis confuses judges. Attempting to recite the analysis, the Court of Appeals mistakenly included the "fundamental attribute of property ownership" element twice, forcing a search for "a clue to the distinction" in this repetition.[143] The court ultimately decided it could "leave this conundrum to another day,"[144] adding "this case does not require us to completely rehash the complex, confusing and often-ethereal

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[140] *Phillips v. Montgomery County*, 442 S.W.3d 233, 240 & n.10 (Tenn. 2014).

[141] *See, e.g., Thun v. City of Bonney Lake*, 3 Wn. App. 2d 453, 462–66, 416 P.3d 743 (2018); *Connor v. City of Seattle*, 153 Wn. App. 673, 700, 223 P.3d 1201, 1214–15 (2009); *Paradise, Inc. v. Pierce County*, 124 Wn. App. 759, 773–74, 102 P.3d 173, 180–81 (2004); *Jones v. King County*, 74 Wn. App. 467, 479–80, 874 P.2d 853, 859 (1994). *See* Wynne at 160–63 (explaining how the Washington analysis was designed to offer the government an opportunity to defeat a takings claim and avoid paying compensation).

[142] *See Lingle*, 544 U.S. at 542–44 (removing the "substantially advances" element from the federal takings analysis; calling "untenable" the notion that a law takes property by virtue of its ineffectiveness).

[143] *Guimont v. City of Seattle*, 77 Wn. App. 74, 80–81 & n.6, 896 P.2d 70 (1995).

[144] *Id.*, 77 Wn. App. at 85 n.9.

realm of theoretical law" of takings in Washington.[145] The Washington takings analysis also confuses federal courts. One District Court eschewed the Washington analysis and applied only the federal analysis to resolve a takings claim brought under the U.S. and Washington Constitutions,[146] but another applied the federal analysis to a federal claim and the Washington analysis to a state claim.[147] The Washington analysis also yields inconsistent treatment of federal takings claims depending on where they are filed: federal courts consistently apply the federal takings analysis to federal takings claims, but Washington courts apply the Washington analysis to federal claims.[148]

The legal underpinnings of the Washington analysis's unique elements have changed or disappeared. Although the "substantially advances" element was part of the federal analysis when this Court articulated the Washington analysis,[149] the U.S. Supreme Court removed

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[145] *Id*. at 79.

[146] *Heitman v. City of Spokane Valley*, 2010 WL 816727 at *4–6 (E.D. Wash. 2010, unpublished), *aff'd sub nom. Conklin Development v. City of Spokane Valley*, 448 F. App'x 687, 2011 WL 3648100 (2011). *See* **Appendix 2**; GR 14.1(d).

[147] *Tapps Brewing, Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1228–32 (W.D. Wash. 2007), *aff'd sub nom. McGlung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008).

[148] *See, e.g.*, *Margola*, 121 Wn.2d at 642; *Guimont*, 121 Wn.2d at 604; *Robinson*, 119 Wn.2d at 47; *Sintra*, 119 Wn.2d at 14; *Presbytery*, 114 Wn.2d at 333.

[149] *Orion*, 109 Wn.2d at 647, 655 (citing *Agins v. City of Tiburon*, 447 U.S. 255 (1980)).

that element in 2005 because it conflated takings and due process concepts.[150] That change prompted one Court of Appeals judge to recognize that the "substantially advances" element is now "doctrinally and practically untenable in takings analysis."[151]

The "seeks less to prevent a harm" element is undermined for similar reasons. This Court crafted that element from substantive due process law,[152] and the Court of Appeals has called it an oxymoronic "due process takings analysis."[153] Again, the U.S. Supreme Court explained in 2005 that due process law has no place in a takings analysis.[154] More directly, in *Lucas* in 1992, the Court rejected a "seeks less to prevent a harm" element as impractical because it calls for a distinction that "is difficult, if not impossible, to discern on an objective, value-free basis . . . ."[155] "[T]he distinction between 'harm-preventing' and 'benefit-

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[150] *Lingle*, 544 U.S. at 540–48 (abrogating *Agins*).

[151] *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 621, 124 P.3d 324 (2005) (Becker, J., dissenting).

[152] *See Presbytery*, 114 Wn.2d at 329; *Orion*, 109 Wn.2d at 650–51. Another problem with this element is inconsistency. This Court sometimes posed it as whether the regulation is employed to enhance the value of public property. *E.g.*, *Presbytery*, 114 Wn.2d at 329. *Accord Manufactured Housing Cmtys. of Wash. v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000) (four-Justice lead opinion); *Guimont*, 121 Wn.2d at 617–20 (Utter, J., concurring).

[153] *Connor*, 153 Wn. App. 673, 700, 223 P.3d 1201, 1214 (2009).

[154] *Lingle*, 544 U.S. at 542–44.

[155] *Lucas*, 505 U.S. at 1026.

conferring' regulation is often in the eye of the beholder . . . . Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate."[156] Contemporary scholars agreed that *Lucas* should have gutted the "seeks less to prevent a harm" element of the Washington takings analysis.[157]

The thin underpinnings of the "fundamental attribute" element have evaporated. That element is from a scholar's incorrect 1989 prediction about the direction of federal takings law.[158] Inferring principles and doctrine from the results of case law rather than its language,[159] the scholar observed that, at that time, the U.S. Supreme Court had "never held a regulation that merely restricts use, no matter how severely, to be a

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[156] *Id.* at 1024–25.

[157] *See, e.g.*, John M. Groen and Richard M. Stephens, *Takings Law,* Lucas, *and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1293 (1993) ("*Lucas* directly undermines the core component of Washington's threshold inquiry."); Elaine Spencer, *Dashed "Investment-Backed" Expectations: Will the Constitution Protect Property Owners from Excesses in Implementation of the Growth Management Act?*, 16 U. PUGET SOUND L. REV. 1223, 1229 (1993).

[158] Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. PUGET SOUND L. REV. 339 (1989). *See Presbytery*, 114 Wn.2d at 329–30 (adopting Settle's "fundamental attribute" element).

[159] *See, e.g.*, Settle, 12 U. PUGET SOUND L. REV. at 354 ("doctrine may be inferable from some of the decisions even though it has not been fully articulated"); *id*. at 389 n.308 ("to the extent that the doctrine is unarticulated and intuitive, coherent principles explaining outcomes are inferable"); *id.* at 402 ("This Article focused on what is and, by logical inference and extrapolation, what might be the law of regulatory takings.").

taking," so recommended the "fundamental attribute" element to reduce confusion in those "use regulation cases."[160] But the U.S. Supreme Court did not follow the scholar's suggested path. In 1992, *Lucas* undermined the premise of the scholar's analysis by holding that a mere use regulation *can* be a taking.[161] The U.S. Supreme Court has not employed a "fundamental attribute" distinction as a separate element. To the contrary, the Court evaluates all the property an owner holds; destruction of one stick in the bundle of property attributes, fundamental or otherwise, does not prove a taking.[162]

4. The FIT Rule passes muster even under the six-part analysis.

Even if this Court were to retain the six-part Washington takings analysis, Plaintiffs could not carry their burden of proving the FIT Rule violates it. The City has demonstrated how Plaintiffs would fail under the three elements common to the federal and Washington analyses: the *Loretto* physical invasion element, the *Lucas* total deprivation element, and the *Penn Central* factors.

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[160] *Id*. at 386–92.

[161] *Lucas*, 505 U.S. at 1019.

[162] *See, e.g.*, *Murr*, 137 S. Ct. at 1944; *Tahoe-Sierra*, 535 U.S. at 326–27, 330–31; *Keystone*, 480 U.S. at 496–500; *PruneYard*, 447 U.S. at 82–83; *Andrus*, 444 U.S. at 65–66.

Plaintiffs would fare no better under the three elements unique to the Washington analysis. The FIT Rule does not destroy a fundamental attribute of property ownership.[163] This Court follows federal law in holding that, where a landlord opens her property to tenants, an ordinance limiting the choice of tenants destroys no fundamental attribute.[164]

The FIT Rule does not "seek less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit."[165] The Rule prevents harm by requiring landlords to use an accepted best practice to curb implicit bias in their tenancy decisions.

And the Rule substantially advances a legitimate state interest.[166] It furthers the venerable governmental purpose of reducing discrimination by mandating a first-in-time decision-making approach touted as a best practice by landlord organizations and others.

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[163] *See Margola*, 121 Wn.2d at 643–44, 646.

[164] *Id*. at 648 ("the ordinance restricts, but does not destroy, Margola's right to exclude others from his property"); *Guimont*, 121 Wn.2d at 608 (because "[t]he Act on its face does not force park owners to allow others to occupy their land[,] the Act does not unconstitutionally infringe any other fundamental attribute of property ownership, such as the right to possess, exclude others, or dispose of property"); *Presbytery*, 114 Wn. 2d at 333 n.21 ("Not every infringement on a fundamental attribute of ownership will necessarily constitute a 'taking'.")

[165] *See Guimont*, 121 Wn.2d at 603; *Margola*, 121 Wn.2d at 645.

[166] *See Presbytery*, 114 Wn.2d at 333.

5. Even if this Court retains the six-part analysis, this Court should decline to follow the lead opinion in *Manufactured Housing*.

Plaintiffs and the trial court invoked neither the federal nor Washington analysis, relying instead on *Manufactured Housing*'s lead opinion.[167] That reliance is misplaced because this Court should overrule the "fundamental attribute" element of the Washington analysis, which the lead *Manufactured Housing* opinion claimed to follow.[168] But even if this Court retains the six-part analysis, it should decline to follow *Manufactured Housing* because it is nonbinding, against the weight of authority, and distinguishable.

"A plurality opinion has limited precedential value and is not binding."[169] *Manufactured Housing* fractured this Court 4-1-1-2-1. Four justices signed the lead opinion, basing their rationale on Washington's "fundamental attribute" element.[170] Justice Sanders issued a separate concurring opinion, relying on *Loretto* and *Penn Central* from the federal

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[167] CP 361–65 (Motion, relying on *Manufactured Housing*, 142 Wn.2d 347); CP 525–27 (Order; same).

[168] *Manufactured Housing*, 142 Wn.2d at 358. Although not adopting the lead opinion's analysis, Justice Sanders agreed the "dispositive feature" of that opinion was its reading of the "fundamental attribute" element. *Id*. at 383 (Sanders, J., concurring).

[169] *Lauer v. Pierce County*, 173 Wn.2d 242, 258, 267 P.3d 988 (2011).

[170] *Manufactured Housing*, 142 Wn.2d at 355 and 369 (relying on *Presbytery* and *Guimont* for the proposition that a taking occurs if a regulation destroys a fundamental right of property ownership).

analysis[171] and adding his belief that the lead opinion—whose rationale he did not adopt—followed the Washington analysis.[172] Justice Madsen concurred in the result without writing or joining an opinion.[173] Justices Johnson and Smith issued one dissent, and Justice Talmadge another.[174]

Even if the lead *Manufactured Housing* opinion had precedential value, it cannot be squared with the weight of other binding authority. According to the lead *Manufactured Housing* opinion, the destruction of one of the "fundamental attributes" of property ownership constitutes a *per se* taking without further analysis.[175] But three earlier decisions ruled to the contrary. If a regulation "infringes upon a fundamental attribute of property ownership, further takings analysis is necessary"—the plaintiff must still prove the regulation advances no legitimate state interest or fails under *Penn Central*.[176] *Manufactured Housing* did not overrule those

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[171] *Id*. at 381–83 (Sanders, J., concurring).

[172] *Id*. at 380 ("I take issue with the view expressed in both dissents that the majority's analysis is somehow inconsistent with *Guimont* . . . . In reality the majority strictly applies the *Guimont* holding that an appropriation for public use of a fundamental attribute of property ownership constitutes a taking in eminent domain.").

[173] *Id.* at 375 (Madsen, J., concurring in result only).

[174] *Id*. at 384 (Johnson, J. dissenting, with Smith, J., concurring); *id*. at 391 (Talmadge, J., dissenting).

[175] *Id.* at 355, 369.

[176] *Guimont*, 121 Wn.2d. at 595. *Accord id*. at 603 ("if the regulation infringes on a fundamental attribute of ownership, the court proceeds with its taking analysis": the substantially advances test and *Penn Central* factors); *id.* at 603 n.6 ("Not every infringement on a fundamental attribute of ownership will necessarily constitute a

decisions; they remain valid. Three to one, the weight of authority is that proving destruction of a "fundamental attribute" does not prove a taking.

Even if *Manufactured Housing* carried weight, it is distinguishable. It involved the power to grant a right of first refusal to buy property, which the lead opinion viewed as "part and parcel of the power to dispose of property," one of the three "fundamental attributes" recognized in Washington takings law (along with the rights to possess and exclude others).[177] Plaintiffs here initially asserted a right to select tenants, but not finding that right in case law, analogized to the rights to exclude others or dispose of property.[178] This Court and the U.S. Supreme Courts reject a right to choose tenants, whether that right is couched as a right to exclude others, dispose of property, or prevent physical invasion. *Loretto* ruled a regulation causing a physical invasion takes property because it effectively

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'taking'."); *Margola*, 121 Wn.2d at 645 ("if the regulation infringes on a fundamental attribute of ownership, the court proceeds with its takings analysis"); *Presbytery*, 114 Wn.2d at 333 ("if we determine that the regulation denies the owner a fundamental attribute of ownership, it then becomes necessary to determine whether the regulation effects a 'taking'"); *id*. at 333 n.21 ("Not every infringement on a fundamental attribute of ownership will necessarily constitute a 'taking'.").

[177] *Manufactured Housing*, 142 Wn.2d at 366. *Accord id.* at 365 (enumerating the three fundamental attributes); *Robinson*, 119 Wn.2d at 50 (same); *Presbytery*, 114 Wn.2d at 329–30 (same).

[178] CP 362, 364 (Motion); CP 452, 453–54 (Plaintiffs' Response/Reply). Plaintiffs also claimed a right to choose the recipient of a right of first refusal. *See* CP 363–65 (Motion). But Plaintiffs relied on *Manufactured Housing*, which explained that the power to offer a right of first refusal derives from the right to dispose of property. *Manufactured Housing*, 142 Wn.2d at 364–66.

destroys the rights to exclude others and dispose of property.[179] *Loretto* rejected the notion that landlords could use the "physical invasion" test—or the underlying concerns about the rights to exclude and dispose—to attack tenant-protection laws:

> [W]e do not agree . . . that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.[180]

Yee invoked *Loretto* to reject a takings challenge to a tenant-protection law. *Yee* used the "right to exclude" and "right to choose" a tenant as synonyms for a right to prevent a physical invasion, and rejected those asserted rights because a landlord may exclude *all* tenants, but not *particular* ones:

> Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government. While the "**right to exclude**" is doubtless, as petitioners assert, "one of the most essential sticks in the bundle of rights that are commonly characterized as property," we do not find that right to have been taken . . . .
>
> The same may be said of petitioners' contention that the ordinance amounts to compelled physical occupation because it deprives petitioners of the **ability to choose**

[179] *Loretto*, 458 U.S. at 435–36.

[180] *Id*. at 440.

> **their incoming tenants** . . . . Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their **inability to exclude** particular individuals.[181]

This Court follows *Yee*, rejecting a landlord's alleged right to select tenants no matter the underlying attribute of property ownership on which that allegation rests. *Margola* rejected a takings challenge to a landlord-tenant regulation, ruling that because the plaintiff rented to tenants, the plaintiff could prove neither a physical invasion nor destruction of any fundamental attribute of property ownership:

> Like *Yee*, Margola has voluntarily rented space to tenants. Likewise, Margola can continue to evict tenants as long as he pays a relatively small annual fee, just as the park owners in *Yee* could continue to evict as long as they gave notice to the tenants. **Accordingly, the ordinance restricts, but does not destroy, Margola's right to exclude others from his property.** As the Court in *Yee* noted: "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain *in perpetuity* from terminating a tenancy". (Italics ours.) *Yee*, . . . 112 S. Ct. at 1529 . . . . Thus, the registration ordinance in this case **does not destroy any fundamental attribute of property ownership** and does not rise to the level of a physical taking.[182]

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[181] *Yee*, 503 U.S. at 528, 530–31 (emphasis added; citations omitted).

[182] *Margola*, 121 Wn.2d at 648 (emphasis added).

Guimont also followed *Yee* to rule a landlord who rents cannot claim a physical invasion or the destruction of any other fundamental attribute of property ownership, such as the right to exclude or dispose:

> Like *Yee*, the park owners' physical takings argument in this case lacks merit. The Act on its face does not force park owners to allow others to occupy their land. Rather, the park owners have voluntarily rented space to the mobile home owners, and the Act itself does not compel the park owners to continue this relationship. Indeed, the Act still allows the park owners to terminate their tenancies, close their parks, and sell their land. Thus, the park owners have failed to show that the Act on its face requires any "physical invasion" of their property. **Likewise, for the same reasons, the Act does not unconstitutionally infringe any other fundamental attribute of property ownership, such as the right to possess, exclude others, or dispose of property**.[183]

If Plaintiffs were correct—if limiting a landlord's "right" to rent to the person of the landlord's choosing is a *per se* taking under *Manufactured Housing*—then all antidiscrimination rental laws would fall. Plaintiffs' argument does not depend on the landlords' reason for choosing a tenant—no matter the reason, abrogating the "right" to choose is a *per se* taking. A law preventing a landlord from refusing tenancy to a person because of sexual orientation, race, or religion effectively prevents the landlord from excluding someone the landlord may not prefer because the applicant is neither straight, white, nor Christian. If the FIT Rule is a *per*

[183] *Guimont*, 121 Wn.2d at 608 (emphasis added; footnote omitted).

se taking because it limits a landlord's "right" to choose, so too is a statutory requirement not to choose on the grounds of sexual orientation, race, or religion.

D. Plaintiffs' "private takings" claim is superfluous and misplaced.

This Court need not entertain Plaintiffs' claim that the FIT Rule effects a prohibited "private taking." The Rule effects no taking, obviating any inquiry into its public or private nature.[184] And had Plaintiffs established a *per se* taking, the inquiry would end there—Plaintiffs would be entitled to the declaratory relief they seek.

Plaintiffs' "private taking" claim is also misplaced in regulatory takings. Whether a taking is for a public or private use is limited to physical takings through eminent domain or inverse condemnation—the ultimate question being whether the government may acquire the property even if the government paid compensation. Every authorization of a "public use" in the Washington Constitution is for the appropriation of land or water,[185] and every example of this Court applying the "public

[184] *See, e.g.*, *2910 Georgia Avenue*, 234 F. Supp. 3d at 306 ("The public use requirement becomes relevant only if a taking has occurred.").

[185] Wash. Const. art. I, § 16 (reclamation and settlement); *id.*, art. VIII, § 8 (port development); *id.*, art. VIII, § 11 (agricultural development); *id.*, art. XXI, § 1 (water for irrigation, mining, and manufacturing).

use" limitation deals with eminent domain or inverse condemnation.[186] The only exceptions are two opinions in *Manufactured Housing*,[187] which overlooked admonitions not to treat physical takings cases as controlling precedents for regulatory takings claims.[188]

E. Plaintiffs' facial free speech claim fails.

A government must justify its regulation of commercial speech.[189] The City meets that burden under the correct constitutional analysis (governing disclosure requirements) and the incorrect analysis Plaintiffs and the trial court invoke (governing speech restrictions).

1. The FIT Rule imposes a disclosure requirement that passes muster under *Zauderer*.

Because the Washington and U.S. Constitutions offer commercial speech the same protection, Washington courts apply the federal analysis to Washington commercial free speech claims.[190] When assessing the

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[186] *E.g.*, *Dickgieser v. State*, 153 Wn.2d 530, 535–40, 105 P.3d 26 (2005); *State ex rel. Wash. State Convention and Trade Cntr. v. Evans*, 136 Wn.2d 811, 966 P.2d 1252 (1998); *Petition of City of Seattle*, 96 Wn.2d at 627; *Miller v. City of Tacoma*, 61 Wn.2d 374, 382–88, 378 P.2d 464 (1963); *Hogue*, 54 Wn.2d at 838–39.

[187] *Manufactured Housing*, 142 Wn.2d at 370–74 (lead opinion); *id*. at 383–84 (Sanders, J., concurring).

[188] *Tahoe-Sierra*, 535 U.S. at 323–24; *Presbytery*, 114 Wn.2d at 335.

[189] *National Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

[190] *Bradburn v. North Cent. Regional Library Dist*., 168 Wn.2d 789, 800, 231 P.3d 166 (2010); *National Fed'n of Retired Persons v. Insurance Comm'r*, 120 Wn.2d 101, 119, 838 P.2d 680 (1992).

constitutionality of a requirement that commercial speakers disclose information, courts apply the deferential *Zauderer* test, under which the disclosure must be of factual and uncontroversial information, and not unjustified or unduly burdensome.[191]

The FIT Rule clears *Zauderer*. The Rule requires disclosure of factual and uncontroversial tenancy criteria landlords develop. The City justifies the disclosure as part of a regulation advancing the City's substantial interest in reducing implicit bias in tenancy decisions. The disclosure does not burden or chill landlord's other commercial speech. The FIT Rule just adds one more disclosure to the others state law already requires in this heavily regulated field.[192]

2. The FIT Rule is constitutional even under *Central Hudson*.

Plaintiffs press the wrong standard: *Central Hudson*'s test for assessing restrictions on commercial speech.[193] The U.S. Supreme Court recognizes the "material differences between disclosure requirements and outright prohibitions on speech"[194] and recommends "disclosure

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[191] *National Inst.*, 138 S. Ct. at 2370–78; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

[192] *See* RCW 59.18.257(1).

[193] CP 470–71 (Plaintiffs' Response/Reply, citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557 (1980)).

[194] *Zauderer*, 471 U.S. at 650.

requirements as one of the acceptable less restrictive alternatives to actual suppression of speech" because a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[195]

Nothing supports the trial court's conclusions that the FIT Rule "imposes sweeping advertising restrictions" and dictates how landlords communicate with prospective tenants.[196] The Rule does not limit how landlords advertise their units; it simply requires landlords to disclose the screening criteria and thresholds they develop. The Rule prohibits no landlord from adding "call to learn how to apply" or "email for further details,"[197] or including a criterion that the applicant and landlord must be able to negotiate acceptable financial and other terms.[198] The Rule does not preclude an interview as part of the information needed to conduct tenant screening.[199] Before Plaintiffs sued, the Seattle Office of Civil Rights ("SOCR"), tasked with enforcing the Rule,[200] posted a document

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[195] *Id*. at 651 & n.14.

[196] *Cf.* CP 530 ¶ 23, 532 ¶ 28 (Order).

[197] *Cf.* CP 530 ¶ 23 (Order).

[198] *Cf.* CP 526 ¶ 12, 532 ¶ 28 (Order).

[199] *Cf.* CP 480 (*Amicus* Brief).

[200] *See* SMC 14.08.010 ("The Department shall enforce the provisions of this chapter"); SMC 14.08.020 (defining "Department" as SOCR).

confirming the Rule blocks no landlord from requiring an applicant to attend an interview or open house:

> 9. **What are the ordinance's requirements around** setting screening criteria (for example, requiring holding deposits or fees, credit checks, requiring applications to be submitted in-person, **applicant interviews**, **requiring attendance at an open house,** requiring payment of first or last month's rent, etc.)?
>
> The ordinance does not outline any requirements or limitations related to specific screening criteria.[201]

The trial court mistakenly relied on *Expressions Hair Design* to conclude *Central Hudson* is the proper test.[202] The issue in *Expressions* was whether a law was a regulation of speech or price.[203] Having found it to be a speech regulation, the Court remanded the question of whether it should be assessed under *Central Hudson* or *Zauderer*.[204] *Expressions* is irrelevant because the FIT Rule regulates speech (obviating the issue

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[201] CP 507 (citing SOCR, FIRST-IN-TIME REQUIREMENTS, SEATTLE'S OPEN HOUSING ORDINANCE, SMC 14.08, FREQUENTLY ASKED QUESTIONS, *now available at* https://web.archive.org/web/20170130014601/https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/FAQ_FIT_FINAL_1-12-17.pdf, last accessed July 24, 2018 (emphasis added)).

[202] CP 529 ¶ 21 (Order; citing *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017)). The trial court did not cite *Central Hudson*, but the lead opinion from a plurality decision from this Court invoking *Central Hudson*. CP 530–32 (Order, citing *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 555, 104 P.3d 1280 (2005)).

[203] *Expressions*, 137 S. Ct. at 1146–48.

[204] *Id*. at 1150–51. The Second Circuit Court of Appeals certified the case to a state court to answer the question of whether the law prohibits speech or mandates a disclosure. *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 102–04 (2d Cir. 2017).

Expressions addressed) through a disclosure requirement assessed under *Zauderer* (answering the question pending on remand in *Expressions*).

The FIT Rule would survive scrutiny even if deemed a speech restriction subject to the *Central Hudson* test.[205] The parties dispute only two elements of that test.[206] First, the restriction must directly advance the government's interest. Although mere speculation will not suffice, this standard does not require empirical data.[207] It does not require what the trial court demanded: "individualized suspicion of disparate treatment."[208] Instead, the government may clear this standard by referring to studies, anecdotes, history, consensus, or even common sense.[209] Courts defer to a reasonable legislative belief that the restriction will advance the government's stated interest.[210] Here, consistent with studies, scholarship, and common sense—reinforced by a U.S. Supreme Court decision recognizing the role of implicit bias in housing decisions[211]—the City

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[205] *See Central Hudson*, 447 U.S. at 566.

[206] Plaintiffs concede the FIT Rule relates to a substantial government interest. CP 380 (Motion).

[207] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001).

[208] *Cf.* CP 380–82 (Motion); CP 532 ¶ 28 (Order).

[209] *Lorillard*, 533 U.S. at 555.

[210] *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341–42 (1986).

[211] *Texas Dep't of Housing*, 135 S. Ct. at 2522.

Council could reasonably believe that implicit bias in tenancy decisions is real and that imposing an industry-touted best practice will materially advance the City's interest in reducing discrimination.

Second, the restriction must also be no more extensive than necessary to serve the government's interest. The U.S. Supreme Court clarified this is not a "least restrictive means" test—it requires only a reasonable, proportionate fit between the legislature's ends and the means chosen to accomplish those ends.[212] The Court defers to legislative assessments of the fit, providing "needed leeway" in commercial speech, long the subject of governmental regulation. [213] Requiring landlords to adhere to an industry-accepted first-in-time requirement reasonably fits the goal of reducing discrimination from implicit bias. Any limitations on landlords' commercial speech are well within the bounds of the already heavily regulated landlord-tenant relationship. The trial court mistakenly relied on the *Mattress Outlet* plurality's treatment of the "no more extensive" prong.[214] That four-justice opinion has no precedential value.[215]

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[212] *Lorillard*, 533 U.S. at 556.

[213] *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480–81 (1989) (internal citations omitted).

[214] CP 530–31 (Order, citing *Mattress Outlet*, 153 Wn.2d at 555). *Accord* CP 381–82 (Motion).

[215] *See Lauer*, 173 Wn.2d at 258. In *Mattress Outlet*, a company challenged a county's enforcement of its sign regulation against workers wearing raincoats emblazoned with the company's advertisements. 153 Wn.2d at 508–09. Four justices found the regulation

Its application of *Central Hudson* was rejected by the four-justice dissent[216] and has not been invoked by this Court since.

V. CONCLUSION

This Court should reaffirm Washington's intent to embrace the federal due process and takings analyses and overrule past case law to the extent it invokes contrary analyses. This Court should also rule that a "private takings" claim is misplaced in a challenge to a regulation and recognize the proper free speech analysis for disclosure requirements. The FIT Rule passes muster under the correct constitutional analyses and would withstand scrutiny even under the incorrect analyses Plaintiffs and the trial court invoke. The City respectfully asks this Court to reverse the trial court and order it to enter judgment for the City.

Respectfully submitted August 24, 2018.

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Seattle City Attorney

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s/ Sara O'Connor-Kriss, WSBA #41569
Assistant City Attorneys
For Appellant City of Seattle

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unconstitutional (*id*. at 508–16), four found it constitutional (*id*. at 518–29), and one concluded the raincoats were not signs so were free of the regulation (*id*. at 516–17).

[216] *Mattress Outlet*, 153 Wn.2d at 518–29 (Madsen, J., dissenting, joined by Justices Johnson, Fairhurst, and Bridge).

SMC 14.08.050 - First-in-time

A. Effective January 1, 2017, it is an unfair practice for a person to fail to:

1. provide notice to a prospective occupant, in writing or by posting in the office of the person leasing the unit or in the building where the unit is physically located and, if existing, on the website advertising rental of the unit, in addition to and at the same time as providing the information required by RCW 59.18.257(1), of:

    a. 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; including any different or additional criteria that will be used if the owner chooses to conduct an individualized assessment related to criminal records.

    b. all information, documentation, and other submissions necessary for the owner to conduct screening using the criteria stated in the notice required in subsection 14.08.050.A.1.a. A rental application is considered complete when it includes all the information, documentation, and other submissions stated in the notice required in this subsection 14.08.050.A.1.b. Lack of a material omission in the application by a prospective occupant will not render the application incomplete.

    c. information explaining how to request additional time to complete an application to either ensure meaningful access to the application or a reasonable accommodation and how fulfilling the request impacts the application receipt date, pursuant to subsection 14.08.050.B and C.

    d. the applicability to the available unit of the exceptions stated in subsections 14.08.050.A.4.a and b.

2. note the date and time of when the owner receives a completed rental application, whether submitted through the mail, electronically, or in person.

3. screen completed rental applications in chronological order as required in subsection 14.08.050.A.2 to determine whether a prospective occupant meets all the screening criteria that are necessary for approval of the application. If, after conducting the screening, the owner needs more information than was stated in the notice required in subsection 14.08.050.A.1.b to determine whether to approve the application or takes an adverse action as described in RCW 59.18.257(1)(c) or decides to

conduct an individualized assessment, the application shall not be rendered incomplete. The owner shall notify the prospective occupant in writing, by phone, or in person of what additional information is needed, and the specified period of time (at least 72 hours) that the prospective occupant has to provide the additional information. The owner's failure to provide the notice required in this subsection 14.08.050.A.3 does not affect the prospective occupant's right to 72 hours to provide additional information. If the additional information is provided within the specified period of time, the original submission date of the completed application for purposes of determining the chronological order of receipt will not be affected. If the information is not provided by the end of the specified period of time, the owner may consider the application incomplete or reject the application.

4. offer tenancy of the available unit to the first prospective occupant meeting all the screening criteria necessary for approval of the application. If the first approved prospective occupant does not accept the offer of tenancy for the available unit within 48 hours of when the offer is made, the owner shall review the next completed rental application in chronological order until a prospective occupant accepts the owner's offer of tenancy. This subsection 14.08.050.A.4 does not apply when the owner:

    a. is legally obligated to set aside the available unit to serve specific vulnerable populations;

    b. voluntarily agrees to set aside the available unit to serve specific vulnerable populations, including but not limited to homeless persons, survivors of domestic violence, persons with low income, and persons referred to the owner by non-profit organizations or social service agencies.

B. If a prospective occupant requires additional time to submit a complete rental application because of the need to ensure meaningful access to the application or for a reasonable accommodation, the prospective occupant must make a request to the owner. The owner shall document the date and time of the request and it will serve as the date and time of receipt for purposes of determining the chronological order of receipt pursuant to subsection 14.08.050.A.2. The owner shall not unreasonably deny a request for additional time. If the request for additional time is denied, the date and time of receipt of the complete application shall serve as the date and time of receipt pursuant to subsection 14.08.050.A.2. This subsection 14.08.050.B does not diminish or otherwise affect any duty of an owner under local, state,

or federal law to grant a reasonable accommodation to an individual with a disability.

C. To maintain the prospective occupant's chronological position noted at the time of notice, the owner may require that the prospective occupant provide reasonable documentation of the need for additional time to ensure meaningful access along with the completed application. The owner must notify the prospective occupant at the time the owner grants any request for additional time if the owner will require submission of reasonable documentation. If such notice is given and reasonable documentation is not provided with the completed application, the owner may change the date and time of receipt from when the request was made to the date and time the complete application is submitted. This subsection 14.08.050.C applies only to requests for additional time based on the need to ensure meaningful access to the application. It does not apply to requests for reasonable accommodation.

D. First-in-time evaluation

The Department shall ask the City Auditor to conduct an evaluation of the impact of the program described in subsections 14.08.050.A-C to determine if the program should be maintained, amended, or repealed. The evaluation shall only be conducted on the basis of the program's impacts after 18 months of implementation. The evaluation should include an analysis of the impact on discrimination based on a protected class and impact on the ability of low-income persons and persons with limited English proficiency to obtain housing. The City Auditor, at their discretion, may retain an independent, outside party to conduct the evaluation. The evaluation shall be submitted to the City Council by the end of 2018.

E. Persons must comply with this Section 14.08.050 by July 1, 2017.

F. Nothing in this Section 14.08.050 shall apply to an accessory dwelling unit or detached accessory dwelling unit wherein the owner or person entitled to possession thereof maintains a permanent residence, home or abode on the same lot.

(Ord. 125228, § 1, 2016; Ord. 125114, § 5, 2016.)

*** * * ***

SMC 14.08.030 - Unfair practices forbidden.

Unfair practices as defined in this chapter are contrary to the public peace, health, safety and general welfare and are prohibited by the City in the exercise of its police power.

(Ord. 121593, § 3, 2004; Ord. 116818, § 3, 1993; Ord. 113610, § 3, 1987; Ord. 109050, § 1(part), 1980; Ord. 108205, § 2(part), 1979; Ord. 104839, § 3(1), 1975.)

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SMC 14.08.020 - Definitions

Definitions as used in this Chapter 14.08, unless additional meaning clearly appears from the context, shall have the meanings subscribed:

"Accessory dwelling unit" has the meaning defined in Chapter 23.84A.032's definition of "Residential use".

"Aggrieved person" includes any person who:

1. Claims to have been injured by an unfair practice prohibited by this Chapter 14.08; or
2. Believes that he or she will be injured by an unfair practice prohibited by this Chapter 14.08 that is about to occur.

"Alternative source of income" means lawful, verifiable income derived from sources other than wages, salaries, or other compensation for employment. It includes but is not limited to monies derived from Social Security benefits, supplemental security income, unemployment benefits, other retirement programs, child support, the Aged, Blind or Disabled Cash Assistance Program, Refugee Cash Assistance, and any federal, state, local government, private, or nonprofit-administered benefit program.

"Blockbusting" means, for profit, to promote, induce, or attempt to promote or induce any person to, engage in a real estate transaction by representing that a person or persons of a particular race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, alternative source of income, or who participates in a Section 8 or other subsidy program, or who is disabled, or who is a disabled person who uses a service animal has moved or may move into the neighborhood.

"Charge" means a claim or set of claims alleging an unfair practice or practices prohibited under this Chapter 14.08.

"Charging party" means any person who files a charge alleging an unfair practice under this Chapter 14.08, including the Director.

"City" means The City of Seattle.

"City department" means any agency, office, board, or commission of the City, or any department employee acting on its behalf, but shall not mean a public corporation chartered under Chapter 3.110, or any contractor, consultant, or concessionaire or lessee.

"Commission" means the Seattle Human Rights Commission.

"Department" means the Seattle Office for Civil Rights.

"Detached accessory dwelling unit" has the meaning defined in Chapter 23.84A.032's definition of "Residential use".

"Director" means the Director of the Seattle Office for Civil Rights or the Director's designee.

"Disabled" means a person who has a disability.

"Disability" means the presence of a sensory, mental, or physical impairment that: is medically cognizable or diagnosable; or exists as a record or history; or is perceived to exist whether or not it exists in fact. A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, whether or not it limits the ability to work generally or work at a particular job, or whether or not it limits any other activity within the scope of this Chapter 14.08. For purposes of this definition, "impairment" includes, but is not limited to:

1. Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
2. Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"Discriminate" means to do any act which constitutes discrimination.

"Discrimination" means any conduct, whether by single act or as part of a practice, the effect of which is to adversely affect or differentiate between or among individuals or groups of individuals, because of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, honorably discharged veteran or military status, alternative source of income, participation in a Section 8 or other subsidy program, the presence of any disability, or the use of a service animal by a disabled person.

"Dual-filed" means any charge alleging an unfair practice that is filed with both the Department of Housing and Urban Development and the Seattle Office for Civil Rights without regard to which of the two agencies initially processed the charge.

"Dwelling" means any building, structure, or portion thereof which is occupied as, or is designed or intended for occupancy as, a residence by one or more individuals or families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

"Ensuring meaningful access" means the ability of a person with limited English proficiency to use or obtain language assistance services or resources to understand and communicate effectively, including, but not limited to, translation or interpretation services.

"Gender identity" means a person's gender-related identity, appearance, or expression, whether or not traditionally associated with one's biological sex or one's sex at birth, and includes a person's attitudes, preferences, beliefs, and practices pertaining thereto.

"Hearing Examiner" means the Seattle Hearing Examiner.

"Housing costs" means the compensation or fees paid or charged, usually periodically, for the use of any housing unit. "Housing costs" include the basic rent charge and any periodic or monthly fees for other services paid to the owner by the occupant, but do not include utility charges that are based on usage and that the occupant has agreed in the rental agreement to pay, unless the obligation to pay those charges is itself a change in the terms of the rental agreement.

"Lender" means any bank, insurance company, savings or building and loan association, credit union, trust company, mortgage company, or other person or agent thereof, engaged wholly or partly in the business of lending money for the financing or acquisition, construction, repair, or maintenance of real property.

"Marital status" means the presence or absence of a marital relationship and includes the status of married, separated, divorced, engaged, widowed, single, or cohabiting.

"Occupant" means any person who has established residence or has the right to occupy real property.

"Owner" means any person who owns, leases, subleases, rents, operates, manages, has charge of, controls or has the right of ownership, possession, management, charge, or control of real property on their own behalf or on behalf of another.

"Parental status" means being a parent, step-parent, adoptive parent, guardian, foster parent, or custodian of a minor child or children under the age of 18 years, or the designee with written permission of a parent or other person having legal custody of a child or children under the age of 18 years, which child or children shall reside permanently or temporarily with such parent or other person. In addition, parental status shall refer to any person who is pregnant or who is in the process of acquiring legal custody of a minor child under the age of 18 years.

"Party" means the person charging or making a charge or complaint or upon whose behalf a complaint is made alleging an unfair practice, the person alleged or found to have committed an unfair practice, and the Seattle Office for Civil Rights.

"Person" means one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives, trustees, trustees in bankruptcy and receivers. It includes any owner, lessee, proprietor, manager, agent or employee, whether one or more natural persons, and any political or civil subdivision or agency or instrumentality of the City.

"Political ideology" means any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group. "Political ideology" includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not interfere with the property rights of the landowner as it applies to housing.

"Preferred employer program" means any policy or practice in which a person provides different terms and conditions, including but not limited to discounts or waiver of fees or deposits, in connection with renting, leasing, or subleasing real property to a prospective occupant because the prospective

occupant is employed by a specific employer. "Preferred employer program" does not include different terms and conditions provided in city-funded housing or other publicly funded housing, for the benefit of city or public employees, housing specifically designated as employer housing which is owned or operated by an employer and leased for the benefit of its employees only, or any program affirmatively furthering fair housing. For purposes of this definition, "affirmatively furthering fair housing" means assisting homeless persons to obtain appropriate housing and assisting persons at risk of becoming homeless; retention of the affordable housing stock; and increasing the availability of permanent housing in standard condition and affordable cost to low-income and moderate-income families, particularly to members of disadvantaged minorities, without discrimination on the basis of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, honorably discharged veteran or military status, alternative source of income, participation in a Section 8 program or other subsidy program, the presence of any disability or the use of a service animal by a disabled person. "Affirmatively furthering fair housing" also means increasing the supply of supportive housing, which combines structural features and services needed to enable persons with special needs, including persons with HIV/AIDS and their families, to live with dignity and independence; and providing housing affordable to low-income persons accessible to job opportunities.

"Prospective borrower" means any person who seeks to borrow money to finance the acquisition, construction, repair, or maintenance of real property.

"Prospective occupant" means any person who seeks to purchase, lease, sublease, or rent real property.

"Real estate agent, salesperson or employee" means any person employed by, associated with, or acting for a real estate broker to perform or assist in the performance of any or all of the functions of a real estate broker.

"Real estate broker" means any person who for a fee, commission, or other valuable consideration, lists for sale, sells, purchases, exchanges, leases or subleases, rents, or negotiates or offers or attempts to negotiate the sale, purchase, exchange, lease, sublease, or rental of real property of another, or holds themselves out as engaged in the business of selling, purchasing, exchanging, listing, leasing, subleasing, or renting real property of another, or collects the rental for use of real property of another.

"Real estate transaction" means the sale, purchase, conveyance, exchange, rental, lease, sublease, assignment, transfer, or other disposition of real property.

"Real estate-related transaction" means any of the following:

1. The making or purchasing of loans or providing other financial assistance:
    a. For purchasing, constructing, improving, repairing, or maintaining real property, or
    b. Secured by real property; or
2. The selling, brokering, or appraising of real property; or
3. The insuring of real property, mortgages, or the issuance of insurance related to any real estate transaction.

"Real property" means dwellings, buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and any interest therein.

"Respondent" means any person who is alleged to have committed an unfair practice prohibited by this Chapter 14.08.

"Section 8 or other subsidy program" means short or long term federal, state or local government, private nonprofit, or other assistance programs in which a tenant's rent is paid either partially by the program (through a direct arrangement between the program and the owner or lessor of the real property), and partially by the tenant or completely by the program. Other subsidy programs include but are not limited to HUD-Veteran Affairs Supportive Housing (VASH) vouchers, Housing and Essential Needs (HEN) funds, and short-term rental assistance provided by Rapid Rehousing subsidies.

"Service animal" means an animal that provides medically necessary support for the benefit of an individual with a disability.

"Sexual orientation" means actual or perceived male or female heterosexuality, bisexuality, or homosexuality, and includes a person's attitudes, preferences, beliefs, and practices pertaining thereto.

"Steering" means to show or otherwise take an action which results, directly or indirectly, in steering a person or persons to any section of the City or to a particular real property in a manner tending to segregate or maintain segregation on the basis of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation,

gender identity, political ideology, alternative source of income, participation in a Section 8 or other subsidy program, the presence of any disability, or the use of a service animal by a disabled person.

"Verifiable" means the source of income can be confirmed as to its amount or receipt.

"Honorably discharged veteran or military status" means:

1. A veteran, as defined in RCW 41.04.007; or
2. An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(Ord. 125228, § 1, 2016; Ord. 125114, § 2, 2016; Ord. 124829, § 4, 2015; Ord. 123527, § 6, 2011; Ord. 123014, § 7, 2009; Ord. 121593, § 2, 2004; Ord. 119628, § 7, 1999; Ord. 118392, § 34, 1996; Ord. 116818, § 2, 1993; Ord. 114864, § 1, 1989; Ord. 113610, § 2, 1987; Ord. 113144, § 2, 1986; Ord. 112903, § 10, 1986; Ord. 108205, § 1, 1979; Ord. 104839, § 2, 1975.)

United States District Court,
E.D. Washington.
Robert HEITMAN, J.R., individually and on behalf of the marital community, and Conklin Development, a Washington general partnership, Plaintiffs,
v.
CITY OF SPOKANE VALLEY, a political subdivision of the State of Washington, Defendant.
No. CV-09-0070-FVS.

March 5, 2010.

Stacy A. Bjordahl, Parsons Burnett Bjordahl LLP, Timothy Michael Lawlor, Nathan G. Smith, Witherspoon Kelley Davenport & Toole, Spokane, WA, for Plaintiffs.

Kenneth W. Harper, Menke Jackson Beyer Ehlis & Harper, Yakima, WA, Cary P. Driskell, Michael F. Connelly, Office of the City Attorney, Spokane Valley, WA, for Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FRED VAN SICKLE, Senior District Judge.

***1 THIS MATTER** comes before the Court on the parties' cross-motions for summary judgment. Plaintiffs are represented by Timothy Lawlor, Stacy A. Bjordahl, and Nathan G. Smith. Kenneth W. Harper, Cary P. Driskell and Michael F. Connelly represent Defendant.

BACKGROUND

Plaintiff Conklin Development was the record owner of the property at issue in this lawsuit. Plaintiff Robert Heitman manages Conklin Development and is a 50% owner. Mr. Heitman is a real estate developer, general contractor, and home builder.

On October 23, 2007, Defendant City of Spokane Valley ("the City") recorded a Title Notice concerning Plaintiffs' property affecting a 25 foot wide strip running along the southern boundary of Plaintiffs' parcel. The Title Notice indicates that the 25 foot wide Future Acquisition Area ("FAA") is necessary for a right-of-way to extend Appleway Avenue.[FN1] The City has indicated it will pay fair market value for the FAA at the time it is needed for the construction of Appleway Avenue.

FN1. The Title Notice provides as follows:

> [T]he City of Spokane Valley ... is imposing a future acquisition area necessary for right-of-way required to extend Appleway Avenue ... and to implement provisions set forth in the Comprehensive Plan. The future acquisition area and restrictions placed thereon shall consist of the following:
>
> a. A 25 foot wide strip of property running along the southern boundary of the parcel and abutting the current right of way is reserved for a future acquisition area.
>
> b. Future building and other setbacks required by the City of Spokane Valley Zoning Code shall be measured from the future acquisition area boundary. Exceptions to the full setback may be administratively granted pursuant to Section 14.710.300.
>
> c. No required parking or stormwater facilities shall be located within the future acquisition area unless an administrative exception has been granted pursuant to SVMC 14.710. All physical structures placed within the future acquisition area shall require approval pursuant to SVMC 14.710.100.
>
> d. The future acquisition area, until acquired, shall be private property and may be used as allowed in the zone, except that any improvements (such as landscaping, surface drainage, signs or others) shall be considered interim uses.
>
> e. The responsibility for relocating any improvements placed with the future acquisition area, which have been approved by the City of Spokane Valley pursuant to SVMC 14.710.300, shall be as set forth in the approval document.

(Ct. Rec. 39, Affidavit of Robert Heitman, Exh. E).

Plaintiffs allege that the City's actions were an arbitrary and unlawful interference with property rights and violated Plaintiffs' rights to the due process of law. (Complaint ¶ 6.3). Plaintiffs additionally allege a claim based on RCW 64.40.020 arising out of the same circumstances. (Complaint § 6.9). Plaintiffs previously stipulated to a dismissal of all claims arising out of Washington's Land Use Petition Act, RCW 36.70C. Plaintiffs have thus withdrawn their previous contention that the City Hearing Examiner engaged in an unlawful procedure with respect to the hearings held on the FAA and their previous request to reverse the decision of the Hearing Examiner.

DISCUSSION

I. LEGAL STANDARD

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986) (A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."). A material fact is one "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A dispute regarding a material fact raises a genuine issue for trial only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968)). "[A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury ... to resolve the parties' differing versions of the truth." *First National Bank of Arizona*, 391 U.S. at 288-289, 88 S.Ct. at 1592.

***2** Here, the facts upon which the Court relies are either undisputed or established by evidence that permits but one conclusion concerning the fact's existence.

II. CONSTITUTIONAL TAKINGS CLAIM

Plaintiffs' motion asserts that the sole issue for the Court to decide is whether under the Washington state constitution the government is required to pay just compensation before it takes private property for a future right-of-way. (Ct. Rec. 34 at 1). Plaintiffs argue that the FAA deprived them of all economically viable use of the property; therefore, they are entitled to just compensation for the imposition of the FAA on the property they owned.

The Washington state constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made." Wash. const. art. I, § 16. The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Therefore, the Washington state constitution and the Takings Clause of the Fifth Amendment provide the same rights. *See Sintra, Inc. v. City of Seattle*, 119 Wash.2d 1, 13, 829 P.2d 765 (1992). Plaintiffs assert that based on the undisputed facts of record, they should be awarded summary judgment on this takings claim.

The City responds that the takings claim should be dismissed because (1) Plaintiffs failed to specifically plead the claim, (2) Plaintiffs do not own the real property affected by the FAA, and (3) the anti-piecemealing rule defeats Plaintiffs' motion for summary judgment on the takings claim.

A. Failure to Plead

Plaintiffs' complaint alleges (1) a claim under 42 U.S.C. § 1983 for the deprivation of due process pursuant to the Fourteenth Amendment (Complaint ¶ 6.3), (2) a damages claim pursuant to RCW 64.40 (Complaint ¶¶ 6.8-6.9), and (3) claims arising out of Washington's Land Use Petition Act, RCW 36.70C. [FN2] Plaintiffs' complaint does not assert a specific takings claim.

> FN2. Plaintiffs have stipulated to a dismissal of all claims arising out of Washington's Land Use Petition Act, RCW 36.70C (Ct.Rec.24); therefore, Plaintiffs' only remaining causes of action specifically asserted in the complaint arise out of Section 1983 and RCW 64.40.

Although Plaintiffs fail to explicitly allege a takings cause of action in the complaint, the complaint mentions that Plaintiffs' private property was improperly taken "for public use without the payment of just compensation" (Complaint ¶ 3.2) and that the Hearing Examiner's decision amounted to "a taking of the property without the payment of just compensation" (Complaint ¶ 5.5). As noted by Plaintiffs, the basis for each of the claims asserted in the complaint is a governmental taking without the payment of just compensation. (Ct. Rec. 48 at 6).

While Plaintiffs indicate they are willing to amend the complaint (Ct. Rec. 48 at 7), it appears that the City has been fully apprised of Plaintiffs' takings claim and has sufficiently addressed the claim in its briefing on the cross-motions for summary judgment. The Court determines that amendment is unnecessary, and Plaintiffs' takings claim shall not be dismissed for the failure to plead the claim.

B. Ownership of Property at Issue

***3** The City contends that Plaintiffs do not own the real property affected by the regulations of which they complain. (Ct. Rec. 29 at 3). The City claims that the property at issue is owned by the Spokane County Library District ("SCLD") pursuant to a purchase and sale agreement executed on July 23, 2007, and closed on October 30, 2007.[FN3] Plaintiffs respond that they seek compensation for the taking of all land as a result of the FAA on October 23, 2007. They argue that whether the parcel was divided and sold at a later date is not relevant to their takings claim. (Ct. Rec. 48 at 3, 7-8, 11). The Court finds that the issue pertains to all of Plaintiffs' relevant property as of October 23, 2007, not merely the portion conveyed to SCLD at a later date.

> FN3. In July 2007, negotiations began between Conklin Development and the SCLD for land suitable for a new branch library. A purchase and sale agreement was executed on July 23, 2007. Mr. Heitman later expanded the width of the property conveyed to SCLD by an additional 25 feet in order to accommodate the FAA. The sale between Conklin Development and SCLD closed on October 30, 2007.

C. Anti-Piecemealing Rule

The City argues that Plaintiffs have presented no evidence regarding the effect of the FAA on the property as a whole, and the FAA's impact on only the 25-foot strip of land is irrelevant to a takings claim. (Ct. Rec. 43 at 3-6; Ct. Rec. 54 at 3-6).

The anti-piecemealing rule holds that a regulatory scheme's economic impact is to be determined by viewing the full bundle of property rights in its entirety. *See Presbytery of Seattle v. King County*, 114 Wash.2d 320, 333-334, 787 P.2d 907, 915 (1990) ("neither state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether a ***piece*** of it has been taken or whether a due process violation has occurred with regard to a ***piece*** of regulated property. Rather, we have consistently viewed property in its ***entirety.***") (emphasis in original). Federal case law has also applied the anti-piecemealing rule. *See Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 130-131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978) (" 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole[.]"); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 498, 107 S.Ct. 1252, 94 L.Ed.2d 472 (1987) (rejecting piecemealing theory based on "separate segment" of property for takings law purposes: "[m]any zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property.").

Here, the valuation opinion of Plaintiffs' expert, Mr. Sherwood, relates solely to the FAA strip standing alone. (Ct.Rec.38). Moreover, deposition testimony of the City's expert, Mr. Jolicoeur, which Plaintiffs rely upon extensively in their briefing, also addresses only the value of the FAA area. (Ct. Rec. 34 at 13-15). Consequently, Plaintiffs' motion for summary

judgment does not present evidence about the value of the entire bundle of property affected by the regulated 25-foot strip. Plaintiffs have not satisfied their burden of proving that they have been denied the economically viable use of their property. A disputed issue of material fact thus exists with regard to the economic impact of the FAA on the property. This disputed issue of material fact defeats Plaintiffs' motion for summary judgment on their takings claim.

***4** However, even if the Court were to conclude that the antipiecemealing rule does not establish a disputed issue of material fact, the Court determines that Plaintiffs' takings claim should be dismissed on its merits in any event. *See infra.*

D. Merits of Takings Claim

Plaintiffs contend that the FAA deprived the property at issue of all of its economic value which resulted in a taking without the payment of just compensation. In addition to the problems associated with the anti-piecemealing rule discussed above, Plaintiffs' argument lacks support.

As indicated by the City, Plaintiffs' have not discussed the *Gunwall* factors [FN4] for state constitutional review. (Ct. Rec. 43 at 6). If a party does not provide constitutional analysis based upon the factors set out in *Gunwall*, the court will not analyze the state constitutional grounds in a case. *First Covenant Church of Seattle v. City of Seattle*, 120 Wash.2d 203, 223-224, 840 P.2d 174 (1992).

> FN4. Six nonexclusive factors, set forth in *State v. Gunwall*, 106 Wash.2d 54, 59, 720 P.2d 808 (1986), are relevant in determining whether the Washington state constitution extends broader rights to citizens than the federal constitution.

In any event, Washington state courts have expressed an intent for a regulatory takings analysis to be consistent with the federal constitution. *See Orion Corp. v. State*, 109 Wash.2d 621, 657-658, 747 P.2d 1062 (1987) ("[I]n order to avoid exacerbating the confusion surrounding the regulatory takings doctrine, and because the federal approach may in some instance provide broader protection, we will apply the federal analysis to review all regulatory takings claims."). Based on the foregoing, the Court shall confine its regulatory takings analysis to the federal constitution.

Regulatory takings claims require some governmental regulation that compels the owner to sacrifice all economically viable use of his or her property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). "When the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019 (emphasis in original). A regulatory takings plaintiff must be able to demonstrate economic burdens on property that are so severe that they are the functional equivalent of physical dispossession. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 538, 532-547 (2005).

Regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). *Lingle*, 544 U.S. at 538. The *Penn Central* Court identified several factors that have particular significance in evaluating regulatory takings claims. *Id.* Primary among those factors are the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action may be relevant in discerning whether a taking has occurred. *Id*. at 538-539.

1. Economic Impact

Plaintiffs argue that the experts retained by both parties agree that the property affected by the FAA is deprived of all economic value. (Ct. Rec. 34 at 12-15). Plaintiffs thus contend that there is no genuine issue of material fact that the FAA deprived them of all economically viable use of the land. (Ct. Rec. 34 at 12). This is not the case.

***5** Plaintiffs' expert, Mr. Dewitt Sherwood, assigned no value to the FAA strip. However, as noted above, Mr. Sherwood's appraisal opinion did not take into consideration the property as a whole. Mr. Sherwood's opinion of valuation relates solely to the FAA strip standing alone. (Ct.Rec.38).

The City's expert, Mr. Bruce C. Jolicoeur, prepared an opinion which demonstrates the diminution in value attributable to the FAA in relationship to the larger

parcel as a whole. (Ct.Rec.45). Mr. Jolicoeur indicated it was **assumed** that the FAA would deprive an owner of all durable use. (Ct. Rec. 45 ¶ 10). However, Mr. Jolicoeur opined that the FAA caused a 12.8% diminution in value to the larger parcel of the SCLD, not a total reduction in value. [FN5]

> FN5. A loss of value, standing alone, does not amount to a taking. *Mayer Built Homes, Inc. v. Town of Steilacoom,* 17 Wash.App. 558, 564, 564 P.2d 1170 (1977) (downzoning that reduced value not a taking); *Penn Central,* 438 U.S. at 131 ("[Supreme Court precedent] uniformly reject[s] the proposition that diminution in property value, standing alone, can establish a 'taking.' ").

Many land uses are still permitted in the FAA area. The FAA has not precluded Plaintiffs' rights to exclusively possess any property, Plaintiffs' rights to exclude anyone from any property, and Plaintiffs' ability to dispose of property. In addition, with the exception of certain major capital improvements, improvements such as driveways, travel lanes, parking stalls, utilities, and signs are allowed when a hardship is demonstrated and the use is shown to be reasonably conditioned to meet the intent of the FAA.

Plaintiffs have not shown that the FAA deprived them of all economically viable use of the property.

2. Investment-Backed Expectations

Subsequent to the imposition of the FAA, Plaintiffs sold a section of the property subject to the FAA to the SCLD for $453,650. This sale evinces that the FAA did not render the entire parcel valueless, nor did the FAA impede Plaintiffs' ability to dispose of the property subject to the FAA. Plaintiffs fail to show that the governmental regulation interfered with "distinct investment-backed expectations."

3. Character of the Governmental Action

There is no evidence that the City imposed the FAA in a manner calculated to discriminate against Plaintiffs or that Plaintiffs have been singled out for differential treatment in an irrational and wholly arbitrary manner. There is no indication that the City has acted improperly.

The issue before the Court is whether there was a taking on October 23, 2009, when the City imposed the FAA, or whether a taking will occur on a future date when the City acquires an interest in the FAA-regulated property to begin construction on Appleway Avenue. As indicated above, Plaintiffs are not able to show that the FAA deprived them of all economically viable use of the land or that the governmental regulation interfered with "distinct investment-backed expectations." Furthermore, there is no evidence that the City imposed the FAA in an inappropriate manner. Therefore, the City has not acquired a property interest as a result of the FAA.

It is undisputed that the City will be required to provide just compensation when the City acquires an interest in the FAA-regulated property in order to construct Appleway Avenue. (Ct. Rec. 43 at 17). Based on the undisputed facts before the Court, the Court concludes that no taking will occur until that point in time.

***6** "[A] party challenging governmental action as an unconstitutional taking bears a substantial burden." *Eastern Enterprises v. Apfel,* 524 U.S. 498, 523, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). Plaintiffs have failed to meet that burden. Therefore, summary judgment in favor of the City as to the takings claim will be granted and summary judgment for Plaintiffs will be denied.

III. SUBSTANTIVE DUE PROCESS CLAIM

Defendant's motion for summary judgment asserts that Plaintiffs' substantive due process claim should also be dismissed. (Ct. Rec. 29 at 14-19). "To establish a violation of substantive due process ..., a plaintiff is ordinarily required to prove that a challenged government action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Patel v. Penman,* 103 F.3d 868, 874 (9th Cir.1996) (citations and internal quotations omitted).

Plaintiffs' response asserts, without elaboration, that "the City is clearly arbitrary and capricious." (Ct. Rec. 48 at 15). However, Plaintiffs have not adequately explained how the City's conduct is arbitrary and capricious. Plaintiffs response does not provide a sufficient basis to support their substantive due process claim.

To maintain a substantive due process claim, Plaintiffs must show that the City's actions lacked a rational relationship to a government interest. *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 485 (9th Cir.2008); *see also Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir.1993) ("The rational relationship test ... applies to substantive due process challenges to property zoning ordinances."). Here, the City indicates that the intent of the FAA is to assure the proper function of roads, arterials and the roadway network of the City. (Ct. Rec. 29 at 18); SVMC § 14.710.00. The regulation intends to: (1) improve roadway safety, (2) provide for roadway expansion, (3) establish new roadways, (4) provide developers and property owners with an understanding of the future location and width of roadways, (5) reduce future impacts on property owners, and (6) minimize the cost of such improvements to the taxpayers of this County and State. *Id.* The City asserts that the planning activities are directly related to future investment in public infrastructure for transportation and blight reduction. (Ct. Rec. 43 at 9-10). Plaintiffs do not dispute that the FAA could advance the City's intended purpose as outlined above. Accordingly, Plaintiffs do not assert that the FAA lacked a rational relationship to the stated planning goals.

The Court grants Defendant's summary judgment motion with respect to the substantive due process claim because Plaintiffs have not established a sufficient basis for a finding that the City's actions were clearly arbitrary and unreasonable or that the FAA lacked a rational relationship to a government interest. Plaintiffs' substantive due process claim is dismissed.

IV. CLAIM PURSUANT TO RCW 64.40

***7** RCW 64.40 establishes a claim for damages for the conduct of an agency that is considered "arbitrary, capricious, unlawful, or exceed[ing] lawful authority." RCW 64.40.020. With respect to their claim that the City violated RCW 64.40, Plaintiffs have not shown how the City's actions were arbitrary and capricious and have provided insufficient information to challenge Defendant's summary judgment motion with respect to the state law claim. Accordingly, the Court grants Defendant's motion with respect to this claim. Plaintiffs' cause of action under RCW 64.40 is dismissed.

RULING

The Court being fully advised, **IT IS HEREBY ORDERED as follows:**

1. Defendants' Motion for Summary Judgment **(Ct.Rec.27)** is **GRANTED.**

2. Plaintiff's Motion for Summary Judgment **(Ct.Rec.33)** is **DENIED.**

3. Judgment shall be entered in favor of Defendant. Plaintiffs' action shall be dismissed in its entirety.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, provide copies to counsel, **enter judgment in favor of Defendant** and **close the file.**

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 these parties:

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DATED August 24, 2018 at Seattle, Washington.

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SEATTLE CITY ATTORNEY'S OFFICE - GOVERNMENT AFFAIRS

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