No. 19-1136

IN THE

Supreme Court of the United States

CHONG AND MARILYN YIM, KELLY LYLES, BETH BYLUND, CNA APARTMENTS, LLC, AND EILEEN, LLC,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF *AMICUS CURIAE* RENTAL HOUSING ASSOCIATION OF WASHINGTON

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A. INTEREST OF *AMICUS CURIAE* RHAWA

This memorandum is submitted on behalf of the Rental Housing Association of Washington ("RHAWA") supporting the petitioners' petition for a writ of certiorari to the Washington Supreme Court. This memorandum is filed with the consent of the parties pursuant to Rule 37(2)(a).[1]

RHAWA is a 5,000 plus member non-profit organization of rental housing owners (single family homes to multi-family communities) in Washington. Its objectives are to oversee the general welfare of the rental housing industry, lead advocacy efforts, provide continuous development of skills and knowledge, and assist members to provide appropriate services to the renting public.

RHAWA represents the interests of rental housing owners to state and local legislative bodies, news media and the general public. RHAWA is actively involved in the Washington State Legislature and local governments on any legislation affecting landlords (as it was on FIT before the Seattle City Council). Its staff studies the regular meeting agendas of the local governments, meets with city and county council members, and reports to its board about any issues which affect the local community. It is also involved in educating and encouraging member involvement on issues affecting the rental housing

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

industry. RHAWA offers educational programs which enhance rental property owners' knowledge and provides different fora for the sharing of pertinent information in the rental housing industry and social interaction. RHAWA also offers products and services rental property owners need to be successful, while encouraging the highest standards of ethics and integrity for its members. RHAWA promotes the value of the rental housing industry to the community and educates renters about the process of becoming a tenant and being a good tenant.

In this instance, RHAWA actively participated before the Seattle City Council on the Council Bill that became FIT, clearly articulating its opposition to the City's proposed mandatory FIT law.[2] Second, one of the plaintiffs in the FIT case was Christopher Benis, the former RHAWA president.[3] Finally, RHAWA was quoted in news accounts, welcoming the trial court's ruling here.[4]

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2. Sean Martin, RHAWA's lobbyist, told the aide to the Council Bill's prime sponsor on July 14, 2016 that RHAWA believed "that there are many issues in the legislation which do not properly address real-world tenant screening situations, and other sections which require clarifying." Martin then went on to note: "For rolling applications, we do not believe first-in-time should apply at all," noting the practical problems yet again. RHAWA offered a detailed critique of the legislation.

3. In fact, as a direct result of FIT's enactment, Mr. Benis felt so strongly about FIT's adverse implications and similar anti-landlord legislation emanating from the Seattle City Council that CNA Apartments, LLC, in which his family had an interest, sold the three apartment buildings it owned in the City.

4. *See*, *e.g.*, Sara Anne Lloyd, *Court rules against Seattle's first-in-time law*, Curbed, March 29, 2018, https://seattle.curbed.com/2018/3/29/17177026/seattle-first-in-time-law ("In a statement,

RHAWA participated as an *amicus curiae* before the Washington Supreme Court.

B. SUMMARY OF ARGUMENT

The City of Seattle ("City") enacted Ordinance Number 125114 in 2016 requiring landlords to promulgate criteria for the rental of residential units and then mandatorily rent to the first prospective renter who putatively meets such criteria. The centerpiece of that ordinance is Seattle Municipal Code ("SMC") § 14.08.050.[5]

Various landlords sued the City in the King County Superior Court contending that this first-in-time ordinance ("FIT") was unconstitutional as a violation of their rights to substantive due process of law and engage in commercial free speech, and constituted a taking of

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the Rental Housing Association of Washington (RHAWA)'s interim executive director Sean Martin said he's 'pleased that the court recognized the rights of rental housing owners to decide how to lawfully operate their private property.'"); Daniel Beekman, *Judge rejects Seattle's 'first-come, first-served' rental law as unconstitutional*, Seattle *Times*, March 28, 2018, https://www.seattletimes.com/seattle-news/politics/judge-rejects-seattles-first-come-first-served-rental-law/ ("Chris Benis, a real-estate attorney and a plaintiff in the case whose family owns a small apartment building in Magnolia, said getting to know perspective tenants is important. 'The idea of the city preventing us from making a judgmental call to protect our property and other tenants is just plain wrong,' said Benis, who serves as legal counsel for and is a past president of the Rental Housing Association of Washington, a landlord group.").

5. That Ordinance was subsequently amended in 2016 by Ordinance 125228, delaying its effective date to July 1, 2017.

their property. The trial court agreed, invalidating FIT as unconstitutional under this Court's well-established substantive due process principles, but the Washington Supreme Court then reversed that decision, articulating an incorrect analysis of this Court's substantive due process juris prudence.

RHAWA adopts the statement of the case set forth by the petitioners in their petition at 3-13.

C. ARGUMENT

Although RHAWA fully agrees with the petitioners' argument in their petition at 13-21 that FIT destroys a fundamental aspect of landlords' property right – the right to rent to persons entirely of their choosing, so long as the constitutional rights of tenants are not impaired – RHAWA focuses its argument to this Court on the substantive due process issue and how FIT unduly oppresses landlords' property rights.

(1) The Washington Supreme Court Misunderstood This Court's Precedents on Substantive Due Process of Law

The Washington Supreme Court opinion qualifies for review by this Court under Rule 10(c). Indeed, this is precisely the type of case for which certiorari jurisdiction was envisioned – "to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of federal laws." *Braxton v. U.S.,* 500 U.S. 344, 347, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991). Only this Court can vindicate its substantive due process jurisprudence.

For at least thirty years, as petitioners note in their petition at 10, the Washington Supreme Court in *numerous* cases has required that a regulation must not be "unduly oppressive" as part of a substantive due process analysis. *E.g., West Main Assocs. v. City of Bellevue,* 106 Wn.2d 47, 52, 720 P.2d 782 (1986); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907, *cert. denied*, 488 U.S. 911 (1990). Indeed, in *Weden v. San Juan County*, 135 Wn.2d 678, 706, 958 P.2d 273 (1998), the Washington court observed that the purpose of the "unduly oppressive" prong of the substantive due process test "is to prevent excessive police power regulations that would require an individual to 'shoulder an economic burden, which in justice and fairness the public should rightfully bear.'" (quoting and citing, *inter alia, Orion Corp. v. State,* 109 Wn.2d 621, 648-49, 747 P.2d 1062 (1987).[6]

But without complying with its own stringent *stare decisis* protocol, the Washington Supreme Court swept away its substantive due process jurisprudence in the guise of adhering to this Court's substantive due process analysis.

But the Washington court completely misperceived this Court's substantive due process analysis which, at its core, requires that the regulation "substantially

6. The "unduly oppressive" prong of the substantive due process has been applied by all three divisions of the Washington Court of Appeals in reliance on the former Washington Supreme Court precedent. *See, e.g., Cradduck v. Yakima County*, 166 Wn. App. 435, 443, 271 P.3d 289 (2012); *Bayfield Resources Co. v. Western Wash. Growth Management Hearings Bd.*, 157 Wn. App. 1067, 2010 WL 3639906 (2010); *Klineburger v. Wash. State Dep't of Ecology*, 4 Wn. App. 2d 1077, 2018 WL 3853574 at *4-5 (2018), *review dismissed*, 192 Wn.2d 1018 (2019).

advance" the government's purpose in a regulation, as the petitioners document in their petition at 22-26. This Court's decision in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542-43, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) did not dispense with an analysis of the impact of the questioned regulation upon those affected by it. The adverse impact of a regulation on the property owner is essential to this Court's analysis and goes beyond the notion that there is merely a rational basis for such regulation. As this Court observed, "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id.* at 542. Obviously, this analysis does not focus only on the government's ostensible objective in the regulation, but also on how that regulation impacts the legitimate property interests of the regulated landowner. How else to assess this Court's reference to "arbitrariness" or "irrationality" of the regulation in *Lingle*? The Washington court's decision focused *only* on the government's ostensible regulatory objective, *ignoring* the impact of the regulation on the property owner. That would set the fundamental purpose of the Due Process Clause on its ear. "The touchstone of due process is *protection of the individual* against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (emphasis added).

Further, as the petitioners articulate in their petition at 28-29, there is a plain misconception on the part of a number of state high courts, unlike the Federal circuit courts, regarding whether this Court's substantive due process jurisprudence requires consideration of a regulation's impact on the person or entity subject to it. This case classically fits within the provisions of this Court's Rule 10(c) for review, given the state court split

of authority and the Washington court's decision at odds with this Court's substantive due process precedents.

(2) This Court Should Grant Review Because FIT Is Arbitrary, Unduly Oppressive of Landlords' Property Rights and Fails to Advance Its Alleged Regulatory Purpose, and Will Only Encourage Similar Rights–Violative Ordinances Nationally

The Washington Supreme Court's erroneous analysis of this Court's substantive due process law will severely harm the property rights of landlords nationwide. RHAWA can readily attest to the profoundly oppressive nature of Seattle's FIT ordinance from the on-the-ground experience of its members.[7]

FIT was allegedly designed to avert landlords' discrimination in rentals by eliminating landlord subjectivity and assuring the application of objective

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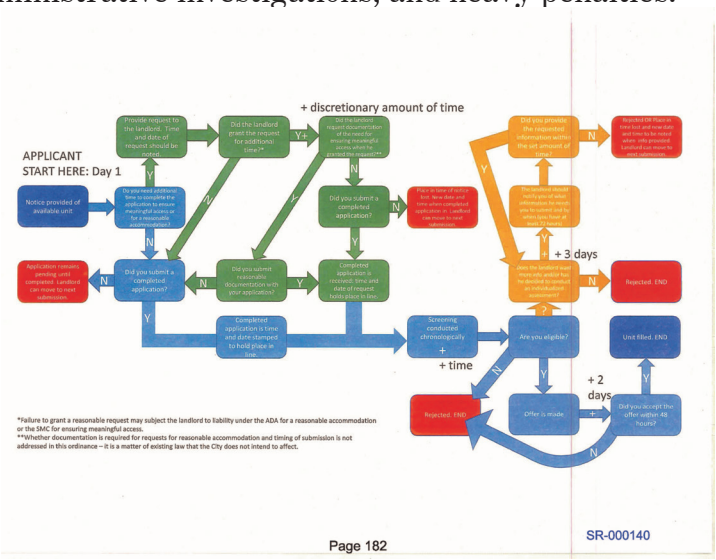
7. As petitioners have recounted at 35, in addition to severely curtailing criminal background checks of prospective tenants, FIT is but one of numerous anti-landlord measures emanating from Seattle's City Council. 40% of Seattle's landlords are selling their properties due to such onerous regulations, graphically illustrating the unduly oppressive nature of the City's anti-landlord actions. Tom and Curley Show, *40 percent of Seattle landlords are selling due to new rental rules*, KIRO Radio, July 26, 2018, https://mynorthwest.com/1061466/seattle-landlords-rent-regulations/. *See also*, Angie Gerrald and Charlotte Thistle, *Seattle keeps making it harder for small landlords like us,* Seattle *Times*, February 9, 2020, https://www.seattletimes.com/opinion/seattle-keeps-making-it-harder-for-small-landlords-including-a-proposed-ban-on-winter-evictions/ (noting that the City's actions prejudice small landlords in particular, making its rental housing market "more expensive and less flexible").

criteria in property rentals. FIT fails of that goal and substitutes instead a Rube Goldberg-like regulatory regime that will subject landlords to possible civil lawsuits, administrative investigations, and heavy penalties:



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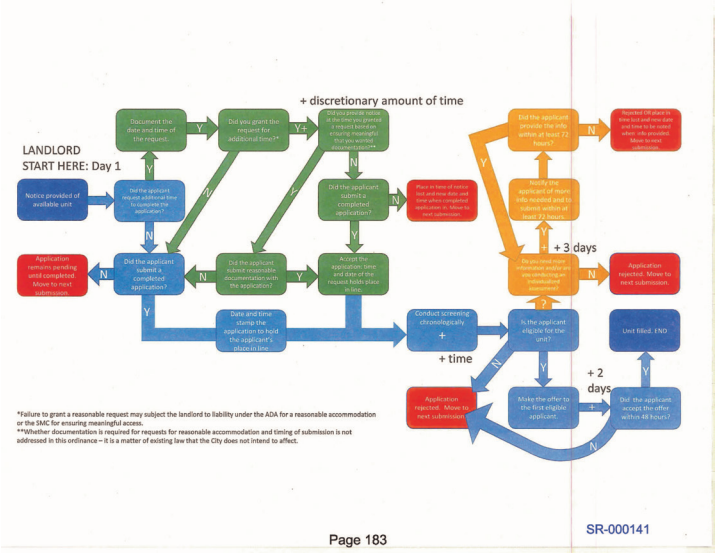

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FIT's mandate takes away a landlord's freedom of contract, because once the terms of tenancy are advertised, the terms, acceptable by anyone, are set in stone and negotiations are impossible without meeting FIT's truly arcane procedures.

Landlords need flexibility on the exact terms of a residential tenancy. Smaller landlords usually negotiate in a "give and take" way with prospective tenants on a variety of factors. The first person to apply might want a 6-month lease instead of a year's lease. They might want to move in on February 1, not December 1. To obtain a desirable unit, a prospective client might offer a higher rental rate or request other concessions in negotiations. A prospective tenant might come to a landlord saying, "will you replace the carpet if I pay $50 more per month?" The landlord may want to reply, "OK, but for that, I am going to require a 2-year lease." Under FIT, such negotiations are forbidden.

Moreover, a landlord can never know all the "deal killers" that may arise in negotiations. An ordinance that requires a landlord to specify in advance all criteria for tenancy and a threshold for each item, takes away all discretion. A landlord cannot possibly envision all the circumstances that might arise before a deal is struck with a potential tenant. For example, an RHAWA landlord showed an apartment to an applicant who gave her kids pens. The children, as children do, then promptly started writing on the walls. Does a landlord have to contemplate, in advance, that the tenants' kids will not damage the unit while showing it or else the landlord cannot use that to

disqualify an applicant? If an African-American landlord sets the criteria for the rental of a unit and a neo-Nazi skinhead emblazoned with swastika tattoos arrives at the door, wearing a KKK button, can that landlord use that fact to say this tenant is not a good fit? And even if criteria can be developed, what if the criteria are essentially subjective in nature? An RHAWA landlord has a client who owns a duplex, lives in one half, and rents out the other. She has a dog and allows her tenants to have pets. She has "doggy dates" between her dog and the prospective tenants' to see if the pets get along. She does this before she offers them an application for tenancy. How is she able to establish a threshold for how satisfactory the dogs' interaction must be to go to the next step in the process? Similar issues are legion.

With a mandatory FIT, with attendant civil and criminal penalties, any error by the landlord only guarantees litigation, with its attendant aggravation and expense.

More critically, if the City's goal is to eliminate landlord "subjectivity" and "implicit bias" in rentals, as the City claimed below, in its brief at 6-9, FIT again fails of that objective. The City claimed below that a landlord may essentially establish whatever "criteria" she/he might choose for the rental of a property. But, of course, in the real world, it is not as simple as the City portrays. In the examples noted *supra*, what if the African-American landlord who wishes to avoid renting to the Neo-Nazi establishes a criterion that any renter must be "compatible with the landlord's social values?" Would that highly subjective criterion pass muster or does the City have authority under FIT to invalidate what it deems to be

objectionable criteria? In the landlord and dog scenario, if the landlord established a criterion that the renter's dog must be satisfactory to the landlord, would that work? The City baldly asserted before the Washington Supreme Court in its brief at 31 that the criteria need not even be "quantifiable or objective." If that is true, how can landlord subjectivity or implicit bias then be eliminated by FIT? Moreover, the ordinance speaks in terms of a "minimum threshold" for the criteria, seemingly allowing the City to decide if a threshold of some sort for the "objective" criteria is met.

Simply put, the City did not eliminate all landlord "subjectivity" in the rental of properties by enacting FIT unless it ultimately decides in its administration of FIT that certain inherently subjective criteria established by landlords will be unacceptable to it. FIT is, thus, arbitrary.[8]

FIT is too arbitrary to satisfy the "unduly oppressive/substantially advances" analysis, given its disruption of a

8. Such a "trust us" argument from the City only implicitly acknowledges the ultimate vagueness of the FIT law, suggesting that it may be subject to a due process challenge on such grounds. "Vague laws invite arbitrary power." *Sessions v. Dimaya*, __ U.S. __, 138 S. Ct. 1204, 1223, 200 L. Ed. 2d 549 (2018) (Gorsuch, J. concurring). A statute can be impermissibly vague for either of two independent reasons: first, it if fails to provide people of ordinary intelligence a reasonable opportunity to understand what it prohibits; or, second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (Prosecution under a loitering ordinance held invalid). Both facets of the *Morales* void-for-vagueness analysis are implicated by the City's FIT ordinance.

landlord's fundamental attribute of property ownership, and the heavy potential penalties it imposes. Landlords will face litigation and serious penalties on the basis of Seattle's highly subjective ordinance. If that ordinance stands, it will become the model for numerous other jurisdictions in our country.

D. CONCLUSION

This case presents an important one for the clear articulation of this Court's substantive due process principles in the landlord-tenant setting. FIT is an overreach by the City that deprives landlords of vital property rights. Review by this Court is merited. Rule 10(c). This Court should grant a writ of certiorari to the Washington Supreme Courth.

DATED this 26th day of March, 2020.

Respectfully submitted,

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