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FILE
In Clerks Office
Supreme Court of Washington
Date NOV 14 2019
s/ Owens. J., for C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CHONG and MARILYN YIM, KELLY LYLES, BETH, BYLUND, CNA APARTMENTS LLC, and EILEEN LLC, Respondents,	)	NO. 95813-1
v.	)	En Banc
THE CITY OF SEATTLE, Appellant.	)	Filed NOV 14 2019

YU, J.—This case concerns the constitutionality of Seattle's "first-in-time rule" (FIT rule), Seattle Municipal Code (SMC) 14.08.050. Broadly speaking, the FIT rule provides that Seattle landlords seeking to fill vacant tenancies must provide notice of their rental criteria, screen all completed applications in chronological order, and offer tenancy to the first qualified applicant, subject to certain exceptions. The plaintiffs are Seattle landlords, who claim the FIT rule facially violates their state constitutional rights.

On cross motions for summary judgment, the trial court ruled that the FIT rule is unconstitutional on its face because (1) the FIT rule facially effects a per se regulatory taking for private use in violation of article

I, section 16, (2) the FIT rule facially infringes on the plaintiffs' substantive due process rights in violation of article I, section 3, and (3) the FIT rule facially infringes on the plaintiffs' free speech rights in violation of article I, section 5. Wash. Const. art. I, § § 16, 3, 5.

Defendant city of Seattle (City) appealed. We granted direct review and now reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2014, Seattle's mayor and the Seattle City Council appointed a committee "to evaluate potential strategies to make Seattle more affordable, equitable, and inclusive." Clerk's Papers (CP) at 319. The committee recommended "a multi-prong approach of bold and innovative solutions." *Id.* After considering the committee's recommendations, the Seattle City Council amended Seattle's Open Housing Ordinance, ch. 14.08 SMC. These amendments included adoption of the FIT rule.

The FIT rule provides that when a Seattle property owner seeks to fill a tenancy, the owner must first "provide notice to a prospective occupant" of "the criteria the owner will use to screen prospective occupants and the minimum threshold for each criterion," as well as "all information, documentation, and other submissions necessary for the owner to conduct screening." SMC 14.08.050(A)(1)(a)-(b). Next, the property owner must "note the date and time of when the owner receives a completed rental application" and "screen completed rental applications in chronological order." *Id.* at (A)(2)-(3). "If, after conducting the screening, the owner needs more information than was stated in the notice," the

owner must "notify the prospective occupant in writing, by phone, or in person of what additional information is needed." *Id.* at (A)(3). Finally, the property owner must "offer tenancy of the available unit to the first prospective occupant meeting all the screening criteria necessary for approval of the application." *Id.* at (A)(4). The first qualified applicant has 48 hours in which to accept the offer of tenancy. *Id.* If the applicant does not accept, "the owner shall review the next completed rental application in chronological order until a prospective occupant accepts the owner's offer of tenancy." *Id.*

There are a number of exceptions to these general procedures. No part of the FIT rule applies "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." *Id.* at (F). In addition, an owner does not have to offer tenancy to the first qualified applicant if the owner "is legally obligated to" or "voluntarily agrees to set aside the available unit to serve specific vulnerable populations." *Id.* at (A)(4)(a)-(b). The FIT rule also contains procedures for potential occupants with disabilities to seek "additional time to submit a complete rental application because of the need to ensure meaningful access to the application." *Id.* at (B).

The FIT rule became effective on January 1, 2017, although compliance was not required until July 1, 2017. *Id.* at (A), (E). On August 16, 2017, the plaintiffs filed a first amended complaint, "seeking a declaration that the City's [FIT] rule . . . violates the Takings, Due Process, and Free Speech Clauses of the Washington State Constitution, and also seeking a

permanent injunction forbidding the City from enforcing its unconstitutional rule." CP at 19. The plaintiffs challenge the FIT rule only "on its face," not as applied. *Id.* at 30, 33.

The parties filed cross motions for summary judgment based on a statement of stipulated facts and a stipulated record. The trial court ruled in favor of the plaintiffs on each of their claims, concluding that the FIT rule facially violates article I, section 16 (the takings clause), section 3 (the due process clause), and section 5 (the free speech clause) of the Washington State Constitution. The City appealed, and we granted direct review. Order, No. 95813-1 (Wash. Nov. 28, 2018).

ISSUES

A. Does the FIT rule facially effect a regulatory taking for purposes of article I, section 16?

B. If the FIT rule does facially effect a regulatory taking, is it for private use in violation of article I, section 16?

C. Does the FIT rule facially violate the plaintiffs' article I, section 3 right to substantive due process?

D. Does the FIT rule facially violate the plaintiffs' article I, section 5 right to free speech?

ANALYSIS

This case presents two important questions of state constitutional law that will have consequences far beyond the particular claims at issue here. First, we must define when a law regulating the use of property crosses the line into a "regulatory taking" for purposes of article I, section 16. Second, we must determine the standard of review that applies to

article I, section 3 substantive due process challenges to laws regulating the use of property.

As to the first issue, this court has always attempted to define regulatory takings consistently with federal courts applying the takings clause of the Fifth Amendment. U.S. Const. amend. V. The federal definition of regulatory takings has been substantially clarified since we last considered the issue, such that the "legal underpinnings of our precedent have changed or disappeared altogether." *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters,* 180 Wn.2d 54, 66, 322 P.3d 1207 (2014). It has not been shown that we should adopt a Washington-specific definition as a matter of independent state law at this time, and we therefore adopt the definition of regulatory takings set forth by the United States Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005), as discussed in more detail below. The following precedent is disavowed to the extent that it defines regulatory takings in a manner that is inconsistent with *Chevron U.S.A.*: *Orion Corp. v. State,* 109 Wn.2d 621, 747 P.2d 1062 (1987); *Presbytery of Seattle v. King County,* 114 Wn.2d 320, 787 P.2d 907 (1990); *Sintra, Inc. v. City of Seattle,* 119 Wn.2d 1, 829 P.2d 765 (1992); *Robinson v. City of Seattle,* 119 Wn.2d 34, 830 P.2d 318 (1992); *Guimont v. Clarke,* 121 Wn.2d 586, 854 P.2d 1 (1993); *Margola Associates v. City of Seattle,* 121 Wn.2d 625, 854 P.2d 23 (1993); and *Manufactured Housing Communities of Washington v. State,* 142 Wn.2d 347, 13 P.3d 183 (2000) (plurality opinion).

Regarding the second issue, as analyzed in more detail in our opinion for *Chong Yim v. City of Seattle,*

No. 96817-9 (Wash. Nov. 14, 2019) *(Yim* II), this court has always attempted to apply a standard of review to article I, section 3 substantive due process claims that is consistent with the standard used by federal courts applying the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. As with defining regulatory takings, it has not been shown that we should depart from federal law at this time, and we therefore apply rational basis review to the plaintiffs' substantive due process challenge to the FIT rule.

Turning to the specific claims presented in this case, the constitutionality of the FIT rule is a question of law reviewed de novo. *Amunrud v. Ed. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). The plaintiffs' facial takings and substantive due process claims cannot succeed unless the plaintiffs show that "no set of circumstances exists in which [the FIT rule], as currently written, can be constitutionally applied." *City of Redmond v. Moore,* 151 Wn.2d 664, 669, 91 P.3d 875 (2004). They cannot meet that burden on the record presented, while the City has met its burden of justifying the FIT rule for purposes of the plaintiffs' facial free speech claim. We therefore reverse and remand with instructions to grant the City's motion for summary judgment.

A. The FIT rule does not facially effect a regulatory taking

The takings clause of the Fifth Amendment provides, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Likewise, article I, section 16 provides, "No private property shall be taken or damaged for public or private use without just compensation having been

first made." Wash. Const. art. I, § 16. Both the federal and state takings clauses allow for "[c]laims of inverse condemnation by excessive regulation," otherwise known as "regulatory takings" claims. *Orion Corp.,* 109 Wn.2d at 642.

Regulatory takings claims are based on the premise that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon,* 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922). When a regulation goes too far, it becomes "a de facto exercise of eminent domain," even though the private individual still actually owns and possesses the property. *Orion Corp.,* 109 Wn.2d at 645. Such regulatory takings, like traditional exercises of eminent domain, require either just compensation (if the property is taken for public use) or invalidation of the law (if the property is taken for private use). *Mfd. Hous.,* 142 Wn.2d at 362.

Regulatory takings may be either "per se" or "partial." A per se regulatory taking is found where a regulation's impact is necessarily so onerous that the regulation's mere existence is, "from the landowner's point of view, the equivalent of a physical appropriation." *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). As a matter of federal law, such categorical treatment is appropriate for only "two relatively narrow categories" of regulations-regulations that "require[ ] an owner to suffer a permanent physical invasion of her property" and "regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Chevron U.S.A.*, 544 U.S. at 538 (second alteration in original) (quoting

Lucas, 505 U.S. at 1019).[1] All other regulations are susceptible of partial regulatory takings claims, which federal courts decide based on a multifactor test (the *Penn Central* factors) applied on a case-by-case basis. *Id.* at 538-39 (citing *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

The plaintiffs here claim the FIT rule facially effects a per se regulatory taking, but they do not contend that it fits into either of the per se categories recognized by federal courts. Instead, they contend that Washington courts recognize another category of per se regulatory takings, which includes any regulation that "destroys one or more of the fundamental attributes of ownership (the right to possess, exclude others and to dispose of property)." *Mfd. Hous.,* 142 Wn.2d at 355. The plaintiffs argue that the FIT rule falls into this per se category "because it strips landlords of a fundamental attribute of property ownership—the right to choose to whom one will rent their property." Resp'ts' Br. at 1.

We now clarify that none of our regulatory takings cases have purported to define regulatory takings (either per se or partial) as a matter of independent state law. Instead, we have always attempted to discern and apply the federal definition of regulatory

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[1] There is another form of takings cases not relevant here that deals with "adjudicative land-use exactions-specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Chevron U.S.A.,* 544 U.S. at 546 (citing *Dolan v. City of Tigard*, 512 U.S. 374, 379-80, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)).

takings. Since we last attempted to do so, the federal definition has been clarified substantially and is now clearly inconsistent with the definitions set forth in our precedent. Thus, the legal underpinnings of our precedent have disappeared, and it has not been shown that we should now adopt a Washington specific definition of regulatory takings as a matter of independent state law.

Therefore, we disavow our precedent, adopt the federal definition of regulatory takings, and hold that the plaintiffs cannot show the FIT rule facially meets this definition on the record presented. We express no opinion as to whether the FIT rule effects a regulatory taking as applied to any particular property.

1. We have never defined regulatory takings as a matter of independent state law

The plaintiffs emphasize that their takings claim is based on the Washington State Constitution and contend that "[t]he 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." *Id.* at 20-21. It is certainly true that we have the authority to interpret article I, section 16 independently of the Fifth Amendment's takings clause. However, it is incorrect to suggest that we have already done so for purposes of defining regulatory takings. To the contrary, for over 30 years, we have attempted to define regulatory takings in a manner that is consistent with federal law. Unfortunately, for many years, federal regulatory takings cases were complex and occasionally inconsistent, making our task extremely challenging

and giving the inaccurate impression that this court was attempting to set forth a Washington-specific doctrine based on independent state law.

a. Our *pre-Manufactured Housing* cases did not define regulatory takings based on independent state law

Although we have never defined regulatory takings based on independent state law, our precedent may appear to have done so. *See, e.g., Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1191-93 (9th Cir. 2012) (analyzing state regulatory takings claim separately from federal regulatory takings claim); *Lemire v. Dep't of Ecology,* 178 Wn.2d 227, 242, 309 P.3d 395 (2013) ("The parties and amici strenuously debate the framework on which this court should rest a taking analysis, including whether and to what extent our state constitutional takings provision may offer greater protection than its federal counterpart."); Roger D. Wynne, *The Path out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis,* 86 Wash. L. Rev. 125, 136 (2011) (pointing to "three unique elements" of Washington takings law). Regrettably, this court has added to the confusion by occasionally characterizing our cases as setting forth a "state 'regulatory takings' doctrine." *Robinson,* 119 Wn.2d at 47. We resolve this confusion now.

The reason our precedent appears unusual is because this court was attempting to set forth "a doctrinally consistent, definitive test" for regulatory takings, which "has proved an elusive goal, sometimes characterized as 'the lawyer's equivalent of the physicist's hunt for the quark.'" *Orion Corp.,* 109 Wn.2d at 645 (internal quotation marks omitted)

(quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 199 n.17, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), *overruled in part by Knick v. Township of Scott,* 588 U.S. _, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019)). It should not be surprising that our pursuit of such an elusive goal left this court as something of an outlier.

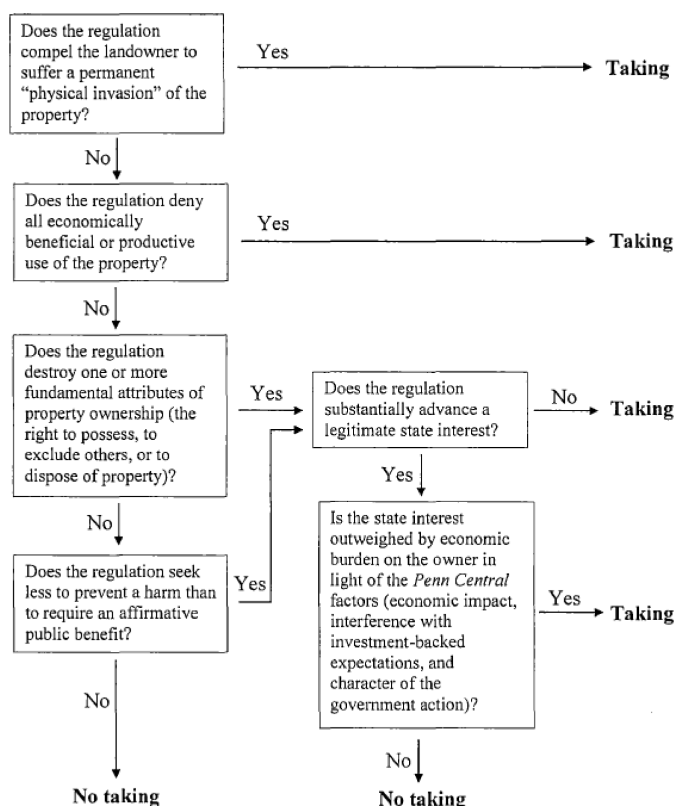
However, our attempts to articulate a test for when regulations cross the line into regulatory takings have always attempted to achieve consistency with federal law, not to set forth an independent state law doctrine.

Achieving consistency with federal regulatory takings law proved difficult due to "unresolved tensions between divergent lines of authority." *Id.* Even though the United States Supreme Court held in 1922 that a police power regulation becomes a taking if it goes too far, the United States Supreme Court (and this court, following its lead) continued to state that "an exercise of the police power protective of the public health, safety, or welfare *cannot* be a taking requiring compensation." *Id.* at 646 (emphasis added) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); *Miller* v. *Schoene*, 276 U.S. 272, 48 S. Ct. 246, 72 L. Ed. 568 (1928); *Mugler* v. *Kansas,* 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1897); *Cougar Bus. Owners Ass'n* v. *State,* 97 Wn.2d 466, 647 P.2d 481 (1982); *Markham Advert. Co.* v. *State*, 73 Wn.2d 405, 427, 439 P.2d 248 (1968)). Thus, it appeared that some regulations of private property were categorically incapable of being regulatory takings, but it was not clear which ones.

Moreover, regulatory takings cases suffered from a "doctrinal blurring that has occurred between due process and regulatory takings." *Id.* at 647. Federal and state cases held that "a police power action must be reasonably necessary to serve a legitimate state interest" to survive a substantive due process challenge. *Id.* at 646-47 (citing *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594-95, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962); *Lawton* v. *Steele,* 152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894); *W. Main Assocs.* v. *City of Bellevue,* 106 Wn.2d 47, 52, 720 P.2d 782 (1986); *Cougar Bus. Owners,* 97 Wn.2d at 476). Meanwhile, "[a] regulatory taking also hinges on whether the challenged regulation is 'reasonably necessary to the effectuation of a substantial public purpose,' or 'does not substantially advance legitimate state interests.'" *Id.* at 647 (citation omitted) (internal quotation marks omitted) (quoting *Penn Central,* 438 U.S. at 127; *Keystone,* 480 U.S. at 485). It was thus difficult to determine whether and to what extent substantive due process principles were relevant to the regulatory takings analysis.

As a result of such confusion, courts were left to determine when a regulation crosses the line into a regulatory taking based on "'essentially ad hoc, factual inquiries.'" *Keystone*, 480 U.S. at 495 (internal quotation marks omitted) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)). In an effort to bring some uniformity to the regulatory takings analysis, this court "ventur[ed] where other courts had feared to go, [and] began the painful process of developing coherent legal doctrine to supplant vague or nonexistent principles and intuitive determinations." Richard L. Settle, *Regulatory Taking Doctrine in Washington:*

Now You See It, Now You Don't, 12 U. Puget Sound L. Rev. 339, 341 (1989). After revising and clarifying our analysis several times, we ultimately settled on the following multistep test:



Margola, 121 Wn.2d at 643-46; *Guimont*, 121 Wn.2d at 598-604; *see also Robinson,* 119 Wn.2d 34; *Sintra*, 119 Wn.2d 1; *Presbytery,* 114 Wn.2d 320; *Orion Corp.,* 109 Wn.2d 621. By the time we settled on this framework in 1993, it had been suggested that our test was "undermined by language in *Lucas* questioning harm versus benefit analysis." *Guimont*, 121 Wn.2d at 603 n.5. However, we declined to address that issue because "it would be premature to

begin dismantling our takings framework, carefully crafted in *Presbytery, Sintra,* and *Robinson,* without more definitive guidance on this issue from the United States Supreme Court." *Id.*

While we continued to await more definitive guidance, this court decided *Manufactured Housing,* which forms the basis of the plaintiffs' regulatory takings claim in this case.

b. *Manufactured Housing* did not define regulatory takings based on independent state law

Manufactured Housing's lead opinion cited only *Presbytery* to support its holding that a regulation is "subject to a categorical 'facial' taking challenge" when it "destroys one or more of the fundamental attributes of ownership (the right to possess, exclude others and to dispose of property)."[2] *Mfd. Hous.,* 142 Wn.2d at 355. The plaintiffs and allied amici contend that this category of per se regulatory takings is based on independent state law and therefore cannot be disavowed unless it is shown to be both incorrect and harmful. We clarify that this category of per se regulatory takings is not based on independent state law.

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[2] The dissents challenged this holding as an incorrect application of *Presbytery*. *Mfd. Hous.,* 142 Wn.2d at 388 (Johnson, J., dissenting), 407-08 (Talmadge, J., dissenting). However, because we hold that *Manufactured Housing*'s legal underpinnings have disappeared, we assume without deciding that it correctly applied *Presbytery*. We also assume without deciding that *Manufactured Housing*'s lead opinion was joined by a majority of the court on the issues relevant to this case and that the facts of *Manufactured Housing* are not materially distinguishable from the facts presented here.

Presbytery unambiguously applied *"the* 'taking' analysis used by the United States Supreme Court and by this court," drawing no distinction between the two. 114 Wn.2d at 333 (emphasis added). *Presbytery*'s approach was entirely consistent with our prior explicit holding that "we will apply the federal analysis to review all regulatory takings claims." *Orion Corp.,* 109 Wn.2d at 658; *see also Margola Assocs.*, 121 Wn.2d at 642 n.6; *Guimont,* 121 Wn.2d at 604. Thus, by relying solely on *Presbytery* to define a per se regulatory taking, *Manufactured Housing* necessarily relied on federal law.

Furthermore, when applying its definition to the facts presented, *Manufactured Housing*'s lead opinion cited *Presbytery* again, along with other Washington cases, federal cases, and cases from other states. *Mfd. Hous.,* 142 Wn.2d at 364-68. Thus, it is clear from the range of authorities cited in *Manufactured Housing*'s lead opinion that its definition of a per se regulatory taking was not based on independent state law but on an attempt to apply federal law and, perhaps, to discern a national consensus.

It may appear that *Manufactured Housing* was applying a Washington specific definition of regulatory takings because the lead opinion included a *Gunwall*[3] analysis. *Id.* at 356-61. However, the *Gunwall* analysis was unrelated to the definition of regulatory takings. Instead, "[w]hat is key is article I, section 16's absolute prohibition against taking private property for private use." *Id.* at 357.

The court therefore concluded that the Washington State Constitution is more protective

[3] *State v. Gunwall,* 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

than the federal constitution on the basis "that 'private use' under amended article I, section 16 is defined more literally than under the Fifth Amendment, and that Washington's interpretation of 'public use' has been more restrictive." *Id.* at 361. Nevertheless, the conclusion that article I, section 16 defines public and private use more protectively than the federal constitution does not also establish that article I, section 16 has a more protective definition of regulatory takings. Those are two separate questions implicating two different parts of the regulatory takings analysis.

Regulatory takings cases involve a "remedial question of how compensation is measured once a regulatory taking is established" and "the quite different and logically prior question whether the . . . regulation at issue had in fact constituted a taking." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 328, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002). The definition of a regulatory taking goes only to the initial determination of whether "'property' has actually been taken." *Mfd. Hous.*, 142 Wn.2d at 363-64. Meanwhile, the public/private use distinction goes only to the appropriate remedy once a taking has been established-compensation or invalidation. *See id.* at 362.

Thus, none of our cases, including *Manufactured Housing,* defined regulatory takings based on independent state law. Instead, we have always tried to ascertain and apply a definition that is consistent with federal law. Our regulatory takings cases appear state-specific only because, for many years, the federal definition was difficult to understand. The

United States Supreme Court has since provided definitive guidance on that issue, which “[a]n overwhelming majority of states” have followed. *Phillips v. Montgomery County*, 442 S.W.3d 233, 240 (Tenn. 2014). We now do the same.

2. The legal underpinnings of our definition of regulatory takings have disappeared

Because our prior definition of regulatory takings was not based on independent state law, we need not decide whether it is incorrect and harmful.

Instead, “we can reconsider our precedent not only when it has been shown to be incorrect and harmful but also when the legal underpinnings of our precedent have changed or disappeared altogether.” *W.G. Clark*, 180 Wn.2d at 66. We do so now because two United States Supreme Court cases decided after *Manufactured Housing* establish that the federal legal underpinnings of our precedent have disappeared, and it has not been shown that there is a principled basis on which to depart from federal law at this time.

First, in 2002, the United States Supreme Court held that categorical rules are rarely appropriate in regulatory takings cases. *Tahoe-Sierra*, 535 U.S. 302. The regulations at issue in *Tahoe-Sierra* were two temporary development moratoria “that, *while in effect,* denie[d] a property owner all viable economic use of her property.” *Id.* at 320 (emphasis added). A number of property owners brought a facial takings claim, arguing that the regulations “g[ave] rise to an unqualified constitutional obligation to compensate [them] for the value of its use during that period.” *Id.*

The United States Supreme Court rejected their claim, cautioning that "we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings." *Id.* at 326. Instead, categorical rules for regulatory takings claims are appropriate only in an "'extraordinary circumstance,'" such as when a *permanent* regulation provides that "'*no* productive or economically beneficial use of land is permitted.'" *Id.* at 330 (quoting *Lucas,* 505 U.S. at 1017).

In such extraordinary circumstances, there is no need for a case-specific inquiry because the regulation will "*always* force individuals to bear a special burden that should be shared by the public as a whole." *Id.* at 341 (emphasis added). However, absent extraordinary circumstances, "the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry." *Id.* at 332. To determine whether there were extraordinary circumstances requiring a categorical rule, *Tahoe-Sierra* considered "the concepts of 'fairness and justice' that underlie the Takings Clause" and held that the temporary moratoria at issue could not be deemed per se regulatory takings. *Id.* at 334.

Tahoe-Sierra thus deeply undermines *Manufactured Housing's* view that a categorical rule is appropriate whenever a property owner is deprived of any part of "the 'bundle of sticks' representing the valuable incidents of ownership." *Mfd. Hous.,* 142 Wn.2d at 366. Instead, according to *Tahoe-Sierra,* categorical rules for regulatory takings claims are appropriate only in extraordinary circumstances. It is unlikely that *Tahoe-Sierra* would recognize extraordinary circumstances are present whenever a

regulation limits “the right to choose to whom one will rent their property.” Resp’ts’ Br. at 1. If that were so, every antidiscrimination law that prohibits a landlord from rejecting a tenant based on protected characteristics would be a per se regulatory taking requiring either compensation or invalidation. *E.g.,* RCW 49.60.222(1)(f); SMC 14.08.040(A). *Tahoe-Sierra* would likely not allow such a holding because it “would render routine government processes prohibitively expensive,” if not impossible. 535 U.S. at 335.

Although *Tahoe-Sierra* cautioned that categorical rules are rarely appropriate in regulatory takings cases, it left open the question of when regulations present such extraordinary circumstances that categorical rules are appropriate. That question was resolved in 2005, when *Chevron U.S.A.* definitively held that there are only “two relatively narrow categories” of “regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes.” 544 U.S. at 538.

One per se category applies “where government requires an owner to suffer a permanent physical invasion of her property.” *Id.* The other “applies to regulations that completely deprive an owner of ‘*all* economically beneficial us[e]’ of her property.” *Id.* (alteration in original) (quoting *Lucas*, 505 U.S. at 1019).

Any other alleged regulatory taking must be analyzed on a case-by-case basis according to the *Penn Central* factors. *Id.* at 538-39. The United States Supreme Court has since consistently applied these standards when defining regulatory takings, such that *Chevron U.S.A.* is clearly the Court’s final,

definitive statement on this issue at this time. *See Murr v. Wisconsin,* 582 U.S._, 137 S. Ct. 1933, 1942-43, 198 L. Ed. 2d 497 (2017); *Horne v. Dep 't of Agric.,* 576 U.S._, 135 S. Ct. 2419, 2429, 192 L. Ed. 2d 388 (2015); *Ark. Game & Fish Comm 'n v. United States,* 568 U.S. 23, 31-32, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prat.,* 560 U.S. 702, 713, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (partial plurality opinion).

Chevron U.S.A. narrowly defines per se regulatory takings that trigger categorical rules. By contrast, *Manufactured Housing*'s definition of per se regulatory takings broadly applies a categorical rule to any regulation that destroys any fundamental attribute of ownership. *Tahoe-Sierra* strongly indicates such a categorical rule would be rejected by the United States Supreme Court and *Chevron U.S.A.* confirms it. Therefore, *Manufactured Housing's* definition of per se regulatory takings is no longer a valid application of the federal law on which it was based. And because it has not been shown that we should now depart from the federal definition of regulatory takings as a matter of independent state law, we disavow *Manufactured Housing*'s definition.[4]

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[4] Some amici appear to contend that we should now adopt *Manufactured Housing*'s definition of per se regulatory takings as a matter of independent state law. However, amici's arguments are all based on Washington's more protective definitions of public and private uses, which, as discussed above, are relevant only to the appropriate remedy once a taking has been established. No party or amicus performs a *Gunwall* analysis or provides any other principled basis on which to define regulatory takings broadly as a matter of independent state law. *See Gunwall,* 106 Wn.2d 54. We therefore decline to do so.

In addition, *Chevron U.S.A.* clarified the *Penn Central* factors for evaluating partial regulatory takings claims that do not fit within either per se category. Those factors are intended to shed light on "the *magnitude or character of the burden* a particular regulation imposes upon private property rights" and to provide "information about how any regulatory burden is *distributed* among property owners." *Id.* at 542. The factors explicitly do not ask "whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Id.*

By contrast, our prior regulatory takings cases allow a regulation to be "insulated from a 'takings' challenge" if it "protects the public from harm" and require courts to consider whether the challenged "regulation substantially advances legitimate state interests." *Presbytery,* 114 Wn.2d at 330, 333; *see also Margola Assocs.,* 121 Wn.2d at 645-46; *Guimont,* 121 Wn.2d at 603-04; *Robinson,* 119 Wn.2d at 49-50; *Sintra,* 119 Wn.2d at 14-17; *Orion Corp.,* 109 Wn.2d at 658.

That precedent can no longer be valid because it may provide *less* protection for private property rights than the federal constitution does. *See Orion Corp.,* 109 Wn.2d at 652, 657-58.

In sum, today we continue our long-standing practice of following federal law in defining regulatory takings and explicitly adopt the definition set forth in *Chevron U.S.A.* Pursuant to *Chevron U.S.A.,* there are only two categories of per se regulatory takings: (1) "where government requires an owner to suffer a permanent physical invasion of her property" and (2) "regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." 544

U.S. at 538 (alteration in original) (quoting *Lucas,* 505 U.S. at 1019). If an alleged regulatory taking does not fit into either category, it must be considered on a case-by-case basis in accordance with the *Penn Central* factors. *Id.* at 538-39.

3. The plaintiffs do not show that the FIT rule facially effects a regulatory taking

The plaintiffs do not argue that the FIT rule fits into either of the per se categories set forth in *Chevron U.S.A.,* and it clearly does not. On its face, the FIT rule does not require any property owners to suffer any permanent physical invasion of their properties, and the plaintiffs do not contend that the FIT rule deprives them of *any* economically beneficial uses of their properties, let alone *every* economically beneficial use. The plaintiffs also do not contend that the FIT rule is a regulatory taking pursuant to the *Penn Central* factors.[5] We therefore reverse the trial court and hold that the plaintiffs have not shown the FIT rule facially effects a regulatory taking of their property.

B. Because the plaintiffs have not shown that the FIT rule effects a taking, we do not reach the issue of whether it is for private use

The plaintiffs contend that the regulatory taking effected by the FIT rule is for private use, rather than public use, and is therefore invalid. Because we hold that the plaintiffs do not show the FIT rule effects a taking at all, we decline to consider the public/private use distinction. As discussed above, that distinction is

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[5] We express no opinion on whether application of the *Penn Central* factors would show that the FIT rule effects a regulatory taking as applied to any particular property.

relevant only to the appropriate remedy where a taking has been shown, and no taking has been shown here.

C. The FIT rule does not facially violate substantive due process

The plaintiffs next claim that the FIT rule facially violates their article I, section 3 right to substantive due process, contending that the FIT rule is subject to heightened scrutiny because it regulates a fundamental attribute of property ownership. We hold that the applicable standard is rational basis review, which the FIT rule survives.

1. The FIT rule is subject to rational basis review

As discussed in more detail in our opinion in *Yim* II, we have never held that independent state law requires a heightened standard of review for substantive due process challenges to laws regulating the use of property. Instead, we have always looked to federal law to discern the appropriate standard of review, and it has not been shown that we should adopt a heightened standard now as a matter of independent state law. We therefore hold that the plaintiffs' article I, section 3 substantive due process claim is subject to the same standard that would apply if their claims were based on the due process clauses of the Fifth and Fourteenth Amendments. That standard is rational basis review.

We recognize that some United States Supreme Court precedent might suggest heightened scrutiny is required by stating that laws regulating the use of property must not be "'unduly oppressive'" on the property owner, or must have a "'substantial relation'" to a legitimate government purpose. *Goldblatt,* 369

U.S. at 595 (quoting *Lawton,* 152 U.S. at 137); *Nectow v. City of Cambridge,* 277 U.S. 183, 187, 48 S. Ct. 447, 72 L. Ed. 842 (1928) (quoting *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926)). However, the United States Supreme Court does not interpret this language as requiring heightened scrutiny. Instead, the "unduly oppressive" test has been interpreted as "applying a deferential 'reasonableness' standard." *Chevron U.S.A.,* 544 U.S. at 541 (internal quotation marks omitted) (citing and quoting *Goldblatt,* 369 U.S. at 594-95; *Lawton,* 152 U.S. at 137). Likewise, it has long been acknowledged that "the use of property and the making of contracts are normally matters of private and not of public concern," but "[e]qually fundamental with the private right is that of the public to regulate it in the common interest." *Nebbia v. New York,* 291 U.S. 502,523, 54 S. Ct. 505, 78 L. Ed. 940 (1934).

Therefore, a law regulating the use of property violates substantive due process only if it "fails to serve any legitimate governmental objective," making it "arbitrary or irrational." *Chevron U.S.A.,* 544 U.S. at 542; *see also Kentner v. City of Sanibel,* 750 F.3d 1274, 1280-81 (11th Cir. 2014), *cert. denied,* 135 S. Ct. 950 (2015); *Samson v. City of Bainbridge Island,* 683 F.3d 1051, 1058 (9th Cir.), *cert. denied,* 568 U.S. 1041 (2012). This test corresponds to rational basis review, which requires only that "the challenged law must be rationally related to a legitimate state interest." *Amunrud,* 158 Wn.2d at 222. We therefore apply

rational basis review to the plaintiffs' substantive due process challenge to the FIT rule.[6]

2. The FIT rule survives rational basis review on its face

Rational basis review requires that "the challenged law must be rationally related to a legitimate state interest." *Id.* Rational basis review is highly deferential because "a court may assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." *Id.*

The purpose of the FIT rule is to mitigate the impact of implicit bias in tenancy decisions. The plaintiffs appear to suggest this is not a legitimate government interest because "implicit bias can be both positive and negative." Resp'ts' Br. at 41. However, the fact that implicit bias may work to some people's advantage some of the time does not mean that mitigating its impact is an illegitimate purpose. Indeed, this court has recognized the importance of mitigating implicit bias in the context of jury selection with the enactment of GR 37. The plaintiffs do not show that implicit bias must be allowed to continue in the rental housing context.

The FIT rule's requirements are also rationally related to achieving its purpose. A rational person could believe that implicit bias will be mitigated by requiring landlords to offer tenancy to the first

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[6] Appended to our opinion in *Yim* II is a nonexclusive list of this court's precedent that can no longer be interpreted as requiring heightened scrutiny in substantive due process challenges to laws regulating the use of property.

qualified applicant, rather than giving landlords discretion to reject an otherwise-qualified applicant based on a "gut check." Verbatim Report of Proceedings (Feb. 23, 2018) at 36. It is precisely in such gut-check decisions where implicit bias is most likely to have influence because bias is "often unintentional, institutional, or unconscious." *State v. Saintcalle,* 178 Wn.2d 34, 36, 309 P.3d 326 (2013) (plurality opinion), *abrogated on other grounds by City of Seattle v. Erickson,* 188 Wn.2d 721, 398 P.3d 1124 (2017).

Indeed, the FIT rule's requirements are based on best practices recommended by industry associations, who advise that "[u]sing a set criteria also helps show that you are screening all applicants alike and can help avoid claims of discrimination by applicants not granted tenancy." CP at 315. Landlords are therefore advised to offer tenancy to the first qualified applicant "as a *best practice* when confronted with multiple, equally valid applications as a 'tie breaker.'" Br. of Amicus Curiae Rental Hous. Ass'n of Wash. at 3. Appearing as amici, several rental housing associations emphatically state that they do *not* support the FIT rule.

Nevertheless, the procedures required by the FIT rule are consistent with industry recommended best practices. Amici object only to making those practices mandatory, contending that doing so is unwise and will prove ineffective. Rational basis review does not invite a demanding inquiry by this court into whether the FIT rule is good policy. Instead, our task is limited to deciding whether mandating industry-recommended best practices for avoiding discrimination in tenancy decisions is rationally

related to reducing the influence of implicit bias in tenancy decisions. The answer is clearly yes.

The plaintiffs further suggest that the FIT rule fails rational basis review because it is overbroad, given that "non-legal approaches" could be used instead and the FIT rule applies "even where a protected class is not among the landlords' applicant pool." Resp'ts' Br. at 41. However, "[t]he overbreadth doctrine may not be employed unless First Amendment activities are within the scope of the challenged enactment." *City of Seattle v. Montana,* 129 Wn.2d 583, 598, 919 P.2d 1218 (1996) (plurality opinion); U.S. Const. amend. I. Thus, any assertion of overbreadth is irrelevant to the plaintiffs' facial substantive due process claim. The plaintiffs' free speech claim is addressed separately below.

It may well be that the FIT rule will prove ineffective or unwise as a matter of policy. However, the plaintiffs do not carry their "'heavy burden'" of showing that it facially violates substantive due process as a matter of law. *Amunrud,* 158 Wn.2d at 215 (quoting *Larson v. Seattle Popular Monorail Auth.,* 156 Wn.2d 752, 757, 131 P.3d 892 (2006)). We therefore reverse the trial court and hold that the FIT rule survives rational basis review on its face.

D. The FIT rule does not facially violate free speech rights

Finally, the plaintiffs claim that the FIT rule facially violates their article I, section 5 right to free speech. It is undisputed that the speech at issue here (advertisements for vacant tenancies) is "commercial speech," that is, "'speech proposing a commercial transaction.'" *Zauderer v. Office of Disciplinary*

Counsel, 471 U.S. 626, 637, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985) (quoting *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 455-56, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)). It is also undisputed that article I, section 5 and the First Amendment provide identical protections for commercial speech. *Bradburn v. N. Cent. Reg'l Library Dist.,* 168 Wn.2d 789, 800, 231 P.3d 166 (2010).

The main focus of the parties' dispute is the level of scrutiny that we must apply to the FIT rule. The trial court agreed with the plaintiffs that the FIT rule is subject to intermediate scrutiny and "cannot survive." CP at 520. We reverse. The FIT rule is subject to, and survives, deferential scrutiny.

1. The FIT rule is subject to deferential scrutiny

"'[C]ommercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'" *Zauderer,* 471 U.S. at 637. The level of scrutiny applied to laws governing commercial speech depends on whether the law at issue actually restricts commercial speech or merely requires commercial speakers to include factual disclosures. *Id.* at 650.

Where a law restricts truthful commercial speech proposing a lawful transaction, the law is subject to intermediate scrutiny. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 564, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Meanwhile, if the law merely requires factual disclosures by commercial speakers, review is deferential because a person's "constitutionally protected interest in *not* providing any particular factual information in his advertising

is minimal." *Zauderer,* 471 U.S. at 651. Therefore, "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* The government has the burden of proving its disclosure requirements are "neither unjustified nor unduly burdensome." *Nat'l Inst. of Family & Life Advocates v. Becerra,* 585 U.S. _, 138 S. Ct. 2361, 2377, 201 L. Ed. 2d 835 (2018) (*NIFLA*).

The plaintiffs contend that the FIT rule is a restriction on their commercial speech because the FIT rule provides that "[l]andlords 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." Resp'ts' Br. at 43. Nothing in the text of the FIT rule supports the plaintiffs' contention.

Washington law already provides that "[p]rior to obtaining any information about a prospective tenant, the prospective landlord shall first notify the prospective tenant" of the "types of information [that] will be accessed to conduct the tenant screening" and "[w]hat criteria may result in denial of the application." RCW 59.18.257(1)(a)(i)-(ii). The validity of that statute is not challenged here.

The FIT rule merely provides that if property owners have additional rental criteria beyond what may result in a denial, they must "at the same time" give prospective tenants notice of what those criteria are and how they may be met. SMC 14.08.050(A)(1).

On its face, the FIT rule does not impose any restrictions on what the landlord's additional criteria may be or how they must be worded, and, contrary to

the trial court's finding, it does not facially preclude advertisements for vacant tenancies from including phrases such as "'call to learn how to apply' or 'email me for further details.'" CP at 518. If the FIT rule is interpreted to impose such restrictions in the future, a property owner may bring an as-applied challenge that might be subject to heightened scrutiny. However, on its face, the FIT rule requires only that landlords disclose factual information about their own rental criteria. It is therefore subject to deferential scrutiny in accordance with *Zauderer*.

2. The FIT rule survives deferential scrutiny

The plaintiffs analyze their free speech claim only in accordance with intermediate scrutiny. However, it is still the City's burden to prove that the FIT rule survives deferential scrutiny. *NIFLA*, 138 S. Ct. at 2377. We hold the City has met its burden because on its face, the FIT rule is a justified disclosure requirement that does not unduly burden the plaintiffs' free speech rights.

To prove that the FIT rule is justified, the City must show that it addresses "a harm that is 'potentially real not purely hypothetical.'" *Id.* (quoting *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation,* 512 U.S. 136, 146, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994)). The City has shown that the problem of implicit bias in Seattle's rental housing market is (at least) potentially real, based on a 2014 study that "showed evidence of differential treatment in over 60% of the tests" based on "race, national origin, sexual orientation and gender identity." City of Seattle's Opening Br. at 7; CP at 57. This differential treatment included subjecting different applicants to different rental criteria:

> African American and Latino testers were told about criminal background and credit history checks more frequently than the white testers. They also were asked more often about their spouses' employment history (especially with Latino testers). They also were shown and told about fewer amenities, provided fewer applications and brochures, were shown fewer vacant units. In some cases, the prices quoted were higher for the same unit.
>
> Testers for sexual orientation and gender identity were shown fewer amenities, provided fewer applications and brochures, and were shown fewer vacant units. In some cases, the prices quoted were higher for the same unit.

CP at 57. This is sufficient justification for the FIT rule's enactment. To prove that the FIT rule does not "unduly burden[ ] protected speech," the City must show that it does not impose "a government-scripted, speaker-based disclosure requirement that is wholly disconnected from [the City]'s informational interest." *NIFLA,* 138 S. Ct. at 2377. It clearly does not. The landlords are required to disclose only the rental criteria they set for themselves, so the FIT rule does not impose any type of script. In addition, requiring landlords to disclose their rental criteria is directly connected to the City's interest in ensuring that the same rental criteria are applied to all applicants rather than subjecting some applicants to more demanding criteria due to the influence of implicit bias.

We therefore reverse the trial court and hold that the FIT rule survives deferential scrutiny on its face.

CONCLUSION

The FIT rule is unquestionably an experiment. This is clear from the rule itself, which requires "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." SMC 14.08.050(D). There is room for substantial debate about whether such an experiment is likely to succeed.

However, the plaintiffs' facial challenges ask only whether the FIT rule is an experiment that Seattle is constitutionally prohibited from conducting. It is not.

We clarify that Washington courts have always attempted to define regulatory takings consistently with federal law, and we continue to do so now.

Therefore, we adopt the definition of regulatory takings set forth in *Chevron U.S.A.* for purposes of article I, section 16 and hold that the plaintiffs have not met their burden of showing the FIT rule facially meets this definition. We also clarify that rational basis review applies in substantive due process challenges to laws regulating the use of property and hold that the plaintiffs have not met their burden of proving that the FIT rule fails rational basis review on its face. Finally, we hold that on its face, the FIT rule requires only factual disclosures and the City has met its burden of showing the FIT rule survives deferential scrutiny.

We therefore reverse the trial court and remand with instructions to grant the City's motion for summary judgment.

s/ YU, J.

WE CONCUR:

s/ FAIRHURST, CJ.	s/ STEPHENS, J.
s/ JOHNSON, J.	s/ WIGGINS, J.
s/ MADSEN, J.	s/ GONZALEZ, J.
s/ OWENS, J.	s/ GORDON-McCLOUD, J.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

THIS MATTER having come on before the undersigned judge of the above entitled Court on Cross-Motions for Summary Judgment. The Court reviewed the supporting and responsive pleadings filed herein as follows:

1. The Plaintiffs' complaint and amended complaint;

2. The City's Answers;

3. The Plaintiffs' Motion for Summary Judgment and supporting documents;

4. The City's Motion for Summary Judgment and supporting documents;

5. Pertinent portions of the stipulated facts and stipulated record; and,

6. Relevant case law and other authorities cited by the parties.

The Court having heard oral argument, makes the following FINDINGS based on the above submissions and Stipulated Facts and Record:

1. There is no genuine issue as to any material fact.

2. Plaintiffs mount a facial challenge to Seattle Municipal Code Section 14.08.050 enacted in August, 2016. The law, often called the First-in-Time or "FIT" rule, requires landlords to establish screening criteria and offer tenancy to the first applicant meeting them regardless of other factors such as whether other applicants are more qualified or offer a longer lease or more favorable terms.

3. The FIT rule has a laudable goal of eliminating the role of implicit bias in tenancy decisions. In certain respects, the FIT rule attempts to codify industry- recommended best practice by requiring landlords to establish screening criteria and offer tenancy to the first applicant meeting them.

4. While the Rental Housing Association of Washington ("RHA") which submitted an amicus memorandum, recommends screening candidates in chronological order, the Association opposed mandating first-in-time as a matter of law: "For rental housing owners this 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."

5. It is undisputed, and specifically acknowledged by the City, that the FIT rule 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.

6. Plaintiffs claim the FIT rsule, on its face, violates the Washington Constitution by: taking their property without compensation; taking their property for an improper public use; violating their rights to substantive due process; and violating their free speech rights.

7. Though the City argues to the contrary, *Manufactured Housing Communities v. State,* 142 Wn.2d 347, is binding precedent that this Court must follow. It is a plurality opinion in which five justices joined in the rationale and holding in that case.

A plurality opinion is often regarded as highly persuasive, even if not fully binding. *See Texas v. Brown,* 460 U.S. 730, 737, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (plurality opinion) (holding that while one particular plurality opinion was "not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue").

8. Our Supreme Court itself has cited the lead opinion in *Limstrom* as an interpretation by "this court", and saying "we have held," even while recognizing it as a plurality opinion. See *Soter v. Cowles Publishing Co.,* 162 Wash.2d 716, 733, 740, 174 P .3d 60 (2007).

9. In *Manufactured Housing Communities of Washington v. State,* 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000) the Supreme Court held that an owner's right to sell a property interest to whom he or she chooses is a fundamental attribute of property ownership, which cannot be taken without due process and payment of just compensation.

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

11. Choosing a tenant is a fundamental attribute of property ownership. Like a sale of a fee interest, a lease is a disposition of a property interest. *Manufactured Housing* held that selecting a buyer to purchase a property interest is a fundamental attribute of property ownership. Similarly, the right to grant a right of first refusal in the context of a leasehold is just as fundamental as the right to sell fee title in *Manufactured Housing.*

12. The FIT rule's few concessions to landlords' interests do not redeem it. While landlords are permitted to set their own rental criteria. See SMC §

14.08.050(A). This preliminary, general rental criteria does not substitute for the discretion to choose a specific tenant. Notably, the ability to negotiate, for instance-a key element of the right to freely dispose of property-is extinguished by the FIT rule. Even if landlords can impose some limits on the pool of qualified applicants, landlords and tenants still cannot bargain for an arrangement that suits their interests.

13. The FIT rule also violates the "private use" requirement. Article I, Section 16, of the state constitution says, "[p]rivate property shall not be taken for private use." This provision offers greater protection to property owners than its federal counterpart. See *Manufactured Housing,* 142 Wn.2d at 360. Our state Supreme Court has described Article I, Section 16, as an "absolute prohibition against taking private property for private use."

14. In *Manufactured Housing,* the mobile-home law gave "tenants a right to preempt the [mobile-home park] owner's sale to another and to substitute themselves as buyers." *Manufactured Housing,* 142 Wn.2d at 361. The law therefore was a private use taking because it took the right to freely dispose of property and handed a corollary right of first refusal to the tenants. *Id.* at 361-62. Rather than placing property in public hands or increasing public access, "[t]he statute's design and its effect provide a beneficial use for private individuals only."

15. A taking is not for a public use just because it offers a "public benefit." *Manufactured Housing,* 142 Wn.2d at 362. "[T]he fact that the public interest may require it is insufficient if the use is not really public." In *re City of Seattle,* 96 Wn.2d 616, 627, 638 P .2d 549

(1981). The state in *Manufactured Housing* defended the right-of-first-refusal law by lauding its public benefits: preserving housing stock for the poor. *Manufactured Housing,* 142 Wn.2d at 371. The Court held that such benefits could not transform the private nature of the taking into a public one. Similarly, the FIT rule is a taking for private use, regardless of any public benefit.

16. Due process embodies a promise that government will pursue legitimate purposes in a just and rational manner. As set forth in *Presbytery,* 114 Wn.2d at 330 to determine if a law violates due process, courts must address three questions:

a. Is the regulation aimed at achieving a legitimate public purpose?

b. Does the regulation use means reasonably necessary to achieving that purpose?

c. Is the regulation unduly oppressive?

17. As to the first question, the court finds that the regulation is aimed at achieving a legitimate public purpose.

18. As to the second question, the court finds it does not. The principle that government can eliminate ordinary discretion because of the possibility that some people may have unconscious biases has no limiting principle—it would expand the police power beyond reasonable bounds. While the City can regulate the use of property so as not to injure others, a law that undertakes to abolish or limit the exercise of rights beyond what is necessary to provide for the public welfare cannot be included in the lawful police power of the government. See *Ralph v. Wenatchee,* 34

Wn.2d 638, 644, 209 P.2d 270 (1949). Moreover, a law is not reasonably necessary if its rationale and methodology have no meaningful limiting principle. See *Beard v. Banks,* 548 U.S. 521, 546, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006) (Scalia, J., concurring).

19. The FIT rule is also an unreasonable means of pursuing anti-discrimination because of its sweeping overbreadth. "The overbreadth doctrine involves substantive due process and asks whether a statute not only prohibits unprotected conduct, but also reaches constitutionally protected conduct." *Rhoades v. City of Battle Ground,* 115 Wn. App. 752, 768, 63 P.3d 142 (2002); *Am. Dog Owners Ass'n v. City of Yakima,* 113 Wn.2d 213,217, 777 P.2d 1046 (1989). The FIT rule is overbroad since with few exceptions, landlords renting to the general population cannot deny tenancy to the first qualified applicant, period.

20. As to the third question, the court finds the FIT rule is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias. The court reaches this conclusion in analyzing the following non-exclusive factors to weigh as set forth in *Presbytery:*

On the public's side:

• The seriousness of the public problem.

• The extent of the landowner's contribution to the problem.

• The degree to which *the* chosen means solve the problem.

• The feasibility of alternatives.

On the landowner's side:

• The extent of the harm caused.

• The extent of remaining uses.

• The temporary or permanent nature of the law.

• The extent to which the landowner should have anticipated the law.

• The feasibility of changing uses.

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

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

An application is deemed "complete" once the applicant has provided all the information stated in the mandatory notice. The landlord must offer the

unit to the first applicant who satisfies the criteria in the advertisement. Id. § 14.08.050(A)(4).

23. The FIT rule not only constrains the means by which landlords communicate, it also controls the content of that communication. A landlord may not post a rental on the web and say, “call to learn how to apply” or “email me for further details.” Rather, the landlord must list online all information regarding how to apply and all criteria by which applications will be assessed. It is undisputed that the FIT rule violates landlords’ speech rights by prohibiting advertisements based on content and dictating how landlords can advertise.

24. Regulations that burden commercial speech must satisfy intermediate scrutiny. The state constitution protects advertising because “society has a strong interest in preserving the free flow of commercial information.” *Kitsap Cty. v. Mattress Outlet/Gould,* 153 Wn.2d 506, 512, 104 P.3d 1280 (2005). To protect that interest, the state constitution requires that commercial speech regulations satisfy a four-part test:

• Whether the speech is about lawful activity and is not deceptive;

• Whether the government interest at stake is substantial;

• Whether the speech restriction “directly and materially” serves that interest; and

• Whether the restriction is “no more extensive than necessary.”

Id. at 513. A landlord’s advertisement for a vacant unit is commercial speech because it “propose[s] a

commercial transaction." *United States v. Edge Broad. Co.,* 509 U.S. 418, 426, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993). Because the FIT rule burdens that commercial speech, it must satisfy the four-part test.

25. The first and second factors are clear: the speech affected by the FIT rule is neither misleading nor related to unlawful activity and the City has a legitimate interest in preventing discrimination. As to the last two steps, the speech restriction does not "directly and materially" advance the City's interest in stopping discrimination, and it restricts more speech than necessary.

26. The FIT rule does not "directly and materially" advance the City's interest in preventing discrimination because it precludes the use of landlord discretion. To satisfy this component of the commercial speech test, the City must offer more than "mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Mattress Outlet,* 153 Wn.2d at 513 (quoting *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001)). The City cannot sustain this burden.

27. Finally, the City must show that the speech restriction is not more extensive than necessary. A government restricting commercial speech must shoulder the burden of demonstrating that the law is narrowly tailored to achieve its ends. *Mattress Outlet,* 153 Wn.2d at 515. The FIT rule is not narrowly tailored. The City conceded as much in the record when it stipulated to a staff memo stating that the "first in time policy affects a landlord's ability to

exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class." SR 000064.

28. The FIT rule restricts far more speech than necessary to achieve its purposes in stopping discrimination. It imposes sweeping advertising restrictions on all Seattle landlords, restricting their speech without any individualized suspicion of disparate treatment. It forbids valuable speech activities like case-by-case negotiation and tells landlords how to communicate their criteria. Therefore, the City's decision to restrict speech cannot survive intermediate scrutiny.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiffs' Motion for Summary Judgment is hereby GRANTED and the Defendant's Motion for Summary Judgment is DENIED.

Signed on this 28th day of March, 2018.

s/ Suzanne R. Parisien
Honorable Suzanne R. Parisien

FILE
In Clerks Office
Supreme Court of Washington
Date NOV 14 2019
s/ OWENS, J. for C.J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON	)	NO. 96817-9
CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON, Plaintiffs,	)	En Banc
v.	)	Filed NOV 14 2019
THE CITY OF SEATTLE, Defendant.	)	

YU, J.—This case concerns the facial constitutionality of Seattle's Fair Chance Housing Ordinance, which provides in relevant part that it is an unfair practice for landlords and tenant screening services to "[r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history,"

subject to certain exceptions. Seattle Municipal Code (SMC) 14.09.025(A)(2). The plaintiffs claim that on its face, this provision violates their state constitutional right to substantive due process and their federal constitutional rights to free speech and substantive due process. Wash. Const. art. I, § 3; U.S. Const. amends. I, V, XIV.

The merits of the plaintiffs' claims are not before us. Instead, we have been certified three questions by the federal district court regarding the standard that applies to the plaintiffs' state substantive due process claim: (1) "What is the proper standard to analyze a substantive due process claim under the Washington Constitution?" (2) "Is the same standard applied to substantive due process claims involving land use regulations?" and (3) "What standard should be applied to Seattle Municipal Code [chapter] 14.09 ('Fair Chance Housing Ordinance')?" Order, No. C18-0736-JCC, at 2-3 (W.D. Wash. Feb. 5, 2019).

This court has not previously adopted heightened standards for substantive due process challenges to laws regulating the use of property as a matter of independent state law, and we are not asked to do so in this case. Therefore, we answer the district court's questions as follows: Unless and until this court adopts heightened protections as a matter of independent state law, state substantive due process claims are subject to the same standards as federal substantive due process claims. The same is true of state substantive due process claims involving land use regulations and other laws regulating the use of property. Therefore, the standard applicable to the plaintiffs' state substantive due process challenge to

the Fair Chance Housing Ordinance is rational basis review.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014, the mayor of Seattle and the Seattle City Council convened an advisory committee "to evaluate potential strategies to make Seattle more affordable, equitable, and inclusive." Doc. 33-12, at 59 (Stipulated R.). The committee recommended "a multi-pronged approach of bold and innovative solutions to address Seattle's housing affordability crisis," particularly as related to "barriers to housing faced by people with criminal records." *Id.* at 59-60. Based on the committee's report and its own findings, the Seattle City Council enacted the Fair Chance Housing Ordinance, chapter 14.09 SMC. Several Seattle landlords and the Rental Housing Association of Washington (which provides tenant screening services) challenged the ordinance's facial constitutionality in King County Superior Court. Their challenge focuses on SMC 14.09.025(A)(2), which makes it an unfair practice for landlords and tenant screening services to "[r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history," subject to certain exceptions. The plaintiffs claim that this provision facially violates their federal free speech rights and their state and federal substantive due process rights.

Defendant city of Seattle (City) removed the case to federal district court, and the parties filed cross motions for summary judgment based on stipulated facts and a stipulated record. The district court has not yet ruled on the summary judgment motions

because the parties dispute the standard of review that applies to the plaintiffs' state substantive due process claim. The plaintiffs contend that the Fair Chance Housing Ordinance deprives property owners of "a fundamental property interest" and is therefore subject to heightened scrutiny. Doc. 23, at 21.

The City contends that rational basis review applies.

The district court noted that another pending case involving a different Seattle ordinance, *Chong Yim* v. *City of Seattle,* No. 95813-1 (Wash. Nov. 14, 2019) *(Yim* I), raises a similar dispute regarding the standard that applies to state substantive due process claims in Washington. Therefore, "wary about applying a potentially inaccurate standard under state law," the district stayed this case and certified to us three questions regarding the applicable standard of review. Order at 2.

ISSUES

A. "What is the proper standard to analyze a substantive due process claim under the Washington Constitution?" *Id.*

B. "Is the same standard applied to substantive due process claims involving land use regulations?" *Id.*

C. "What standard should be applied to Seattle Municipal Code [chapter] 14.09 ('Fair Chance Housing Ordinance')?" *Id.* at 3.

ANALYSIS

Article I, section 3 of the Washington State Constitution provides, "No person shall be deprived of life, liberty, or property, without due process of law."

Our state due process protection against “the arbitrary exercise of the powers of government” has both procedural and substantive components. *State v. Cater’s Motor Freight Sys., Inc.,* 27 Wn.2d 661, 667, 179 P.2d 496 (1947). The procedural component provides that “[w]hen a state seeks to deprive a person of a protected interest,” the person must “receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.” *Amunrud v. Bd. of Appeals,* 158 Wn.2d 208, 216, 143 P.3d 571 (2006). Meanwhile, the substantive component of due process “protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Id.* at 218-19. This case concerns only the substantive component.

In a substantive due process claim, courts scrutinize the challenged law according to “a means-ends test” to determine if “a regulation of private property is effective in achieving some legitimate public purpose.” *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 542, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (emphasis omitted). The level of scrutiny to be applied depends on “the nature of the right involved.” *Amunrud,* 158 Wn.2d at 219. “State interference with a fundamental right is subject to strict scrutiny,” which “requires that the infringement is narrowly tailored to serve a compelling state interest.” *Id.* at 220. Meanwhile, “[w]hen state action does not affect a fundamental right, the proper standard of review is rational basis,” which requires only that “the challenged law must be rationally related to a legitimate state interest.” *Id.* at 222.

The plaintiffs characterize the right involved here as a "fundamental property interest[]," specifically, "the right of each residential landlord to rent her property to a person of her own choice." Pls.' Resp. Br. at 15-16. They do not contend that this right requires the application of strict scrutiny, but they do not concede that rational basis review applies either. Instead, the plaintiffs argue that there is a third type of review, which applies in substantive due process challenges to laws restricting "fundamental property rights" or "traditional 'old property' rights." *Id.* at 15 n.6. This third type of review, the plaintiffs contend, is "some form of intermediate scrutiny," which exceeds rational basis review by requiring that laws regulating the use of property must either substantially advance a government interest (the "substantially advances test") or not be unduly oppressive on the property owner (the "unduly oppressive test"). *Id.* at 39.

The level of scrutiny that applies to the plaintiffs' state substantive due process claim is a constitutional question that we decide as a matter of law. *Amunrud,* 158 Wn.2d at 215. We hold that rational basis review applies, and we clarify that the cases cited by the plaintiffs can no longer be interpreted as requiring heightened scrutiny because their "legal underpinnings" have "disappeared." *WG. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters,* 180 Wn.2d 54, 66, 322 P.3d 1207 (2014).

A. In answer to the first two certified questions, independent state law does not require heightened scrutiny in article I, section 3 substantive due process challenges to laws regulating the use of property "[T]he protection of the fundamental rights of

Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty." *State v. Coe,* 101 Wn.2d 364, 374, 679 P.2d 353 (1984). Therefore, this court has a duty to recognize heightened constitutional protections as a matter of independent state law in appropriate cases. *O'Day v. King County,* 109 Wn.2d 796, 801-02, 749 P.2d 142 (1988). Nevertheless, "[t]his court traditionally has practiced great restraint in expanding state due process beyond federal perimeters." *Rozner v. City of Bellevue,* 116 Wn.2d 342, 351, 804 P.2d 24 (1991). Accordingly, we have never before required heightened scrutiny in substantive due process challenges to laws regulating the use of property as a matter of independent state law. In light of the arguments presented in this case, we decline to do so now.

We recognize that in a number of cases, this court has recited the "unduly oppressive" test, which appears to exceed rational basis review by asking "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990); *see also, e.g., Tiffany Family Tr. Corp. v. City of Kent,* 155 Wn.2d 225, 238, 119 P.3d 325 (2005); *Orion Corp. v. State,* 109 Wn.2d 621, 651, 747 P.2d 1062 (1987). We have never explicitly rejected the "unduly oppressive" test, although we have noted that it "has limited applicability even in land use cases." *Amunrud,* 158 Wn.2d at 226 n.5. We have also occasionally suggested that a "substantial relation" test applies and that this

test requires heightened scrutiny by asking whether police power regulations bear a "'real or substantial relation'" (as opposed to a merely rational relation) to legitimate government purposes. *Biggers v. City of Bainbridge Island,* 162 Wn.2d 683, 694, 169 P.3d 14 (2007) (plurality opinion) (quoting *State ex rel. Brislawn v. Meath,* 84 Wash. 302, 313, 147 P. 11 (1915)); *see also, e.g., Remington Arms Co. v. Skaggs,* 55 Wn.2d 1, 5-6, 345 P.2d 1085 (1959).

However, this precedent is based on opinions of the United States Supreme Court, not on independent state law. Hugh D. Spitzer, *Municipal Police Power in Washington State,* 75 Wash. L. Rev. 495, 513-15 (2000). The "unduly oppressive" test is derived from an 1894 opinion, *Lawton v. Steele*: To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. 152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894); *see also Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594-95, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962).

Meanwhile, the "substantial relation" test is derived from an 1887 opinion, *Mugler v. Kansas*:

> If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so

> adjudge, and thereby give effect to the Constitution.

123 U.S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205 (1887). We have never held that any form of heightened scrutiny is independently required by article I, section 3 of the Washington State Constitution, and the parties do not ask us to do so now.[1]

Because the heightened scrutiny apparently required by some of our precedent derives from federal law, we need not consider whether such heightened scrutiny is "incorrect and harmful." *W. G. Clark,* 180 Wn.2d at 66. Instead, we may consider whether the federal "legal underpinnings of our precedent have changed or disappeared altogether." *Id.* As discussed below, the federal legal underpinnings of our precedent have disappeared because the United States Supreme Court requires only rational basis review in substantive due process challenges to laws regulating the use of property. In the absence of a *Gunwall*[2] analysis or any other principled basis for departing from federal law, we decline to do so at this time.

The district court's first two certified questions are "What is the proper standard to analyze a substantive

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[1] Two amici in *Yim* I appear to argue that article I, section 3 does provide enhanced substantive protections beyond those guaranteed by the federal due process clauses. *See* Br. of Amicus Curiae Goldwater Inst. *(Yim* I) at 5; Br. of Amicus Curiae Rental Hous. Ass'n of Wash. (*Yim* I) at 13. However, neither filed an amicus brief in this case and neither provides a principled basis on which to recognize enhanced protections as a matter of independent state law.

[2] *State* v. *Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).

due process claim under the Washington Constitution?" and "Is the same standard applied to substantive due process claims involving land use regulations?" Order at 2. We answer that unless and until this court adopts a heightened standard as a matter of independent state law, article I, section 3 substantive due process claims are subject to the same standards as federal substantive due process claims. The same is true for substantive due process claims involving land use regulations. Our precedent suggesting otherwise can no longer be interpreted as requiring a heightened standard of review as a matter of independent state law.[3]

B. In answer to the third certified question, we hold that rational basis review applies to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance

Because the plaintiffs do not advance an independent state law argument, the parties' primary dispute is the minimum level of scrutiny required by the federal due process clauses. Although this issue is arguably not a question of "local law," RCW 2.60.020, we exercise our discretion to address it because it is necessary to provide complete answers to the certified questions in this case. *See Broad v. Mannesmann Anlagenbau, AG,* 141 Wn.2d 670, 676, 10 P.3d 371

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[3] Attached as an appendix is a list of this court's precedent that can no longer be interpreted as requiring a heightened standard of review. We caution that this list is not exclusive and that any holding by this court or the Court of Appeals that heightened scrutiny is required in state substantive due process challenges to laws regulating the use of property is no longer good law. We express no opinion as to whether the outcome of any particular case would have been different had it explicitly applied rational basis review.

(2000). The plaintiffs contend that federal substantive due process law requires heightened scrutiny of laws regulating the use of property and that it does so because "fundamental attribute[s] of property" are recognized as "fundamental right[s] subject to heightened scrutiny" for substantive due process purposes. Pls.' Resp. Br. at 31. Therefore, the plaintiffs reason, their state substantive due process challenge to the Fair Chance Housing Ordinance cannot be subject to deferential rational basis review.

We disagree. As a matter of current federal law, the "unduly oppressive" and "substantial relation" tests are not interpreted as requiring heightened scrutiny, and the "substantially advances" test has been explicitly rejected. Instead, a law regulating the use of property violates substantive due process only if it "fails to serve any legitimate governmental objective," making it "arbitrary or irrational." *Chevron U.S.A.,* 544 U.S. at 542; *see also Kentner v. City of Sanibel,* 750 F.3d 1274, 1280-81 (11th Cir. 2014), *cert. denied,* 135 S. Ct. 950 (2015); *Samson v. City of Bainbridge Island,* 683 F.3d 1051, 1058 (9th Cir.), *cert. denied,* 568 U.S. 1041 (2012). This test corresponds to rational basis review. In addition, the use of property has not been recognized as a fundamental right for substantive due process purposes. Therefore, the standard that applies to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance is rational basis review.

1. The "unduly oppressive" test is no longer interpreted as requiring heightened scrutiny

The plaintiffs correctly point out that the United States Supreme Court has never explicitly overruled

the "unduly oppressive" language that originated in *Lawton* and was repeated in *Goldblatt*. However, the plaintiffs fail to recognize that the United States Supreme Court does not interpret this language as requiring heightened scrutiny. To the contrary, the United States Supreme Court has made it clear in its 2005 *Chevron U.S.A.* decision that *Lawton* and *Goldblatt* should be interpreted as applying a deferential standard that corresponds to rational basis review.

The reason *Goldblatt* may appear to require heightened scrutiny is that *Goldblatt* was decided during a period of "doctrinal blurring that has occurred between due process and regulatory takings." *Orion Corp.,* 109 Wn.2d at 647. A "regulatory taking" occurs when a government restriction on the use of private property is so onerous that the regulation amounts to "a de facto exercise of eminent domain requiring just compensation." *Id.* at 645. For many years, United States Supreme Court cases did not clearly differentiate between the tests for determining (1) when a regulation is so burdensome that it effectively takes private property and (2) when a regulation arbitrarily interferes with the use of property in violation of substantive due process. *See Chevron U.S.A.,* 544 U.S. at 541-42.

Goldblatt was one such case. Its "unduly oppressive" test, which asks who must bear the economic burden of a regulation, *Amunrud,* 158 Wn.2d at 226 n.5, reflects concerns implicated by the takings clause, such as "the *magnitude or character of the burden* a particular regulation imposes upon private property rights" and "how any regulatory burden is *distributed* among property owners."

Chevron U.S.A., 544 U.S. at 542. ~~It does not reflect the core concern of substantive due process, which is "whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Id.*~~ *Petitioners' note: Modified by Order Amending Opinion, January 9, 2020. See Pet. App. D.*

While *Goldblatt* "does appear to assume that the inquiries are the same" for both regulatory takings and substantive due process claims, the United States Supreme Court has recognized that "that assumption is inconsistent with the formulations of our later cases." *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 834 n.3, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). As such, *Goldblatt* has been cited most often for takings principles, not due process principles. *E.g., Lucas v.* S.C. *Coastal Council,* 505 U.S. 1003, 1022, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 490, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104, 124-27, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

To the extent *Goldblatt* does appear to require heightened scrutiny of laws regulating the use of property for substantive due process purposes, the United States Supreme Court has clarified that it does not. Instead, *Goldblatt* has been interpreted as "applying a deferential 'reasonableness' standard." *Chevron U.S.A.,* 544 U.S. at 541 (internal quotation marks omitted) (quoting and citing *Goldblatt,* 369 U.S. at 594-95; *Lawton,* 152 U.S. at 137). This deferential standard protects against "arbitrary or irrational" restrictions on property use. *Id.* at 542; *see also id.* at 548 (Kennedy, J., concurring).

The "arbitrary or irrational" standard is not heightened scrutiny. It corresponds to rational basis review, which requires only that "the challenged law must be rationally related to a legitimate state interest." *Amunrud,* 158 Wn.2d at 222. The plaintiffs do not cite, and we cannot find, any *post-Chevron U.S.A.* decision in which the United States Supreme Court has held the "unduly oppressive" test requires heightened scrutiny in substantive due process challenges to laws regulating the use of property.

As we have already held, "[t]hat a statute is unduly oppressive is not a ground to overturn it under the due process clause." *Salstrom's Vehicles, Inc. v. Dep't of Motor Vehicles,* 87 Wn.2d 686, 693, 555 P.2d 1361 (1976). Today, we reaffirm that holding and clarify that the "unduly oppressive" test recited in many of our cases can no longer be interpreted as requiring heightened scrutiny in substantive due process challenges to laws regulating the use of property.

2. The "substantially advances" test has been rejected and the "substantial relation" test is no longer interpreted as requiring heightened scrutiny

As an alternative to the "unduly oppressive" test, the plaintiffs contend that laws regulating the use of property must be scrutinized in accordance with the "substantially advances" test, which the plaintiffs characterize as "a form of heightened scrutiny that closely mirrors this Court's understanding of the unduly oppressive test." Pls.' Resp. Br. at 38. We disagree. Since at least 1934, federal law has required only deferential rational basis review.

The plaintiffs point to the United States Supreme Court's 2005 decision in *Chevron U.S.A.* to argue that

a heightened "substantially advances" test is required.

However, *Chevron U.S.A.* actually states "that the 'substantially advances' formula was *derived from* due process" and holds "that it has no proper place in our takings jurisprudence." 544 U.S. at 540 (emphasis added). *Chevron U.S.A.* does not hold that a heightened "substantially advances" test reflects current federal substantive due process law, and it clearly does not.

The "substantially advances" test was set forth in a takings case, *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). However, the test was derived from two *Lochner-era*[4] substantive due process cases, *Nectow v. City of Cambridge,* 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928), and *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). Both *Nectow* and *Ambler Realty Co.* do state that zoning regulations must have a "'*substantial relation* to the public health, the public morals, the public safety or the public welfare in its proper sense."' *Nectow,* 277 U.S. at 187-88 (emphasis added) (quoting *Ambler Realty Co.,* 272 U.S. at 395).

Nevertheless, both cases also state that a regulation fails this test only if it "'has *no* foundation in reason and is a mere *arbitrary or irrational* exercise of power."' *Id.* at 187 (emphasis added) (quoting *Ambler Realty Co.,* 272 U.S. at 395). This language is arguably contradictory, as the "substantial relation"

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[4] *Lochner v. New York,* 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), *abrogated by W. Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937).

test may appear to require heightened scrutiny, while the "arbitrary or irrational" test suggests that deferential rational basis review applies. However, any confusion has long since been resolved because the United States Supreme Court does not interpret the "substantial relation" test as requiring heightened scrutiny.

Since at least 1934, the United States Supreme Court has recognized that "the use of property and the making of contracts are normally matters of private and not of public concern," but "[e]qually fundamental with the private right is that of the public to regulate it in the common interest." *Nebbia v. New York,* 291 U.S. 502, 523, 54 S. Ct. 505, 78 L. Ed. 940 (1934). Laws regulating the use of property are therefore not subject to heightened scrutiny:

> The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *see also Greater Chi. Combine & Ctr., Inc. v. City of Chicago,* 431 F.3d 1065, 1071 (7th Cir. 2005) ("[O]ur precedent has routinely applied [*Ambler Realty* Co.] as a rational basis rule for substantive due process and equal protection challenges to municipal ordinances.").

Thus, according to current United States Supreme Court precedent, a law that regulates the use of property violates substantive due process only if it "fails to serve any legitimate governmental objective," making it "arbitrary or irrational."

Chevron U.S.A., 544 U.S. at 542. Even where a law restricts the use of private property, "ordinances are 'presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality.'" *Samson,* 683 F.3d at 1058 (quoting *Kawaoka v. City of Arroyo Grande,* 17 F.3d 1227, 1234 (9th Cir. 1994)); *see also Kentner,* 750 F.3d at 1280-81.

As noted above, this test corresponds to rational basis review, which requires only that "the challenged law must be rationally related to a legitimate state interest." *Amunrud,* 158 Wn.2d at 222. The plaintiffs do not cite, and we cannot find, any *post-Chevron U.S.A.* decision in which the United States Supreme Court has held the "substantial relation" or "substantially advances" tests require heightened scrutiny in substantive due process challenges to laws regulating the use of property. To the contrary, as recently as 2017, the United States Supreme Court reiterated "that the test articulated in *Agins—that* regulation effects a taking if it 'does not substantially advance legitimate state interests'—was improper *because it invited courts to engage in heightened review of the effectiveness of government regulation*." *Murr v. Wisconsin,* 582 U.S._, 137 S. Ct. 1933, 1947, 198 L. Ed. 2d 497 (2017) (emphasis added) (internal quotation marks omitted) (quoting *Chevron U.S.A.,* 544 U.S. at 540).

3. The use of property is not recognized as a fundamental right for substantive due process purposes

Finally, the plaintiffs argue that heightened scrutiny is required because the "fundamental attribute[s] of property" are recognized as "fundamental right[s]" for substantive due process purposes-not so fundamental as to require strict scrutiny, but fundamental enough to require "some form of intermediate scrutiny." Pls.' Resp. Br. at 31, 39. None of the cases the plaintiffs cite could fairly be read to make such a holding.

Without question, the federal due process clauses do require "heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg,* 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). However, our Court of Appeals recently held that the use of property is not a fundamental right for substantive due process purposes: "Just as the right to pursue a particular profession is not a fundamental right but is a right that is nevertheless subject to reasonable government regulation, so, for substantive due process purposes, is the right to use one's property." *Olympic Stewardship Found. v. Envt'l & Land Use Hr'gs Office,* 199 Wn. App. 668, 720-21, 399 P.3d 562 (2017) (citation omitted) (citing *Amunrud,* 158 Wn.2d at 220), *review denied,* 189 Wn.2d 1040, *cert. denied,* 139 S. Ct. 81 (2018). Both this court and the United States Supreme Court declined to review this holding.

Nevertheless, the plaintiffs contend *Olympic Stewardship* was incorrect, relying on cases from this court and the United States Supreme Court that

discuss the importance of property rights, primarily in the context of takings cases. *See* Pls.' Resp. Br. at 2, 16-17, 31, 39; Pls.' Second Statement of Additional Auth.[5]

We do not question that property rights are important. However, as noted above, the United States Supreme Court has also made it clear that takings claims and substantive due process claims are different matters involving different considerations. *Chevron U.S.A.,* 544 U.S. at 541-42. None of the cases cited by the plaintiffs actually addresses the question of whether the use of property is a fundamental right for substantive due process purposes, and they certainly do not make such a holding.

The plaintiffs also cite many cases from this court and the United States Supreme Court applying the "substantial relation" or "unduly oppressive" tests as evidence that the use of property is a fundamental

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[5] Citing *Knick v. Township of Scott,* 588 U.S._, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019) (takings); *Nollan,* 483 U.S. at 833 (takings); *Kaiser Aetna v. United States,* 444 U.S. 164, 179-80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (takings); *Fuentes v. Shevin,* 407 U.S. 67, 81, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (procedural due process); *McCoy v. Union Elevated R.R. Co.,* 247 U.S. 354, 365, 38 S. Ct. 504, 62 L. Ed. 1156 (1918) (just compensation); *City of Bremerton v. Widell,* 146 Wn.2d 561, 572, 51 P.3d 733 (2002) (criminal trespass); *Mfd. Hous. Cmtys. of Wash. v. State,* 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000) (plurality opinion) (takings); *Guimont v. Clarke,* 121 Wn.2d 586, 595, 854 P.2d 1 (1993) (takings); *City of Des Moines v. Gray Bus., LLC,* 130 Wn. App. 600, 613-14, 124 P.3d 324 (2005) (takings); *State Farm Fire & Cas. Co. v. English Cove Assocs.*, 121 Wn. App. 358, 365, 88 P.3d 986 (2004) (insurance contract interpretation).

right. Pls.' Resp. Br. at 2-3, 13-15, 17-22, 32, 37-39; Pls.' Statement of Additional Auths. at 14-15.[6]

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[6] Citing *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74, 85, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (substantial relation); *Moore v. City of East Cleveland,* 431 U.S. 494, 498 n.6, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion) (substantial relation); *Goldblatt,* 369 U.S. at 594-95 (unduly oppressive); *Wash. ex rel. Seattle Title Tr. Co. v. Roberge,* 278 U.S. 116, 121, 49 S. Ct. 50, 73 L. Ed. 210 (1928) (substantial relation); *Nectow,* 277 U.S. at 187-88 (substantial relation); *Ambler Realty Co.,* 272 U.S. at 395 (substantial relation); *Thomas Cusack Co. v. City of Chicago,* 242 U.S. 526,531, 37 S. Ct. 190, 61 L. Ed. 472 (1917) (substantial relation); *Chi., Burlington & Quincy Ry. Co. v. Illinois,* 200 U.S. 561, 593, 26 S. Ct. 341, 50 L. Ed. 596 (1906) (substantial relation); *Jacobson v. Massachusetts,* 197 U.S. 11, 31, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (substantial relation); *Minnesota v. Barber,* 136 U.S. 313, 320, 10 S. Ct. 862, 34 L. Ed. 455 (1890) (substantial relation); *Tiffany Family Tr. Corp.,* 155 Wn.2d 225 (unduly oppressive); *Viking Props., Inc. v. Holm,* 155 Wn.2d 112, 118 P.3d 322 (2005) (unduly oppressive); *Willoughby v. Dep't of Labor & Indus.,* 147 Wn.2d 725, 733, 57 P.3d 611 (2002) (unduly oppressive); *Asarco, Inc. v. Dep't of Ecology,* 145 Wn.2d 750, 762, 43 P.3d 471 (2002) (unduly oppressive); *Christianson v. Snohomish Health Dist.,* 133 Wn.2d 647, 661, 672 n.11, 946 P.2d 768 (1997) (unduly oppressive); *Sintra, Inc. v. City of Seattle,* 131 Wn.2d 640, 935 P.2d 555 (1997) (unduly oppressive); *Rivett v. City of Tacoma,* 123 Wn.2d 573, 580-81, 870 P.2d 299 (1994) (unduly oppressive); *Margola Assocs. v. City of Seattle,* 121 Wn.2d 625, 649-50, 854 P.2d 23 (1993) (unduly oppressive); *Guimont,* 121 Wn.2d at 609 (unduly oppressive); *Robinson v. City of Seattle,* 119 Wn.2d 34, 55,830 P.2d 318 (1992) (unduly oppressive); *Presbytery,* 114 Wn.2d at 330-31 (unduly oppressive); *Orion Corp.,* 109 Wn.2d at 646-47 (unduly oppressive); *W. Main Assocs. v. City of Bellevue,* 106 Wn.2d 47, 52, 720 P.2d 782 (1986) (unduly oppressive); *Cougar Bus. Owners Ass'n v. State,* 97 Wn.2d 466,477,647 P.2d 481 (1982) (unduly oppressive); *State ex rel. Rhodes v. Cook,* 72 Wn.2d 436,439,433 P.2d 677 (1967) ("The test when lawful activity upon private property is involved has been said to be more stringent."); *Remington Arms Co.,* 55 Wn.2d at 5 ("'clear, real, and substantial

However, as discussed above, both tests are now interpreted as deferential standards corresponding to rational basis review. Therefore, the application of these tests does not indicate that the use of property is a fundamental right for substantive due process purposes.

In sum, the "unduly oppressive" test recited in our precedent can no longer be interpreted as requiring heightened scrutiny because its legal underpinnings have disappeared. The plaintiffs also do not show that laws regulating the use of property must be subject to heightened scrutiny as a matter of current federal law or that the use of property is a fundamental right for substantive due process purposes. Therefore, in answer to the third certified question, we hold that rational basis review applies to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance.

CONCLUSION

Based on the foregoing, we answer the certified questions as follows: Unless and until this court recognizes a principled basis for adopting heightened protections as matter of independent state law, state substantive due process claims are subject to the same standards as federal substantive due process claims. The same is true of state substantive due process claims involving land use regulations and other laws regulating the use of property. Therefore, the

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connection'" required (quoting 16 C.J.S. *Constitutional Law* § 195 (1956))); *City of Seattle v. Ford,* 144 Wash. 107, 111, 115, 257 P. 243 (1927) (holding regulation at issue went "'beyond what is necessary'" and was "excessive" (quoting 1 Christopher G. Tiedeman, State and Federal Control of Persons and Property 5 (1900))).

standard applicable to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance is rational basis review.

s/ YU, J.

WE CONCUR:

s/ WIGGINS, J.

s/ JOHNSON, J.

s/ GONZALEZ, J.

s/ OWENS, J.

s/ GORDON-McCLOUD, J.

APPENDIX

The following is a nonexclusive list of Washington Supreme Court cases that may no longer be interpreted as requiring heightened scrutiny in article I, section 3 substantive due process challenges to laws regulating the use of property:

Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 218 P.3d 180 (2009) (plurality opinion)

Allen v. City of Bellingham, 95 Wash. 12, 163 P. 18 (1917)

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006)

Asarco, Inc. v. Dep't of Ecology, 145 Wn.2d 750, 43 P.3d 471 (2002)

Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 169 P.3d 14 (2007) (plurality opinion)

Brown v. City of Seattle, 150 Wash. 203, 272 P. 517, 278 P. 1072 (1928)

Christianson v. Snohomish Health Dist., 133 Wn.2d 647, 946 P.2d 768 (1997)

City of Olympia v. Mann, 1 Wash. 389, 25 P. 337 (1890)

City of Seattle v. Ford, 144 Wash. 107, 257 P. 243 (1927)

City of Seattle v. Montana, 129 Wn.2d 583, 919 P.2d 1218 (1996) (plurality opinion)

City of Seattle v. Proctor, 183 Wash. 293, 48 P.2d 238 (1935)

City of Seattle v. Ross, 54 Wn.2d 655, 344 P.2d 216 (1959)

City of Spokane v. Latham, 181 Wash. 161, 42 P.2d 427 (1935)

Convention Ctr. Coal. v. City of Seattle, 107 Wn.2d 370, 730 P.2d 636 (1986)

Cougar Bus. Owners Ass'n v. State, 97 Wn.2d 466, 64 7 P .2d 481 (1982)

Covell v. City of Seattle, 127 Wn.2d 874, 905 P.2d 324 (1995)

Crane Towing, Inc. v. Gorton, 89 Wn.2d 161, 570 P.2d 428 (1977)

Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 586 P.2d 860 (1978)

Ellestad v. Swayze, 15 Wn.2d 281, 130 P.2d 349 (1942)

Erickson & Assocs. v. Mclerran, 123 Wn.2d 864, 872 P.2d 1090 (1994)

Guimont v. Clarke, 121 Wn.2d 586, 854 P.2d 1 (1993)

Hass v. City of Kirkland, 78 Wn.2d 929, 481 P.2d 9 (1971)

Hauser v. Arness, 44 Wn.2d 358, 267 P.2d 691 (1954)

Homes Unlimited, Inc. v. City of Seattle, 90 Wn.2d 154, 579 P .2d 1331 (1978)

Horney v. Giering, 132 Wash. 555, 231 P. 958 (1925)

Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 49 P.3d 867 (2002)

Lenci v. City of Seattle, 63 Wn.2d 664, 388 P.2d 926 (1964)

Lutz v. City of Longview, 83 Wn.2d 566, 520 P.2d 1374 (1974)

Manos v. City of Seattle, 173 Wash. 662, 24 P.2d 91 (1933)

Margola Assocs. v. City of Seattle, 121 Wn.2d 625, 854 P.2d 23 (1993)

Markham Advert. Co. v. State, 73 Wn.2d 405, 439 P.2d 248 (1968)

Maytown Sand & Gravel, LLC v. Thurston County, 191 Wn.2d 392, 423 P.3d 223 (2018)

McNaughton v. Boeing, 68 Wn.2d 659, 414 P.2d 778 (1966)

Myrick v. Bd. of Pierce County Comm'rs, 102 Wn.2d 698, 677 P.2d 140, 687 P.2d 1152 (1984)

Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062 (1987)

Patton v. City of Bellingham, 179 Wash. 566, 38 P.2d 364 (1934)

Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 907 (1990)

Ragan v. City of Seattle, 58 Wn.2d 779, 364 P.2d 916 (1961)

Remington Arms Co. v. Skaggs, 55 Wn.2d 1, 345 P.2d 1085 (1959)

Rivett v. City of Tacoma, 123 Wn.2d 573, 870 P.2d 299 (1994)

Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992)

Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997)

Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992)

State ex rel. Brislawn v. Meath, 84 Wash. 302, 147 P. 11 (1915)

State ex rel. Faulk v. CSG Job Ctr., 117 Wn.2d 493, 816 P.2d 725 (1991)

State ex rel. Modern Lumber & Millwork Co. v. MacDuff, 161 Wash. 600, 297 P. 733 (1931)

State ex rel. Rhodes v. Cook, 72 Wn.2d 436, 433 P.2d 677 (1967)

State ex rel. Spokane Int'l Ry. Co. v. Kuykendall, 128 Wash. 88, 222 P. 211 (1924)

State ex rel. Warner v. Hayes Inv. Corp., 13 Wn.2d 306, 125 P.2d 262 (1942)

State v. Bowen & Co., 86 Wash. 23, 149 P. 330 (1915)

State v. Conifer Enters., Inc., 82 Wn.2d 94, 508 P.2d 149 (1973)

State v. Fabbri, 98 Wash. 207, 167 P. 133 (1917)

State v. Van Vlack, 101 Wash. 503, 172 P. 563 (1918)

Tiffany Family Tr. Corp. v. City of Kent, 155 Wn.2d 225, 119 P.3d 325 (2005)

Town of Woodway v. Snohomish County, 180 Wn.2d 165, 322 P.3d 1219 (2014)

Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 733 P.2d 182 (1987)

Viking Props., Inc. v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005)

Wash. Kelpers Ass'n v. State, 81 Wn.2d 410, 502 P.2d 1170 (1972)

Weden v. San Juan County, 135 Wn.2d 678, 958 P.2d 273 (1998)

W. Main Assocs. v. City of Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986)

Willoughby v. Dep't of Labor & Indus., 147 Wn.2d 725, 57 P.3d 611 (2002)

STEPHENS, J. (concurring in part, dissenting in part)—I agree with the majority's answers to the first two certified questions, but I write separately because the third certified question does not involve a matter of state law and is therefore not appropriately before this court.

"[C]ertified questions should be confined to uncertain questions of state law." *City of Houston v. Hill,* 482 U.S. 451,471 n.23, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) (citing 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4248 (1978)). Any federal court may

certify a "question of local law" to this court, RCW 2.60.020, but "[t]he decision whether to answer a certified question . . . is within [our] discretion," *Broad v. Mannesmann Anlagenbau, AG,* 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (citing *Hoffman v. Regence Blue Shield,* 140 Wn.2d 121, 128, 991 P.2d 77 (2000); RAP 16.16(a)). At times, we have "declined to answer certified questions where . . . any attempt to answer would be improvident." *United States v. Hoffman,* 154 Wn.2d 730, 748, 116 P.3d 999 (2005) (citing *Hoffman,* 140 Wn.2d at 128).

Here, the district court asks us (1) what standard of scrutiny generally applies to a substantive due process claim under the Washington Constitution, (2) whether that same standard of scrutiny applies to substantive due process claims involving land use regulations, and (3) what standard of scrutiny should be applied to Seattle's Fair Chance Housing Ordinance, chapter 14.09 Seattle Municipal Code. *See* Order, No. C18-0736-JCC, at 2-3 (W.D. Wash. Feb. 5, 2019). As the majority cogently explains in response to the first two certified questions, the standard of scrutiny applicable to substantive due process claims under the Washington Constitution is identical to the standard applicable to such claims under the federal constitution. But then, despite recognizing that "the parties' primary dispute [under the third certified question] is the minimum level of scrutiny required by the federal due process clauses," the majority provides a fairly encompassing analysis of federal substantive due process precedent and proposes a conclusion under "current federal law." Majority at 11-12.

The majority justifies its decision to answer a question of federal law by claiming "it is necessary to

provide complete answers to the certified questions in this case." *Id.* at 11 (citing *Broad,* 141 Wn.2d at 676). But "certified questions should be confined to uncertain questions of state law." *Hill,* 482 U.S. at 471 n.23.

There is nothing to be gained by offering the district court our interpretation of federal law, when that court must make its own decision and will undoubtedly consider further arguments from the parties about whether our (nonbinding) interpretation is right or wrong. Moreover, there is no requirement for us to provide complete—or, indeed, any—answers to certified questions. *See Broad,* 141 Wn.2d at 676 ("The decision whether to answer a certified question pursuant to chapter 2.60 RCW is within the discretion of the court." (citing Hoffman, 140 Wn.2d at 128; RAP 16.16(a))). We frequently limit certified questions, change them, or simply decline to answer-and that is when state law questions are presented. We have all the more reason to decline to answer a question that requires interpretation of uncertain federal law.

I would decline to answer the third certified question here and accordingly dissent from that portion of the majority's opinion.

s/ Stephens, J., Fairhurst, C.J., Madsen, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON	)	NO. 96817-9
CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON, Plaintiffs,	)	ORDER AMENDING OPINION
v.	)	
THE CITY OF SEATTLE, Defendant.	)	

It is hereby ordered that the majority opinion of Yu, J., filed November 14, 2019, in the above entitled case is amended as indicated below.

On page 13, line 18 of the slip opinion, after "544 U.S. at 542." delete "It does not reflect the core concern of substantive due process, which is 'whether a regulation of private property is effective in achieving some legitimate public purpose.' *Id.*"

DATED this 9th day of January, 2020.

s/ STEPHENS, C.J.
Chief Justice

Appendix D-2

APPROVED:

s/ JOHNSON, J.	s/ GONZALEZ, J.
s/ OWENS, J.	s/ GORDON-McCLOUD, J.
s/ WIGGINS , J.	s/ YU, J.

Seattle Municipal Code 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.)

Seattle Municipal Code Chapter 14.09 - Use of Criminal Records in Housing (in relevant part)

* * * * *

14.09.005 - Short title

This Chapter 14.09 shall constitute the "Fair Chance Housing Ordinance" and may be cited as such.

(Ord. 125393, § 2, 2017.)

* * * * *

14.09.025 - Prohibited use of criminal history

A. It is an unfair practice for any person to:

1. Advertise, publicize, or implement any policy or practice that automatically or categorically excludes all individuals with any arrest record, conviction record, or criminal history from any rental housing that is located within the City.

2. Require disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in Section 14.09.115.

3. Carry out an adverse action based on registry information of a prospective adult occupant, an adult tenant, or an adult member of their household, unless the landlord has a

legitimate business reason for taking such action.

4. Carry out an adverse action based on registry information regarding any prospective juvenile occupant, a juvenile tenant, or juvenile member of their household.

5. Carry out an adverse action based on registry information regarding a prospective adult occupant, an adult tenant, or an adult member of their household if the conviction occurred when the individual was a juvenile.

B. If a landlord takes an adverse action based on a legitimate business reason, the landlord shall provide written notice by email, mail, or in person of the adverse action to the prospective occupant or the tenant and state the specific registry information that was the basis for the adverse action.

C. If a consumer report is used by a landlord as part of the screening process, the landlord must provide the name and address of the consumer reporting agency and the prospective occupant's or tenant's rights to obtain a free copy of the consumer report in the event of a denial or other adverse action, and to dispute the accuracy of information appearing in the consumer report.

(Ord. 125515 , § 2, 2018; Ord. 125393 , § 2, 2017.)

* * * * *

Appendix G-1

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CNA APARTMENTS, LLC, and EILEEN, LLC, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.	No. 17-2-05595-6 SEA STIPULATED FACTS AND RECORD

A. Agreement.

For purposes of forthcoming cross motions for summary judgment, the parties stipulate to the following facts and will limit themselves to these facts and the attached documents unless the parties agree to additional facts or documents.

The stipulated facts and attached documents are numbered consecutively. The parties may cite the stipulated facts by paragraph number (using "SF" for "stipulated fact") and the attached documents by page number (using "R" for "stipulated record"). A blank page separates each document.

Although Defendant City of Seattle ("City") is unable to confirm the facts regarding individual plaintiffs (F 1-5), the City stipulates to those facts for purposes of the cross motions for summary judgment. The City also agrees Plaintiffs have established standing to maintain this action.

Nothing in this stipulation precludes either party from: characterizing the attached documents or relying on facts the documents support; citing published material, such as articles in periodicals or papers posted online; asking the court to take judicial notice of adjudicative facts under ER 201; or arguing that certain stipulated facts are immaterial to this dispute.

B. Agreed Facts and Record.

Plaintiffs and their interests in this dispute.

1. Chong and MariLyn Yim own a duplex and a triplex in Seattle. They and their three children live in one of the triplex units. They rent out the duplex and the other two units in the triplex. Several of their rented units are shared by roommates. The Yims share a yard with their renters, and the Yim children are occasionally at home alone when their renters are in the building.

2. 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.

3. CNA Apartments, LLC, is owned by Thomas, John, George, and Penelope Benis for college investment. The LLC manages a six-unit apartment building in Seattle. The three Benis children use the rental income they receive from their ownership

interests in the LLC as their college fund. The children each have a twenty-percent ownership interest in the LLC. Their father, Chris Benis, acts as the LLC's manager, and their mother owns the remaining forty-percent interest.

4. 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. Currently, the Davises rent a unit to two young men from separate minority groups. They have lived in the unit over three years, but they would not satisfy the Davises' current screening requirements that tenants possess prior rental history and a solid credit history. Because both young men were recent graduates, they possessed no such history. The Davises liked them because they were polite, took off their shoes when they viewed the apartment, and seemed excited to live there. The Davises decided to rent to them even though the pair did not satisfy their typical rental criteria.

5. Beth Bylund owns and rents out two single-family homes in Seattle. Ms. Bylund hesitates to raise rents along with the market because she fears losing her current tenants and being forced to offer tenancy to the first prospective occupant meeting all of her screening criteria even if Ms. Bylund would prefer to offer tenancy to a different applicant meeting all of her criteria.

Activity before the relevant legislation.

6. On February 20, 2014, the Seattle Office of Civil Rights ("SOCR") entered a Consultant Agreement with Fair Housing Center of Washington to conduct fair housing testing in Seattle. SR 000001-13.

7. At some later point, SOCR posted "Frequently Asked Questions" on its web page discussing the 2014 fair housing testing. SR 000014-18.

8. On November 2, 2015, SOCR entered a Consultant Agreement with Northwest Fair Housing Alliance to conduct fair housing testing in Seattle. SR 000019-29.

9. On May 2, 2016, SOCR announced it had filed 23 Director's charges of illegal discrimination against landlords based on its 2015 fair housing testing. SR 000030-31.

Ordinance 125114: adding the "first in time" provisions of SMC 14.08.050.

10. On April 19, 2016, the Mayor transmitted legislation to the City Council, which was ultimately assigned Council Bill Number ("CB") 118686. SR 000032-61. CB 118686 did not propose to add Seattle Municipal Code Section ("MC") 14.08.050, which contains the "first in time" provisions at issue in this dispute.

11. On May 23, 2016, the Council referred CB 118686 to the Civil Rights, Utilities, Economic Development, and Arts Committee ("CRUEDA") for review. *See* SR 000032.

12. On or about June 14, 2016, Council Central staff submitted a memo to CRUEDA that, among other things, discussed a potential amendment to add "first in time" provisions. SR 000062-87. (memo and Attachment A; the other attachments are not germane to this dispute).

13. In July 2016, Columbia Legal Services and the Tenants Union of Washington submitted a memo to

staff for Council Member ("CM") Lisa Herbold, the bill's sponsor, commenting on proposed "first in time" amendments. SR 000088-93.

14. On or about July 20, 2016 Council Central staff submitted a memo updating CRUEDA on the "first in time" and other provisions. SR 000094-104. (omitting attachment B, the June 14, 2016 Central Staff memo to CRUEDA already included at R 000062-87).

15. On July 22, 2016, CRUEDA passed an amended version of CB 118686 that would add SMC 14.08.050 and its "first in time" provisions to City law. *See* SR 000032 and SR 000105-128.

16. On July 27, 2016, the City Clerk transmitted that amended version to the Council President as a new bill (CB 118755). SR 000129-134. The Clerk changed the bill number because CRUEDA's amendments changed the bill's title. *See* SR 000135-141. (omitting Attachments A and B, which are included as separate SR documents)

17. On or about August 1, 2016, Council Central staff submitted a memo to the Council explaining: the main changes the Office of Civil Rights proposed to the original bill; CRUEDA's amendments; and changes made to the "first in time" policy before introduction of CB 118755. *Id.*

18. On August 8, 2016 the Council voted to make several amendments to CB 118755 and passed the amended version of the bill. *See* SR 000129-134.

19. On August 12, 2016, CM Herbold posted an entry on her web page about the new legislation. SR 000142-147. Among other things, that entry stated: "The research shows that even within jurisdictions

with strong anti-discrimination laws, it is very important to find ways to address the role of implicit biases in order to reduce discrimination." That sentence contained a link to a 2015 report from the Kirwan Institute for the Study of Race and Ethnicity entitled "Implicit Bias." SR 000148-238. The entry also provided links to other documents, including ones by Washington Citizen Action Network, Washington Rental Housing Association, and Washington Multifamily Housing Association. SR 000239-276.

20. On August 17, 2016, the Mayor signed the bill, which became Ordinance 125114. SR 000277-301. That ordinance added SMC 14.08.050 and its "first in time" provisions to City law.

Ordinance 125228: amending and delaying enforcement of SMC 14.08.050.

21. On December 16, 2016, the Council passed CB 118881, which the Mayor signed on December 21, 2016, and became Ordinance 125228. SR 000302-307. That legislation delayed enforcement of the new "first in time' provisions until July 1, 2017, and exempted certain accessory dwelling units from the provisions. *Id.*

Agreed to November 28, 2017.

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