No. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The City of Seattle's "Fair Chance Housing Ordinance" declares it unlawful for private property owners to consider a prospective tenant's criminal history when deciding who may occupy their property—even though criminals are substantially more likely to reoffend in and around their residences. The Ordinance bans such consideration regardless of the gravity of an applicant's crimes, the number of convictions, the time since the last conviction, or other indicators that the applicant poses a risk of harm to an owner's family or other tenants, and the Ordinance furthermore subjects owners to massive civil penalties for considering that history when selecting tenants. The City exempts itself and other public housing providers from these restrictions.

Chong and MariLyn Yim own a triplex in Seattle. As is often necessary in housing-deprived cities nationwide, the Yims and their three children shared their living and intimate spaces with tenants—they live in one unit and rent the other two. The Ordinance deprived the Yims of their fundamental right to safeguard their home, to keep dangerous convicted criminals out of their property, and of their obligation to protect their children and their tenants.

The question presented is:

Does Seattle's restriction on private owners' right to exclude potentially dangerous tenants from their property violate the Fourteenth Amendment's Due Process Clause?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Chong and MariLyn Yim, Kelly Lyles, Eileen, LLC, and Rental Housing Association of Washington were the plaintiffs-appellants in all proceedings below.

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

CORPORATE DISCLOSURE STATEMENT

Eileen, LLC, and Rental Housing Association of Washington 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 appellate court identified below are directly related to the above-captioned case in this Court.

Chong 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 WRIT OF CERTIORARI

Petitioners Chong and MariLyn Yim, Kelly Lyles, Eileen, LLC, and Rental Housing Association of Washington (jointly the "Yims," or "owners") respectfully request that this Court issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is published at 63 F.4th 783 (9th Cir. 2023), and in Petitioner's Appendix (App.) at 1a. The district court's opinion is available at 2021 WL 2805377 (W.D. Wash. July 6, 2021), and at App.58a. The opinion of the Washington Supreme Court on a question certified by the district court is published at 451 P.3d 694 (Wash. 2019), as amended (Jan. 9, 2020), attached here at App.96a.

STATEMENT OF JURISDICTION

The lower courts had jurisdiction over this case under the First and Fourteenth Amendments to the United States Constitution and 28 U.S.C. § 1331. The Ninth Circuit entered final judgment on March 21, 2023. App.1a. The Ninth Circuit denied Seattle's petition for rehearing en banc and Yim's conditional cross-petition for rehearing en banc on May 30, 2023. App.126a. On June 28, 2023, this Court extended the time to file a petition for writ of certiorari, up to and including September 27, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS AT ISSUE

The Fourteenth Amendment to the U.S. Constitution provides that state and local government shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, cl. 1.

Seattle's "Fair Chance Housing Ordinance" declares it an "unfair practice for any person to ... [r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, tenant, or member of their household based on any arrest record, conviction record, or criminal history." Seattle Municipal Code (SMC) § 14.09.025(A)(2). "Adverse action" includes denying tenancy, evicting an occupant, or terminating a lease. SMC § 14.09.010. All relevant sections are reprinted at App.127a–131a.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Seattle's "Fair Chance Housing Ordinance" (FCHO) threatens the safety of rental owners, their families, and tenants by depriving owners of their right to exclude dangerous ex-convicts from occupying their homes and sharing intimate spaces. Chong and MariLyn Yim, Kelly Lyles, and Eileen, LLC, own and manage small rental properties in Seattle.[1] At the time of enactment, the Yims lived with their three children in one unit of a triplex and rented out the other two units. App.133a. The three units share a yard, a common porch, mailboxes, and a utility room.

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[1] Petitioner Rental Housing Association of Washington (RHA) is a membership organization that provides tenant screening services.

When considering potential tenants, the Yims looked to the applicant's criminal history to ensure the safety of their children and other tenants.

The Yims also own a duplex where they rent rooms to individual tenants, sometimes creating new roommate relationships.[2] When doing so, the Yims would always check the criminal background of new roommate applicants to protect their current tenants.

Kelly Lyles is an artist who relies on the income from her single Seattle rental property to make ends meet. She carefully screened rental applications for indicia of reliability because she could not afford the costs and delays created by a tenant who fails to timely pay rent. As a survivor of a violent crime and a single woman who is frequently onsite, Lyles highly values her safety and the safety of her two tenants, who share the home's common areas including the kitchen and laundry room, when considering applicants.

Scott and Renee Davis, who own and manage Eileen, LLC, also hold the safety and security of their tenants in the highest regard when evaluating new tenants for their seven-unit building, which has a common storage and laundry area in the basement.

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[2] "Because of a roommate's unfettered access to the home, choosing a roommate implicates significant privacy and safety considerations." *Fair Housing Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216, 1221 (9th Cir. 2008). "Government regulation of an individual's ability to pick a roommate thus intrudes into the home, which 'is entitled to special protection as the center of the private lives of our people.'" *Id.* (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)).

Like many private landlords, the Yims, Lyles, and Davises are willing to rent to individuals with minor or nonviolent criminal histories[3] but would exclude applicants whose serious criminal histories create an unreasonable safety risk to their tenants, families, properties, and themselves.[4] This is a common sense response because "[r]ecidivism is a serious public safety concern … throughout the Nation," *Ewing v. California*, 538 U.S. 11, 26 (2003), and "residential proximity to a dangerous person generally increases the risk of being victimized by that person." Charles W. Cunningham, Note, *The Duty of a Landlord to Exercise Reasonable Care in the Selection and Retention of Tenants*, 30 Stan. L. Rev. 725, 737 n.40 (1978) (citing federal government and other studies). The City, however, has barred the Yims from exercising two of the most fundamental and treasured rights in the Anglo-American legal tradition: the right to protect one's home joined with the right to exclude others from one's property. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072 (2021) (the right to exclude is a cherished and fundamental right); *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (the right to protect one's home and family against outside threats is a "basic right" that is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition").

At issue here is whether Seattle acted outside its constitutional authority when it forbade private

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[3] Jacqueline Helfgott, *Ex-offender Needs versus Community Opportunities in Seattle, Washington*, 61 Fed. Probation 12, 20 (1997) (landlords are significantly less likely to reject an applicant based on past drug, property, or domestic abuse offenses than serious violent crimes).

[4] App.134a.

landlords from denying tenancy based on an applicant's criminal history. *See Panhandle E. Pipe Line Co. v. St. Highway Comm'n of Kan.*, 294 U.S. 613, 621 (1935) (due process holds even the broad police power subordinate to constitutional limits); *Yates v. City of Milwaukee*, 77 U.S. 497, 505 (1870) (city violates rule of law when it purports simply to deem property to be a nuisance); Kermit Roosevelt III, *Forget The Fundamentals: Fixing Substantive Due Process*, 8 U. Pa. J. Const. L. 983, 985 (2006) (due process clause "keep[s] the government within its bounded powers" by limiting government incursions into fundamental rights). When evaluating a substantive due process claim, however, courts must first determine whether a right is fundamental within the meaning of the Fourteenth Amendment, relying upon the text of the Constitution and the asserted right's status within the Anglo-American historical and legal tradition. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2246–48 (2022).

Yet, in the decision below, the Ninth Circuit did not consider the text of the Constitution or engage in the historical-traditional analysis otherwise required to determine whether a right is fundamental under the Due Process Clause, stating flatly that "landlords do not have a fundamental right to exclude." App.2a; *Cf. Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S.Ct. 2485, 2489 (2021) (prohibiting owners from recovering possession from nonpaying tenants "intrudes on one of the most fundamental elements of property ownership—the right to exclude"). The Ninth Circuit thus created a sweeping rule that an owner's right to choose who may occupy his or her property can be curtailed for any conceivable reason, without limitation. App.26a–27a.

Contrary to history, tradition, law, and common sense, the FCHO elevates the interests (and convenience) of ex-convicts over property owners' foundational right to safeguard their families, tenants, and homes.[5]

The judiciary should not accord a different level of protection against arbitrary government actions impairing property rights than it does for other "deeply rooted" civil rights. Ronald J. Krotoszynski, *Fundamental Property Rights*, 85 Georgetown L.J. 555, 557 (1997). But lower courts conflict in how to apply substantive due process claims in property rights cases. *See, e.g.*, *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1220 n.45 (6th Cir. 1992) ("We wish it were within our power to harmonize these decisions, but the conflicts among the circuits are too great. Harmony will have to await action by the Supreme Court."). This Court should grant certiorari to clarify that an owner's right to choose to exclude others from their property—particularly those who present a potential danger—is a "full-fledged" constitutional right, just as "the Framers envisioned when they included the [Takings] Clause among the other protections in the Bill of Rights." *Knick v. Twp. of Scott*, 139 S.Ct. 2162, 2170 (2019).

The petition should be granted.

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[5] In the proceedings below, the landlords asserted their right to exclude based on their consideration of reasonable and nondiscriminatory criteria such as the seriousness of an applicant's crimes, number of convictions, and the time since the last conviction. App.134a–135a.

STATEMENT OF THE CASE

A. The "Fair Chance Housing Ordinance"

Enacted as part of a nationwide effort to reduce the impacts of criminal convictions, Seattle's FCHO declares it unlawful for a private property owner to ask tenant applicants about their criminal histories, even if such inquiries would reveal convictions for murder, arson, drug dealing, burglary, or assault; or a rap sheet containing dozens of convictions for theft or vandalism.[6] App.129a. The FCHO also prohibits rental owners from taking any adverse action, such as denying a lease application, or increasing the security deposit, based on an applicant's criminal history. App.127a–130a. Failure to comply with the FCHO subjects owners to rent refunds, tenancy reinstatement, and payment of tenants' attorneys' fees, App.130a, as well as civil penalties ranging from $11,000 to $55,000. App131a. The FCHO applies *only* to private owners; the city exempts itself and other public-housing providers from these restrictions. App.43a.

There's no evidence, however, that forcing private property owners to house criminals against their will actually advances *any* of the FCHO's stated objectives. Instead, Seattle relies on studies about access to *public* housing programs that provide rent subsidies and social services like drug, mental health, and job counseling that help reduce recidivism and help former convicts reintegrate into society. *See*

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[6] A narrow exception allows property owners to exclude adult sex offenders by demonstrating a "legitimate business reason" that exclusion is "necessary to achieve a substantial, legitimate, nondiscriminatory interest." App.42a.

ER.124–127, 135; SER.511 n.116, 512 (citing studies). The studies cautioned that *private* housing, due to its high cost and other factors, may result in *more* housing instability and higher recidivism rates. *See id.* Thus, the studies recommended only that cities expand their supportive public-housing opportunities. *Id.*

The FCHO radically departs from the federal government's use of tenant screening to exclude ex-convicts from federally-subsidized housing, *Inclusive Communities Project, Inc. v. Lincoln Property Co.*, 920 F.3d 890, 900 (5th Cir. 2019), as well as ordinary business and other government practices that use criminal history to assess reliability, safety, honesty, and integrity in contexts like public housing, employment, business licenses, bar admission,[7]

[7] Washington State subjects bar applicants to a "character and fitness review" prior to admission. There is no categorical exclusion of applicants with a criminal record; instead the state retains the *choice* to admit a person with prior criminal conduct. *Matter of Stevens*, 200 Wash.2d 531, 536 (2022) (overruling rejection of bar association's Character and Fitness Board and admitting applicant convicted of "multiple serious crimes" who rehabilitated himself). Even this Court asks prospective admittees if they have been convicted of any crime other than minor traffic violations, and requires them to provide an explanation and relevant documentation so the Court may exercise its choice whether to welcome or exclude the applicant. Supreme Court of the United States, *Application for Admission to Practice*, https://www.supremecourt.gov/bar/barapplication.pdf (visited Sept. 8, 2023).

officeholding,[8] childcare,[9] and firearm purchases.[10] *See* hr.research Institute, *How Human Resource Professionals View and Use Background Screening in Employment* at 7 (2019).[11]

Property owners screen applicants' criminal history in part to fulfill their legal and moral obligations to protect existing tenants from the criminal acts of people the owner invited onto their property. *See State v. Sigman*, 118 Wash.2d 442, 447 (1992). Indeed, because a landlord may be liable for the criminal acts of tenants, *id.*, the Washington Supreme Court recognized that "[i]t would seem only reasonable that the landlord should at the same time enjoy the right to exclude persons who may foreseeably cause such injury." *City of Bremerton v. Widell*, 146 Wn.2d 561, 572 (2002).

The ability to screen for past criminal conduct does not necessarily mean a refusal to rent to applicants. "[L]andlords have shown interest in looking at factors other than criminal history on its own. For some landlords, eviction history, employment, and income were of greater importance than a criminal record.

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[8] *Sapp v. Foxx*, No. 1:22-CV-5314, 2023 WL 4105942, at *6 (N.D. Ill. June 21, 2023) (barring felons from public office furthers state interest in ensuring public confidence in officeholders' honesty and integrity).

[9] Admin. for Children and Families, *Staff Background Checks*, https://childcare.gov/consumer-education/staff-background-checks (visited Sept. 8, 2023).

[10] U.S. Dept. of Justice, Fed. Bureau of Investigation, *2020–2021 Nat'l Instant Criminal Background Check System Operations Report*, (Apr. 2022), https://www.fbi.gov/file-repository/nics-2020-2021-operations-report.pdf/view.

[11] https://www.hr.com/en/resources/free_research_white_papers/hrcom-background-screening-june-2019-research_jwvmqi89.html.

Landlords even show a willingness to consider explanations regarding an applicant's criminal history." Ashley De La Garza, *The Never-Ending Grasp of the Prison Walls: Banning the Box on Housing*, 22 The Scholar: St. Mary's L. Rev. on Race & Social Justice 409, 446–47 (2020); *Khan v. City of Minneapolis*, 922 F.3d 872, 875 (8th Cir. 2019) (landlord has discretion to rent to tenants with criminal histories); *United States v. Edwards*, 944 F.3d 631, 636 (7th Cir. 2019) ("landlord was known to and did rent to sex offenders").

The Yims ask only to exercise the reasoned choice to select the tenants who will share their homes. The FCHO, however, prohibits precisely what reason and common sense require. *See Taylor v. Cisneros*, 102 F.3d 1334, 1343 (3d Cir. 1996) ("[W]hy should a tenant benefit from conviction by using it as a shield against a landlord's attempt to protect its property and the other tenants?"); *Moran v. Screening Pros, LLC*, No. 10–11253–GAO, 2012 WL 10655744, at *7 (C.D. Cal. 2012), *overruled on other grounds by Moran v. Screening Pros, LLC*, 943 F.3d 1175 (9th Cir. 2019) ("[C]ommon sense dictates that a consumer's criminal record can provide insight into their creditworthiness and credit capacity.... Similarly, records of repeat offenses could suggest a consumer is likely to return to jail and thus would be an unreliable debtor or tenant.").

Since the FCHO's enactment, the Yims cannot exclude a person with a history of violence against children or manufacturing methamphetamines or dealing heroin or theft. Ms. Lyles cannot protect herself by excluding a person with a history of violence against women. And the Davises cannot secure their

tenants' property by excluding a convicted burglar from the common storage area. In this way, the FCHO deprives owners of their right to choose who they allow to reside on and share their property.

B. Procedural History

The Yims filed a complaint in a Washington state court seeking a declaratory judgment under both the state and federal constitutions that the FCHO (1) violated free speech rights by censoring publicly available and truthful information, and (2) violated due process rights by depriving landlords of their right to deny tenancy—*i.e.*, the right to exclude—based on the risks posed by an applicant's criminal history. App.2a, 143a.

At that time, Washington state courts offered greater protection of substantive due process rights than federal courts in the Ninth Circuit. When the state's courts reviewed a law that impaired property rights, they considered "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." *Presbytery of Seattle v. King Cnty.*, 114 Wash.2d 320, 330 (1990).

Seattle removed the case to the Western District of Washington, App.143a, which exercised jurisdiction over both the federal and state constitutional claims under 28 U.S.C. § 1331. After the parties filed cross-motions for summary judgment on a stipulated record, the district court certified state law questions to the Washington Supreme Court, asking whether the "substantial relation" and "undue burden" inquiries from *Presbytery* and similar cases remained viable.

The Washington Supreme Court accepted the certified questions and held that the state constitution's due process clause mirrors its federal counterpart. App.101a–102a. Instead of ending its opinion there,[12] the court purported to determine the "current federal law" of due process. App.106a. The state court concluded that this Court's opinions in *Lawton v. Steele*, 152 U.S. 133, 137 (1894); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); and *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962), were impliedly overruled by *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), rendering the "substantial relation" and "undue burden" inquiries defunct.[13] App.107a.

In July 2021, the federal district court denied the Yims' motion for summary judgment and granted Seattle's cross-motion. App.58a. On the free speech claim, the district court held that the prohibition against criminal history inquiries regulated speech, App.68a, but that the Ordinance survived intermediate scrutiny. App.89a.

On the due process claim, the district court did not decide whether a property owner's right to exclude is fundamental, holding instead that *all* deprivations of property are subject to rational basis review. App.64a. The district court rejected the "undue burden,"

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[12] *City of Houston v. Hill*, 482 U.S. 451, 471 n.23 (1987) ("[C]ertified questions should be confined to uncertain questions of state law.").

[13] The Washington Supreme Court subsequently amended its opinion to remove a quotation from *Lingle*, 544 U.S. at 542, that substantive due process requires "a means-ends test" to determine "whether a regulation of private property is *effective* in achieving some legitimate public purpose." App.126a.

"substantial relation," and "means-ends" inquiries in favor of extremely deferential review that asks only "whether the Ordinance could advance any legitimate government purpose." App.64a. The court upheld the ordinance without considering the law's disproportionate impact on individual rights, let alone its means-ends fit.

The Yims appealed. The Ninth Circuit reversed the district court's ruling on the free speech claim, concluding that the FCHO violated the First Amendment because the content-based ban on criminal history was not narrowly drawn to achieve the City's stated goals. App.20a–25a. It affirmed the district court's ruling on due process. App.27a. As a practical matter, the ruling protects the right of property owners to inquire about a potential tenant's criminal history so long as they make no use of the information.

The Ninth Circuit elided the threshold question of whether the right to exclude is fundamental under the Fourteenth Amendment. The Ninth Circuit observed that, although this Court has repeatedly confirmed that the right to exclude is fundamental for purposes of the Takings Clause, it has not yet done so in the context of a right secured by the Due Process Clause. App.25a. The court did not consider the text of the Constitution or engage in the historical-traditional analysis required to determine whether a right is fundamental under the Due Process Clause. Instead, the court equated the right to exclude to the "right to use one's property as one wishes"—a right never claimed by anyone in this litigation—and labeled that right as nonfundamental. App.26a.

Having established this strawman "right," the Ninth Circuit applied a rational basis test, looking for any imagined, conceivably legitimate objective: "[W]e do not require that the City's legislative acts actually advance its stated purposes, but instead look to whether 'the governmental body *could* have had no legitimate reason for its decision.'" App.26a (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994)). Rejecting any consideration of the law's means-ends fit to the "adverse action" prohibition, the Ninth Circuit rejected the "substantial relation" standard of *Euclid*, *Nectow*, and *Lingle* and ignored the "undue burden" inquiry entirely. App.26a–27a. The court found that the FCHO's speech restrictions were disproportionate to the City's interests in reducing barriers to housing for ex-convicts and remediating the racial disparities in the criminal justice system. App.21a–25a. But it refused to consider the same disproportionate impact on property rights, summarily upholding the law's prohibition on property owners acting on truthful information, legitimately obtained. App.27a. According to the Ninth Circuit, that the City articulated a legitimate reason for enacting the law satisfied the rational basis test. *Id.* Seattle petitioned the Ninth Circuit to rehear the First Amendment issue en banc and the Yims filed a conditional cross-petition asking the court to rehear the due process claim should the City's petition be granted. The Ninth Circuit denied both requests. App.126a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD SETTLE THE IMPORTANT QUESTION OF WHETHER A PROPERTY OWNER'S RIGHT TO EXCLUDE IS FUNDAMENTAL AND PROTECTED BY THE DUE PROCESS CLAUSE

A. The Text of the Constitution and This Court's Precedent Shows That the Right to Exclude Is Fundamental

The Ninth Circuit's decision cannot be squared with the text of the Constitution or this Court's decisions. *See Dobbs*, 142 S.Ct. at 2244–45 (the language of the Constitution "offers a fixed standard for ascertaining what our founding document means") (cleaned up, citation omitted). The Fifth and Fourteenth Amendments guarantee that the government shall not "deprive any person of life, liberty, or property, without due process of law." Although the Constitution itself does not define "property," the determination whether a property right qualifies for heightened due process protection must be based on traditional property law principles, historical practice, and this Court's caselaw at the time of ratification. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Tyler v. Hennepin Cnty.*, 143 S.Ct. 1369, 1375 (2023) (applying the historical-traditional analysis to define the property interest in a takings claim).

Traditionally, and consistently, a property owner's right to exclude is fundamental. Indeed, *each* of the essential attributes of property—*i.e.*, the rights to own, use, alienate, and exclude—are fundamental and

protected by due process. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) ("[The Fourteenth Amendment] has been read broadly to extend protection to any significant property interest."); *Buchanan v. Warley*, 245 U.S. 60, 74, 81–82 (1917) (Due process "protects the[] essential attributes of property" … This "fundamental law … prevent[s] state interference with property right except by due process of law."); *see also United States v. Carlton*, 512 U.S. 26, 41–42 (1994) (Scalia, J., concurring) ("the Due Process Clause explicitly applies to 'property'"); *Pennell v. City of San Jose*, 485 U.S. 1, 8–14 (1985) (considering due-process claim alongside a takings challenge).

The right to exclude is no less important than other fundamental rights protected by the Fourteenth Amendment, including speech rights guaranteed by the First Amendment. *Lloyd Corp., Ltd. v. Tanne*r, 407 U.S. 551, 570 (1972) (an owner's right to exclude, like the right to free expression, is a "fundamental right[] of a free society"); *see also Christy v. Lujan*, 490 U.S. 1114 (1989) (White, J., dissenting from denial of certiorari) ("Having the freedom to take actions necessary to protect one's property may well be a liberty 'deeply rooted in this Nation's history and tradition,' and, therefore, entitled to the substantive protection of the Due Process Clause.") (citation omitted); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012) (a property owner's right to exclude is "equally fundamental" to the Second Amendment right to bear arms), *abrogated on other grounds by New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111, 2126 n.4 (2022).

In takings cases, a property owner's right to exclude enjoys the "full-fledged constitutional status

the Framers envisioned when they included the Clause among the other protections in the Bill of Rights." *Knick*, 139 S.Ct. at 2170. The right to exclude is so essential to the very concept of property that it "cannot be balanced away" in service to a government objective. *Cedar Point*, 141 S.Ct. at 2077; *see also Alabama Ass'n of Realtors*, 141 S.Ct. at 2489 (a law preventing landlords "from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude"). When the government enacts a law that impairs the right to exclude, its action "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); Thomas W. Merrill, *Property and the Right to Exclude,* 77 Neb. L. Rev. 730, 730 (1998) ("Give someone the right to exclude others …, and you give them property. Deny someone the exclusion right and they do not have property.").

That the right to exclude is fundamental under the Fifth Amendment strongly suggests that it is also fundamental under the Fourteenth Amendment. *See City of Dayton v. City R. Co.*, 16 F.2d 401, 403 (6th Cir. 1926) (takings and due process claims "present different aspects of the same question"); *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006) (both the Takings Clause and Due Process Clause are "claims based on 'the most fundamental liberty and property rights of this country's citizenry.'").

B. English and Early American Law Protected Property Owners' Right to Exclude, Especially to Protect One's Home and Business from Potential Danger

Even if this Court's precedent were insufficient proof of the fundamental nature of an owner's right to exclude, a right may still be acknowledged as "fundamental" when it is deeply rooted in "the history and tradition that map the essential components of our Nation's concept of ordered liberty." *Dobbs*, 142 S.Ct. at 2248; *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (same). The right to exclude satisfies that inquiry as well.

"[P]roperty rights … are central to our heritage." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring); *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897) (the right to "enjoy[] private property without undue influence or molestation" is "a vital principle of republican institutions"). Property, moreover, is "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); *see also Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) ("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."). "[R]espect for the sanctity of the home" in particular "has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980).

As Sixth Circuit Judge Thapar recently observed when contemplating an individual's due process rights in a seized vehicle: "History links protections for liberty and for property." *Ingram v. Wayne Cnty.*, __ F.4th __, 2023 WL 5622914, at *15 (6th Cir. Aug. 31, 2023) (Thapar, J., concurring). "Early American legal documents made this same connection between liberty and property." *Id.* at *18 (citing, among other sources, the 1776 Virginia Declaration of Rights, which listed among the "inherent rights" of all men "the enjoyment of life and liberty, with the means of acquiring and possessing property."). This "link persisted through our nation's second founding." *Id.*

Among property's several elements, the right to exclude is perhaps the most venerable and "treasured." *Cedar Point*, 141 S.Ct. at 2072. Indeed, the very concept of property arises from the recognition of "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." *Id.* (quoting 2 W. Blackstone, *Commentaries on the Laws of England* 2 (1766)); *see also* Merrill, *supra*, at 745 ("the right to exclude is the first right to emerge in primitive property rights systems"); John Locke, *Second Treatise on Civil Government*, ch. IX, § 124 (1689) ("The great and chief end therefore, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property.").

The right to exclude often manifests as a right to secure one's family and property against outside threats, which itself is deeply rooted in English common law. *See Semaynes Case*, 5 Coke R. 91 (K.B. 1604) ("That the House of every one is to him his

Castle and Fortress, as well for his Defence against Injury and Violence, as for his Repose ..."). Even innkeepers, who generally opened their properties to all travelers, retained a right to refuse entry to anyone, subject only to the qualification that the right be exercised "for good reason." 2 William Blackstone, *Commentaries on the Laws of England in Four Books* 100 (Liberty Fund, Inc. 2011) (1753); *Lane v. Cotton*, 88 Eng. Rep. 1458, 1465 (K.B. 1701) (Holt, C.J.)); *see also Regina v. Rymer*, 2 Q.B.D. 136, 140 (1877) (innkeeper had the right to exclude patron with "sloppy dogs").

The Founders adopted these fundamental principles to protect one's home via multiple provisions of the Bill of Rights. The First Amendment allows people to take shelter in their homes from "unwanted" and "unwelcome" speech. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *Watchtower Bible & Tract Soc. of N. Y., Inc. v. Village of Stratton*, 536 U.S. 150, 168 (2002). The Second Amendment establishes a right to keep and bear arms in one's home, where "the need for defense of self, family, and property is most acute." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). The Third Amendment forbids quartering of soldiers in homes. The Fourth Amendment establishes a right for Americans to be "secure in their … houses … against unreasonable searches and seizures." *Collins v. Virginia*, 138 S.Ct. 1663, 1670 (2018) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.") (citation omitted); *Soldal v. Cook Cnty.*, 506 U.S. 56, 69 (1992) (Fourth Amendment protects both privacy and property). The Fifth Amendment contains two discrete protections: "No person shall ... be deprived of ... property, without due process of law; nor shall

private property be taken for public use, without just compensation." Through these guarantees, the Founders sought to protect individual rights in property and privacy—values that are at their zenith in the home.

This protection of the right to exclude continued during the years leading up to ratification of the Fourteenth Amendment, including both homes and businesses.[14] Critically, in the early American legal tradition, property owners justifiably excluded persons of "notorious character," particularly where it "appear[s] to be necessary for the protection of his guests, or himself." *Markham v. Brown*, 8 N.H. 523, 528, 531 (1837); *Goodenow v. Travis*, 3 Johns. 427, 427–28 (N.Y. 1808) (upholding an owner's right to exclude a "person of bad reputation"). That understanding continued to be enforced in the period between enactment of the Bill of Rights and the Fourteenth Amendment, *State v. Steele*, 11 S.E. 478, 484 (N.C. 1890) (innkeeper may refuse entry to "persons of bad or suspicious character"), and beyond. *Thurston v. Union Pac. Ry. Co.*, 23 F. Cas. 1192, 1192 (C.C.D. Neb. 1877) (common carrier has a right to exclude criminals "or it might be utterly unable to protect itself from ruin"); *Raider v. Dixie Inn*, 248 S.W. 229, 229–30 (Ky. 1923) ("[A]n innkeeper may lawfully refuse to entertain objectionable characters, if to do so is calculated to injure his business or to place himself, business, or guests in a hazardous, uncomfortable, or dangerous situation," such as a "prize fighter who has

[14] In the early days as now, mixed use development resulted in many properties serving as both homes and businesses. Innkeepers thus sought to protect their residence as well as their customers and commercial interests.

been guilty of law breaking," a "card shark," and "persons of bad reputation or those who are under suspicion").

The right to exclude potentially dangerous persons is especially important because property owners have no constitutional right to demand that the state protect them against injury by nonstate actors such as criminals. *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189, 195 (1989); *accord Lovins v. Lee*, 53 F.3d 1208, 1209 (11th Cir. 1995) (no general substantive due process right to be protected against wrongfully released criminals); *Ketchum v. Alameda Cnty.*, 811 F.2d 1243, 1246 (9th Cir. 1987) (same regarding escaped prisoner). People are thus largely free—and often required—to protect themselves and their property. *See* Wash. Rev. Code § 9A.16.020(3) (allowing use of force in self-defense and in defense of property).

C. Adoption of the Fourteenth Amendment Continued this Respect for the Right to Exclude and Protect One's Property

Before the Fourteenth Amendment was ratified, Congress enacted the Civil Rights Act of 1866 to secure "the great fundamental rights," including individual rights in property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 268–69 (1998) (advocates of the Fourteenth Amendment feared that southern state governments would threaten the property rights of African-Americans and those who had supported the Union against the Confederacy). Not satisfied with leaving the protection of these rights to statutory law, Congress proposed the Fourteenth Amendment to elevate these

protections to constitutional status. *Hurd v. Hodge*, 334 U.S. 24, 32–33 (1948); *Buchanan*, 245 U.S. at 78–79. These individual rights in property were plainly understood as "the essence of civil freedom." *Civil Rights Cases*, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting); Harold Hyman & William Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-75* 395–97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s).

> Once again, liberty and property go side by side. And that's no accident. The Fourteenth Amendment's supporters repeatedly linked liberty and property. *See, e.g.*, *Mr. Bingham's Speech*, Wheeling Daily Intelligencer, Sept. 5, 1866, at 2; *Speech of Indiana Gov. Oliver P. Morton on the Fourteenth Amendment, New Albany, IN*, *in 2 The Reconstruction Amendments: The Essential Documents* 251 (Kurt T. Lash ed., 2021). So too did the Civil Rights Act of 1866. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 ("[S]uch citizens, of every race and color ... shall have the same right ... to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."). No matter where we look in our nation's history, we'll find property and liberty traveling together.

Ingram, 2023 WL 5622914, at *18 (Thapar, J., concurring). *See also Shelley v. Kraemer*, 334 U.S. 1, 10 (1948) ("Equality in the enjoyment of property rights was regarded by the framers of that

Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.").

Thus, the understanding that property is a fundamental right prevailed when the Fourteenth Amendment was adopted. As Judge Cooley wrote, the "right to private property is a sacred right" deriving not from positive law but from "the old fundamental law, springing from the original frame and constitution of the realm." Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 436 (2d ed. 1890) (citation omitted). The need to protect property rights against abusive state and local governments was one of the main purposes behind the enactment of the Fourteenth Amendment and the Amendment's original purpose is undermined when property rights are excluded from the substantive protections of the Due Process Clause.

II.

STATE AND LOWER FEDERAL COURTS CONFLICT ON THIS FOUNDATIONAL QUESTION OF CONSTITUTIONAL LAW

The Takings Clause does not prohibit the government from interfering with property rights; rather, it requires just compensation when its interference amounts to a taking. *Lingle*, 544 U.S. at 543. The Due Process Clause, however, flatly prohibits the government from interfering with

property rights under certain circumstances and its action can be halted through an injunction. *See id.*[15]

State and lower federal courts are hopelessly divided on the basic question of whether property rights qualify as "fundamental" under the Fourteenth Amendment. App.25a (noting lack of guidance from this Court); *301, 712, 2103 & 3151 LLC v. Minneapolis*, 27 F.4th 1375, 1385 (8th Cir. 2022) (same); *Falcon Ridge Dev., LLC v. City of Rio Rancho*, No. CIV 99-1365, 2001 WL 37125278, at *5 (D.N.M. Mar. 20, 2001) (observing that it is "unclear whether and to what extent" the right to exclude is considered a fundamental right), *aff'd sub nom. Falcon Ridge Dev., LLC v. City of Rio Rancho*, 33 F.App'x 981 (10th Cir. 2002); Krotoszynski, *supra*, at 577 ("Even at the most basic level, there is a remarkable inconsistency regarding whether substantive due process protects property interests.").

Some courts define property rights the same whether an owner's claims are brought under the Takings Clause or the Due Process Clause. The Eleventh Circuit explained in *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576, 583 and n.7 (11th Cir. 2001), that "two independent bases" require that property owners be compensated for losses due to takings. The first is the Fifth Amendment's command that government pay just compensation for property taken for public use. The second is the Due Process clause, invoked when "invalid uses of the police

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[15] Unless and until the Privileges or Immunities Clause is restored, *e.g.*, *Dobbs*, 142 S.Ct. at 2302 (Thomas, J., concurring), the Due Process and Equal Protection Clauses remain the primary constitutional theories allowing courts to enjoin government action that impairs property rights.

power" take property. "The analysis used to calculate the proper compensation is the same whether a property owner has suffered a Fifth Amendment taking or a Fourteenth Amendment due process violation." *Id.* The First Circuit similarly uses the same definition of property regardless of the constitutional basis for an owner's claim. *Garcia-Rubiera v. Calderon*, 570 F.3d 443, 457 (1st Cir. 2009) ("[W]e perform the same analysis in determining whether a property interest is sufficient under both the Takings Clause and the Due Process Clause.").

The Eighth Circuit and its lower courts hold that *Knick* and *Cedar Point* support the conclusion that the right to exclude is fundamental under the Fourteenth Amendment. *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 728 (8th Cir. 2022) ("The right to exclude is not a creature of statute and is instead fundamental and inherent in the ownership of real property."); *see also Lamplighter Vill. Apartments LLP v. City of St. Paul*, No. CV 21-413, 2021 WL 1526797, at *4 (D. Minn. Apr. 19, 2021) (the right to exclude is fundamental). The Illinois Supreme Court agrees. *Tovey v. Levy*, 401 Ill. 393, 397 (1948) (property rights are fundamental rights within the meaning of the Fourteenth Amendment).

Some courts treat property interests the same for takings and due process challenges only for the purpose of rejecting both. *See Golf Village North, LLC v. City of Powell*, 14 F.4th 611, 623 (6th Cir. 2021); *Hanley v. City of Houston*, No. 98-20706, 1999 WL 236068, at *2 (5th Cir. 1999). It doesn't matter whether the due process claims in these cases are procedural or substantive. *Moore v. Harper*, 143 S.Ct. 2065, 2086 (2023) ("no neat distinction" between

procedural and substantive laws); *Richardson v. Twp. of Brady*, 218 F.3d 508, 518 (6th Cir. 2000) (Ryan, J., concurring) (no distinction between property interests protected by procedural and substantive due process).

Other Circuits and lower courts improperly treat property rights as "a 'poor relation' among the provisions of the Bill of Rights," *Knick*, 139 S.Ct. at 2170, holding that they are unworthy of full protection under the Due Process Clause (citation omitted). These courts define the underlying property as fundamental for takings purposes and nonfundamental in due process cases. *See, e.g.*, *301, 712, 2013 and 3151 LLC*, 27 F.4th at 1385 (declining to extend the fundamental nature of the right to exclude to due process claims); *The West Virginia Coalition Against Domestic Violence, Inc. v. Morrisey*, No. 2:19-cv-00434, 2023 WL 5659040, at *18, 23. (S.D.W.V. Aug. 31, 2023) (an owner's rights to exclude or protect her property are not "fundamental right[s] for the purposes of substantive due process analysis"); *Woodstone Ltd. P'ship v. City of St. Paul*, No. 22-CV-1589, 2023 WL 3586077, at *5 (D. Minn. May 22, 2023) (noting circuit split as to whether property rights are protected by both the Takings Clause and the Due Process Clause, or one but not the other). When property rights are deemed nonfundamental, they are essentially left unprotected. *See Local 342, Long Island Pub. Serv. Employees v. Town Bd.*, 31 F.3d 1191, 1196–97 (2d Cir. 1994) (substantive due process does not protect nonfundamental property rights); *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (same); *ETP Rio Rancho Park, LLC v. Grisham*, 564 F.Supp.3d 1023, 1075 (D.N.M. 2021) ("the Fourteenth Amendment Due Process Clause's protection of 'liberty' has been interpreted to

incorporate most rights listed in the Bill of Rights to state and local governments" but not property rights).

As shown in this case, the Ninth Circuit and Washington's state courts refuse to give property rights—including the right to exclude for the purpose of protecting one's own home—any significance beyond the Fifth Amendment's Takings Clause, holding property rights to be nonfundamental in the due process context.[16] *See* App.25a–26a (concluding that the right to exclude is not fundamental). The Ninth Circuit correctly observed that this Court "has never recognized the right to exclude as a 'fundamental' right in the context of the Due Process Clause." App.25a. This unsettled and important question warrants review.

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[16] Property rights are protected by multiple constitutional provisions. *See, e.g.*, *Tyler*, 143 S.Ct. at 1381 (Gorsuch, J., concurring) (property right in home equity protected under Eighth Amendment excessive fines clause as well as Fifth Amendment takings clause); *Soldal*, 506 U.S. at 70 (Fourth Amendment and Fourteenth Amendment Due Process Clause); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81–82 (1980) (considering right to exclude under both First Amendment Free Speech Clause and the Fifth and Fourteenth Amendment Takings and Due Process Clauses).

III.

THE APPROPRIATE STANDARD FOR REVIEWING LAWS THAT IMPAIR PROPERTY OWNERS' RIGHT TO EXCLUDE IS AN IMPORTANT QUESTION THAT CAN BE RESOLVED ONLY BY THIS COURT

The question whether the right to exclude potential criminals from one's home or business is "fundamental" is important because, under the tiered level of scrutiny developed to analyze constitutional rights, it *matters*. If the asserted right is fundamental, then heightened scrutiny applies, and this Court need only remand for the lower courts to properly analyze the FCHO.[17] If the right is not fundamental, lower courts apply an exceptionally lax version of rational basis review. *See Reed v. Town of Gilbert*, 576 U.S. 155, 184 (2015) (Kagan, J., concurring) (distinguishing between strict scrutiny, intermediate scrutiny, and the "laugh test"); App.26a–27a (upholding FCHO where court could imagine any conceivably legitimate governmental purpose).

State and lower federal courts apply this hierarchical scheme in an inconsistent and

[17] The Constitution does not impose a hierarchy among the rights secured by the Bill of Rights, but this Court has adopted a tiered system for enforcing the protections of the Fourteenth Amendment. *Peruta v. California*, 137 S.Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari) ("The Constitution does not rank certain rights above others, and I do not think this Court should impose such a hierarchy by selectively enforcing its preferred rights."); *see also Bruen*, 142 S.Ct. at 2129 (criticizing such means-ends tests as involving a "judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent

unpredictable manner, as reflected in litigation challenging restrictions on landowners seeking tenants with minimal or nonexistent criminal backgrounds. In *Lamplighter Village Apartments LLP v. City of St. Paul*, for example, a property owner challenged an ordinance that limited (but did not bar) an owner's ability to deny tenancy based on an applicant's criminal history. 534 F.Supp.3d 1029, 1036–37 (D. Minn. 2021). The district court held the right to exclude to be fundamental under the *Dobbs/Glucksberg* analysis, and enjoined St. Paul's ordinance as unlikely to survive strict scrutiny. *Id.* at 1036. St. Paul repealed the ordinance in June 2021 and the case was dismissed. Order, *Lamplighter Vill. Apts. LLP v. City of St. Paul*, Civ. No. 21-413 (D. Minn. Sept. 8, 2021).

When faced with the same property right, however, the Ninth Circuit below reached the opposite conclusion by equating an owner's right to exclude with a strawman "right to use one's property as one wishes,"[18] App.26a, and applying deferential rational basis review rather than engaging in the historical-traditional analysis *Dobbs* demands. *Id.*; *see also* Tom Stanley-Becker, *Breaking the Cycle of Homelessness and Incarceration: Prisoner Reentry, Racial Justice, and Fair Chance Housing Policy*, 7 U. Pa. J.L. & Pub. Aff. 257, 303 (2022) (review by this Court would

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that is out of proportion to the statute's salutary effects upon other important governmental interests.") (cleaned up, citations omitted).

[18] The right to make productive use of one's property has always been limited by the public's interest in avoiding nuisances. *Euclid*, 272 U.S. at 395.

resolve the "sharply contrasting holdings" in *Lamplighter* and *Yim*).

The obvious conflict between *Lamplighter* and *Yim* exemplifies the much wider problem that state and lower federal courts often fail to evaluate the nature of the specific property rights asserted in a due process case before determining the standard of review. *See Dobbs*, 142 S.Ct. at 2246. Such "unprincipled" decision-making risks "freewheeling judicial policymaking." *Id.* at 2248. Whether a right is fundamental under the Fourteenth Amendment depends on the text of the Constitution, "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty." *Id.* Absent these guardrails, as shown by the court below and the Washington Supreme Court in related cases,[19] any judicial determination whether a right is "fundamental" will "unquestionably involve[] policymaking rather than neutral legal analysis." *United States v. Carlton*, 512 U.S. 26, 41–42 (1994) (Scalia, J., concurring).

The Ninth Circuit's conclusion that government may deprive an owner of his or her right to exclude for any conceivably legitimate public purpose is contrary to the Framers' understanding of, and reverence for, the most essential element of property rights. Through centuries of Anglo-American legal tradition, the right to exclude has never been subject to the type of regulation the FCHO contemplates.[20] *Cedar Point*,

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[19] *Yim v. City of Seattle*, 194 Wash.2d 651, 673 (2019); App.96a–123a.

[20] Anti-discrimination laws are an example of "for good reason" qualifications. *Walz*, 30 F.4th at 728–29 (although the right to

141 S.Ct. at 2077 (the right to exclude "cannot be balanced away").

Even if Seattle's restriction on the right to exclude was held subject to a less stringent standard of review, resolution of the question presented is necessary to avoid the plain injustice of forcing private owners to accept potentially violent or dangerous tenants onto their property. Seattle adopted the FCHO to make it easier for ex-convicts to find success in post-release housing and to address the racial impacts of the criminal justice system. ER.137–38. No doubt these issues deserve government's attention, and Seattle's studies concluded that the solutions to those problems require (1) criminal justice reform and (2) the provision of low-cost, *public housing* that provides support services like drug/alcohol treatment, mental health counseling, and job counseling. *See* ER.124–27, 135. But in response and without explanation, Seattle *exempts* public-housing providers (App.43a),

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exclude is a fundamental right, it may properly be limited by antidiscrimination laws) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243, 261–62 (1964)). The FCHO is not an antidiscrimination measure, although its recitals wrongly equate criminal conviction with a person's innate identity. *Trump v. Hawaii*, 138 S.Ct. 2392, 2423 (2018) (cases involving "morally repugnant" racial discrimination are "wholly inapt" to a "facially neutral policy denying certain foreign nationals the privilege of admission"). No one is born a criminal nor forced to engage in criminal activity. *Cf. Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("[D]iscrimination exists against some groups because the animus is warranted—no one could seriously argue that burglars form a suspect class."). The social harms of criminal activity justify fines, imprisonment, disenfranchisement, and other consequences intended to deter and punish, even while criminals are encouraged to reform. *Brown v. Plata*, 563 U.S. 493, 511 (2011).

depriving only *private* owners of the right to exclude applicants who present a high risk of committing serious crimes and endangering other tenants. This, despite the studies noting that private rental housing is not an option for many ex-offenders and that the cost of such housing may result in higher eviction rates and worsening recidivism rates. *See* ER.106.

This disconnect between the FCHO's means and ends closely resembles the irrational law struck down in *Department of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973), which forbade food stamps for households of nonrelated persons, even though such households were the most likely to need aid. *See also Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008) (invalidating licensing scheme that exempted individuals "who are most likely to interact with pesticides" while "the non-pesticide pest controllers who are least likely to interact with pesticides must remain part of the licensing scheme"). Put simply, by focusing solely on private landlords and exempting public-housing providers from the FCHO, Seattle acted arbitrarily and violated the Yims' due process rights.

The FCHO also places an undue burden on private owners. First, property owners have a legal (and moral) duty to screen an applicant's criminal history; yet acting upon the results to protect their families, property, and existing tenants makes the owners liable for significant equitable and monetary penalties. App.130a–131a.[21] An owner's inability,

[21] Some courts resolve the tension by absolving property owners of liability for subsequent harm caused by violent tenants. *See Castaneda v. Olsher*, 41 Cal.4th 1205, 1210 (2007) (Landlords

under the FCHO, to offer basic, legally required protections for existing tenants is unduly oppressive, as is restricting owners' power to make rental decisions based on accurate public criminal records that provide a strongly predictive factor in assessing risk of default.[22] *See Washington ex. rel. Seattle Tit. Tr. Co. v. Roberge*, 278 U.S. 116, 120–21 (1928) ("Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.").

Second, the FCHO improperly shifts the burden of solving quintessential public problems onto individual property owners. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618 (2013) (due process protects property owners "from an unfair allocation of public burdens"). Property owners are rightly concerned with recidivist behavior that threatens harm. A federal government study demonstrates that within ten years of release, 82% of ex-offenders are re-arrested. Leonardo Antenangeli & Matthew R.

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ordinarily have no duty to reject prospective tenants they believe to be gang members unless violence is "extraordinarily foreseeable" because such a duty would "tend to encourage arbitrary housing discrimination and would place landlords in the untenable situation of facing potential liability whichever choice they make about a prospective tenant."). This is little consolation to tenant Ernest Castaneda, caught in the crossfire of a gang-related shooting. *Id.* But Washington state courts impose an affirmative duty on landlords to protect tenants from foreseeable harm caused by other tenants. *See Brady v. Whitewater Creek, Inc.*, 24 Wash.App.2d 728, 748 (2022).

[22] While property owners are forbidden to consider it, the state factors recidivism into sentencing guidelines. *See State v. Murray*, 190 Wash.2d 727, 737–38 (2018) (statute enhances sentences for "rapid recidivism" upon release from custody).

Durose, *Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)*, Bureau of Justice Statistics Special Report 1 (2021). And "most criminals commit crimes close to home." *Friedman v. City of Highland Park*, 784 F.3d 406, 411–12 (7th Cir. 2015) (citing studies). Even if future crimes are committed outside the residence, proximity justifies search warrants that may frighten or embarrass innocent cotenants and owners. *See, e.g.*, *United States v. Davis*, 867 F.3d 1021, 1025 (8th Cir. 2017). Private rental property owners are not responsible for generalized adverse impacts of the criminal justice system, the high housing failure rates among ex-convicts, or high recidivism rates. ER.137–38. Seattle's decision to place the burden of housing the most violent and dangerous ex-convicts on private owners violates due process.

Over a century ago, Justice Oliver Wendell Holmes observed that, because the Fourteenth Amendment's protection of property rights "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Although Justice Holmes found solace in his belief that the erosion of property rights "cannot be accomplished in this way under the Constitution of the United States," *id.*, that is precisely what is occurring in the state and lower federal courts when addressing property rights under the Due Process Clause.

Certiorari is warranted to establish a standard of protection for an owner's right to exclude dangerous persons from his or her property in a manner consistent with its importance in our legal tradition.

Rational basis is clearly inappropriate, *Reno v. Flores*, 507 U.S. 292, 301–02 (1993), as the right to exclude must not be so easily manipulated out of existence.

CONCLUSION

The petition should be granted.

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Respectfully submitted,

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