No. 23-329

In The
Supreme Court of the United States

CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Yims' petition asks this Court to decide whether a property owner's right to exclude potentially dangerous tenants—a fundamental right entitled to full constitutional protection under the Takings Clause—is relegated to a nonfundamental right and deferential rational basis review under the Due Process Clause. The City of Seattle acknowledges the differential treatment of the right to exclude and approves of it. BIO.5, 14. But the question remains: how can a right be fundamental under one clause but not another? "The Constitution functions as a coherent whole, not as a series of isolated and unrelated clauses…" *United States v. Traficant*, 368 F.3d 646, 651 (6th Cir. 2004). This Court has never squarely answered the question whether the right to exclude—a fundamental property right for Takings purposes—is equally fundamental as a matter of due process. This is a foundational question that rests on constitutional theory, history, and tradition. No further factual development or percolation is warranted or needed, and only this Court can answer the question. The petition should be granted.

ARGUMENT

I.

THE YIMS PROPERLY RAISED A FACIAL CHALLENGE UNDER THE DUE PROCESS CLAUSE

Facial challenges are not *abstract* challenges—they are brought in the context of actual people suffering actual injuries. *Mosby v. Ligon*, 418 F.3d 927, 932–33 (8th Cir. 2005) (litigants must satisfy "normal requirements" of Article III standing to bring

facial challenges). Nor is there anything inherent in a facial claim that advises against review. *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415 (2015); *see also* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Calif. L. Rev. 915, 917–18 (2011) (in a dataset of six Supreme Court terms, "the Court adjudicated more facial challenges on the merits than it did as-applied challenges."). Where a regulation, by its plain terms, sweepingly strips individuals of a cherished constitutional right, as is the case here, facial review is warranted. *Chicago v. Morales*, 527 U.S. 41, 46 (1999) (concluding that an "anti-vagrancy" ordinance facially violated the Due Process Clause of the Fourteenth Amendment).

Seattle and the courts below are entirely solicitous of ex-convicts' difficulties in obtaining housing. BIO.1–2. So much so that they are utterly disinterested in property owners' moral and legal obligations to exclude known dangers that threaten their homes, families, tenants, and property—and ask this Court to avert its gaze as well. BIO.5. But the adverse effects of Seattle's ordinance on the Yims and other property owners should not be cast aside or ignored. The Yims and their children share space with their tenants, App.133a, and Kelly Lyles frequently visits her property and her tenants. App.135a ("As a single woman who frequently interacts with her tenants, she considers personal safety when selecting her tenants.").[1] Such interactions are common among property owners who rent and manage small properties. App.135a (Rental Housing Association's

[1] Seattle's complaint that no tenants are party to this action, BIO.3, makes no sense when property owners facially challenge a law that regulates only property owners' actions.

5300 members consist primarily of property owners who "rent out single-family homes, often on a relatively short-term basis due to the landlord's work, personal, or financial needs."). And one need not have record citations for the common-sense proposition that multi-unit rental housing includes shared common spaces. *See Cranwell v. Mesec*, 77 Wash.App. 90, 104 (1995) ("For the tenants, common areas (which include amenities such as laundry rooms and lounges) are extensions of their living space."); *Geise v. Lee*, 84 Wash.2d 866, 871 (1975) (owner of rental property has a duty to exercise reasonable care in providing safe common areas such as walkways).

Seattle coldly mischaracterizes this case as involving remote corporate landowners, BIO.12, 19, as if such property owners have no problem consigning their tenants to cohabiting with dangerous criminals and have no worries about known criminals harming tenants or trashing the place and otherwise engaging in criminal conduct or inviting their criminal associates onto the premises. Of course, Seattle operates from a false premise. *See, e.g.*, GRE Downtowner LLC Am. Br. at 6, 10 (brief explains "GRE's goals to provide safe, clean, comfortable, stable, and affordable housing for the Addison's low-income tenants and to maintain the project as a sustainable enterprise" and describes extensive efforts to combat adverse effects from Seattle's requirement that GRE extend tenancy to known criminals).

Moreover, cities concerned about the lack of housing rely upon corporate property owners that can provide more rental housing stock than individuals renting out a couple rooms in a triplex. *See, e.g.*, *Adult*

Student Housing, Inc. v. State, Dep't of Revenue, 41 Wash.App. 583, 585 (1985) (corporation built 15 apartment buildings to serve students and faculty of a community college). Some corporations are even dedicated to providing housing to "pre-release and post-release persons who are or have been incarcerated in prisons." *Housing Pioneers, Inc. v. C.I.R.*, 58 F.3d 401, 401 (9th Cir. 1995). Even so, as a matter of constitutional law, it doesn't matter whether the property owner is a married couple, a single woman, a small company like Eileen, LLC (7-unit building), or a corporate owner like GRE Downtowner that rents to low-income tenants at "The Addison on Fourth" building. *See* GRE Downtowner LLC Am. Br. at 2 & n.3 (company purchased property for $12 million and invested another $27 million to create apartment homes, 25% of which are reserved for tenants with disabilities, as well as artist lofts, and musician studios; the company accepts tenants subsidized by publicly funded rental assistance). All property owners have a constitutional right to exclude potentially dangerous criminals.

Seattle cannot seriously dispute that where criminals congregate, crime follows. This is the "obvious reason" that Congress authorizes owners of subsidized housing to evict anyone who engages in crime *and* anyone who invites a criminal onto the property. *Dep't of Housing and Urban Dev. v. Rucker*, 535 U.S. 125, 134 (2002) ("Regardless of knowledge, a tenant who cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.") (citation omitted). Congress expressly found that "the increase in drug-related and violent crime not only leads to murders,

muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures." 42 U.S.C. § 11901(4).

Seattle itself requires criminal background checks for many people seeking to work in public schools. Wash. Rev. Code § 28A.400.303 (requiring checks for job positions that require unsupervised access to children or developmentally disabled persons). That is, people with a criminal history are excluded from Seattle's schoolyard properties to "ensure the safety of Washington's school children," *id.* (Official Notes, Findings), but Seattle prohibits the Yims from excluding people with a criminal history from their home's yard where their children play. App.133a ("The Yims share a yard with their renters in the triplex, and the Yim children are occasionally at home alone when the renters are at home."). When government enacts laws that burden ordinary citizens' constitutional rights and exempts itself, this Court takes notice. *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 645 (2023).

Review by this Court is a matter of the utmost importance because an owner's ability to keep known and dangerous criminals off her property is the last line of defense for her family, property, and tenants. The state has no obligation under the Due Process Clause to protect individuals from "invasion by private actors." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). The narrow "state-created danger" doctrine doesn't apply to generally applicable laws. *Sinclair v. City of Seattle*, 61 F.4th 674, 680 (9th Cir. 2023). This means that Seattle can order property owners to welcome

criminals into their homes and then disclaim any responsibility for any mayhem that ensues. It's bad enough that Seattle officials handed over entire city blocks to criminal activity, *id.* at 676, 681 (Seattle Police Department's "wholesale abandonment" of "an entire precinct and a large area of the surrounding neighborhood to protestors for a month" created "a toxic brew of criminality"); they cannot constitutionally demand that private property owners cede their own homes and businesses to the criminal element.

II.

HISTORY AND TRADITION ESTABLISH PROPERTY OWNERS' RIGHT TO EXCLUDE THOSE WHO POTENTIALLY THREATEN PEOPLE AND PROPERTY

The Yims seek to convince this Court that property owners' right to exclude potentially dangerous tenants from their property is fundamental as a matter of Due Process as well as under the Takings Clause. Pet.i, 22. Because this issue is plainly unresolved, Pet.6, 24–28, Seattle sets up a series of strawman arguments by shifting its description of the right depending on which set of cases it seeks to distinguish. It variously describes the right as "the right to deny tenancy to someone based on their criminal history," BIO.7, 11, the "right to deny tenancy to someone [generally]," BIO.9, the "right to choose or evict tenants," BIO.13, "the right to exclude tenants they disfavor," BIO.13, and the "right to discriminate on the basis of criminal history." BIO.14, 18. The multiple descriptions serve only to obfuscate Seattle's insistence that property owners have *no choice* but to welcome into their homes and businesses people with criminal backgrounds, no

matter how recent, how violent, and how repetitious. Pet.7; App.129a (S.M.C. § 14.09.025).

This case does not implicate the right to discriminate against people in suspect classes, such as race, sex, etc. First, criminality is not an immutable personal characteristic; it is conduct that violates the law, often causing grievous harm to people and property. *See Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring in the judgment) (contrasting choice of criminality with immutability of sexual orientation: "discrimination exists against some groups because the animus is warranted—no one could seriously argue that burglars form a suspect class."); *United States v. Rosales-Garay*, 283 F.3d 1200, 1203 n.4 (10th Cir. 2002) ("Convicted criminals are not a suspect class."). Second, discrimination against protected classes such as race and sex can be justified only under strict or heightened scrutiny because it is based on immutable characteristics that we, as a society, agree must be protected by the Equal Protection Clause. *See Bob Jones University v. United States*, 461 U.S. 574, 604 (1983). Discrimination against people who *choose* to engage in criminal activity is not the same thing. *Campbell v. Henry Phipps Plaza South, Inc.*, 356 N.Y.S.2d 326, 327 (App. Div. 1974) (no unlawful discrimination when property owners terminate the tenancy of tenant "and the members of her family" who are "constantly involved in criminal arrests and incidents which constitute a danger to the health and well being of other tenants"); *Thompson v. Ashe*, 250 F.3d 399, 406–07 (6th Cir. 2001) (public housing authority's "no-trespass" list barring individuals involved in criminal activities did not violate the rights of a person on the list who sought to visit family members (who did not specifically invite

him) in the housing project). Given these precedents, which the Yims do not challenge, Seattle's slippery slope (BIO.16) is short and shallow indeed.

Seattle alternatively claims that recidivism isn't *really* a problem, BIO.17, contrary to an overwhelming number of studies by federal government agencies and others. *See* Nat'l Apt. Ass'n Am. Br. at 7 (citing multiple recent studies by the United States Sentencing Commission concluding that "about half of federal offenders were rearrested, almost one-third were reconvicted, and one-quarter were reincarcerated" and "violent offenders reoffended at a higher rate than non-violent offenders"); Consumer Data Industry Ass'n Am. Br. at 7 (citing a 2021 study by the Department of Justices' Bureau of Statistics finding that "[a]bout 1 in 3 (32%) prisoners released in 2012 after serving time for a violent offense were arrested for a violent offense within 5 years."); Citizen Action Defense Fund Am Br. at 14–15 (citing studies that "recidivism rates among the formerly incarcerated remain stubbornly high"). This Court routinely recognizes recidivism as a perpetual problem. *See, e.g.*, *Logan v. United States*, 552 U.S. 23, 29 n.2 (2007) (noting penalty for misdemeanor battery is enhanced when committed by a "repeater" or "habitual" criminal); *Parke v. Raley*, 506 U.S. 20, 27 (1992) ("States have a valid interest in deterring and segregating habitual criminals."); *Moore v. Missouri*, 159 U.S. 673, 677 (1895) ("'the punishment for the second [offense] is increased, because by his persistence in the perpetration of crime, [the defendant] has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence.'").

While housing providers have shown tolerance and openness to renting to many tenants with criminal backgrounds, App.134a, they are rightfully wary of allowing criminals—particularly those with extensive histories—to enter their properties. Seattle's ordinance nonetheless forbids property owners, on pain of significant penalties,[2] from choosing whether to permit or exclude such criminals.

III.

PROPERTY OWNERS FACE SIGNIFICANT COSTS AND PENALTIES FOR TENANTS' CRIMINAL ACTIONS

1. The amicus brief submitted by GRE Downtowner describes the array of extra costs borne by property owners required to accept tenants with a criminal history. GRE owns The Addison on Fourth and has been complying with Fair Chance Housing Ordinance (FCHO) since its enactment. Since FCHO went into effect, crime in and around the Addison increased, prompting GRE to hire armed security guards and take other security measures. GRE Downtowner LLC Am. Br. at 2, 10 (security cost prior to FCHO totaled about $84,000 annually; post-FCHO, the total exceeded $220,000 annually).[3] With less reliable tenants, the Addison saw a marked increase in evictions, costing tens of thousands of dollars

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[2] App.130a–131a (includes injunctive relief and damages to an excluded tenant, plus monetary civil penalties ranging from $11,000 for first violation of the ordinance to $55,000 for two violations within seven years).

[3] GRE installed cameras in public areas, upgraded door hardware, limited access to the elevator, and gave residents access only to their respective floors. GRE Am. Br. at 10.

annually. *Id.* at 8. Due to an increase in anti-social activity in the building, GRE's insurance company increased the assault and battery insurance deductible. *Id.* at 9. Employees, some of whom were afraid to be on the premises alone, quit at a much higher rate, and GRE bore the cost of frequently recruiting, hiring, and training replacements. *Id.*

2. Seattle acknowledges that Washington property owners may face tort liability if a tenant is injured by a foreseeable act of criminality. BIO.16. Such liability is not limited to Washington, as Seattle suggests.[4] *See* Tracy A. Bateman & Susan Thomas, *Landlord's Liability for Failure to Protect Tenant from Criminal Acts of Third Person*, 43 A.L.R.5th 207, 257–62 (1996) (collecting cases from California, District of Columbia, Florida, Georgia, Idaho, Kentucky, Nebraska, New York, North Carolina, Pennsylvania, and Tennessee holding that landlord has duty to exercise reasonable care to protect tenants against foreseeable third-party criminal acts). And this duty often extends to foreseeable criminal acts occurring in common areas. *Sharif v. Leahy*, 133 Wash.App. 1007, at *4 (2006) (unpublished); Bateman & Thomas, *supra*, at 266–69 (collecting cases from District of Columbia, Georgia, Illinois, Massachusetts, Michigan, New Mexico, New York, and Ohio concerning such liability in common areas).

Potential liability extends beyond tort. Property owners may be criminally liable for certain offenses

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[4] Seattle's citation to American Jurisprudence for the proposition that there is no common law duty to perform a criminal background check omits the qualifier, "unless such violence by the other tenants or their guests was highly foreseeable." 49 Am. Jur. 2d Landlord and Tenant § 434 (2021).

committed by their tenants. *See* Wash. Rev. Code § 69.53.010(1) (property owners who knowingly rent, lease or make available any building, space, room or enclosure for an illegal drug purpose commit a felony). Law enforcement may confiscate an entire apartment building under civil asset forfeiture laws based on a single tenant's illegal drug dealing. *See, e.g.*, *United States v. 16 Clinton Street*, 730 F.Supp. 1265, 1267–68 (S.D.N.Y. 1990). Property owners can be liable under public nuisance laws when tenants engage in criminal activities. *State ex rel. Pfeiffer v. Columbus Inn & Suites*, No. 14AP–132, 2014 WL 4854542, at *8 (Ohio App. Sept. 30, 2014) (if a hotel owner doesn't hire security guards or refuse to rent rooms to "known criminals or troublemakers," he is liable for creating and perpetuating a nuisance); *Grosfield v. United States*, 276 U.S. 494, 498 (1928) (owner's business shut down when tenant used space for illegal alcoholic beverage manufacturing).

To expose property owners to extra costs and penalties for tenants' criminal activities—up to and including loss of the property itself—the fundamental fairness underlying the Due Process Clause must protect the right to investigate and exclude prospective tenants whose past criminal activity foreshadows serious future problems. *J. W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 511–12 (1921) (noting "the anxious solicitude a court must feel" regarding "the injustice of making an innocent man suffer for the acts of a guilty one").

CONCLUSION

"There is no war between the Constitution and common sense." *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). Throughout history, property owners have had

the right and the moral responsibility to exclude known criminals from entering their property, especially their homes. Seattle's law forcing property owners to be willfully blind to the dangers presented by criminal tenants implicates the fundamental right to exclude and warrants strict scrutiny under the Due Process Clause. Because this question is unsettled and of increasing importance as other cities look to trendsetters like Seattle for inspiration,[5] the Court should grant the petition.

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Respectfully submitted,

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[5] *See* Nat'l Apt. Ass'n Am. Br. at 4 (As of 2022, 15 municipalities have adopted ordinances similar to FCHO.).