No. ____

In The
Supreme Court of the United States

CHONG and MARILYN YIM, et al.,
Petitioners,

v.

THE CITY OF SEATTLE,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Washington

PETITION FOR WRIT OF CERTIORARI

ETHAN W. BLEVINS
Counsel of Record
BRIAN T. HODGES
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: ewb@pacificlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

Based on its interpretation of federal law, the Washington Supreme Court overruled 68 regulatory takings and due process cases—130 years of jurisprudence—that had (1) held that the government lacks authority to destroy a fundamental attribute of property without just compensation; and (2) prohibited laws that are unduly oppressive of individual rights. The court took this drastic action to uphold a uniquely intrusive and novel City of Seattle ordinance that declared it unlawful for a residential landlord to choose among qualified tenant applicants. Instead, the law grants the first qualified person to apply for a vacancy an exclusive right of first refusal. This "first-in-time" rule is vastly broader than civil rights laws, which are not challenged here, because it prohibits any discretion whatsoever, even for entirely legitimate reasons.

The questions presented are:

1. Whether the destruction of a fundamental attribute of property ownership suffices to establish a taking without the need to prove diminished value or interference with reasonable investment-backed expectations, as recognized by cases like *Hodel v. Irving*, 481 U.S. 704, 716–17 (1987), and *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979); and

2. Whether the Due Process Clause of the Fourteenth Amendment protects against an unduly oppressive legislative act that destroys a fundamental attribute of property ownership as established by *Goldblatt v. Town of*

Hempstead, N.Y., 369 U.S. 590, 594 (1962), and *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

PARTIES TO THE PROCEEDINGS AND RULE 29.6

Petitioners Chong and MariLyn Yim, Kelly Lyles, Beth Bylund, CNA Apartments, LLC, and Eileen, LLC, were the plaintiffs-respondents in all proceedings below.

Respondent City of Seattle was the defendant-petitioner in all proceedings below.

CORPORATE DISCLOSURE STATEMENT

CNA Apartments, LLC, and Eileen, LLC, have no parent corporations, and no publicly held company owns 10% or more of their stock.

RULE 14.1(b)(iii) STATEMENT OF ALL RELATED CASES

The proceedings in the state trial and appellate court identified below are directly related to the above-captioned case in this Court.

Yim v. City of Seattle, King County Superior Court, No. 17-2-05595-6 SEA (March 28, 2018)

Yim v. City of Seattle, 194 Wash. 2d 651, 451 P.3d 675 (Nov. 14, 2019)

Yim v. City of Seattle, 194 Wash. 2d 682, 451 P.3d 694 (Nov. 14, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Chong and MariLyn Yim, Kelly Lyles, Beth Bylund, CNA Apartments, LLC, and Eileen, LLC, respectfully request that this Court issue a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at *Yim v. City of Seattle*, 194 Wash. 2d 651 (2019) (*Yim I*), and is reproduced in Petitioners' Appendix (Pet. App.) A. The opinion of the Washington Superior Court in and for King County, is not published, but reproduced in Pet. App. B. *Yim v. City of Seattle*, King County Superior Court, No. 17-2-05595-6 SEA (Mar. 28, 2018). The Washington Supreme Court's decision in the companion case, *Yim v. City of Seattle*, is reported at 194 Wash.2d 682 (2019) (*Yim II*), and reproduced in Pet. App. C.

STATEMENT OF JURISDICTION

Petitioners successfully sued in Washington state court to overturn the City of Seattle's "first-in-time" rule, a section of Seattle's Open Housing Ordinance, as violating the takings and due process clauses of the Washington State Constitution. The Washington Supreme Court granted direct review and reversed the trial court based on the high court's interpretation of the federal constitution. This Court has jurisdiction under 28 U.S.C. § 1257(a).[1] This Court granted an

[1] The decision below relies entirely on its interpretation of federal law and is thus properly before this Court. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 171 (2009) (state court decision "dictated by federal law" is reviewable), quoting

extension to file this petition up to and including March 13, 2020. Docket No. 19A828.

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Fifth Amendment to the United States Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The relevant regulatory provisions are reproduced in Appendices E and F.

INTRODUCTION

This case asks: does the Constitution protect against a law that is found to be unduly oppressive and to destroy a fundamental attribute of property ownership? This Court's cases suggest that the answer is "yes." Specifically, this Court has held that the Takings Clause may require just compensation when the government destroys a fundamental attribute of property ownership. *See generally Hodel*

Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (court has jurisdiction when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion."); *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (jurisdiction exists where the record establishes that the federal constitutional issues were "*either* raised or squarely considered and resolved in state court").

v. Irving, 481 U.S. 704 (1987), and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). And this Court has long held that the Due Process Clause protects against laws that are unduly oppressive of property rights. *Goldblatt*, 369 U.S. at 594 (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)). In the decision below, however, the Washington Supreme Court refused to follow these decisions, carving a massive hole in takings and due process law in order to uphold an unduly oppressive ordinance that destroys an owner's right to choose who will occupy his or her property.

STATEMENT OF THE CASE AND SUMMARY OF REASONS TO GRANT THE PETITION

The First-in-time Rule

In 2016, the Seattle city council amended an ordinance to require landlords to "offer tenancy of the available unit to the first prospective occupant meeting all the screening criteria necessary for the approval of the application." SMC 14.08.050(A)(4). This "first-in-time rule" purports to eradicate hypothetical "explicit and implicit (unintentional) bias" by eliminating landlords' discretion in tenant selection, even when that discretion is exercised in a manner that does not implicate a protected class. Pet. App. B-3; First Amended Complaint (FAC) at 4–5.

Under the rule, landlords must note the date and time that they receive all rental applications. SMC 14.08.050(A)(2). The landlord must offer the first qualified applicant the exclusive right, for 48 hours, to rent the property. SMC 14.08.050(A)(4). If the first applicant declines, the landlord must extend an offer

to the next qualified applicant in chronological order, who then has up to 48 hours to decide, and so on. *Id.*

A landlord who chooses a tenant out of chronological order is deemed to have committed an "unfair practice" that is "contrary to the public peace, health, safety and general welfare." *Id.*; SMC 14.08.030. In other words, the City has declared the act of selecting a tenant to be a public nuisance. An aggrieved applicant subjected to this "unfair practice" may be entitled to injunctive relief and damages, "including damages for humiliation and mental suffering," and other remedies set forth in the federal Fair Housing Act, and attorneys' fees. SMC 14.08.095(F). Seattle's Office of Civil Rights may prosecute the "unfair practice" of exercising discretion, imposing civil penalties of up to $11,000 for the first offense, $27,500 if another "unfair practice" occurred in the past five years, and $55,000 if two "unfair practices" occurred in the past seven years. SMC 14.08.185. The Office has blanket authority to grant whatever relief it deems "necessary to correct the practice" and effectuate the purpose of the ordinance. SMC 14.08.180(C).

Petitioners

Petitioners are "small" landlords, each of whom owns and manages no more than a handful of rental housing spaces. None of them has ever discriminated against any protected class. FAC at 7–10. All wish to exercise discretion in selecting their tenants. *Id.*

Chong and MariLyn Yim live in a triplex with their three children and rent out the other two spaces. *Id.* at 7. The Yims could not afford to live in Seattle absent

the rental income. *Id.* at 7–8. All residents of the triplex share a yard, where the children play. *Id.* Given the close quarters and concerns about co-residents' proximity to their children, the Yims place a high value on choosing compatible tenants. *Id.* As a result of the first-in-time ordinance, the Yims drafted more stringent screening criteria, reducing both the number of potential tenants who qualify as well as the Yims' ability to offer flexibility or compassion in special cases. *Id.*

Kelly Lyles is a single woman and low-income artist who owns and rents a single-family residence in West Seattle. *Id.* The rent provides the bulk of her income and she cannot risk renting to an unreliable tenant who may force her into an unlawful detainer action.[2] *Id.* She interacts frequently with her tenants and would avoid filling a vacancy with someone she has not personally chosen. *Id.*

Beth Bylund owns and rents two single-family homes. Fearing the consequences of the first-in-time rule, she did not advertise a vacancy that occurred after the rule went into effect. Although relying solely on word-of-mouth slowed the process of filling the vacancy, Bylund could not afford the risks associated with being forced to accept a tenant based on a time-stamp. *Id.* at 9–10.

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[2] A new Seattle ordinance forbids landlords from evicting rent-delinquent tenants during the winter. Council Bill 119726, https://seattle.legistar.com/LegislationDetail.aspx?ID=4277547&GUID=19852BCC-EC7F-4732-9B9B-B67D1BBFA833.

CNA Apartments is a family-owned company that managed a six-unit apartment building to generate rental income to fund college for the family's three children.[3] *Id.* at 8. They exercised their discretion to choose tenants they believed would remain long-term. *Id.*

Eileen, LLC, is a husband-and-wife-owned company that operates a seven-unit residential complex. *Id.* at 8–9. They have exercised their discretion to rent to tenants demonstrating good character who do not meet the standard rental criteria, such as recent graduates with no prior rental history and no solid credit history. *Id.*

Procedural Background

On August 16, 2017, Petitioners filed a lawsuit in Washington state court, alleging takings and due process violations under the state constitution.[4] *Id.* at 1. The court granted Petitioners' motion for summary judgment, invalidating the first-in-time rule as contrary to several provisions of the Washington Constitution. Pet. App. B. The trial court's ruling relied on *Manufactured Housing Communities v. State*, 142 Wash. 2d 347, 363–65 (2000), which held that an owner's right to sell a property interest to whom he or she chooses is a fundamental attribute of property ownership that cannot be taken without due process and just compensation under both the state

[3] During the course of this litigation, CNA Apartments sold its Seattle rental property due to Seattle's oppressive regulations.

[4] The complaint also contained a free speech claim that is not presented in this petition.

and federal constitutions.[5] Pet. App. B-4. Applying *Manufactured Housing*, the court found that the first-in-time rule extinguished landlords' right to decide who will occupy their property and their ability to negotiate, a "key element of the right to freely dispose of property." *Id.* The trial court likewise relied on Washington state and federal cases adopting an "unduly oppressive" inquiry in the due process analysis and found that the first-in-time rule "is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias." Pet. App. B-7.

Seattle petitioned the Washington Supreme Court for direct review on the grounds that the trial court relied on state law in conflict with federal takings and due process jurisprudence, particularly *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). The Washington Supreme Court granted review on November 28, 2018.

Meanwhile, on May 1, 2018, some of the same Petitioners as here challenged a Seattle ordinance that prohibits landlords from conducting criminal

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[5] Prior to the decision below, Washington courts followed this Court's "fundamental attribute" test which holds that, in certain circumstances, the destruction of a fundamental attribute of property may give rise to a taking. *See Manufactured Housing*, 142 Wash. 2d at 368 (quoting *Agins v. Tiburon,* 447 U.S. 255, 262 (1980) (Where an ordinance "appropriates an owner's right to sell his property to persons of his choice[,] City has thus 'extinguish[ed] a fundamental attribute of ownership,' in violation of federal and state Constitutions.")); *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 12 (1992) (identifying the fundamental attribute test as enforcing a federal standard).

background checks, on both federal and state constitutional grounds. While cross-motions for summary judgment were pending, Seattle asked the federal district court to certify several questions to the Washington Supreme Court, including the proper standard to analyze a substantive due process claim under the Washington Constitution. City of Seattle's Motion to Certify Question, *Yim v. City of Seattle*, Case 2:18-cv-00736-JCC (W.D. Wash. Jan. 11, 2019) Dkt. No. 51. The basis for the motion was to connect the "*Yim II*" background check case with the "*Yim I*" first-in-time case, because both cases presented the issue of whether "undue oppression" is a standard for a substantive due process violation. *Id.* at 4 (noting that resolving this question "requires tracing Washington and *federal case law* back to the 1890s.") (emphasis added). The district court certified the questions, *Yim v. City of Seattle*, 2019 WL 446633 *1 (W.D. Wash. Feb. 5, 2019), and the Washington Supreme Court accepted the certification and consolidated *Yim I* and *Yim II* for oral argument.

On November 14, 2019, the Washington Supreme Court issued decisions in both *Yim I* and *Yim II*.[6] Relying solely on federal law to inform its construction of analogous state law, *Yim II* held that the Washington state constitution's due process guarantee uses the same standards as its federal counterpart. Pet. App. C-2. The court's interpretation

[6] The combination of the first-in-time rule and the ban on criminal background checks means that landlords could be forced to rent to criminals—and any roommates they bring along. SMC 7.24.030(H) as amended by Ord. No. 125950 (Oct. 11, 2019).

of federal law, however, conflicts with this Court's interpretation. Rather than applying federal law as this Court requires—to protect individual rights—the court below held that the "unduly oppressive" inquiry is not part of "current" federal due process law. *Id.* The court expressly incorporated this holding into *Yim I*. Pet. App. A-6. Moreover, *Yim I* expressly declined to "adopt a Washington-specific definition" of regulatory taking, thus analyzing Petitioners' claims solely pursuant to its interpretation of federal law. Pet. App. A-5. The resolution of the case thus turned entirely on federal law. *See Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (jurisdiction is proper when "a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.") (citation omitted).[7] Indeed, with *Yim II* currently proceeding in federal district court, the Washington Supreme Court's interpretation of federal law is actively influencing federal court litigation of federal constitutional rights. *See Yim II*, Order approving supplemental briefing schedule, Case No. 2:18-cv-00736-JCC (W.D. Wash. Feb. 28, 2020).

[7] In *Ohio v. Reiner*, the Supreme Court of Ohio wrongly interpreted this Court's precedents interpreting the Fifth Amendment's right for a criminal defendant to avoid compulsion to be a witness against himself to reach the result that the defendant was wrongly granted immunity under a state statute. This Court had jurisdiction "over a state-court judgment that rests, as a threshold matter, on a determination of federal law." *Id.*

The Washington Supreme Court's Precedent-Shattering Decision

At Seattle's request, the Washington Supreme Court accepted direct review of *Yim I* and the certification of *Yim II* to conform Washington law with Seattle's view of federal law regarding takings and due process. Adopting Seattle's arguments in full, the court upheld the first-in-time rule against claims that it took the landlords' private property and transferred it to private individuals, and deprived landlords of their due process rights.

To reach this conclusion, the court reversed decades of its own takings decisions and rejected numerous on-point decisions of this Court on which those decisions were based. Pet. App. A-9 ("we disavow our precedent"). The court specifically overturned seven decisions that had applied *Agins,* 447 U.S. at 262 (citing *Kaiser Aetna*, 444 U.S. at 180), to hold that the Takings Clauses of the Washington and United States Constitutions require compensation for a regulatory taking that deprives a property owner of a fundamental attribute of property ownership. Pet. App. A-5. By incorporating *Yim II*, the lower court overturned at least 61 additional cases—representing 130 years of due process jurisprudence—that held that the government violates the state and federal constitutions when it acts in a way that is unduly oppressive to individual rights. The court provided a "nonexclusive" list of overruled cases in a separate appendix. Pet. App. A-6; C-22–26.

Petitioners alleged a taking of their right to choose the tenants who will occupy their property, arguing

that the ordinance effected a transfer of this essential aspect of property ownership to the government and private parties. *See Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."). Having cast aside the "fundamental attribute" test, the Washington Supreme Court announced that the first-in-time rule would survive the takings challenge unless the Petitioners showed that the regulation effected a taking under all factors set out by *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Pet. App. A-6. The court dismissed their regulatory takings claim without ever acknowledging that the abrogation of a "fundamental attribute" of property is itself a taking under federal law and without acknowledging the federal underpinnings of its earlier decisions. Pet. App. A-6, 22. *See, e.g.*, *Hodel*, 481 U.S. at 716 (holding that a taking occurred where statute effected a "total abrogation" of "one of the most essential sticks in the bundle of rights that are commonly characterized as property.").

The court then rejected Petitioners' substantive due process claim. Petitioners argued that, due to the ordinance's interference with a fundamental attribute of property ownership, it was subject to the long-accepted "unduly oppressive" analysis of *Lawton v. Steele*, 152 U.S. at 137. The court below recognized that this Court's due process precedents require an effective means-end analysis to ensure that states do not act in an "unduly oppressive" manner. Pet. App. A-23–24. It rejected the ongoing validity of those

cases, however, *id.* at A-24, and ignored the trial court's finding that the rule was in fact "unduly oppressive." *See* Pet. App. B-7 ("[T]he court finds the [first-in-time] rule is unduly oppressive because it severely restricts innocent business practices and bypasses less oppressive alternatives for addressing unconscious bias."). Moreover, the court held that the "unduly oppressive" test should be considered under the federal takings clause, but then failed to analyze the first-in-time rule as a taking under an "unduly oppressive" analysis. *Id.* at C-12–13 (observing that the "unduly oppressive" test appears to address "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.'") (emphasis added).

Applying a toothless version of rational basis analysis, the court below determined it could uphold the law if it could "assume the existence of any necessary state of facts which it can reasonably conceive" to determine that a rational relationship exists. *Id.* at A-25. The court held that "mitigat[ing] the impact of implicit bias in tenancy decisions" was a legitimate state interest and that eliminating landlord discretion was not only rational, but a best practice. *Id.* In sum, although the court below accepted that the asserted property rights are protected by state and federal due process and takings clauses, it applied such extremely deferential takings

and due process tests as to render those protections illusory.[8]

Petitioners timely filed this petition on March 13, 2020.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW RAISES AN IMPORTANT QUESTION AS TO WHETHER A REGULATION THAT EXTINGUISHES AN OWNER'S RIGHT TO DECIDE WHO WILL OCCUPY HIS OR HER PROPERTY CONSTITUTES A TAKING

This Court should grant the Petition to confirm that the destruction of a fundamental attribute of property ownership—discretion to determine who will live on one's property—can rise to the level of a taking. The Washington Supreme Court adopted a categorical rule that takings that do not involve a physical occupation or total loss of viable use must be evaluated under *Penn Central Transp. Co.*, 438 U.S. at 124. Pet. App. A-7–8. Washington's bright line rule conflicts with this Court's admonition that, while *Penn Central* provides a fundamental "guide" for resolving takings claims, there is "no magic formula [that] enables a court to judge, in every case, whether a given government interference with property is a taking." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012). It also conflicts with this Court's holdings that a taking occurs when

[8] In dicta, the Washington Supreme Court also eliminated a state takings inquiry that is not material to this case, which asked whether the regulation was designed to provide an affirmative benefit or prevent a harm. Pet. App. A-21.

regulation destroys a fundamental attribute of property ownership.

Courts often employ *Penn Central* to analyze takings claims, looking to factors like interference with reasonable investment-backed expectations, economic impact, and the character of government action. 438 U.S. at 124. However, a regulatory taking also can occur in the absence of interference with investment-backed expectations and loss in value when government regulation destroys a fundamental attribute of property ownership. *See, e.g.*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) (a taking occurred where Washington law required that interest from attorney-held client funds be remitted to a private foundation); *Hodel*, 481 U.S. at 717–18 (a regulatory taking occurred in the absence of investment-backed expectations and economic loss where statute deprived property owners of right to transfer property via devise or descent); *Kaiser Aetna*, 444 U.S. at 180 (a government-imposed navigational servitude on a private marina caused a taking without regard to investment-backed expectations or economic loss). While this Court has recognized a variety of circumstances where destruction of a fundamental attribute of property causes a taking, it has not clearly articulated a rule of decision that can be applied beyond the circumstances of each particular case. Petitioners ask that this Court apply its holdings in cases like *Hodel* and *Kaiser Aetna* to another fundamental attribute of property ownership: the right to alienate or lease property.

The circumstances of this case demonstrate that a taking may occur when regulation destroys a fundamental attribute of property ownership. Seattle

has outlawed landlords' discretion to decide who will occupy their property, thus implicating the right to exclude and the right to alienate property to a person of one's choosing. *See F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) (likening the right to exclude to a right to invite persons of one's choice onto private property). These property interests are no less fundamental because the law burdening them does not result in direct financial loss. *See, e.g.*, *Hodel*, 481 U.S. at 715 ("There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right."); *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 382–83 (Tex. 2012) ("[P]roperty does not refer to a thing but rather to the rights between a person and a thing.").

A. This Court Has Historically Recognized that a Regulation that Destroys a Fundamental Attribute of Ownership Can Constitute a Taking

The Washington Supreme Court wrongly concluded that this Court has restricted regulatory takings to three varieties: *Penn Central*, physical invasion, and destruction of all economically viable use. *See* Pet. App. A-7–8. However, a "physical invasion" is simply one iteration of the broader principle that the state may not destroy a fundamental attribute of property ownership without just compensation, regardless of *Penn Central* factors. In *Kaiser Aetna*, 444 U.S. at 166, for instance, the United States imposed a public right of access through a privately-owned lagoon. This Court bypassed *Penn Central* and held that the government effected a taking because it destroyed a fundamental attribute

of property ownership—the right to exclude.[9] *Id.* at 179–80.

This Court has applied this approach to other fundamental attributes of property ownership. In *Hodel v. Irving*, Congress deprived owners of fractional interests in tribal lands of the right to pass on property by devise or descent. 481 U.S. at 709. As "a *total* abrogation" of a well-established property right, the law effected a taking even though the claimants had no investment-backed expectations and any economic harm was negligible. *Id.* at 715–17. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (a taking occurred without regard to *Penn Central* where a state statute laid claim to the interest accrued on interpleader funds that lawfully belonged to creditors); *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2428–29 (2015) (a law effected a taking where the owners "lose any right to control the[] disposition" of their property).[10]

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[9] This Court later adopted a categorical rule for permanent physical occupations, holding that a "minor" "physical intrusion by government" is "determinative," with no need to apply all *Penn Central* factors. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1989).

[10] Generating confusion, however, this Court has sometimes indicated that "fundamental attribute" takings are part of *Penn Central*'s "character of the government action" factor, yet has sometimes construed such takings as separate and apart from *Penn Central*. *Compare Loretto*, 458 U.S. at 426 (where regulation causes physical intrusion, "the 'character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative"), *and Hodel*, 481 U.S. at 716 ("But the character of the Government regulation here is extraordinary.") *with Lingle*, 544

The notion that destruction of a fundamental attribute of property ownership results in a taking finds support in this Court's earliest regulatory takings case—*Yates v. City of Milwaukee*, 77 U.S. 497 (1870). Yates owned land adjacent to the Milwaukee River, where he'd constructed a wharf. *Id.* at 498. A Milwaukee ordinance declared the wharf a public nuisance and ordered its removal. *Id.* at 498–99. The Court rejected the city's contention that the wharf constituted a nuisance, then held that the riparian right to build a wharf "is property" and cannot be "destroyed or impaired" except "upon due compensation." *Id.* at 504. This approach reflected a long history of regulatory takings cases in state courts that looked to whether a property interest had been destroyed rather than *Penn Central* considerations like loss in value. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211, 1290 (1996) ("None of the early cases asserted a minimum devaluation threshold for compensation."); *id.* at 1291 ("antebellum state courts" would demand compensation for a destruction of "any discrete right associated with a piece of property.").

Hence, the principle underlying *Kaiser Aetna*, *Hodel*, and *Yates* is that a taking occurs when government "extinguish[es] a fundamental attribute of ownership." *Agins*, 447 U.S. at 262 (abrogated on other grounds by *Lingle*, 544 U.S. 528). This test also

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U.S. at 538 (describing the *Loretto* test as distinct from *Penn Central*), *and Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n*, No. 18-15738, 2020 WL 812918 *18 (9th Cir. 2020) ("Even if [the character of the governmental action] factor weighs in favor of finding a taking, this factor is not alone a sufficient basis to find that a taking occurred.").

accords with this Court's definition of "property" as a set of distinct interests, each warranting Fifth Amendment protection: Property refers to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors*, 323 U.S. 373, 378–79 (1945). The Fifth Amendment "is addressed to every sort of interest the citizen may possess." *Id.* at 378. *See also Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 398 (1994) (It is well established that even if only a single element of an owner's "'bundle of [property] rights'" is extinguished, there has been a regulatory taking.).

The fundamental attribute test previously employed by the Washington Supreme Court views property as a set of independent rights, each protected by the constitution. *See Manufactured Housing*, 142 Wash. 2d at 364. "Because in modern theory property consists of rights rather than things to which those rights attach, it is the destruction of those rights insofar as their owners are concerned, whether by formal expropriation or confiscatory regulations, that constitutes a taking." Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Bill Rts. J. 679, 682 (2005); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harv. L. Rev. 621, 663 n.187 (1998) (enumerating 11 core rights in the bundle, including the "right to manage use by others.") (citation omitted).

As Professor Epstein explained,

> Clearly any impoverished definition of private property that literally only

> encompassed the right to exclude should—and indeed does—flunk constitutional scrutiny . . . . Yet once these other rights are admitted back into the bundle, it is an utter mystery why they should be regarded as second-tier for constitutional purposes when they have equal dignity with the right to exclude . . . .

Richard A. Epstein, *From* Penn Central *to* Lingle*: The Long Backwards Road*, 40 J. Marshall L. Rev. 593, 603 (2007). This Court has repeatedly recognized that destruction of certain well-established property interests will result in a taking. This Court should grant the Petition to apply this takings principle to the property interests destroyed by Seattle's first-in-time rule.

B. *Lingle v. Chevron* Did Not Overrule *Hodel* and *Kaiser Aetna*

The Supreme Court of Washington disavowed its "fundamental attribute" test as inconsistent with *Lingle v. Chevron*, 544 U.S. 528. Pet. App. A-5. *Lingle*, however, contains no such ruling, and this Court has admonished that it will not change the law by implication. *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997). Indeed, a plain reading of *Lingle* belies the state court's interpretation. *Lingle* involved one narrow question: "whether the 'substantially advances' formula announced in *Agins v. City of Tiburon* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking." *Lingle*, 544 U.S. at 532. This Court said no: "this formula prescribes an inquiry in the nature of a due process, not a takings test, and that it has no proper place in our takings jurisprudence." *Id.* at 540.

Critically, *Lingle* emphasized that its holding "does not require us to disturb any of our prior holdings." *Id.* at 545. In this circumstance, state and lower federal courts *must* follow this Court's "prior holdings" even if its precedent appears to conflict with another line of decisions. *State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

The Washington Supreme Court focused on *Lingle*'s description of "two relatively narrow categories" of takings tests that are separate and distinct from the *Penn Central* test: physical invasions and destruction of all economically viable use. *Lingle*, 544 U.S. at 538. According to the court below, takings claims outside these two categories are governed exclusively by *Penn Central*. *Id.*

The Washington Supreme Court took *Lingle*'s description of modern takings jurisprudence as a repudiation of the "fundamental attribute" test because the latter test does not necessarily fit in the categories of either physical invasion or destruction of economically viable use. Yet this reading of *Lingle* ignores *Hodel* and similar cases cited above that did not involve physical invasion, where this Court nonetheless held that destruction of a fundamental attribute of property ownership effected a taking. To allow a regulation that oppressively destroys a fundamental attribute of property to stand unreviewed ignores the basic command that "[c]ourts must strive for consistency with the central purpose of the Takings Clause: to 'bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950

(2017) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)).

The Washington Supreme Court's confusion reflects conflict and lack of clarity in this Court's caselaw. *Compare Hodel*, 481 U.S. 716 ("[A] total abrogation of the [right to pass on property] cannot be upheld"), *with Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").[11] The court below wrongly interpreted *Lingle*'s dicta to imply that "fundamental attribute" takings exist only in the context of a physical invasion. This Court should grant the Petition to address whether a property owner can prove a taking by showing that regulation destroys a fundamental attribute of property ownership.

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[11] In *Andrus v. Allard*, owners of lawfully acquired eagle feathers challenged a Department of Interior rule prohibiting sale of the feathers as a Fifth Amendment taking because it destroyed their right to sell property. 444 U.S. at 53. The Court rejected that claim, stating that "the denial of one traditional property right does not always amount to a taking." *Id.* at 65. The Court found it "crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66. *Allard* conflicts with *Hodel* and other cases holding that destruction of fundamental attributes of property ownership constitutes a taking. Indeed, Justice Scalia noted that because the statute in *Hodel* was "indistinguishable" from the statute at issue in *Allard*, *Hodel* "effectively limits *Allard* to its facts." *Hodel*, 481 U.S. at 719 (Scalia, J., concurring).

II

THE DECISION BELOW CONFLICTS WITH CASES HOLDING THAT SUBSTANTIVE DUE PROCESS PROTECTS AGAINST UNDUE OPPRESSION OF INDIVIDUAL PROPERTY RIGHTS

This Court should also grant the Petition to determine whether the "unduly oppressive" inquiry remains a valid factor in a due process analysis. Normally, due process prohibits laws "that are unnecessary, and that will be oppressive to the citizen." *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 289 (1887); *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (Due process prevents government "from abusing [its] power, or employing it as an instrument of oppression.") (citations omitted); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 709 (1884) (If a government action is "found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'").

It was undisputed below that an owner's right to choose who will occupy his or her property is a fundamental attribute of property ownership that cannot be destroyed or diminished by state action without complying with due process.[12] Pet. App. A-23.

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[12]*See Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2170 (2019) (The Framers intended that property rights be provided "full-fledged constitutional status . . . when they included the [Takings Clause] in the Bill of Rights."); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) ("[The Fourteenth Amendment] has been read broadly to extend protection to any significant property interest."); Robert E. Riggs, *Substantive Due Process in 1791*,

Thus, the critical question before the Washington Supreme Court was whether the unduly oppressive test applies to regulations that destroy a property right. According to this Court, it does. Substantive due process requires "a means-ends test" to determine "whether a regulation of private property is *effective* in achieving some legitimate public purpose."[13] *Lingle*, 528 U.S. at 542; *see also Euclid*, 272 U.S. at 387–88 (courts must evaluate the "circumstances and conditions" of the case because a court will only defer to legislative judgment where the validity of the government action is deemed "fairly debatable"). This means that courts must determine whether the destruction of a property right is "reasonably necessary for the accomplishment of the [public] purpose, and not unduly oppressive upon individuals." *Goldblatt*, 369 U.S. at 594. The undue oppression prong is a necessary component of this evaluation

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1990 Wis. L. Rev. 941, 949 (tracing the due process protection for property rights to Chapter 39 of the Magna Carta).

[13] *See also Moore v. East Cleveland*, 431 U.S. 494, 498 n.6 (1977) ("[O]ur cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose."); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 167 (1973) (the means selected must have "a manifest tendency to cure or at least to make the evil less"); *Nebbia v. New York,* 291 U.S. 502, 525 (1934) ("[T]he means selected shall have a real and substantial relation to the objective sought to be attained."); *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928) (land-use restriction "cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."); *Euclid*, 272 U.S. at 395 (holding unconstitutional a land-use ordinance that is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."); *Yates*, 77 U.S. at 505 (the state cannot, by mere declaration, make a particular use of property a public nuisance).

because "[t]here is no reasonable or rational basis for claiming that the oppressive and unfair methods [are] in any way essential to the [government objective]." *Haynes v. State of Wash.*, 373 U.S. 503, 519 (1963); *United States v. Carlton*, 512 U.S. 26, 30 (1994) (The "harsh and oppressive" formulation "does not differ from the prohibition against arbitrary and irrational legislation").

The decision below, however, forbids precisely what this Court has required. The trial court properly engaged in the *Goldblatt* inquiry to find Seattle's first-in-time rule unduly oppressive. Pet. App. B-7. Without disturbing that finding, the Washington Supreme Court improperly adopted a new standard that upheld the City's use of unduly oppressive means as a legitimate tool for advancing "experimental" policies. Pet. App. A-32. Such a test aggrandizes expansive government authority and limits individual rights, contrary to this Court's instruction. *See United States v. Morrison*, 529 U.S. 598, 607 (2000).

A. *Lingle* Did Not Repudiate the "Unduly Oppressive" Test

The Washington Supreme Court abandoned the "unduly oppressive" test on the theory that *Lingle* implicitly forbids courts from considering a law's oppressive nature in a due process challenge.[14] The Washington court's misreading of this Court's opinion

[14] Pet. App. A-5–6, incorporating Pet. App. C-11; A-26, ("Rational basis review . . . 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.").

deprives property owners of significant individual rights.

Insofar as *Lingle* addressed substantive due process, it merely reaffirmed the settled rule that property deprivations must "substantially advance a legitimate state interest." 544 U.S. at 540–41. *See also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618 (2013) (confirming that due process protects property owners "from an unfair allocation of public burdens.").

That said, the lower court's confusion reflects *superficial* inconsistencies in this Court's discussion of substantive due process. *Lingle* confirms that a substantive due process challenge to a property restriction is subject to "a means-ends test," 544 U.S. at 542, but later observes that the Court has "eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation." *Id.* at 544–45. The Washington court seized upon this last statement, in isolation, as evidence that the Court had impliedly overruled the means-ends analysis required by *Lawton*, *Euclid*, *Nectow*, and *Goldblatt*. Pet. App. A-24. But, read in context, the phrase "such heightened scrutiny" refers to a different inquiry than the "unduly oppressive" test. *See Arkansas Game & Fish*, 568 U.S. at 36 ("[T]he first rule of case law as well as statutory interpretation is: Read on.").

Lingle's reference to "such heightened scrutiny" was a direct response to the Hawai'i district court's ruling that the "substantially advances" test authorized "courts to substitute their predictive judgments for those of elected legislatures and expert agencies." *Lingle*, 544 U.S. at 544. The district court

held that it was required "to choose between the views of two opposing economists as to whether Hawai'i's rent control statute would [affect] prices in the State's retail gasoline market." *Id.* at 544–45. "Finding one expert to be 'more persuasive' than the other, the court concluded that the Hawai'i Legislature's chosen regulatory strategy would not actually achieve its objectives." *Id.* at 545. It was in response to that "remarkable" formulation of the "substantially advances" test, that this Court stated, "we have long eschewed *such* heightened scrutiny when addressing substantive due process challenges to government regulation." *Id.* at 544–45 (emphasis added). Read in context, this passage restates the existing post-*Lochner* rule that courts should defer to the legislature regarding which expert opinion to follow where there is "room for debate and for an honest difference of opinion." *See Lochner v. New York*, 198 U.S. 45, 72 (1905) (Harlan, J., dissenting). That section of *Lingle* made no mention of the "unduly oppressive" inquiry.

Beyond its misapplication of *Lingle*, the Washington court alternatively—and equally improperly—concluded in *Yim II* (incorporated into *Yim I*) that the "unduly oppressive" inquiry is an outdated relic derived from *Euclid* and *Nectow*, which the court dismissed as "two *Lochner*-era substantive due process cases." Pet. App. C-15. Yet *Lochner* did not involve unduly oppressive government action. This Court overruled *Lochner* on the sole basis that the decision had authorized courts to substitute their own policy judgments for that of the legislature. *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). It is well-settled, however, that the question whether a law is "arbitrary, oppressive, and unjust" can be made

"without interfering with that large discretion which every legislative power has" in enacting laws. *Ballard v. Hunter*, 204 U.S. 241, 256 (1907); *Davidson v. City of New Orleans*, 96 U.S. 97, 107–08 (1877) (the "unduly oppressive" inquiry evaluates the *effect and impact* of a regulation, not its *wisdom*). Thus, this Court has never suggested that the repudiation of *Lochner* extends to the "unduly oppressive" inquiry.[15]

In conflict with these decisions, the Washington Supreme Court held that, as a matter of *federal* law, the "unduly oppressive" inquiry no longer applies when evaluating whether a restriction on the use of property complies with due process. Pet. App. C-14. In so doing, the court expressly disregarded *Goldblatt* and *Lawton*,[16] Pet. App. C-13, replacing this Court's standard of review with an extremely deferential standard that asks only whether the government can articulate any conceivable relationship between the impairment of a right and a public purpose—a standard that warrants review because it endorses the use of oppression as a legitimate means to achieve a legislative goal. Pet. App. A-25.

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[15] Indeed, this Court has applied the "unduly oppressive" test in a variety of circumstances since *Lochner*. *See*, *e.g.*, *Stogner v. California*, 539 U.S. 607, 653 (2003) (due process protects against oppressive prosecution); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453–54 (1993) (oppressive fines violate due process); *Heath v. Alabama*, 474 U.S. 82, 103 (1985) (relentless prosecutorial action is unduly oppressive and violates due process); *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) (retroactive legislation may violate due process if it is harsh and oppressive); *Engle v. Isaac*, 456 U.S. 107, 133 (1982) (oppressive shifting of the burden of proof violates due process).

[16] *Cf.* Pet. App. C-11–12 (acknowledging that this Court has not "expressly overruled" *Lawton* or *Goldblatt*).

B. The Decision Below Widens a Growing Conflict Among State Courts Regarding the Validity of the Unduly Oppressive Test

This constitutional conflict is not confined to a pair of Washington Supreme Court decisions. The continuing validity of this Court's "unduly oppressive" inquiry is subject to a widening conflict in the state courts. Courts from Colorado, Georgia, Minnesota, and Utah similarly hold that the unduly oppressive inquiry has no application in cases involving a deprivation of property rights. *See Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 2014 CO 37, ¶ 30, 325 P.3d 1032, 1040 (2014); *King v. City of Bainbridge*, 276 Ga. 484, 488 (2003); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 n.9 (Utah 1998); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 289 (Minn. App. 1996).

Other state courts, however, hold that substantive due process requires a court to determine "whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015); *see also City of Monroe v. Nicol*, 898 N.W.2d 899, 903 (Iowa Ct. App. 2017); *Englin v. Bd. of Cty. Comm'rs*, 310 Mont. 1, 4 (2002); *Adams Sanitation Co., Inc. v. Commw. of Pa., Dep't of Envtl. Prot.*, 552 Pa. 304, 314 (1998); *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 131 (1998); *Griffin Dev. Co. v. City of Oxnard*, 39 Cal. 3d 256, 272 (1985); *Bingo Catering & Supplies, Inc. v. Duncan*, 237 Kan. 352, 355 (1985); *Cider Barrel Mobile Home Court v. Eader*,

287 Md. 571, 579 (1980); *City of Collinsville v. Seiber*, 82 Ill. App. 3d 719, 723-24 (1980).

Meanwhile, the federal circuit courts of appeals all recognize the continuing validity of the "unduly oppressive" analysis in substantive due process cases involving property rights, unlike Washington. *See, e.g.*, *Susan Virginia Parker v. Henry & William Evans Home for Children, Inc.*, 762 F. App'x 147, 158 (4th Cir. 2019); *Guertin v. Michigan*, 912 F.3d 907, 917 (6th Cir. 2019); *Holland v. Rosen*, 895 F.3d 272, 292 (3d Cir. 2018); *Waldman v. Conway*, 871 F.3d 1283, 1292 (11th Cir. 2017); *Nestle Waters N. Am., Inc. v. City of New York*, 689 F. App'x 87, 88 (2d Cir. 2017); *Gladden v. Richbourg*, 759 F.3d 960, 964 (8th Cir. 2014); *Vandevere v. Lloyd*, 644 F.3d 957, 969 (9th Cir. 2011); *Bettendorf v. St. Croix Cty.*, 631 F.3d 421, 426 (7th Cir. 2011); *Torromeo v. Town of Fremont, NH*, 438 F.3d 113, 118 (1st Cir. 2006); *Greene v. United States*, 440 F.3d 1304, 1314 (Fed. Cir. 2006); *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 248 (5th Cir. 2003); *Sherwood v. Oklahoma Cty.*, 42 F. App'x 353, 357 (10th Cir. 2002); *Washington Teachers' Union Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. Bd. of Educ. of the D.C.*, 109 F.3d 774, 781 (D.C. Cir. 1997).

The right to be free of unduly oppressive regulation is a federal constitutional right that cannot be allowed to vary by state or jurisdiction.

III

THIS CASE PRESENTS A GOOD VEHICLE FOR ADDRESSING THE TAKINGS AND DUE PROCESS ISSUES BECAUSE THE FIRST-IN-TIME RULE DESTROYS FUNDAMENTAL ATTRIBUTES OF PROPERTY OWNERSHIP

This petition squarely presents the "fundamental attribute" and "unduly oppressive" questions because the first-in-time rule destroys fundamental attributes of property ownership protected by the Fifth and Fourteenth Amendments to the U.S. Constitution—namely, the right to determine who will occupy the property by choosing to whom to sell or lease. *See Civil Rights Cases*, 109 U.S. 3, 22 (1883) (The right "to inherit, purchase, lease, sell, and convey property" is among those rights that make up the "essence of civil freedom."); *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (The right to "dispose of [property] for lawful purposes" is recognized as an "essential attribute[] of property" and protected by the Fourteenth Amendment); *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 191–92 (1936) (The right to sell one's property "is within the protection of the Fifth and Fourteenth Amendments."). Washington courts previously recognized that the "right to alienate property is essential to its use and enjoyment," *State v. Moore*, 7 Wash. 173, 175 (1893), and that a law granting a right of first refusal to a third party destroys the right of free alienation. *Manufactured Housing*, 142 Wash. 2d at 363–65 (Landowners have a fundamental right to sell their property to whom they choose, at a price they choose.).

The Washington court's decision to uphold an unduly oppressive regulation threatens more than property rights—it strikes at the heart of individual liberty. Property rights are "an essential pre-condition to the realization of other basic civil rights and liberties which the [Fourteenth] Amendment was intended to guarantee." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Id.* at 552.); *see also Murr*, 137 S. Ct. at 1943 ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.").

Buchanan v. Warley, 245 U.S. 60, demonstrates that the right to alienate property is a fundamental attribute of property ownership. It also illustrates the interdependence between property rights and other personal liberties. There, the Court held that a Louisville ordinance that barred individuals from occupying property where most houses were occupied by persons not of their race violated due process. *Id.* at 82.

Buchanan demonstrates the injustice below. First, although the challenged statute forbade the black purchaser from living in the house, *Buchanan* focused on whether the law violated *the owner's* right to sell to the person of his choice. *Id.* at 78. Second, although the white owner could still sell his house to a white buyer, the limitation on the pool of potential buyers destroyed the individual owner's right "to acquire, enjoy, and dispose of his property." *Id.* at 80. Finally,

the Court admonished that the solution to social issues "cannot be promoted by depriving citizens of their constitutional rights and privileges." *Id*. at 80–81. *Buchanan* was decided when state and local government increasingly invoked the police powers to adopt segregation zoning. The Court put a stop to it by emphasizing the need for rigorous protection of property rights in championing individual rights against oppressive government. *See* James W. Ely, Jr., *Reflections on* Buchanan v. Warley*, Property Rights, and Race*, 51 Vand. L. Rev. 953, 964 (1998) ("*Buchanan* forcefully demonstrates that regard for property rights is not an end in itself, but is also important for securing individual autonomy and other personal liberties.").

The law struck down in *Buchanan* rested on the same theory of expansive police powers that underlies Seattle's ordinance: that property owners should be stripped of their right to choose who will occupy their property because they cannot be trusted to promote the social norms of the day. While Seattle claims that its goals are within its police powers, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution." *Buchanan*, 245 U.S. at 82.

This Court should address the protections due to property owners in the context of a leasehold. The right to dispose of property by leasing is no less fundamental than the right to dispose of property in fee, like in *Buchanan*. This right is of nationwide importance because cities like Seattle are enacting more and more stringent regulations to restrict

landlords' ability to rent their property.[17] This Court's takings jurisprudence should reflect the approach of *Pennell v. San Jose*, 485 U.S. 1, 22 (1988): the fact that the State has acted through the "landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere 'economic regulation,' which can disproportionally burden particular individuals."

This case is an excellent vehicle for analyzing the property rights at stake and how due process and takings protections apply to them because it presents that issue as a pure question of law. The Washington Supreme Court did not disturb the trial court's finding that the first-in-time rule destroys interrelated fundamental attributes of property ownership: "choosing a tenant" and "a right to grant a right of first refusal in the context of a leasehold." Pet. App. B-4. First, the rule removes discretion in selecting a tenant by requiring a landlord to offer a unit to the first qualified applicant. Pet. App. A-3. Second, the rule forces landlords to offer a right of first refusal to the

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[17] For example, on February 20, 2020, landlords in Portland, Oregon, claimed violation of their substantive due process rights to challenge an ordinance imposing a first-in-time requirement and restrictions on use of criminal background checks, credit history, and rental history, among other things. *Newcomb v. City of Portland*, Case No. 3:20-cv-00294 (D. Or. 2020). Other cities have recently imposed similar restrictions on tenant screening. *See, e.g.*, Adam Brinklow, *Oakland approves ban on tenant criminal background checks*, Curbed (Jan. 23, 2020), https://sf.curbed.com/2020/1/23/21078782/oakland-background-check-renters-criminal-fair-chance; Marissa Evans, *Minneapolis City Council passes limits on tenant screening by landlords*, Minneapolis Star Tribune (Sept. 13, 2019), http://www.startribune.com/minneapolis-council-passes-limits-on-tenant-screening-by-landlords/560246252/.

first qualified applicant for up to 48 hours, a right that passes on to the next individual in chronological order if the applicant declines the offer. *Id.* The Washington Supreme Court reversed solely on the grounds that the trial court applied then-binding law to those undisputed facts. Pet. App. A-4–6.

The underlying facts demonstrate the significance of the questions presented. Seattle's first-in-time rule's destruction of two recognized property interests has severe consequences for Petitioners. Chong and MariLyn Yim now lack control over who shares their home and yard. Kelly Lyles, a single woman, cannot choose a tenant that she feels safe associating with. Eileen, LLC, can no longer offer flexibility with regard to its rental criteria. Landlords cannot deviate from credit score requirements to offer struggling applicants an opportunity in light of mitigating factors. Nor can landlords accept an offer from an applicant second, third, or fourth in line, even if the applicant offers to enter into a longer lease, perform yard work, or otherwise makes an offer that puts them above the competition.

The bottom line is that Seattle has chosen to destroy a fundamental attribute of property ownership as part of a strategy to impair the rights to control and make economically viable use of private property. *See Loretto*, 458 U.S. at 435 (When the government destroys a fundamental attribute of property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."). In addition to the first-in-time and criminal background check ordinances, Seattle continues to find new ways to restrict property owners' rights to determine who

will occupy their property—all of which hinge on the constitutionality of the City's attempt to extinguish the right to choose who will live in one's property. *See* SMC 22.206.160 (forbidding landlords from evicting rent-delinquent tenants during the winter); SMC 7.24.030 (over landlord objections, tenants are entitled to invite roommates to occupy the rented property); SMC 14.09 (banning landlords from conducting criminal background checks); SMC 14.08.040(I), 14.08.015 (prohibiting preferred employer programs or discretion based on tenants' source of income); SMC 7.24.035 (capping move-in fees and requiring installment payments). The decision below gives cities virtually unlimited power to determine the use, occupation, and disposition of private property and it does so by rejecting this Court's precedent. If the Washington decision is allowed to stand, there will have been a plain constitutional injury without a remedy.

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

ETHAN W. BLEVINS
Counsel of Record
BRIAN T. HODGES
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: ewb@pacificlegal.org

Counsel for Petitioners