Honorable Suzanne Parisien
Dept. 42
Hearing with argument February 23, 2018, 9:00 a.m.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CNA APARTMENTS, LLC, and EILEEN, LLC, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.	Case No. 17-2-05595-6 - SEA **PLAINTIFFS' RESPONSE TO CITY'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

PACIFIC LEGAL FOUNDATION
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TABLE OF AUTHORITIES

Cases

PACIFIC LEGAL FOUNDATION
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Ordinances

PACIFIC LEGAL FOUNDATION
10940 NE 33rd Place, Suite 210
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(425) 576-0484

Other Authorities

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INTRODUCTION AND RELIEF REQUESTED

Manufactured Housing Communities of Washington v. State, contrary to the City's claim, is a clear majority decision that controls the Yims' takings claim. 142 Wn.2d 347, 13 P.3d 183 (2000). Likewise, the "unduly oppressive" test that validates the Yims in their due process claim remains good law, contrary to the City's assertions. The Yims request that this Court grant their motion for summary judgment and deny the City's cross-motion.

CORRECTIONS TO CITY'S STATEMENT OF FACTS

The City contends that the first-in-time rule is reasonable and necessary to combat the possibility of implicit bias. But the stipulated facts and record do not support that contention.

Chong and MariLyn Yim, Kelly Lyles, Beth Bylund, Eileen, LLC, and CNA Apartments, LLC, are small-time landlords in Seattle. *See* SF ¶¶ 3-4. Under the City's first-in-time rule, they have no choice but to offer up their rental property to the first applicant who meets their written rental criteria. *See* SMC 14.08.050(A)(4). They must do so even if factors arise after the applicant completes the application that alert the landlord to safety concerns, compatibility issues, or any other consideration that might make a reasonable landlord hesitate to enter into a long-term relationship with a tenant.

The City contends that "first-in-time" is an industry-recommended practice. City's Opening/Response at 22. That does not tell the whole story. While the Rental Housing Association of Washington recommends screening candidates in chronological order, the City omits the fact that the Association opposed mandating first-in-time as a matter of law: "For rental housing owners this poses a serious threat to the screening process, and removes a great deal of discretion owners would typically be allowed to determine whether or not an applicant is someone they would

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wish to rent to." Rental Housing Association, *Seattle Council Forces Rental Owners To Accept First Applicant*, RHA's Legislative Blog (Aug. 2016). [1]

The first-in-time rule also goes beyond the best practice. The industry, for example, never says that the best practice should be inflexible and unyielding, regardless of concerns that may arise with respect to the first qualified applicant. Yet the first-in-time rule demands this uncompromising inflexibility. *See* SMC 14.08.050(A). Moreover, no industry professionals cited by the City recommend listing all criteria used to assess applications on web advertisements, though the first-in-time rule requires this. *See id*. 14.08.050(A)(1)(a). Nor do professionals recommend listing an inflexible "minimum threshold" for each criterion, which the rule also requires. *Id*.

The City argues that the first-in-time rule is necessary to combat implicit bias, relying on several scholarly and government publications. *See*, *e.g.*, Kirwan Institute for the Study of Race and Ethnicity, *State of the Science: Implicit Bias Review 2015* (SR-000148-238); Equal Justice Society, *Lessons from Mt. Holly*, 11 Hastings Race & Poverty L. J. 241 (2014); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)*, 40 J. Marshall L. Rev. 455 (2007).

These studies, however, do not recommend a first-in-time rule. Instead, the studies emphasize non-legal approaches to addressing implicit bias in housing, such as intergroup contact, ad campaigns, and diversity training. *See* SR-000183, 191–92; Equal Justice Society, *supra* at 260;

[1] http://www.rha-ps.com/Blog/post/2016/08/15/Seattle-Council-forces-rental-owners-to-accept-first-applicant.aspx.

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Schwemm, *supra* at 508. Indeed, one of the studies suggests that "greater attention should be paid to non-legal sources of encouragement for landlords to treat all would-be tenants equally." Schwemm, *supra* at 508. The studies assert that implicit bias can be unlearned through these methods and other life experiences, such as "perspective-taking," loving-kindness meditation, and observing "counterstereotypical exemplars." SR-000194–95. None of the scholarly research recommends banning landlord discretion over selecting tenants.

STATEMENT OF ISSUES

1. Does the lead opinion in *Manufactured Housing*, which had a five-justice majority, constitute binding precedent that controls the outcome of this case?
2. Does the "unduly oppressive" test, which has a long history in due-process challenges to property regulations, forbid the practice of banning discretion in tenant selection?
3. Do the first-in-time rule's restrictions on landlord advertising satisfy First Amendment scrutiny?

EVIDENCE RELIED UPON

The Plaintiffs rely on the stipulated facts and record, as well as adjudicative facts subject to judicial notice under ER 201.

AUTHORITY AND ARGUMENT

Manufactured Housing Communities v. State, which applies the takings test upon which the Yims rely, is binding precedent that this Court must follow. 142 Wn.2d 347. Five justices joined in the rationale and holding in that case, contrary to the City's dubious arithmetic. *Manufactured Housing* controls the takings analysis in this case rather than the inapposite cases cited by the City.

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The "unduly oppressive" test is also binding law in this state. The City's attempt to wish away this long-standing due process test falls just as flat as the attempt to dodge *Manufactured Housing*. Regardless, under either the unduly oppressive or rational basis test, the City's sweeping ban on innocuous decision-making by landlords cannot stand.

The City concedes that the first-in-time rule "directly regulates speech." City's Opening/Response at 34. Intermediate scrutiny, however, is the proper standard rather than the rational basis test suggested by the City, which is reserved for disclosure requirements designed to prevent deception. The first-in-time rule fails that standard because the rule's speech restrictions are more extensive than necessary.

I. *Manufactured Housing* is a binding decision that controls the Yims' takings claim

A. *Manufactured Housing* is not a non-binding plurality opinion

In *Manufactured Housing*, the Washington Supreme Court held that an uncompensated taking occurs when a regulation destroys a "fundamental attribute of property ownership." 142 Wn.2d at 355. The Court used that test to invalidate a mobile-home-park regulation that required park owners to offer the tenants a right of first refusal if the owners sold the property. *Id*. at 351–52.

Manufactured Housing had a clear majority. Five justices agreed with the lead opinion, with one of them—Justice Sanders—writing a concurrence. Caselaw regarding concurrences and split decisions demonstrates that *Manufactured Housing* produced binding law.

The key issue is whether Justice Sanders' concurrence counts toward a majority. It does. A normal concurrence generally indicates that the concurring Justice agrees with both the legal

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rule and its application in the lead opinion but wants to discuss something in greater depth. James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 Geo. L.J. 515, 519 (2011). In *In re Detention of Reyes*, the Washington Supreme Court held that a 4-1-4 decision produced precedent: "A principle of law reached by a majority of the court, even in a fractured opinion, is not considered a plurality but rather binding precedent." 184 Wn.2d 340, 346, 358 P.3d 394 (2015).

Of course, concurrences can and do expressly disagree with the lead opinion. But such concurrences are usually labelled as "Justice X, concurring in the judgment" or something similar, while concurrences joining the lead opinion are labelled simply as "Justice X, concurring." *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many; Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 8 n.14 (1993).

A plurality opinion arises when a majority concurs in the result but no single rationale or opinion attracts five votes. Spriggs & Stras, *supra* at 519. When that occurs, the case still produces binding law, but the holding becomes the narrowest opinion concurring in the result: "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." *Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). [2]

Manufactured Housing is a majority decision. Four justices signed on to the lead opinion, and Justice Sanders concurred with the lead opinion's analysis, making a five-justice majority. *See*

[2] In an equally divided split, such as a 4-4 decision with one justice recused, the lower court's decision stands. *See, e.g.*, *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (Mem), 194 L. Ed. 2d 255 (2016) ("The judgment is affirmed by an equally divided Court."). That was not the situation in *Manufactured Housing* because six justices voted to reverse.

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Manufactured Housing, 142 Wn.2d at 375. Justice Sanders's concurrence made this clear: "I therefore emphatically agree with the majority's conclusion that '[t]he instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership' and see that as the dispositive feature of the majority's analysis." *Id*. at 383. Thus, Justice Sanders concurred in the lead opinion, while only Justice Madsen concurred "in result only." *Id*. at 375. Justice Sanders' concurrence therefore completed a five-justice majority. *See Reyes*, 184 Wn.2d at 346.

If any doubt remains as to whether the fundamental attribute test is binding, Justice Talmadge's dissent settles it. He departed from the Court's application of the fundamental attribute test, but he did not disagree that the test is valid. As he stated: "Finally, a taking by enactment of a statute or regulation can be demonstrated when the government action destroys or derogates a fundamental attribute of ownership." *Manufactured Housing*, 142 Wn.2d at 407 (Talmadge, J., dissenting). Thus, five justices agreed that the taking of a right of first refusal violated the fundamental-attribute test, and six justices agreed that the fundamental attribute test is valid.

Moreover, both dissenting opinions referred to the lead opinion as the majority. Justice Johnson, joined by Justice Smith, referred to it as the "majority" fourteen times. *See id*. at 384–91. And Justice Talmadge used that term fifty times. *See id*. at 391–430. If the dissenters doubted the controlling nature of that opinion, surely they would have said so.

Even if the lead opinion in *Manufactured Housing* did not draw a majority of the Court, it still is a binding decision. If a decision is split, then the narrowest opinion concurring in the result still creates binding precedent. *See Davidson*, 135 Wn.2d at 128. The only two opinions written that concurred in the result came to the same conclusion—the mobile-home-park law was a *per se*

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taking under the fundamental attribute test. However the City tries to slice this pie, it cannot avoid the conclusion that *Manufactured Housing* binds this Court. *See Matter of Arnold*, 198 Wn. App. 842, 846, 396 P.3d 375 (2017) ("Adherence [to Supreme Court decisions] is mandatory, regardless of the merits of the higher court's decision.").

No court in this state has adopted the City's claim that *Manufactured Housing* is not binding law. Indeed, courts regularly cite to and apply the decision as binding authority. *See, e.g.*, *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1191–92 (9th Cir. 2012) (applying *Manufactured Housing* to local mobile-home ordinances); *Dickgeiser v. State*, 153 Wn.2d 530, 536–38, 105 P.3d 26 (2005) (discussing and distinguishing *Manufactured Housing*'s holding); *South Kitsap Family Worship Center v. Weir*, 135 Wn. App. 900, 909–10, 146 P.3d 935 (2006) (analyzing the *Manufactured Housing* decision's impact on a prior Supreme Court decision); *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 611–12, 124 P.3d 324 (2005) (recognizing the fundamental attribute test); *Borden v. City of Olympia*, 113 Wn. App. 359, 374, 53 P.3d 1020 (2002) (applying the fundamental attribute test in the context of flooding).

Manufactured Housing is not even the first case to have recognized the fundamental attribute test. The Supreme Court acknowledged the test in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993), a case involving a challenge to the Mobilehome Relocation Assistance Act, which required mobile-home-park owners to pay relocation costs if the owner converted the park to a different use. *Id*. at 591. *Guimont* determined that takings law required the court to examine whether the challenged regulation deprives the landowner of a fundamental attribute of property ownership even if no physical invasion or total taking occurred. *Id*. at 603. The Court further

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explained that Guimont could have shown a *per se* taking had the Act separately deprived him of a fundamental attribute of ownership. *Id*. at 605 n.7. This Court is bound by these precedents.

B. *Manufactured Housing* controls the outcome of this case

1. The right to lease property is a fundamental attribute of property ownership subject to takings protection, and *Yee v. City of Escondido* does not hold otherwise

The City relies on *Yee v. City of Escondido* and *Margola Associates v. City of Seattle* to argue that removing all discretion in selecting a tenant cannot constitute a taking. *See* City's Opening/Response at 18–19; *Yee v. City of Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); *Margola Associates, Inc. v. City of Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993). *Yee*, however, presented a different takings claim in an unrelated context. *Margola*, too, involved a distinct set of facts that only highlights the contrast between the permissible regulation present in that case and the categorical taking here.

In *Yee*, mobile-home-park owners challenged a rent control ordinance, claiming that it mandated a permanent physical occupation of their property because it limited their ability to evict tenants or disapprove incoming mobile-home buyers. *Yee*, 503 U.S. at 526–27. The Court rejected the physical takings claim. *Id*. at 532.

Yee does not affect the analysis here because *Yee* addressed a different takings test in a different context. The Supreme Court in *Yee* only addressed the claim that the rent control ordinance caused a physical occupation. *Id*. The Court's holding and reasoning rested on that takings theory alone. Indeed, the Court repeatedly noted that its holding was limited only to the physical-takings issue and that any other takings test—such as regulatory taking—would wait for

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another day. *See id*. at 527, 531, 533–34, 537. For instance, when the petitioners argued that the law resulted in a permanent occupation of their land, the Court responded: "This argument, *while perhaps within the scope of our regulatory taking cases*, cannot be squared easily with our cases on physical takings." *Id*. at 527 (emphasis added). As to the petitioners' argument that a physical taking occurred because they could not control who purchased mobile homes, the Court said: "Again, this effect *may be relevant to a regulatory taking argument*, as it may be one factor a reviewing court would wish to consider in determining whether the ordinance unjustly imposes a burden on petitioners." *Id*. at 530–31 (emphasis added).

A failed physical takings claim does not spell doom for a regulatory takings claim. As the Supreme Court observed in *Yee*, the physical takings and regulatory takings tests are separate and should not be conflated:

> Consideration of whether a regulatory taking occurred would not assist in resolving whether a physical taking occurred as well; neither of the two questions is subsidiary to the other. Both might be subsidiary to a question embracing both—Was there a taking?—but they exist side by side, neither encompassing the other.

Id. at 537. *Yee*'s holding as to physical takings, therefore, does not—as the *Yee* Court repeatedly emphasized—control regulatory takings claims, including Washington's fundamental attribute test.

Yee also involved a different context: mobile-home-park regulations. Tenants of a mobile home park own the mobile home and rent the pad upon which the mobile home sits. As the Supreme Court noted, the petitioners' argument was "predicated on the unusual economic relationship between park owners and mobile home owners." *Id*. at 526.

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The petitioners' takings theory was uniquely tailored to this economic context. They did not argue that the rent control ordinance directly appropriated their right to select tenants. Rather, their argument was more indirect; the ordinance allegedly impaired their right to select tenants because "before the adoption of the ordinance they were able to influence a mobile home owner's selection of a purchaser by threatening to increase the rent for prospective purchasers they disfavored." *Id*. at 531 n.*. The Court rejected the argument that this caused a physical taking. *Id*. at 530-31.

This case is altogether different. First, the first-in-time rule removes the right to select a tenant on its face, not as a tenuous consequence of a facially valid law. Second, the park owners in *Yee* still had a right to decide to whom they entered into an initial lease agreement with. They did so with the understanding that the mobile-home owner had the right to sell the home—and the ordinance did not alter this basic reality. By contrast, Seattle landlords cannot decide to whom to lease their property in the first instance. Since *Yee* presented a different claim in a different context, the City's reliance on it fails to remove this case from the orbit of *Manufactured Housing*.

The implications behind the City's reliance on *Yee* make this point clear. Under the City's reasoning, a property owner loses the right to exclude once he or she has decided to open the property for rental. *See* City's Opening/Response at 18-19. This, however, would abrogate basic tenets of property law, which grant landowners who have not opened their property to the entire public the right to decide who can and who cannot enter property by their consent. *See* Restatement (Second) of Torts § 167. The mobile-home context is unique because two layers of property ownership exist—the mobile home itself and the pad beneath. But with private residences—leased or not—landowners have a right to decide whether to grant or withdraw consent to enter. Certainly

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under trespass law, a public premises defense is available to a defendant who enters premises open to the general public and meets the landowner's conditions for access. *See State v. Finley*, 97 Wn. App. 129, 138, 982 P.2d 681 (1999). But private rental homes are not akin to a shopping mall; landlords do not open their property to the general public just because they lease property to a particular individual or family. The City's theory would abrogate such traditional principles of property law.

The City's reliance on *Margola Associates v. City of Seattle* does not fare any better. *See* 121 Wn.2d 625; City's Opening/Response at 17–19. Unlike *Yee*, *Margola* did address both regulatory and physical takings theories. But the ordinance at issue in *Margola* does not resemble the first-in-time rule. In *Margola*, apartment owners challenged Seattle's ordinance requiring them to pay a per-unit fee to fund an inspection program. *Margola*, 121 Wn.2d at 632. They argued, among other things, that the ordinance made it more difficult to evict tenants, and that this resulted in both a physical and a regulatory taking. *Id*. at 647. The Court rejected these takings theories, holding that "the ordinance restricts, but does not destroy, Margola's right to exclude others from his property." *Id*. at 648.

Margola does not control this case. In *Margola*, the apartment owners could still select their tenants. Thus, *Margola* only limited a landlord's right to exclude with respect to a tenant that he had already voluntarily rented to. *Id*. at 648.The ordinance merely imposed a minor burden on their ability to end a tenancy, not begin one.

The right to select a tenant in the first instance and the right to exclude a tenant that has already been invited onto the property are categorically different. In the latter instance, a landlord has already consented to that particular tenant's use of the property. Indeed, *Margola* did not

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address the right to dispose of a property interest at all, which is the core of the Yims' claim. Here, landlords have not extended any voluntary invitation to the first qualified applicant. That individual does not enjoy a right to use the landlords' property—against the landlords' wishes—just because they happened to apply first. Putting out an advertisement to rent a property does not extinguish the landlords' right to decide whom to enter into a lease with and whom to invite or exclude from the premises.

2. Plaintiffs' claim does not endanger other anti-discrimination laws

Contrary to the City's embellishments, the Yims are not threatening to overthrow our traditional anti-discrimination laws. They do not seek a right to select tenants "free of government regulation." *See* City's Opening/Response at 18. Rather, as stated in their amended complaint: "Landowners have a constitutionally protected right to rent or sell their property, *in a non-discriminatory manner*, to whom they choose. . . ." FAC ¶ 1 (emphasis edded).

Property rights exist subject to reasonable regulation. The Yims do not dispute that the City can prohibit intentional discrimination based on a protected class. The Yims instead rely on a simple distinction emblazoned in the Supreme Court's takings jurisprudence: "The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

The first-in-time rule balloons far beyond a law prohibiting intentional discrimination against protected classes. A sweeping ban that—without any direct evidence—prevents people from engaging in innocuous conduct bears no resemblance to a law targeting only bad actions. The Yims do not seek relief that would in any way endanger laws forbidding housing discrimination.

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Indeed, the first-in-time rule, unlike long-standing laws forbidding discrimination, applies even where no discrimination could exist, such as where all qualified applicants are not part of a protected class. The Yims simply want the right to engage in blameless conduct subject to laws forbidding conscious discrimination.

II. The first-in-time rule violates the unduly oppressive test, which is the established test for due process challenges to property regulations

The first-in-time rule's extraordinary breadth cannot satisfy the unduly oppressive test. The City denies the precedential value of this well-established due process doctrine in the property context. That test, however, remains good law, and this Court is bound to apply it. Regardless, the first-in-time rule, by forbidding any choice of tenant, cannot even satisfy rational basis review.

A. The unduly oppressive test is binding law

The unduly oppressive test is a fixture in this state's substantive-due-process caselaw regarding property deprivations. It asks whether a land-use regulation has a legitimate public purpose, whether it uses reasonable means to achieve that purpose, or whether the regulation is unduly oppressive on the landowner. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990).

The City declares the unduly oppressive test to be dead. It is not. That test still applies to due-process claims challenging property regulations, as it always has. *See, e.g.*, *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180 (2012) (applying the unduly oppressive test to mobile-home zoning ordinances); *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997) (applying the test to Seattle's housing preservation ordinance); *Guimont*, 121 Wn.2d 586 (1993) (striking down a mobile-home tenant relocation ordinance under the unduly oppressive

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test); *Presbytery*, 114 Wn.2d 320 (1990) (applying the test to a wetlands ordinance); *West Main Associates v. City of Bellevue,* 106 Wn.2d 47, 720 P.2d 782 (1986) (applying the test to an ordinance establishing the point at which development rights vested); *Cradduck v. Yakima County*, 166 Wn. App. 435, 271 P.3d 289 (2012) (applying the test to development restrictions in a floodplain ordinance); *Bayfield Resources Co. v. WWGMHB*, 158 Wn. App. 866, 244 P.3d 412 (2010) (applying the test to a critical areas ordinance); *Conner v. City of Seattle,* 153 Wn. App. 673, 223 P.3d 1201 (2009) (applying the test to a permit denial); *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006) (applying the test to a county comprehensive land-use plan). Indeed the test is formulated specifically for challenges to property regulations, as the third prong of the test asks whether the regulation is "unduly oppressive *on the land owner*." *Presbytery*, 114 Wn.2d at 330 (emphasis added).

To support its argument that the unduly oppressive test is invalid, the City relies upon *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006). *See* City's Opening/Response at 25–26. But that case did not relate to land use—where the unduly oppressive test is traditionally used—and never once questioned that test's applicability in property cases.[3]

In *Amunrud*, a taxi driver challenged a law suspending his commercial driver's license because he had fallen behind in child support. *Id*. at 212–13. His substantive-due-process challenge

[3] The other, older case cited by the City as supposedly disapproving the unduly oppressive test also arose outside the property context in a dispute about vehicle warranty regulations. *See In re Binding Declaratory Ruling of Dep't of Motor Vehicles*, 87 Wn.2d 686, 555 P.2d 1361 (1976); City's Opening/Response at 24 n.91.

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(425) 576-0484

rested on his right to earn a living. *Id*. at 219, 230–31. The Court applied rational basis and rejected the claim. *Id*. at 211.

Nothing in *Amunrud* indicates that the majority saw itself as uprooting the state's substantive-due-process jurisprudence in the property realm. Indeed, the majority only mentions the unduly oppressive test briefly in response to the dissent. *Id*. at 226. The opinion does not discuss stare decisis or even criticize prior cases relying on the test. *See id.* The state supreme court has committed that it "will not—and should not—overrule" clear rules of law "sub silentio." *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). "To do so does an injustice to parties who rely on this court to provide clear rules of law and risks increasing litigation costs and delays to parties who cannot determine from this court's precedent whether a rule of decisional law continues to be valid." *Id*. *Amunrud*'s perfunctory treatment of the unduly oppressive issue should not be read to upend established precedent.

The City also mischaracterized *Amunrud* by implying that it criticized the unduly oppressive test as a return to the *Lochner* era. *See* City's Opening/Response at 25. It did not; rather, the majority criticized the dissent for making arguments reminiscent of the *Lochner* era. *Amunrud*, 158 Wn.2d at 227–28. In short, *Amunrud* is an unremarkable case that respects a long-standing distinction between two different due process tests—rational basis for cases like *Amunrud* that do not involve regulation of property, and the unduly oppressive test for property cases.

Courts before and since *Amunrud* have followed this distinction. Our courts consistently applied rational basis to substantive-due-process challenges involving liberty interests before *Amunrud*, with occasional exceptions. *See, e.g.*, *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997) (applying rational basis to a substantive-due-process challenge to a marijuana law

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prohibiting medical use); *In re Metcalf*, 92 Wn. App. 165, 963 P.2d 911 (1998) (applying the rational basis test to a substantive-due-process claim challenging deductions from prisoner wages); *Meyers v. Newport Cons. Joint Sch. Dist. No. 56-415*, 31 Wn. App. 145, 639 P.2d 853 (1982) (applying rational basis in a substantive due process challenge to a teacher's dismissal). *Contra Weden v. San Juan County*, 135 Wn.2d 678, 706, 958 P.2d 273 (1998) (applying the unduly oppressive test to an ordinance banning motorized watercraft on marine waters). These cases applied rational basis during the same timeframe that our state courts were also applying the unduly oppressive test in the land-use setting. *See, e.g.*, *Sintra*, 131 Wn.2d 640 (1997); *Guimont*, 121 Wn.2d 586 (1993); *Presbytery*, 114 Wn.2d 320 (1990), *West Main Associates*, 106 Wn.2d 47 (1986).

Amunrud did not change this pattern. Indeed, the pattern has continued since *Amunrud*. When due-process challenges relate to property regulations, courts still apply the unduly oppressive test. *See Cradduck*, 166 Wn. App. 435 (2012) (applying the test to a floodplain ordinance); *Bayfield Resources Co.*, 158 Wn. App. 866 (2010) (applying the test to a critical areas ordinance); *Conner*, 153 Wn. App. 673 (2009) (applying the test to a permit denial); *Peste*, 133 Wn. App. 456 (2006) (applying the test to a county comprehensive land-use plan). And when the due-process challenge involves liberty interests, courts have continued to apply rational basis. *See, e.g., Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011) (rational basis test applied to due-process claim that counsel must be appointed to represent a minor at a truancy hearing); *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, __ Wn.2d __, 406 P.3d 1199 (2017) (applying rational basis in a due-process challenge to a retail marijuana licensing requirement);

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Johnson v. Washington Dep't of Fish and Wildlife, 175 Wn. App. 765, 305 P.3d 1130 (2013) (applying rational basis in a due-process challenge to a denial of a commercial fishing license).

Instead of reconciling these tests, the City accuses our state courts of not getting "the message." City's Opening/Response at 26. Not so. These two due process tests have long existed side by side and continue to do so, a reality that *Amunrud* itself only confirmed. Indeed, in *Cradduck v. Yakima County*, the court of appeals applied the unduly oppressive test to a property regulation in an opinion that also cited *Amunrud*. *See Cradduck*, 166 Wn. App. at 442–43. The courts know *Amunrud* exists and understand that case better than the City; they are not the ones that are confused. [4]

It is true that the Supreme Court of Washington has not relied on the unduly oppressive test since *Amunrud*, but the Supreme Court has not had occasion to do so because it has not granted a substantive-due-process case regarding a land-use regulation during that timeframe. [5]

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[4] Two Division II decisions have deviated from this pattern by applying rational basis review to land-use regulations. *Olympic Stewardship Foundation v. State Environmental and Land Use Hearings Office*, 199 Wn. App. 668, 399 P.3d 562 (2017); *Jesperson v. Clark County*, 199 Wn. App. 568, 399 P.3d 1209 (2017). In light of the discussion above, however, these two cases are outliers, and, in any case, Division I has continued to follow the unduly oppressive test in the land-use setting. *See Conner*, 153 Wn. App. 673 (2009).

[5] The state Supreme Court has reviewed 31 cases raising substantive-due-process issues since *Amunrud*. Of the 31, only two relate to property rights: *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), which involved fines for building code violations, and *Lummi Indian Nation v. State*, 170 Wn.2d 247, 241 P.3d 1220 (2010), which involved water rights. In *Post*, the Court declined to address the substantive-due-process issue. *Post*, 167 Wn.2d at 312 n.11. And in *Lummi Indian Nation*, the Court simply held that a facial due-process challenge was improper under the circumstances. *Lummi Indian Nation*, 170 Wn.2d at 267. Neither case addressed the due-process test that would have otherwise applied.

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The question, then, is simply whether the first-in-time rule is a property regulation to which the unduly oppressive test should apply. It is, as the many cases applying the unduly oppressive test to residential housing ordinances attest. *See*, *e.g.*, *Sintra*, 131 Wn.2d 640 (applying the unduly oppressive test to a fee imposed for removing property from the residential housing market); *Guimont*, 121 Wn.2d 586 (1993) (applying the unduly oppressive test to a requirement that mobile-home-park owners pay relocation costs when changing the park's use); *Margola*, 121 Wn.2d 625 (1993) (applying the unduly oppressive test to a fee and registration requirement for residential rental units). The unduly oppressive test therefore applies.

B. The first-in-time rule is not a reasonable means of preventing discrimination

Whether rational basis or the unduly oppressive test applies, the means used in achieving any government interest must be reasonable, not arbitrary and capricious. A sweeping ban on normal conduct—much of which is wholly innocuous—is not a reasonable means to preventing discrimination.

The principle that the police power has fundamental limits bounded by reasonableness is a core foundation of due process law. *See Weden*, 135 Wn.2d at 706 ("The purpose of this [due process] analysis is to prevent excessive police power regulations. . . ."). Our country has long recognized that the police power is not boundless. As Justice Samuel Chase admonished in 1798: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control . . . There are acts which the federal or state legislature cannot do without exceeding their authority." *Calder v. Bull*, 3 U.S. 386, 387–88, 1 L. Ed. 648 (1798). His examples have interesting parallels to this dispute, such as a law "that punished a citizen for an innocent action" or "a law that destroys, or impairs, the lawful private contracts of citizens . . . or a law that takes property

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from A. and gives it to B." *Id*. at 388. Such actions by a government cannot stand because "[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Id*.

In critiquing the Yims' premise that this use of the police power goes too far, the City does not even dispute the hypotheticals raised by the Yims regarding the City's remarkably broad exercise of power. The Yims' opening brief, for instance, points out that banning behavior because it might be influenced by implicit bias would seem to have no rational limit—a limit that the police power must have. *See* Plaintiffs' Opening at 17-20. The Yims point out, for instance, that the City's means of dealing with implicit bias would seem to also justify forbidding employment interviews or physician discretion. *Id*. at 18. The City bristles at these hypotheticals but does not even attempt to rebut them. It appears the City, too, cannot see any genuine limit to the power that it has asserted in imposing the first-in-time rule.

The fact that the industry recommends screening in chronological order does not mean that forcing all landlords to offer tenancy to the first qualified tenant is therefore reasonable. Indeed, the Rental Housing Association, one of the organizations that recommends this best practice, opposed the first-in-time rule because it would "pose a serious threat to the screening process." RHA's Legislative Blog, *supra*. Yet the City repeatedly asserts that it is simply codifying an accepted practice in the industry. *See* City's Opening/Response at 22-23.

When it comes to reasonableness, the difference between a recommendation and a mandate is paramount. A property right—or any other right, for that matter—by its nature bestows the "freedom to differ"—to decide for one's self whether to follow community norms or deviate from them. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87

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L. Ed. 1628 (1943). Freedom means little if it does not mean that someone can chart a course against the stream based on their own assessment of what is best in light of their own circumstances.

Coercing a practice is not reasonable just because scholars believe that practice is wise. Scholars recommend regular exercise, but surely government-mandated exercise would not be a reasonable approach to promoting health. Likewise, the state bar association recommends that attorneys engage in a minimum number of pro bono hours annually. Coercing attorneys to provide free legal services, however, would surely impinge on their liberty interests. The mere fact that the industry recommends screening applicants in order does not mean that government force is justified or reasonable.

C. The first-in-time rule is unduly oppressive on landlords

1. The Yims did not waive due process arguments

The City claims that the Yims did not discuss all the factors in the unduly oppressive prong of the due process test and therefore somehow waived argument regarding factors left undiscussed in the opening brief. This argument lacks merit.

The third prong of the unduly oppressive test asks whether the challenged regulation "is unduly oppressive on the landowner." *Presbytery*, 114 Wn.2d at 330. Caselaw has listed a number of illustrative factors to consider in analyzing this prong—several that favor the government and several that favor the claimant. *Id.* at 331. Omitting discussion on a few of the factors in a non-exhaustive, multifactorial test in the first of two trial briefs does not constitute waiver.

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The Yims did not discuss a few of the factors that weigh in favor of the City because of the strategic decision to save discussion of those factors for the response to the City's briefing. The Yims also did not discuss two factors that weigh on the side of the property owner: whether the law could have been anticipated by landlords or whether a changed use in the property is feasible. The Yims did not discuss those factors at length because the answer to the first question is patent—no other government entity in the country has engaged in a sweeping ban of this magnitude—and because the second question is more appropriate for as-applied claims.

The City states that the Yims did not address two factors that are not actually factors in the unduly oppressive test. It quotes from *Laurel Park v. City of Tumwater*: "[T]he two most important factors are the fact that the present-day effect on Plaintiffs' property values is little to none and the fact that Plaintiffs may continue to use their properties as they have been used for decades." 698 F.3d at 1194; City's Opening/Response at 30. Those "factors" are not from the unduly oppressive test. *See Presbytery*, 114 Wn.2d at 341(describing the actual factors for the unduly oppressive test). The *Laurel Park* statement is just a fact-specific application of the unduly oppressive test regarding a mobile-home-park zoning ordinance. *See Laurel Park*, 698 F.3d at 1194.

The Yims addressed the unduly oppressive test for three pages of its opening brief, not to mention the pages devoted to the test in this response. That is a stark contrast to the City's single citation for inadequate briefing, where the plaintiffs had devoted just a single, unsupported sentence to the unduly oppressive test. *Margola*, 121 Wn.2d at 649; *see* City's Opening/Response at 29. The Yims' strategic choice to conserve word count and reserve responsive arguments for a response brief does not amount to waiver.

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2. The first-in-time rule bans a wide range of innocuous conduct that does not cause discrimination

The City asserts that the sweeping ban on landlord discretion is appropriate because "who other than landlords could be responsible for bias in tenancy decisions?" City's Opening/Response at 31. The City then quotes *Weden v. San Juan County*: "It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm." *Id*. at 31; *Weden*, 135 Wn.2d at 707.

But, in fact, the ordinance in *Weden* is a useful contrast to the first-in-time rule. In *Weden*, a county ordinance banned all jet skis and similar one-man motorized vessels from operating in marine waters in order to address noise pollution. *Weden*, 135 Wn.2d at 684–85. The County's findings stated that all watercraft subject to the ban contributed to the noise problem. *Id*. Thus, the ban extended only to the conduct producing the harm. It was in this context that the Court said: "It defies logic to suggest an ordinance is unduly oppressive when it *only* regulates the activity which is *directly responsible* for the harm." *Weden*, 135 Wn.2d at 707 (emphasis added).

The first-in-time rule does not limit itself "only" to those actions "directly responsible" for the harm of discrimination. Unlike the county in *Weden*, the City has made no finding that every landlord in the City is "directly responsible" for discrimination whenever they select tenants. The first-in-time rule extends beyond banning conduct "directly responsible" for discrimination in at least three ways.

First, landlords might deny tenancy to the first qualified applicant for a host of valid reasons unrelated to bias. If an applicant has submitted a qualified application but is extremely rude when he drops it off, the landlord cannot reject the applicant on that basis. If the first qualified applicant

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leers at the landlord or otherwise makes the landlord feel unsafe or uncomfortable, the landlord still has no choice but to offer the unit to that applicant. Or if the landlord believes a subsequent applicant deserves a break or presents a more responsible rental history, the landlord still must select the first. A city council staff memo that the City stipulated to in the record agrees that the first-in-time rules forbids these innocuous judgment calls: "Use of a first in time policy affects [] a landlord's ability to exercise discretion when deciding between potential tenants that may be based on factors unrelated to whether a potential tenant is a member of a protected class." SR-000064. Such innocuous behavior is not "directly responsible" for discrimination. Yet the City's ban forbids any use of discretion, regardless of how innocuous or reasonable it might be.

Second, the research cited by the City demonstrates that not all landlords inevitably engage in discrimination. Implicit bias can be unlearned through life experiences or training. *See* SR-000190–96; Schwemm, *supra* at 507–08. And implicit bias—where it does occur—can sometimes be favorable to protected classes. SR-000156–57. Yet the City has applied its ban to all landlords without demonstrating that all landlords have failed to unlearn implicit biases or that such implicit biases are uniformly unfavorable. Any landlords who have gone through debiasing training or whose implicit biases favor protected classes cannot be "directly responsible" for discrimination.

Third, the ban applies to circumstances where no possibility of discrimination against a protected class even exists. In a circumstance where no members of a protected class are in an application pool—or where all applicants are part of the same protected class—the ban still applies even though implicit bias could not logically harm any protected class.

Thus, this case does not at all resemble *Weden*, where the ordinance only reached the conduct that caused the harm and no farther. By limiting the scope of the law only to the vessels

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directly responsible for noise pollution, *Weden* respected a fundamental limit on the police power: "Proof of actual harm is necessary because any law that undertakes to limit the exercise of rights beyond what is necessary to provide for the public welfare, cannot be included in the police power of the government." *Ralph v. Wenatchee*, 34 Wn.2d 638, 642–44, 209 P.2d 270 (1949).

The first-in-time rule does not respect that limit. Indeed, the first-in-time rule is more like a ban on all watercraft, motorized or not, as a means to stop noise pollution from small motorized vessels. That would extend far beyond the conduct directly responsible for the harm, much like the first-in-time rule.

The City also makes the incorrect argument that the Yims must demonstrate economic harm. *See* City's Opening/Response at 30. The City quotes from *Laurel Park Community, LLC v. City of Tumwater*: "It would be odd to conclude that an ordinance that had no economic effect on most properties was oppressive at all, let alone unduly oppressive." 698 F.3d at 1195. But the Court there only addressed economic injury because the plaintiffs' theory hinged on economic injury: "Tumwater's ordinances will result in significant economic losses in terms of total value and percentage that will be borne exclusively by the park owners." *Laurel Park*, Brief of Appellants, 2011 WL 96840006 at *54. *Laurel Park* did not hold that economic injury was necessary to prove undue oppression. Indeed, many rights violations occur without economic injury in contexts such as speech or privacy; the harm is the restriction on the right, not necessarily monetary losses that accompany that restriction.

Moreover, none of the unduly oppressive factors require economic harm. *See Guimont*, 121 Wn.2d at 610. For instance, in *City of Seattle v. McCoy*, the Division I Court of Appeals struck down an abatement action that resulted in the temporary closure of a lawful business because of

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patrons' drug-related activity. 101 Wn. App. 815, 823–24, 4 P.3d 159 (2000). The Court held that the abatement action was unduly oppressive despite no evidence regarding the economic harm to the property owners and no evidence regarding the economic cost of avoiding abatement by changing uses. *Id*. at 842. The Court simply held that—even without evidence of economic harm—the abatement was unduly oppressive because it deprived an innocent property owner of their property because of the illegal acts of others. *Id*. at 843. A showing of economic harm is one way to demonstrate an unduly oppressive law, but it is by no means the only way.

The City also disputes the Yims' reading of the ordinance, insisting that a landlord could still reject a qualified applicant because of belligerence or if the applicant makes the landlord feel unsafe. Yet the City offers no interpretation of the first-in-time rule that could explain how the actual text of the rule supports this reading. Indeed, the first-in-time rule is designed to prohibit such intuitive judgment calls because of a presumed implicit bias. The rule, on its face, requires the landlord to take the first qualified applicant once all advertised criteria are met. *See* SMC 14.08.050. If, after the application is completed, unforeseen but significant factors arise—such as the applicant insulting the landlord with racial slurs—the landlord is still stuck with that applicant. Landlords cannot foresee every situation that can arise, nor would it be realistic for landlords to create a laundry list of the unlimited possibilities that might be relevant to a rental decision. Moreover, not all issues that could arise can be boiled down as criteria with a "minimum threshold" as the first-in-time rule requires. SMC 14.08.050(A)(1)(a). These concerns are not "unwarranted inferences," as the City calls them. City's Opening/Response at 7. They are necessary inferences based on a plain reading of the text. The City has offered no alternative interpretation suggesting otherwise.

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Additionally, the Yims raised plausible, less oppressive alternatives, such as diversity training. Plaintiffs' Opening at 22-23. In response, the City—without citation—states that the Yims' alternatives "conflict with research." City's Opening/Response at 27. But all the alternatives suggested by the Yims are based on the scientific research relied upon by the City and stipulated in the record. *See* Plaintiffs' Opening at 22-23; SR-000190–96. With plausible, less onerous alternatives recommended by stipulated evidence, the City cannot credibly argue that its oppressive approach is a reasonable means to prevent housing discrimination.

III. The first-in-time rule violates the First Amendment

The City concedes that the first-in-time rule "directly regulates speech." City's Opening/Response at 34. The only remaining issues therefore are the proper level of scrutiny and its application.

A. The *Zauderer* exception to intermediate scrutiny does not apply because the first-in-time rule restricts speech and is not designed to prevent deception

The City asks this Court to apply the weak *Zauderer* standard of review for disclosure requirements rather than intermediate scrutiny. But *Zauderer* does not apply for two reasons: (1) *Zauderer* only applies to disclosure requirements that are intended to prevent deception; and (2) the first-in-time rule is not just a disclosure requirement—it restricts and controls the content of speech. Intermediate scrutiny therefore applies.

In the commercial speech context, the Supreme Court permits only one narrow exception to intermediate scrutiny: rational basis applies when the regulation is a disclosure requirement necessary to further the "State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed.

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2d 652 (1985). This Court should not expand rational basis review—already an outlier in First Amendment law—beyond the narrow confines crafted by the Supreme Court.

Both of the leading Supreme Court cases applying rational basis review to disclosure requirements dealt squarely with an interest in preventing deception. In *Zauderer*, the Court upheld a disciplinary ruling against an attorney for fraudulent advertising. 471 U.S. at 633–35. Specifically, the attorney promised clients that they would owe no legal fees in cases without a recovery, and failed to disclose that clients may still be liable for costs in unsuccessful claims. *See id*. at 630-34. But *Zauderer* was based on the fact that the First Amendment does not protect deceptive advertisements; demanding disclosure is presumptively permissible where the government could otherwise ban the deceptive speech entirely. *See id*. at 638.

The Court again confirmed that the *Zauderer* exception only applies to disclosure measures designed to prevent deception in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010). The law there required professionals providing debt relief assistance to disclose "that the assistance may involve bankruptcy relief." *Id*. at 233–34. The Court upheld the provisions, finding that the challenged requirements "share the essential feature[] of the rule at issue in *Zauderer*" in that they "are intended to combat the problem of inherently misleading commercial advertisement." *Id*. at 250 (emphasis added). Because the interest in preventing deception is clearly not the purpose of the first-in-time rule, the *Zauderer* standard does not apply.

Moreover, *Zauderer* only applies to disclosure requirements, not regulations that restrict speech, because "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech." *See Zauderer*, 471 U.S. at 651. The first-in-time rule certainly

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requires disclosures, but it also restricts what landlords can say in their advertisements. *Zauderer* does not apply to such speech restrictions.

The first-in-time rule restricts speech. The text—as a matter of logical inevitability—forbids the common practice of advertising flexible criteria based on case-by-case considerations. The rule requires landlords to list in online advertising all "the criteria the owner will use to screen prospective occupants and the minimum threshold that the potential applicant must meet." SMC 14.08.050(A)(1)(a). On its face, this language forbids an advertisement that expresses flexibility in criteria, since the landlord must stipulate a mandatory minimum threshold with each criterion. A landlord cannot, for instance, say "credit scores will be handled on a case-by-case basis," since this would omit a minimum threshold. The rule therefore restricts speech. The City contests this reading, yet it again fails to offer a competing interpretation. *See* City's Opening/Response at 33–34.

B. The first-in-time rule does not satisfy intermediate scrutiny

The test for commercial speech involves four steps laid out in *Central Hudson Gas & Electricity Corporation v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 341 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

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The first-in-time rule does not pass muster under this test because it regulates constitutionally protected expression in a manner that is more extensive than necessary to serve the government's interest in anti-discrimination.

The City misstates the first step when it implies that a facial challenge carries the burden of demonstrating that all speech subject to the ordinance is not misleading or unlawful. City's Opening/Response at 35. This would seem to preclude any facial challenge to commercial speech regulations, since there always exists the possibility that an individual instance of misleading or unlawful speech will fall within the scope of any given speech regulation. Yet commercial speech regulations have been successfully challenged on their face. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001) (striking down a facial challenge to tobacco advertisement regulations); Brief for Petitioners, 2001 WL 185381 at *i (framing the question presented in *Lorillard* as a facial challenge). Step one simply asks whether the ordinance is limited to regulating unprotected speech, such as misleading speech or speech related to unlawful activity. *See Central Hudson*, 337 U.S. at 566; *Lorillard*, 533 U.S. at 564. Landlord advertisements for rental units—the target of the first-in-time rule's speech restrictions—are not unprotected speech in this sense. Thus, the speech regulated by the first-in-time rule is protected by the First Amendment.

The first-in-time rule falters because it is "more extensive than is necessary to serve" the governmental interest in preventing discrimination. *Lorillard Tobacco Company v. Reilly* is instructive regarding this fourth factor. There, Massachusetts imposed advertising restrictions on tobacco companies, banning outdoor advertising and point-of-sale advertising within 1000 feet of schools and playgrounds. *Id*. at 534. The Court held that the bans did not have "a reasonable fit

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between the means and ends of the regulatory scheme" because of their "broad sweep." *Id*. at 561–63. The Court held that the failure to engage in "case-specific" analysis of the impact and need for speech restrictions depending on locations where advertising occurred and the "uniformly broad sweep" of the ad bans demonstrated an unconstitutional "lack of tailoring." *Id*. at 563.

The first-in-time rule suffers from similar defects. All landlords, regardless of whether they have any demonstrated history of discrimination, face the first-in-time rule's speech restrictions. The "uniformly broad sweep" of the rule without any regard for "case-specific" considerations demonstrates the same fatal lack of tailoring as in *Lorillard*. Other options do exist for addressing implicit bias that do not involve restricting landlord speech, as amply demonstrated by the publications cited by the City. *See, e.g.*, SR-000191–94; Schwemm, *supra* at 508.

The City also asserts that the Yims' First Amendment challenge fails because the Yims "cannot disprove the existence" of a landlord who unconsciously discriminates. City's Opening/Response at 35. But the party that carries the burden of proof on this issue is the City, not the Yims. As the Court stated in *Lorillard*, the burden rests with the government to demonstrate that a commercial-speech regulation meets the tailoring requirement of *Central Hudson*: "We conclude that the Attorney General has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use." *Lorillard*, 533 U.S. at 565. The City here

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has likewise failed to show that the first-in-time rule's speech restrictions are not more extensive than necessary to advance its anti-discrimination interests. [6]

The City also dismisses the restrictions on landlords' speech here as "minimal." City's Opening/Response at 33–34. But the City's judgment as to whether the landlords' speech interests here are important or not is irrelevant. As the Supreme Court said in *Lorillard*, "there is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification." *Lorillard*, 533 U.S. at 567. Certainly, the speech interest at stake here was not "minimal" for the minority renters with poor rental histories that plaintiff Scott Davis currently rents to because Davis maintained flexibility in his rental criteria. SF ¶ 4.

The City's speech restrictions on a landlord's advertising cannot satisfy intermediate scrutiny.

CONCLUSION

This Court must obey binding precedent. Contrary to the City's attempts to question the binding nature of the cases cited by the Yims, whether it be *Manufactured Housing*, the unduly oppressive test, or *Mattress Outlet*, these cases stand as good law. Each, in turn, speaks to the

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[6] The City also criticizes the Yims' reliance on the state supreme court case of *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 104 P.3d 1280 (2005), once again raising the dubious argument that a state supreme court decision is not binding if four justices join the lead opinion and one concurs. But as discussed above, this depends on the nature of the concurring opinion. As it happens, *Mattress Outlet* is just like *Manufactured Housing* in this respect: four justices joined the lead opinion, one concurred, one concurred only in the result, and three dissented. *Compare id*. at 506 with *Manufactured Housing*, 142 Wn.2d at 375. As discussed in detail in Part I.a. of this brief, a lead opinion is a majority decision if a fifth justice concurs normally, not just "in the result." And much like *Manufactured Housing*, the *Mattress Outlet* dissent repeatedly referred to the lead opinion as the "majority." *Id*. at 518–19, 521–23, 525–29 (Madsen, J., dissenting).

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constitutional infirmities of this novel and oppressive approach to housing discrimination. The Yims' motion for summary judgment should be granted and the City's cross-motion denied.

CERTIFICATION OF COMPLIANCE

I certify that the foregoing motion contains 9,339 words and complies with Local Court Rules.

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Dated: February 7, 2018.

By: s/ Ethan W. Blevins

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel for the City of Seattle,

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