Case No: 958131

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHONG and MARILYN YIM, KELLY LYLES, BTH BYLUND, CNA APARTMENTS, LLC, and EILEEN, LLC,

Respondents,

v.

THE CITY OF SEATTLE,

Appellant.

RESPONDENTS' BRIEF

ETHAN W. BLEVINS, WSBA # 48219
BRIAN T. HODGES, WSBA # 31976
Pacific Legal Foundation
10940 Northeast 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484

Attorneys for Respondents

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INTRODUCTION

Seattle's first-in-time (FIT) rule—the first of its kind in the country—requires landlords to rent to the first qualified rental applicant regardless of why a landlord might prefer another applicant. The trial court held that the FIT rule violated four separate constitutional guarantees. The FIT rule is an uncompensated taking because it strips landlords of a fundamental attribute of property ownership—the right to choose to whom one will rent their property—and it is a taking for private use because it grants a right of first refusal to a private party. The FIT rule also contravenes due process because it attempts to curtail decisions potentially motivated by implicit bias through the radical means of banning landlord discretion in tenant selection. And the rule oversteps the constitutional guarantee of free speech by dictating how landlords advertise.

The City now asks this Court to uproot decades of settled jurisprudence to clear the way for this radical regulation. This case does not call for a sea change in constitutional law. Simply put, the City's desire to police the unconscious thoughts of its citizens goes too far and violates multiple constitutional guarantees. Even if this Court finds only one of the trial court's holdings to be correct, the summary judgment order should be affirmed.

STATEMENT OF THE CASE

Chong and MariLyn Yim, Kelly Lyles, Beth Bylund, Eileen, LLC, and CNA Apartments, LLC, are small-time landlords in Seattle. *See* CP 39 (Stipulated Facts). The Yims own a duplex and a triplex in the City. CP 39. Chong and MariLyn live with their three children in one of the triplex units, and they rent out the duplex and the other two units in the triplex. *Id.* Several of their rented units are shared by roommates. *Id.* The Yims share a yard with their renters, and the Yim children are occasionally at home alone when the renters are in the building. *Id.*

Kelly Lyles is a single woman who owns and rents a home in West Seattle. Ms. Lyles is a local artist who relies on her rental for most of her income. CP 37.

The Benis family that owned CNA Apartments, LLC, sold their six-unit apartment building in Seattle after this litigation began. The LLC managed the building on behalf of the three Benis children, who each owned a twenty percent interest and used the income as their college fund. CP 37. Their father managed the LLC and their mother owned the remaining interest. *Id.*

Scott Davis and his wife own and manage Eileen, LLC, through which they operate a seven-unit residential complex in the Greenlake area of Seattle. CP 38. Currently, the Davises rent a unit to two young men from

separate minority groups. *Id.* Because both young men were recent graduates, they possessed no rental or credit history. *Id.* Nonetheless, the Davises liked them and decided to rent to them even though the pair did not satisfy their typical rental criteria. *Id.*

Beth Bylund owns and rents out two single-family homes in Seattle. *Id.*

The FIT rule requires landlords to "screen completed rental applications in chronological order" and "offer tenancy of the available unit to the first prospective occupant meeting all the [landlord's] screening criteria." SMC § 14.08.050(A)(3),(4). If this first qualified applicant does not accept the unit within 48 hours, then the landlord must offer the unit to the next qualified applicant, and so on. *Id.* Landlords must also disclose all rental criteria in their advertisements and include a "minimum threshold for each criterion." *Id.* § 14.08.050(A)(1)(a).

Under FIT, the landlord respondents (collectively, the Yims) have no choice but to offer up their rental property to the first applicant who meets their written rental criteria. *See* SMC § 14.08.050(A)(4). They must do so even if factors arise after the applicant completes the application that alert the landlord to safety concerns, compatibility issues, or any other consideration that might make a reasonable landlord hesitate to enter into a long-term rental relationship. As Judge Parisien described it, the Yims

"want the right to choose among a pool . . . of otherwise qualified folks and they want to be able to have their gut check that we use all the time in the real world when we're hiring someone to walk our dog or pick up our kids after school—whatever it may be." RP at 36. It is this discretion to make thoughtful decisions about the people in our lives that the Yims wish to exercise as landlords.

The City Council implemented FIT to address concerns that landlords' alleged implicit bias might harm minorities. The Yims do not dispute the existence of implicit bias or the studies relied upon by the City in crafting and defending FIT. According to these studies, implicit bias is an unconscious mentality that can affect a wide array of human activities, from policing to medical practice. CP 198-99 (Stipulated Record). As the City itself concedes, implicit bias can be either negative or positive. *See* City's Opening Brief at 6; CP 238-39, 257.

None of the studies relied upon by the City recommend FIT. Rather, the studies emphasize non-legal approaches to addressing implicit bias in housing, such as intergroup contact, ad campaigns, and diversity training. *See* CP 225, 233-34; 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, 260 (2014); Robert G. Schwemm, *Why do Landlords Still*

Discriminate (and What Can Be Done About It)?, 40 J. Marshall L. Rev. 455, 508 (2007). Indeed, one article cited by the City suggests that "greater attention should be paid to non-legal sources of encouragement for landlords to treat all would-be tenants equally." Schwemm, *supra* at 508. The City's sources assert that individuals can unlearn and overcome implicit bias through these and other life experiences. CP 236-37.

The FIT rule does not mirror industry best practices. While the Rental Housing Association of Washington (RHA) recommends screening candidates in chronological order, the City omits the fact that RHA opposed mandating FIT: "For rental housing owners [the FIT rule] poses a serious threat to the screening process, and removes a great deal of discretion owners would typically be allowed to determine whether or not an applicant is someone they would wish to rent to." RHA, *Seattle Council Forces Rental Owners To Accept First Applicant*, RHA's Legislative Blog (Aug. 2016).[1]

Unlike FIT, the best practice advised by industry experts allows for discretion. Implicit in the industry practice is that a landlord retains

[1] This source was cited in the briefing below. *See* CP 445 (Plaintiffs' Response to City's MSJ and Reply at 2). It is available at http://www.rha-ps.com/Blog/post/2016/08/15/Seattle-Council-forces-rental-owners-to-acceptfirst-applicant.aspx.

discretion to deal with unanticipated issues. As RHA explains, FIT "omits several key variables in the screening process, such as . . . having discretion to rent to a lesser qualified individual who is second in line to give that individual a new housing opportunity." *Id.* A mandated practice is fundamentally different from a recommended one that allows for common-sense deviations when unusual circumstances arise.

Indeed, RHA's advice allows for such flexibility: "You also need to decide what method you will use for screening. Are you going to process one application at a time and take the first qualified tenant? Or are you going to run a series of applications and take the most qualified applicant[?] Make sure to let your applicants know the method you will be using." CP 316. The City sets FIT in stone while industry experts allow for and encourage wise discretion.

The 48-hour waiting period mandated by FIT also differs from any recommended practice. This allows applicants to force landlords into a waiting game that industry best practices do not advocate. The City's suggestion that FIT just codifies a best practice merits skepticism.

ARGUMENT

Under *Manufactured Housing Communities v. State*, FIT is a taking because it destroys a fundamental attribute of property ownership—the Yims' right to lease property to a person of their choosing. 142 Wn.2d 347,

13 P.3d 183 (2000). That binding decision is entitled to stare decisis, and the City has failed to demonstrate that *Manufactured Housing* is wrong or harmful.

Moreover, the taking wrought by FIT is a taking for private use because it gives the taken property interest to a private party. Any public benefit that might accrue from this taking does not transform FIT into a taking for public use.

FIT also subverts due process because it hoists an unduly oppressive burden on landlords. The City opted for this radical approach despite the less-oppressive alternatives suggested in the stipulated record.

Finally, FIT violates landlords' speech rights by mandating that they communicate minimum thresholds with each rental criterion. FIT thus constitutes a speech restriction, not merely a disclosure requirement, and must satisfy intermediate scrutiny. FIT fails that test because it is speculative, underinclusive, and unnecessarily burdensome.

I. UNDER BINDING WASHINGTON CASELAW, THE FIT RULE IS AN UNCONSTITUTIONAL TAKING BECAUSE IT DESTROYS A FUNDAMENTAL ATTRIBUTE OF PROPERTY OWNERSHIP

Manufactured Housing Communities v. State resolves the Yims' takings claim. 142 Wn.2d at 355. In *Manufactured Housing*, this Court held that an uncompensated taking arises when a regulation destroys a

"fundamental attribute of property ownership." *Id.* at 355; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 179, 110 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (holding that the right to exclude is a "fundamental element" of property ownership that cannot be taken without just compensation). The Court used that test to invalidate a regulation that required mobile-home-park owners to offer tenants a right of first refusal if the owners sold the property. 142 Wn.2d at 351-52. As the trial court noted, it is the "most recent and on-point decision" regarding the "fundamental attribute" test. CP 520. This Court should affirm the trial court's careful application of that case to the FIT rule.

A. The fundamental attribute test is rooted in binding caselaw

Manufactured Housing is binding precedent. Five justices agreed with the lead opinion, with one of them—Justice Sanders—writing a concurrence. A split decision in which a concurrence agrees with the lead opinion produces binding law. In *In re Detention of Reyes*, the Washington Supreme Court held that a 4-1-4 decision produced precedent: "A principle of law reached by a majority of the court, even in a fractured opinion, is not considered a plurality but rather binding precedent." 184 Wn.2d 340, 346, 358 P.3d 394 (2015).

Of course, a concurrence may not count toward a majority if it expressly disagrees with the lead opinion. But such concurrences are

usually labelled as something like "Justice X, concurring in the judgment" while concurrences joining the lead opinion are labelled simply as "Justice X, concurring." *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 8 n.14 (1993).

When no opinion draws a majority, the case still produces binding law, but the holding becomes the narrowest opinion concurring in the result: "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998).

Here, four justices signed on to the lead opinion, and Justice Sanders concurred with the lead opinion's analysis, making a five-justice majority. *See Manufactured Housing*, 142 Wn.2d at 375. Justice Sanders' concurrence made this clear: "I therefore emphatically agree with the majority's conclusion that '[t]he instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership' and see that as the dispositive feature of the majority's analysis." *Id.* at 375. Also, the opinion described Justice Sanders as "concurring," a distinct contrast with Justice Madsen, whom the opinion describes as concurring "in the result only." *Id.* Justice

Sanders' concurrence therefore completed a five-justice majority. *See Reyes*, 184 Wn.2d at 346.

None of the justices writing in *Manufactured Housing* believed that the lead opinion was non-binding. The concurrence and both dissents referred to the lead opinion repeatedly as "the majority." *See id.* at 375-427 (Justice Sanders referred to the lead opinion as the majority 16 times, Justice Talmadge did so 50 times, and Justice Johnson 14 times). If the dissenters doubted the controlling nature of that opinion, surely they would have said so.

Contrary to all nine justices in *Manufactured Housing*, the City argues that *Manufactured Housing* is a "fractured decision" that does not qualify as binding precedent. Opening Brief at 1, 47. This is false—Justice Sanders and the four other justices on the lead opinion all reached the conclusion that a taking had occurred under the fundamental attribute test. Even if the City's novel head-counting is correct, the narrowest opinion concurring in the result would still create binding precedent. *See Davidson*, 135 Wn.2d at 128. Here, the only two opinions that concurred in the result came to the same conclusion—the mobile-home-park law was a taking under the fundamental attribute test. However the City tries to slice this pie, it cannot avoid the conclusion that *Manufactured Housing* is binding precedent.

B. The FIT rule violates the fundamental attribute test by stripping landlords of the right to freely dispose of their property through a leasehold

The trial court correctly held that "[c]hoosing a tenant is a fundamental attribute of property ownership." CP 514 (Order at 4). *Manufactured Housing* held that choosing to whom a landowner sells property is a fundamental attribute of the right to dispose of property. In *Manufactured Housing*, mobile-home-park owners looking to sell their property had to offer tenants a right of first refusal. 142 Wn.2d at 351-52. The power to grant or withhold that right is a core aspect of the right to sell property that cannot be taken without just compensation. *Id.* at 366.

Control over whether to grant or withhold a right of first refusal is fundamental, regardless of whether the property owner is leasing or selling. CP 514. Leasing is just one method of disposing of a property interest. Indeed, the leasehold itself is a property interest that cannot be taken without just compensation. *See United States v. General Motors Corp.*, 323 U.S. 373, 383, 65 S. Ct. 375, 89 L. Ed. 311 (1945). When a property owner alienates this property interest, she enjoys the right to lease to whom she wishes as a fundamental attribute of property ownership. And, as in *Manufactured Housing*, the landlord has the right to grant or withhold a right of first refusal.

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

Safety, compatibility, and future liability are among these interests. The Yim family, for example, lives in one of the units of their triplex. CP 37. With young children and a shared yard, they want to feel safe with their renters. *Id.* Kelly Lyles, too, has safety concerns as a single woman. *Id*. When she collects rent or visits to assess a problem, she wants to feel comfortable being in the unit with the tenant. *Id.* If a mobile-home-park owner has a fundamental right to decide to whom to sell, a landlord most certainly has an equivalent right in selecting a tenant to whom to lease to.

The FIT rule destroys a fundamental attribute of property ownership—the right to dispose of a property ownership to a person of the landlord's choosing. FIT requires landlords to offer a unit to the first qualified applicant. SMC § 14.08.050(A)(4). This strips the landlord's power to grant or withhold such a right, destroying "part of 'the bundle of sticks' which the *owner* enjoys as a vested incident of ownership." *Manufactured Housing*, 142 Wn.2d at 367. The rule therefore causes a taking.

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

A landlord's ability to set general rental criteria under the FIT rule does not prevent a taking. While general criteria can allow some imprecise control over the pool of qualified applicants, written criteria cannot substitute for the discretion to choose a specific tenant.

Landlords, for instance, can no longer negotiate directly with applicants, a key aspect of the right to dispose of property. As the trial court held, "landlords and tenants . . . cannot bargain for an arrangement that suits their interests." CP 514. For example, a landlord would simply have to ignore an applicant's offer to pay higher rent if that applicant was not the first in line. Likewise, a landlord could not accept a later applicant's offer to do some repairs if the landlord dropped the monthly rent by $50, regardless of whether both landlord and tenant wanted to do business.

Likewise, safety and compatibility concerns cannot be resolved through general criteria. Qualities such as trustworthiness and friendliness require the discretion to sift through applications and meet potential tenants. Scott Davis, for instance, was glad to waive some of his general rental criteria because two young minority applicants made a good impression. CP 38. Genuine choice cannot be reduced to paper.

The City relies on *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992), and *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993), to argue that a landlord cannot bring a takings claim over regulations that limit the landlord's power to exclude a tenant. *See* City's Opening Brief at 50-52. Both these decisions are distinguishable.

In *Yee*, mobile-home-park owners claimed that a rent control ordinance caused a physical taking of their property because it limited their ability to evict tenants or disapprove incoming mobile-home buyers. *Yee*, 503 U.S. at 526-27. The Supreme Court rejected the physical takings claim.

Yee only addressed this physical occupation claim. *Id.* The Court repeatedly noted that its holding was limited only to physical takings. *See id.* at 527. ("This argument, *while perhaps within the scope of our regulatory takings cases*, cannot be squared easily with our cases on physical takings.") (emphasis added); *see also id.* at 530-31 ("Again, this

effect *may be relevant to a regulatory taking argument*, as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners.").

The *Yee* Court observed that the physical takings and regulatory takings tests should not be conflated:

> Consideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well; neither of the two questions is subsidiary to the other. Both might be subsidiary to a question embracing both—Was there a taking?—but they exist side by side, neither encompassing the other.

Id. at 537; *see also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002), (It is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."). *Yee's* holding as to physical takings, therefore, does not control regulatory takings claims, especially a state takings claim.

Yee also involved a different context: mobile-home-park regulations. Tenants of a mobile-home-park own the mobile-home and rent the pad upon which the mobile-home sits. As the Supreme Court noted, the petitioners' argument was "predicated on the unusual economic relationship between park owners and mobile-home owners." *Id.* at 526.

The petitioners' takings theory was uniquely tailored to this economic context. They did not argue that the rent control ordinance directly appropriated their right to select tenants. Rather, their argument was more indirect; the ordinance allegedly impaired their right to select tenants because "before the adoption of the ordinance they were able to influence a mobile home owner's selection of a purchaser by threatening to increase the rent for prospective purchasers they disfavored." *Id.* at 531 n*. The Court rejected the argument that this caused a physical taking. *Id.* at 530-31.

By contrast, the FIT rule removes the right to select a tenant on its face, not as a tenuous effect. Unlike the park owners in *Yee*, Seattle landlords cannot decide to whom to lease their property in the first instance. As the trial court said, "I have a hard time finding *Yee* even close to analogous." RP 37.

The City's reliance on *Margola Associates v. City of Seattle* does not fare any better. *See* 121 Wn.2d 625; City's Opening Brief at 51-52. Unlike *Yee*, *Margola* addressed both regulatory and physical takings theories. *Margola*, 121 Wn.2d at 648. But the ordinance in *Margola* does not resemble the FIT rule. In *Margola*, apartment owners challenged Seattle's ordinance assessing a per-unit fee to fund an inspection program. *Margola*, 121 Wn.2d at 632. They argued that the ordinance made it more difficult to evict tenants. *Id.* at 647. This Court held that "the ordinance

restricts, but does not destroy, Margola's right to exclude others from his property." *Id.* at 648.

Margola does not control this case because the apartment owners in *Margola* could still select their tenants. The inspection ordinance only limited a landlord's right to exclude with respect to a tenant that he had already voluntarily rented to. *Id.* The ordinance merely imposed a minor burden on their ability to end a tenancy, not begin one.

The right to select a tenant in the first instance and the right to exclude a current tenant are categorically different. In the latter instance, a landlord has already consented to that tenant's use of the property. The Yims rely on the right to dispose of a leasehold to a person of their choosing, not the right to exclude that person after the choice has been made and the legal rights associated with an existing leasehold are in place.

Contrary to the City's embellishments, this right to select a lessee does not threaten to overthrow our traditional anti-discrimination laws. The Yims do not dispute that the City can prohibit intentional discrimination based on a protected class. The Yims instead rely on a simple distinction emblazoned in the Supreme Court's takings jurisprudence: "The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922). A sweeping ban

that prevents people from engaging in innocuous conduct that in many cases will not even affect a protected class bears no resemblance to a law targeting only intentional discrimination. The Yims simply want the right to engage in blameless conduct subject to laws forbidding conscious discrimination.

C. This Court should not overrule *Manufactured Housing*

Perhaps recognizing that *Manufactured Housing* forecloses the City's arguments on the merits, the City asks this Court to simply overrule Washington takings law. The Court should decline.

Stare decisis promotes fairness, predictability, and consistency. *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997). It "is vital to protecting the rights of litigants and the integrity of the common law." *State v. W.R., Jr.*, 181 Wn.2d 757, 768, 336 P. 3d 1134 (2014). Hence, this Court will only overturn precedent upon a clear showing that it is both incorrect and harmful. *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011).

A decision may be incorrect for any number of reasons. This Court has held that a past decision was incorrect because of inconsistency with other precedent, the state constitution, state statutes, or public policy. *See id.*

Regardless of how erroneous a prior decision might have been, however, this Court will not overrule it unless it is also harmful. *Barber*, 170 Wn.2d at 864. This Court has found precedent to be harmful where it

causes injustice toward criminal defendants, infringes a constitutional protection, or otherwise creates "serious policy problems." *State v. Otton*, 185 Wn.2d 673, 701-02, 374 P.3d 1108 (2016) (Gordon McCloud, J., concurring).

Oddly, rather than ask this Court to overturn *Manufactured Housing*, the City instead asks this Court to transform the universe of state takings jurisprudence in one shot, including aspects of takings law that are not implicated in this case. This Court should decline the invitation to retrofit a narrow takings issue into a Trojan horse for mounting an assault on state takings law.

Even if the City did ask this Court to specifically overturn the actual case at issue, this Court should decline to do so. The City bears the burden of demonstrating why *Manufactured Housing* is incorrect and harmful. It fails in both respects.

The City's brief discussion on why the fundamental attribute test is wrong questions the strength of its "legal underpinnings." City's Opening Brief at 44. But *Manufactured Housing* is not an aberrational outlier in applying the fundamental attribute test. That test "did not just fall from the sky one day." *State v. Berlin*, 133 Wn.2d 541, 554, 947 P.2d 700 (1997) (Alexander, J., dissenting). In fact, the test has a long history. *See, e.g.*, *id.*; *Kaiser Aetna*, 444 U.S. at 179 (holding that the right to exclude is a

"fundamental element" of property ownership that cannot be taken without just compensation); *Sintra, Inc. v. City of Seattle,* 119 Wn.2d 1, 14 n.6, 829 P.2d 765 (1992) ("[R]egulation may also be a taking if it destroys one or more of the fundamental attributes of property ownership."); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329-30, 787 P.2d 907 (1990) ("[C]ourt[s] should ask whether the regulation destroys one or more of the fundamental attributes of property ownership."). The doctrine stems from the age-old principle that property includes a family of rights: "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself." *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960), (quoting *Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W. 513 (1921). *Manufactured Housing* is not an outlying branch of takings law that requires pruning.

The City also argues that state takings law is out of step with the federal analysis. City's Opening Brief at 42. This complaint might have more force if the Yims had raised a federal takings claim, in which case consistency with federal courts may bear on whether Washington takings law is correct. But this case only raises the issue of whether this Court's approach to its own state constitution is correct. The federal approach to

takings therefore does not offer a relevant comparison because this Court can interpret its own state constitution as it sees fit—so long as its interpretation does not go below the floor of protection guaranteed by the Federal Constitution.

Even if the City persuades this Court that *Manufactured Housing* is wrong, the City still must carry the burden of proving that the decision is harmful. Yet the City does not once mention why *Manufactured Housing* satisfies the "harmful" requirement for overturning precedent. In fact, the City's description of why Washington takings law is harmful focuses on issues that have nothing to do with *Manufactured Housing* and the fundamental attribute test. The City's perfunctory discussion of harm cites two elements of state takings law not at issue here, the "seeks less to prevent a harm" element and the "substantially advances" element. *See* City's Opening Brief at 41.

The City also claims that the Washington state takings analysis generally "confuses judges" because courts seem uncertain regarding what test to apply in Washington takings claims. *See id.* But this confusion is not a product of the fundamental attribute test itself; rather, any confusion over which test to apply would be alleviated by reaffirming and clarifying state takings law rather than overturning precedent. The City has not made a clear showing that *Manufactured Housing* is harmful.

II. THE FIT RULE IS A TAKING FOR PRIVATE USE

The trial court correctly concluded that "the FIT rule is a taking for private use, regardless of any public benefit." CP 515. This Court should affirm that holding.

Article I, Section 16, of the state constitution says, "Private property shall not be taken for private use." This provision is more robust than its federal counterpart. *See Manufactured Housing*, 142 Wn.2d at 360. This Court has described the private use clause as an "absolute prohibition against taking private property for private use." *Id.* at 357. *Manufactured Housing* exemplified this Court's strict approach when it held that any public benefit from preserving housing stock did not transform the essentially private character of the property transfer. *Id.*; *see also In re City of Seattle*, 96 Wn.2d 616, 627, 638 P.2d 549 (1981) ("[T]he fact that the public interest may require it is insufficient if the use is not really public.").

The FIT rule is likewise a taking for private use, regardless of any public benefit. The rule strips a landlord of the power to grant or withhold a right of first refusal and then gives a right of first refusal to the first qualified applicant. The rule does not place property in public ownership, nor does it increase public access. Any public benefit in reducing discrimination does not overcome the reality that the rule transfers a property right to a private individual.

III. THE FIT RULE VIOLATES DUE PROCESS UNDER THE WELL-ESTABLISHED UNDULY OPPRESSIVE TEST OR EVEN THE MISPLACED RATIONAL BASIS TEST

The FIT rule's burdensome reach cannot satisfy the unduly oppressive test or any other due process test. The City denies the precedential value of the unduly oppressive test despite its long-standing use by state courts to resolve due process claims for property deprivations. Additionally, the City does not satisfy the heavy burden required to overcome stare decisis. In any case, the FIT rule cannot even pass rational basis review.

A. The unduly oppressive test for due process claims in the property context remains good law

The unduly oppressive test is a fixture in this state's substantive-due-process caselaw regarding property deprivations. The state test asks whether a land-use regulation has a legitimate public purpose, whether it uses reasonable means to achieve that purpose, or whether the regulation is unduly oppressive on the landowner. *Presbytery of Seattle*, 114 Wn.2d at 330.

The City declares the unduly oppressive test to be dead. *See* City's Opening Brief at 20-21. It is not. That test still applies to due-process claims challenging property deprivations, as it always has. *See, e.g.*, *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180 (9th Cir. 2012)

(applying the unduly oppressive test to mobile-home zoning ordinances); *Sintra v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997) (applying the test to Seattle's housing preservation ordinance); *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993) (striking down a mobile-home tenant relocation ordinance under the unduly oppressive test); *Presbytery*, 114 Wn.2d at 320 (applying the test to a wetlands ordinance); *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986) (applying the test to an ordinance establishing the point at which development rights vested); *Cradduck v. Yakima Cty.*, 166 Wn. App. 435, 271 P.3d 289 (2012) (applying the test to a floodplain ordinance); *Bayfield Resources Co. v. WWGMHB*, 158 Wn. App. 866, 244 P.3d 412 (2010) (applying the test to a critical areas ordinance); *Conner v. City of Seattle*, 153 Wn. App. 673, 223 P.3d 1201 (2009) (applying the test to a permit denial); *Peste v. Mason Cty.*, 133 Wn. App. 456, 136 P.3d 140 (2006) (applying the test to a comprehensive land-use plan). Indeed, the test is formulated specifically for challenges to property regulations, as the third prong of the test asks whether the regulation is "unduly oppressive *on the land owner*." *Presbytery*, 114 Wn.2d at 330 (emphasis added).

Most cases that the City cites as support for overruling the unduly oppressive test are not property cases, where the test traditionally applies. Rather, the City cites cases involving non-enumerated liberty interests

where courts have long applied rational basis review. For example, the City relies on *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006), where a taxi driver challenged a law suspending his commercial driver's license because of delinquent child support payments. *Id.* at 212-13. The Court applied rational basis and rejected his claim, which was based on his right to earn a living. *See id.* at 211, 219, 230-31.

The City argues that the unduly oppressive test is now disfavored because *Amunrud* declined to apply the unduly oppressive test as advocated by the dissent. City's Opening Brief at 20-21; *Amunrud*, 158 Wn.2d at 226. But *Amunrud* is not a land-use case, where the unduly oppressive test is traditionally used, and *Amunrud* never questioned the test's applicability in property cases. *Amunrud's* perfunctory treatment of the unduly oppressive test in a different context should not be read to upend established precedent sub silentio. *See Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (This Court "will not—and should not—overrule" rules of law "sub silentio."). *Amunrud* is an unremarkable case that respects a long-standing distinction between two different due process tests—rational basis for cases involve non-enumerated and non-fundamental liberty interests, and the unduly oppressive test for property deprivations. *Compare State v. Manussier*, 129 Wn.2d 652, 673, 921 P.2d 473 (1996) ("When a physical liberty interest alone is involved in a statutory

classification, this court applies the deferential rational relationship test.") *with Guimont*, 121 Wn.2d at 609 (applying unduly oppressive test to a land-use regulation).

Courts before and since *Amunrud* have followed this distinction. Our courts consistently applied rational basis to substantive-due-process challenges involving liberty interests before *Amunrud*. *See*, *e.g.*, *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997) (applying rational basis to a marijuana law prohibiting medical use); *In re Metcalf*, 92 Wn. App. 165, 963 P.2d 911 (1998) (applying rational basis to deductions from prisoner wages); *Meyers v. Newport Consol. Joint Sch. Dist. No. 56-415*, 31 Wn. App. 145, 639 P.2d 853 (1982) (applying rational basis to a teacher's dismissal). These cases applied rational basis during the same timeframe that our state courts were also applying the unduly oppressive test in the land-use setting. *See*, *e.g.*, *Sintra*, 131 Wn.2d 640 (1997); *Guimont*, 121 Wn.2d 586 (1993); *Presbytery*, 114 Wn.2d 320 (1990), *West Main Associates*, 106 Wn.2d 47 (1986).

This pattern has continued since *Amunrud*. Courts still apply the unduly oppressive test to property deprivations. *See Cradduck*, 166 Wn. App. 435 (2012); *Bayfield Resources Co.*, 158 Wn. App. 866 (2010); *Conner*, 153 Wn. App. 673 (2009). And when the due-process challenge involves liberty interests, courts have applied rational basis. *See*, *e.g.*,

Bellevue Sch. Dist. v. E.S., 171 Wn.2d 695, 257 P.3d 570 (2011) (rational basis test applied to due-process claim that counsel must be appointed to represent a minor at a truancy hearing); *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 406 P.3d 1199 (2017) (applying rational basis in a due-process challenge to a retail marijuana licensing requirement); *Johnson v. Washington Dep't of Fish and Wildlife*, 175 Wn. App. 765, 305 P.3d 1130 (2013) (applying rational basis in a due-process challenge to a denial of a commercial fishing license). These two due-process tests have long existed side by side, a reality that *Amunrud* itself only confirmed.

Contrary to the City's account, federal due-process cases follow this same distinction between non-enumerated liberty interests and property interests. Federal law uses a "substantially advances" test to assess land-use regulations under substantive due process, not rational basis. *See Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926) ("[I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-41, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) ("There is no question that the 'substantially advances' formula was derived from due

process, not takings, precedents."); *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) ("*Euclid* held that land-use regulations violate the Due Process Clause if they are 'clearly arbitrary and unreasonable, having no substantial relations to the public health, safety, morals, or general welfare.'"); *Nectow v. City of Cambridge*, 277 U.S. 183, 188, 48 S. Ct. 447, 72 L. Ed. 842 (1928) (A land-use restriction "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."). The unduly oppressive test is simply another way of describing the "substantially advances" test. In fact, the United States Supreme Court has used this very "unduly oppressive" phrase in describing the federal due process test for land-use regulations. *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594-95, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962) (Due process requires the government to show that a land-use regulation is required and "that the means are reasonably necessary for the accomplishment of the purpose, and *not unduly oppressive* upon individuals.") (emphasis added).[2] As this Court

[2] The City tries to argue that the Supreme Court expressly rejected the unduly oppressive test in a case called *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129, 89 S. Ct. 323, 21 L. Ed. 2d 289 (1968). But *Brotherhood* did not involve a property deprivation, and it only held that the plaintiffs failed to carry their claim, not that the unduly oppressive test was an incorrect due process test in all circumstances. *See id.* at 143.

said, "The 'unduly oppressive' analysis merely provides a structure for determining the overall reasonableness of the means used to achieve the regulation's public purpose." *Guimont*, 121 Wn.2d at 609, n.10. Thus, both federal and state law follow this due-process pattern.

B. The FIT rule violates the unduly oppressive test

To determine if a law violates due process, courts must address three questions: (1) Is the regulation aimed at achieving a legitimate public purpose? (2) Is the regulation reasonably necessary to achieve that purpose? And (3) Is the regulation unduly oppressive? *Presbytery*, 114 Wn.2d at 330. The FIT rule relies on an unreasonable and unduly oppressive means to achieve its purpose.

i. The means chosen by the City to address unconscious bias are unreasonable

The FIT rule is not reasonably necessary to achieving the purpose of preventing discrimination and mitigating implicit bias because the burdens placed on landlords restrict far more conduct than necessary to achieve the government's interest.

First, the concept that government can remove everyday discretion because the City suspects that some people may harbor faulty unconscious mental processes would justify nigh limitless use of the police power. A law that undertakes to abolish or limit the exercise of rights beyond what is necessary to provide for the public welfare cannot be included in the lawful

police power of the government. *See Ralph v. Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270 (1949). The police power does not include the authority to impose an unnecessary blanket prohibition that extends to those who do not produce the harm. *See Seattle v. Ford*, 144 Wash. 107, 114-15, 257 P. 243 (1927).

The FIT rule is also an unreasonable means of pursuing anti-discrimination because it extends well beyond what's necessary to address discrimination. A law cannot justly outlaw innocent, harmless behavior in its zeal to curtail a harm. *See City of Seattle v. McCoy*, 101 Wn. App. 815, 840, 4 P.3d 159 (2000) (reasoning that a law that takes property from an innocent individual to strike at a public harm raises due process concerns). Regardless of the government's virtuous intent, a means that inflicts this wide collateral damage does not satisfy due process.

Landlords renting to the general population cannot deny tenancy to the first qualified applicant for any reason. If the first qualified applicant is belligerent on the phone, the landlord must still rent to him. If the landlord sees a swastika tattooed on the first applicant's wrist when he visits the unit, the landlord still must rent to him. Likewise, even if the second qualified applicant makes a good impression and needs a break, the landlord cannot offer them the unit. Scott Davis would not have been able to offer his two minority tenants housing under the FIT rule. CP 37.

Moreover, the law extends to scenarios where no risk of discrimination exists. The FIT rule applies even if the qualified applicants in the pool are all part of the same class—if, for instance, all the qualified applicants are heterosexual couples of the same race. *See* SMC § 14.08.030. Thus, even when discrimination against a protected class could not possibly occur, the rule nonetheless applies. City staff recognized this problem but declined to incorporate any leniency into the law. *See* CP 106 ("Use of a first in time policy affects [] a landlord's ability to exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class."). The FIT rule is not "reasonably necessary" to prevent discrimination, and it unjustly prohibits a wide swath of innocent behavior.

The FIT rule is not just a reasonable codification of an industry-recommended practice. A mandate differs fundamentally from a recommendation. A recommendation allows for flexibility in light of circumstance and allows for the exercise of independent judgment, while a mandate does not. Professionals may recommend that we exercise five times a week, but a government mandate to do so would be unreasonable, in part because it would deny individuals the flexibility to decide when deviation from a best practice is called for. The FIT mandate likewise denies a flexibility that the industry practice preserves.

The City asserts that the sweeping ban on landlord discretion is appropriate because "who other than landlords could be responsible for bias in tenancy decisions?" City's Opening Brief at 32. The City then quotes *Weden v. San Juan County*: "It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity is directly responsible for the harm." *Id.* at 32; *Weden*, 135 Wn.2d 678, 707, 958 P.2d 273 (1998). But the relevant question is whether all landlords inevitably exercise their discretion in a discriminatory manner. The City has not and cannot demonstrate that this is the case.

In fact, the ordinance in *Weden v. San Juan County* is a useful contrast to the FIT rule. In *Weden*, a county ordinance banned all jet skis and similar one-man motorized vessels from operating in marine waters in order to address noise pollution. *Weden*, 135 Wn.2d at 684-85. The county's findings stated that all watercraft subject to the ban contributed to the noise problem. *Id.* Thus, the ban extended only to the conduct producing the harm. It was in this context that the Court said: "It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity [that] is *directly responsible* for the harm." *Id.* at 707 (emphasis added).

The FIT rule does not limit itself "only" to those actions "directly responsible" for the harm of discrimination. Unlike the county in *Weden*, the City has made no finding that every landlord in the City is "directly

responsible" for discrimination whenever they select tenants. *Weden* would be similar to the FIT rule if the county had addressed its noise problem by banning all watercraft—even non-motorized boats that didn't contribute to noise pollution. The FIT rule extends beyond banning conduct directly responsible for discrimination because it regulates landlords where no chance of discrimination exists, where a landlord has a reasonable, non-discriminatory reason for denying the first qualified applicant, or where landlords have successfully unlearned or mitigated their implicit biases.

ii. The FIT rule is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias

In addition, the FIT rule is also unduly oppressive. Washington courts have devised a list of non-exclusive factors to weigh in considering this final prong of the due-process analysis. On the public's side, courts consider the seriousness of the public problem, the extent of the landowner's contribution to the problem, the degree to which the chosen means solve the problem, and the feasibility of alternatives. *Presbytery*, 114 Wn.2d at 331. On the landowner's side, courts consider the extent of the harm caused, the extent of remaining uses, the temporary or permanent nature of the law, the extent to which the landowner should have anticipated the law, and the feasibility of changing uses. *Id.*

The unduly oppressive factors that weigh the public's interest do not favor the FIT rule. The public problem of implicit bias in housing might be serious, but the City does not present evidence that all landlords subject to the FIT rule contribute to the problem. The studies relied upon by the City state that implicit biases can be unlearned and mitigated. Yet FIT presumes that all landlords are subject to implicit bias in their tenancy decisions. Further, the City itself concedes that implicit biases can be positive and in fact favor minorities, particularly if the landlord is a minority. *See* City's Opening Brief; CP 198-99. Yet the City has applied a blanket restriction on landlord discretion that affects even those landlords who may exhibit positive implicit biases. Thus, the rule extends to landlords who do not contribute to the problem the City seeks to address.

Moreover, the City's chosen means do not adequately solve the problem of implicit bias. Removing choice from the tenant selection process only deals with one layer of landlord discretion. Landlords still exercise discretion in deciding whether an applicant satisfies rental criteria. A landlord's implicit bias is just as likely to influence decisions about a tenant's qualifications. After all, according to the City, landlords can use subjective criteria such as "must be good with children" or "not belligerent or threatening" and can require a personal interview to assess whether such a criterion is satisfied. City's Opening Brief at 31. The subjective nature of

these criteria would allow for implicit bias to continue to affect landlords' rental decisions.

Instead of restricting landlord discretion, the City could have opted for feasible less-restrictive alternatives. Indeed, laws against intentional discrimination in housing already exist on the state, local, and federal level. *See* 42 U.S.C. § 3604; RCW 49.60.030; SMC § 14.08.040. Of course, housing discrimination may continue despite enforcement of these laws, but imperfect enforcement is an uncontroversial price to pay for a free society. *See* 4 William Blackstone, *Commentaries on the Laws of England* *352 (1768) ("[I]t is better that ten guilty persons escape, than that one innocent suffer."). The City cannot ban choice because some individuals might abuse it.

Other less oppressive options also exist. The stipulated record suggests training seminars, intergroup contact, and other educational approaches. CP 232-38. Through education, implicit biases "can be gradually unlearned and replaced with new mental associations." CP 257; *see also id.* at 259-60. The City could have initiated workshops for landlords or a training regimen imposed on landlords with a history of disparate treatment. The City claims that these less burdensome alternatives conflict with research, City's Opening Brief at 26-27, yet these alternatives are drawn from the very research that the City relies on. CP 225, 233-37.

Councilmember Herbold herself lauded the "exciting" opportunity to "unlearn" our unconscious biases. CP 185. Yet despite her enthusiasm, she instead banned landlord judgment before even attempting to train them to overcome their implicit biases, leaving them benighted and unable to make basic business decisions absent government control.

While the unduly oppressive factors that favor the City are weak, the factors used to analyze the landowners' burden are strong. The FIT rule causes significant harm. It affects virtually all landlords in the City and strikes at a fundamental aspect of a landlord's business—identifying their lessee for years to come. Landlords can no longer weigh which tenant will be the best fit under the circumstances. Landlords can no longer deny tenancy to someone based on reasonable judgments, such as denying tenancy because someone was rude on the phone or made the landlord feel unsafe during a visit to the unit. Nor can landlords and tenants negotiate with each other regarding criteria; what the landlord posts in advance must be the sole basis for determining qualifications. And the FIT rule forces landlords to allow each applicant a 48-hour period to accept or reject an offer. SMC § 14.08.050(A)(4). Nothing prevents applicants form tying up multiple properties in this manner. In a hot market, landlords lose income and potential tenants as they are forced to sit on the sidelines while a first qualified applicant shops around.

The City's recently commissioned landlord survey reveals how landlords themselves feel about FIT's impact on them. University of Washington, *Seattle Rental Housing Study: Final Report* (June 2018).[3] Over eighty percent of landlord respondents felt that FIT placed an unreasonable burden on landlords, and seventy percent felt that the rule reduces "their ability to use their own judgement in deciding to whom to rent." *Id.* at 22. The extent of the harm caused by the FIT rule is significant.

The unduly oppressive test also asks courts to consider the extent of remaining uses, the temporary or permanent nature of the law, the extent to which landowners should have anticipated the law, and the feasibility of changing uses. The "remaining use" factor is not especially relevant where the regulation burdens a particular use rather than forbidding it outright. The permanent nature of the FIT rule cuts against its lawfulness. Landlords could not have anticipated this wholly novel approach to housing regulation. And as for feasibility of changing uses, there is no feasible way for landlords to avoid the burden except to leave the rental business entirely, an excessive demand that would harm landlords and tenants alike. *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) ("[A] landlord's ability to rent his

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[3] *Available at* https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/UWSRHSFINAL.pdf.

property may not be conditioned on his forfeiting the right to compensation for a physical occupation."); *Horne v. Dep't of Agriculture*, __ U.S. __, 135 S. Ct. 2419, 2430, 192 L. Ed. 2d 388 (2015) (rejecting the argument that raisin reserve requirement was not a taking because raisin growers could instead plant different crops or sell wine).

The City argues that the Yims must demonstrate economic injury to show a due process violation. City's Opening Brief at 29-30. The City quotes from *Laurel Park Community, LLC v. City of Tumwater*: "It would be odd to conclude that an ordinance that had no economic effect on most properties was oppressive at all, let alone unduly oppressive." 698 F.3d at 1195. But the plaintiffs' theory in that case hinged on economic injury: "Tumwater's ordinances will result in significant economic losses in terms of total value and percentage that will be borne exclusively by the park owners." *Laurel Park*, Brief of Appellants, 2011 WL 96840006 at *54. *Laurel Park* did not hold that economic injury was always required to prove undue oppression. Indeed, many rights violations occur without economic injury in contexts such as speech or privacy; the harm is the restriction of the right, not necessarily monetary losses that accompany that restriction.

Moreover, none of the unduly oppressive factors require economic harm. *See Guimont*, 121 Wn.2d at 610. For instance, in *City of Seattle v. McCoy*, Division I struck down an abatement action that resulted in the

temporary closure of a lawful business because of patrons' drug-related activity. 101 Wn. App. at 823-24. The court held that the abatement action was unduly oppressive despite no evidence regarding the economic harm to the property owners and no evidence regarding the economic cost of avoiding abatement by changing uses. *Id.* at 842. The Court simply held that—even without evidence of economic harm—the abatement was unduly oppressive because it deprived an innocent property owner of their property because of the illegal acts of others. *Id.* at 843. Certainly, economic harm may help to demonstrate the significance of an impact, but to hold that economic harm is a necessary component of a substantive-due-process challenge would revolutionize and severely restrict due process law.

C. This Court should not overrule the undue oppression test

This Court should not uproot this well-established due-process test. As with the takings issue, the City fails to carry its high burden of demonstrating that the unduly oppressive test is clearly incorrect and harmful.

As discussed above, the unduly oppressive test is not incorrect—it is in line with both state and federal approaches to due process in the property context. The City's claim that the unduly oppressive test "hearkens back to the *Lochner* era" is hyperbolic. *See* City's Opening Brief at 22. Our state courts have applied the unduly oppressive test for decades without

suffering a hint of the opprobrium reserved for *Lochner*. The City wrongly argues that *Amunrud* compared the unduly oppressive test to *Lochner*. The *Amunrud* majority criticized the dissent, not the unduly oppressive test, for making arguments reminiscent of the *Lochner* era. *Amunrud*, 158 Wn.2d at 227-28. The City's "guilt by association" approach to undermining precedent does not demonstrate that the unduly oppressive test is incorrect.

Even so, the City also fails to demonstrate that the unduly oppressive test is harmful. The City only makes one argument for harm: "Its continued presence sows confusion" because courts are unclear about which due process to apply. City's Opening Brief at 23. The City may make a good case for clarifying when the unduly oppressive applies, but not for jettisoning long-standing precedent. In short, the City describes no harm that can only be cured by overturning precedent.

D. The FIT rule even violates the inappropriate rational basis test

Even if this Court decides to review the FIT rule under rational basis, it should still hold that it violates even this deferential standard. Alternatively, if the Court decides that rational basis review is called for (and reverses the trial court on all other grounds), it should remand this case to the lower court to address that issue.

The rational basis test forbids "arbitrary and irrational" laws. *State v. Hirschfelder*, 170 Wn.2d 536, 551, 242 P.3d 876 (2010). Laws must have "a rational relation to some legitimate end." *Id.*

The FIT rule fails this means-end fit for the same reasons outlined in Section III.B.i regarding reasonableness of means. For example, the City itself concedes that implicit bias can be both positive and negative. Yet the FIT rule forbids all discretion in tenancy selection, regardless of whether any potential bias is positive or negative. This blanket ban on behavior that can be good or bad depending on circumstance is irrational and arbitrary.

The City's approach is also irrational because it does not abide by the advice of the very studies that it relies upon. None of the sources relied upon by the City suggest an approach like the FIT rule. They tend to emphasize non-legal approaches such as training. The City's failure to even attempt the recommendations of the studies that supposedly support the FIT rule is irrational.

Finally, the application of the FIT rule to circumstances where implicit bias cannot operate to hurt a protected class is irrational. City staff admitted that the FIT rule would still bar discretion even where a protected class is not among the landlords' applicant pool. Saddling landlords with a heavy burden even where the FIT rule cannot fulfill its objective fails even rational basis.

IV. THE FIT RULE VIOLATES LANDLORDS' COMMERCIAL SPEECH RIGHTS BY DICTATING HOW LANDLORDS ADVERTISE THEIR UNITS

The FIT rule regulates the content of speech by requiring landlords to advertise minimum thresholds for criteria. It therefore must satisfy intermediate scrutiny, a standard that it cannot satisfy.

A. The FIT rule restricts speech

A law that regulates the content of commercial speech must face intermediate scrutiny. A law is content-based if it targets speech "based on its communicative content." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228, 192 L. Ed. 2d 236 (2015). Content-based speech restrictions can arise where a speech regulation "forces speakers to alter their speech to conform with an agenda they do not set." *Pacific Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 9, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986); *see also NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

The FIT rule is a content-based speech regulation, not just a disclosure requirement, because it forces landlords to alter their speech and prohibits certain speech based on content. Landlords' advertisements must include all "the criteria the owner will use to screen prospective occupants and the minimum threshold for each criterion that the potential occupant must meet." *Id.* § 14.08.050(A)(1)(a).

The FIT rule restricts certain content on landlord advertisements and dictates content by compelling landlords to impose "minimum thresholds" for each criterion. Landlords cannot decline to communicate a minimum threshold or communicate a flexible standard and then weigh the credit history against other positive or negative factors in the application. Instead, a landlord must "alter their speech to conform with an agenda they do not set." *Pacific Gas*, 475 U.S. at 9. The FIT rule must therefore satisfy intermediate scrutiny.

B. The FIT rule fails intermediate scrutiny

Commercial speech restrictions are subject to a four-part test, set out in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), which asks:

- Whether the speech is related to lawful activity and is not deceptive;
- Whether the government interest at stake is substantial;
- Whether the speech restriction "directly and materially" serves that interest; and
- Whether the restriction is "no more extensive than necessary."

See also World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 684 (9th Cir. 2010).

If the speech at issue passes the first step, then the government bears the burden of satisfying the other three steps. *Valle Del Sol, Inc. v. Whiting*,

709 F.3d 808, 816 (9th Cir. 2013). The FIT rule targets landlord advertisements that are neither unlawful nor deceitful, so the City must show that its interest is substantial, that the ban furthers that interest, and that the ban is not more extensive than necessary to achieve the interest. At minimum, the City fails steps three and four.

i. The FIT rule does not directly advance a substantial government interest

A regulation of commercial speech must "directly advance" the government's substantial interest. *Central Hudson*, 447 U.S. at 564. The City cannot satisfy this step because the FIT rule relies on speculation and is underinclusive.

a. The FIT rule is speculative

The City must present evidence that "the harms it recites are real" rather than "*mere* speculation and conjecture." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001). This demand for concrete evidence is not satisfied by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995).

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

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

The stipulated record demonstrates FIT's speculative nature. The Kirwan Institute study says that implicit biases can be positive. CP 198-99. Indeed, implicit biases tend to favor our own group identities and can favor minority groups if landlords are members of that group. CP 238-39, 257. The City has provided no evidence that all landlords are relying on implicit bias in a wholly negative fashion.

Moreover, implicit biases can be unlearned. CP 199. The City has presented no evidence that Seattle landlords have universally failed to overcome any implicit biases. The City imposed a blanket rule banning innocuous behavior based on speculation. This does not satisfy the direct advancement step of intermediate scrutiny.

b. The FIT rule is underinclusive

A speech regulation also violates the advancement step if it is underinclusive. *Valle Del Sol*, 709 F.3d at 824. Underinclusivity arises when a regulation reaches only a subset of the activity that causes the alleged harm, such that the regulation fails to achieve its purported goal.

Metro Lights LLC v. City of Los Angeles, 551 F.3d 898, 906 (9th Cir. 2009). For example, in *City of Cincinnati v. Discovery Network, Inc.*, Cincinnati prohibited commercial handbills on public property to address clutter but allowed noncommercial handbills. 507 U.S. 410, 412, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993). The distinction bore no relationship to the city's interests, since both types of handbill contributed equally to clutter. *Id.* at 425. The restriction thus lacked the required "fit between its goals and its chosen means." *Id.* at 428.

The FIT rule is underinclusive. The rule does not reduce possible implicit bias in determining which tenant applicants are qualified. According to the City, the FIT rule allows landlords to require a personal interview to assess whether the applicant satisfies criteria, and landlords can impose subjective criteria such as "not belligerent or threatening." City's Opening Brief at 31. If this is an accurate reading of the FIT rule, then it exposes a fatal underinclusivity. The FIT rule severely restricts one key element of landlord decision-making while leaving open the door for implicit bias to still affect housing decisions in determining whether an applicant is qualified. Like the handbill law, the FIT rule lacks the required "fit between its goals and its chosen means." *Discovery Network*, 507 U.S. at 428.

ii. The FIT rule is more extensive than necessary

The availability of less restrictive alternatives indicates that a law is more extensive than necessary. *See Rubin*, 514 U.S. at 491 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that § 205(e)(2) is more extensive than necessary."); *see also Kitsap Cty. v. Mattress Outlet/Gould*, 153 Wn.2d 506, 515, 104 P.3d 1280 (2005) ("The existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is relevant in reviewing the reasonability of the means chosen."). In addition to roads not taken, enforcement of existing laws can be a valid alternative to a speech restriction. *See Italian Colors Restaurant v. Becerra*, 878 F.3d 1165, 1178 (9th Cir. 2018) (holding that California had "other, more narrowly tailored means of preventing consumer deception," including enforcement of existing laws against unfair business practices).

As already discussed, the City had many alternatives available aside from the FIT rule. For one, the City already has anti-discrimination laws that it can actively enforce. Moreover, the research that the City relies upon offers many recommendations, from workshops to ad campaigns, but not a single source that the City has relied upon suggests the FIT rule. CP 225,

233-34; Equal Justice Society, *supra* at 260; Schwemm, *supra* at 508. The FIT rule is therefore more extensive than necessary.

CONCLUSION

The trial court correctly held that the FIT rule violates four separate constitutional guarantees. The City's project here is ambitious: it asks this Court to reverse on four separate grounds and overrule entrenched takings and due process law. Instead, this Court should affirm the trial court's sensible ruling that the FIT rule is a step too far.

DATED: Sept. 24, 2018. Respectfully submitted,

By: s/ ETHAN W. BLEVINS
BRIAN T. HODGES, WSBA # 31976
ETHAN W. BLEVINS, WSBA # 48219
Pacific Legal Foundation
10940 Northeast 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Email: EBlevins@pacificlegal.org

Attorneys for Respondents