Honorable Sue Parisien
Noted for argument Friday, Feb. 23, 2018, 9:00 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CAN APARTMENTS, LLC, and EILEEN, LLC, Plaintiffs, vs. CITY OF SEATTLE, Defendant.	No. 17-2-05595-6 SEA CITY OF SEATTLE'S OPENING/RESPONSE ON CROSS MOTIONS FOR SUMMARY JUDGMENT

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I. INTRODUCTION AND RELIEF REQUESTED

Studies substantiate implicit bias in tenancy decisions. Landlord organizations and other real estate professionals tout first-in-time decision-making as a best practice to avoid discrimination. The City of Seattle codified that best practice to address implicit bias. The law, often called the First-in-Time or "FIT" Rule, requires landlords to establish screening criteria and offer tenancy to the first applicant meeting them.

Plaintiff landlords dislike the FIT Rule. They contend the Rule, on its face, violates takings, due process, and free speech provisions of the Washington Constitution. But Plaintiffs invoke incorrect legal standards and rely on assumptions about the Rule unsupported by its text.

The City respectfully asks this Court for summary judgment. This Court should: recognize the correct standards (and call on the Washington Supreme Court to bring much-needed clarity to Washington's law of takings and due process); apply those standards to uphold the FIT Rule against this facial challenge; and rule that the City would be entitled to judgment even under the incorrect standards Plaintiffs invoke.

II. FACTS

The Stipulated Facts and Record introduce Plaintiffs, discuss City actions taken before adoption of the FIT Rule, and outline the legislative history of the two ordinances that resulted in the FIT Rule. Certain facts from the record and other published material merit the Court's attention.[1]

[1] The parties did not preclude citation to such published material as periodicals or web pages. Stipulated Facts and Record ("SR") at SR-2.

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A. Based on published studies, scholars and other researchers recognize implicit bias in tenancy decisions.

Implicit bias encompasses favorable and unfavorable assessments and is activated involuntarily and without an individual's awareness or intentional control.[2] "Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection."[3] Housing discrimination testing, using pairs of equally qualified applicants with one applicant in a protected class and the other in a non-protected class, consistently demonstrate this phenomenon. The U.S. Department of Housing and Urban Development ("HUD") published the results of "paired" studies in 1977, 1989, and 2000.[4] HUD's most recent results, published in 2012, concluded that discrimination in housing persists, even if not in its most blatant forms:

> Although the most blatant forms of housing discrimination (refusing to meet with a minority homeseeker or provide information about any available units) have declined since the first national paired-testing study in 1977, the forms of discrimination that persist (providing information about fewer units) raise the costs of housing search for minorities and restrict their housing options.[5]

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[2] SR-214: Cheryl Staats, Kelly Capatosto, Robin A. Wright, and Danya Contractor, *State of the Science: Implicit Bias Review 2015* at 62 (Kirwin Institute, Ohio State Univ., 2015).

[3] *Id.*

[4] *See* Urban Institute Metropolitan Housing and Communities Policy Center, *Discrimination in Metropolitan Housing Markets: National Results from Phase I of HDS 2000*, Exec. Summary at i – viii (Submitted to HUD, Nov. 2002) (discussing the 1977 and 1989 reports) (available at https://www.huduser.gov/portal/publications/hsgfin/hds_phase1.html, accessed Jan. 14, 2018).

[5] Urban Institute, *Housing Discrimination Against Racial and Ethnic Minorities 2012* at xi (Prepared for HUD Office of Policy Devel. and Research, June 2013) (available at https://www.huduser.gov/portal/publications/fairhsg/hsg_discrimination_2012.html, accessed Jan. 14, 2018)

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Citing those and other studies and publications, the Washington Community Action Network concludes express and implicit bias still works against marginalized communities seeking housing:

> When looking for rentals, marginalized communities often face discrimination — both blatant and implicit. Whites are more likely than people of color to be told about rent incentives as well as the possibility of negotiating lease terms. Same-sex couples also face significant discrimination when trying to access housing; they are far less likely than heterosexual couples to get a response from a landlord when looking for a rental. Disability discrimination complaints represented more than half of the complaints filed in 2014 with local, state, and federal housing agencies, private fair-housing groups, or the US DOJ.[6]

Based on the results of studies, the Kirwan Institute, an Ohio State University interdisciplinary research organization, concludes implicit bias infects tenancy decisions even if overt bias has waned:

> The existence of unconscious bias helps to explain the persistence of housing inequality and high levels of residential segregation, despite the dismantling of racially discriminatory laws. Every act of buying or renting housing involves human actors who exercise discretion, sometimes unconsciously. Paired testing studies…have proved that differential treatment of persons in housing markets persists…. Thus while the most blatant forms of housing discrimination (redlining, restrictive covenants, refusing to meet with minority home seekers) may have been eliminated or reduced, additional policies and strategies will be needed to create pathways to housing and opportunity free of bias.[7]

Legal scholars likewise conclude implicit bias can undermine a prospective tenant even before meeting the landlord:

> Minority home-seekers often encounter bias from the moment they begin their search if a name or voice signifies belonging to a non-dominant group.

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[6] SR-248: Margaret Diddams and Xochitl Maykovich, *Seattle's Renting Crisis: Report and Policy Recommendations* at 8 (Wash. Community Action Network, July 2016).

[7] Jillian Olinger, Kelly Capatosto, and Mary Ana McKay, *Challenging Race as Risk: How Implicit Bias undermines housing opportunity in America—and what we can do about it* at 16 (Kirwin Institute, Ohio State Univ., 2016) (available at http://kirwaninstitute.osu.edu/my-product/challenging-race-as-risk-implicit-bias-in-housing/, accessed Jan. 14, 2018).

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> Researchers have observed: "Applicants making initial inquiries as to the availability of an apartment . . . may have their ethnicity, character, competence, and attractiveness evaluated before they ever meet their prospective landlord, and the results may be tangible in the loss of an opportunity to find suitable housing."[8]

To yet another legal scholar, the discouraging results of implicit bias studies suggest that, "even if the [the federal Fair Housing Act] were successful in eliminating all consciously motivated discrimination, a great deal of race-based discrimination would still occur in rental markets, practiced by landlords who are not even aware they are disfavoring minority applicants and who may see themselves as law-abiding housing providers."[9] Or as another legal scholar put it more simply, the studies "indicate that implicit biases against minorities exist and lead to disparities that simply cannot be attributed to purely economic factors."[10]

B. As a best practice, landlord organizations and others recommend first-in-time decision-making based on established criteria.

To help landlords make fair housing decisions and avoid discrimination liability, landlord organizations promote a simple best practice: establish criteria and accept the first tenant who meets them. For example, the Washington Multi-Family Housing Association ("the professional trade association that advances the interests of the multifamily industry"[11]), on a web page entitled *Fair Housing Best Practices*, recommends selecting tenants using a first-in-time process:

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[8] Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. Haw. L. Rev. 313, 319 (2015) (quoting Adrian G. Carpusor & William E. Loges, *Rental Discrimination and Ethnicity in Names*, 36 J. APPLIED SOC. PSYCHOL. 934, 937 (2006)).

[9] Robert G. Schwemm, *Why Do Landlords Still Discriminate (and What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 504 (2007).

[10] Equal Justice Society, Wilson Sonsini Goodrich, Rosati, *Lessons from Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias,* 11 HASTINGS RACE & POVERTY L. J. 241, 258–59 (2014). *Accord id*. at 259 ("Research illustrates that racial discrimination is not limited to overt, direct-contact interactions, but rather involves implicit biases that influence decisions that otherwise appear to be neutral.").

[11] https://www.wmfha.org/about-us (accessed Jan. 12, 2018).

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> **Accept the first qualified resident** to complete the application process and be approved. **Date and time-stamp all applications** and any supporting documentation required, when you receive it from the prospective applicant.
>
> Do not make assumptions about your residents. **Only use facts based on your screening criteria to determine whether an applicant is qualified**.[12]

The Rental Housing Association of Washington ("one of the most valuable resources for independent rental owners and managers"[13]) likewise advised that an acceptable screening method is to "process one application at a time and take the first qualified tenant" and that "[u]sing a set criteria [sic] also helps show that you are screening all applicants alike and can help avoid claims of discrimination by applicants not granted tenancy."[14] The National Apartment Owners Association is more emphatic: "You really need to select the first qualified applicant that meets your requirements."[15]

This advice echoes recommendations from fair housing organizations[16] and other real estate professionals.[17]

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[12] SR-272 (emphasis added). *See* SR-143: City Councilmember Herbold's web site citing this page as an example of a best practice.

[13] https://www.rhawa.org/about-rhawa.html (accessed Jan. 12, 2018).

[14] SR-273 – 274.

[15] *Best Practices for Avoiding Discrimination*, https://www.american-apartment-owners-association.org/property-management/landlord-quick-tips/fair-housing-best-practices/ (accessed Jan. 11, 2018).

[16] *See* SR-64: Memo from Asha Venkataraman to Council Committee (June 14, 2016) ("Fair housing organizations often recommend first in time policies to landlords as a best practice"). *See also* SR-264: Margaret Diddams and Xochitl Maykovich, *Seattle's Renting Crisis: Report and Policy Recommendations* at 8 (Wash. Community Action Network, July 2016) ("Further - as a way to overcome any implicit bias that might exist - landlords must be required to accept the first tenant to apply who meets the tenancy requirements."); SR-89: Memo from Columbia Legal Services and Tenants Union of Washington to Andra Krazler, Aide to Councilmember Herbold at 2 (July 2016) ("First in Time creates a more objective process for landlords to use when reviewing rental applications to remove both explicit and implicit bias based on source of income status, as well as other protected classes including race and gender.").

[17] *See, e.g.*, Global Verification Network, *How To Screen Tenants And Avoid Discrimination* (June 2017), http://globalverificationnetwork.com/how-screen-tenants-and-avoid-discrimination ("As a best practice, it's wise to accept the first qualified applicant for your open apartment."); MyScreeningReport.com, *Tenant Screening 101—*

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C. The FIT Rule codifies the first-in-time best practice to limit implicit bias.

The FIT Rule attempts to limit implicit bias through first-in-time decision-making. The language that became the FIT Rule was first introduced to a City Council committee with the explanation that first-in-time decision-making is often recommended "as a best practice to ensure that unconscious biases do not result in discrimination when a landlord is deciding between multiple tenants who qualify for a rental unit."[18]

The FIT Rule is codified at Seattle Municipal Code ("SMC") Section 14.08.050. The FIT Rule, along with related provisions, is attached as an appendix.[19] The Rule comprises four basic components:

1. A landlord must provide notice of the landlord's screening criteria, "all information, documentation, and other submissions" needed to conduct the screening, and information on how to request more time to complete an application.

2. An application is complete when it includes the required "information, documentation, and other submissions."

3. The landlord must note the date and time of each complete application.

First Come – First Serve (July 10, 2013), http://blog.myscreeningreport.com/first-come-first-serve/ ("Best Practice – Screen Applicants on a First come-First serve Basis"); Omar Barraza, *Does Your Tenant Screening Pass a Fair Housing Test?* (Jan. 2002), https://www.kingcounty.gov/~/media/exec/civilrights/documents/screen.ashx?la=en ("In general, it is safer to take applications on first-come, first-served basis."); Jennifer Chan, *How to Select From Multiple Qualified Rental Applications*, https://www.zillow.com/rental-manager/resources/multiple-qualified-rental-applications/ ("One way to avoid the dilemma of multiple qualified renters is to lease your unit to the first qualified applicant."); Tracey March, *Choosing Between Qualified Tenants*, https://www.allpropertymanagement.com/blog/2012/10/01/choosing-between-multiple-qualified-tenants/ ("One way to handle multiple qualified applicants is to sort the applications based on when each application was submitted, and offer the property to the first qualified applicant."). All of those pages were accessed Jan. 11, 2018.

[18] SR-64.

[19] For context, the Appendix provides two other sections in reverse numerical order. One is SMC 14.08.030, which prohibits "unfair practices" as defined in SMC Chapter 14.08, including the FIT Rule. This is why the FIT Rule begins by explaining "it is an unfair practice for a person to fail to" follow the Rule. SMC 14.08.050.A. The other section is SMC 14.08.020, which defines terms used in SMC Chapter 14.08.

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4. The landlord must screen each application in the order completed and offer the unit to the first applicant meeting the landlord's criteria. [20]

The Rule does not apply to units the landlord limits to specific vulnerable populations, or to accessory dwelling units (often called "mother-in-law" units) or detached accessory dwelling units (often called "back-yard cottages") if the landlord resides on the property.[21]

D. On its face, the FIT Rule imposes no substantive or additional procedural limitations.

Because the City has not attempted to enforce the FIT Rule against Plaintiffs, this facial challenge is limited to the words on the Rule's face. Those words impose no requirement or limitation on the procedural or substantive aspects of the criteria or the "information, documentation, and other submissions" needed to conduct the screening.

Plaintiffs make unwarranted inferences from the FIT Rule. Contrary to their assertions, nothing on the face of the Rule precludes an interview as part of the application.[22] The text does not mandate "general" criteria; they may be specific.[23] The text prevents no landlord from establishing criteria that would exclude an applicant who is belligerent or sports tattoos, let alone a swastika tattoo.[24]

Because other laws limit a landlord's ability to discriminate based on, say, race or gender, a landlord would not likely include those as criteria. But the FIT Rule itself imposes no such limitation.

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[20] SMC 14.08.050.A.

[21] SMC 14.08.050.A.4 and .F.

[22] *Cf.* Motion at 12.

[23] *Cf.* Motion at 11-12.

[24] *Cf.* Motion at 19.

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III. EVIDENCE RELIED UPON

The City relies on the Stipulated Facts and Record, the published material cited in the City's briefing, and the other papers and pleadings on file with the Court.

IV. ISSUES

1. Washington courts apply a six-part text to assess takings claims. Plaintiffs do not address that test. Have Plaintiffs failed to carry their burden of proving the FIT Rule, on its face, effects a taking under this test?

2. Plaintiffs instead invoke the lead opinion in *Manufactured Housing*, which is non-binding and distinguishable from the facts Plaintiffs present. Have Plaintiffs failed to carry their burden of proving the Rule, on its face, effects a taking?

3. Plaintiffs allege the FIT Rule effects a taking for a prohibited "private use." Plaintiffs have not proven the Rule effects a taking and would be entitled to relief if they had. Is Plaintiffs' "private takings" claim superfluous?

4. The Washington Supreme Court applies the deferential rational-basis test to substantive due process claims. Plaintiffs do not address that test. Have Plaintiffs failed to carry their burden of proving the FIT Rule, on its face, violates landlords' due process rights?

5. To press their due process claim, Plaintiffs invoke the discredited "undue oppression" test, which requires them to prove the FIT Rule does not use means reasonably necessary to achieve its purpose and, on its face, "unduly oppresses" landlords. Plaintiffs allege no economic harm and the Washington Supreme Court rules "[i]t defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm."[25] Even if the "undue burden" test were still valid, have Plaintiffs failed to carry their burden of proving the FIT Rule, on its face, violates that test?

6. Because the FIT Rule imposes a disclosure requirement and does not restrict landlords' commercial speech, it must be reviewed under the deferential *Zauderer* test. Plaintiffs do not address that test, which the FIT Rule passes. Is the City entitled to judgment on Plaintiffs' free speech claim?

7. Believing the FIT Rule restricts landlords' speech, Plaintiffs rely on *Central Hudson* to prove their facial free speech claim. The Rule passes muster under *Central Hudson* because it adopts an industry-accepted best practice to advance the City's interest in reducing implicit bias in tenancy decisions, which represents a reasonable fit between the City's means and ends. Even if *Central Hudson*

[25] *Weden v. San Juan County*, 135 Wn.2d 678, 707, 958 P.2d 273 (1998).

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provided the test, would the City be entitled to judgment on Plaintiffs' free speech claims?

V. ARGUMENT

Plaintiffs mount only facial constitutional challenges to the FIT Rule based on the Washington Constitution's takings, due process, and free speech provisions. A facial constitutional challenge "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[26] A court must reject a facial challenge "if there are any circumstances where the statute can constitutionally be applied."[27]

This Court should grant the City's motion because Plaintiffs cannot meet this burden and the City is entitled to judgment as a matter of law.[28]

A. The FIT Rule does not effect a taking of Plaintiffs' property.

Out of deference to the legislative process, courts presume a law is constitutional unless the challenger proves it unconstitutional beyond a reasonable doubt:

> [T]he "beyond a reasonable doubt" standard used when a statute is challenged as unconstitutional refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people

[26] *United States v. Salerno*, 481 U.S. 739, 745 (1987). This statement remains good law in the context of takings claims: "While we have held that *Casey* 'overruled *Salerno* in the context of facial challenges to abortion statutes,' we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so." *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461,467 (9th Cir. 2001) (quoting *Planned Parenthood of S. Arizona v. Lawall*, 180 F.3d 1022, 1027 (9th Cir.1999)).

[27] *Washington State Republican Party v. Wash. State Pub. Disclosure Comm'n,* 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000).

[28] *See* CR 56(c).

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> and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.[29]

Anyone making a facial takings claim faces an uphill battle made especially steep by insisting on a categorical rule.[30]

Complicating Plaintiffs' takings claim is the confused state of Washington takings law. The Washington Supreme Court has consistently held that, when determining whether a regulation goes so far as to take property, Washington courts apply the federal takings analysis because the Washington Constitution provides no greater protection. But the Washington Supreme Court misstated the federal analysis, leading some to mistakenly believe takings claims under the Washington Constitution require a unique analysis. And the Court issued a plurality opinion in *Manufactured Housing* that misread even the incorrect Washington analysis to announce a categorical rule Plaintiffs now invoke.[31]

This Court cannot fix Washington's broken takings law, but it should underscore the need for Supreme Court reform and hold: the FIT Rule effects no taking under the federal analysis or Washington's unique analysis; the plurality opinion in *Manufactured Housing* is not binding; and *Manufactured Housing* is distinguishable from this case in any event.

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[29] *Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998). As discussed below, the burden shifts to the government in free speech challenges.

[30] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 320 (2002); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-96 (1987).

[31] *Manufactured Housing Communities of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000).

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1. The FIT Rule does not effect a taking under the federal takings analysis.

Having found the federal takings analysis "may in some instance provide broader protection" than offered by Washington law,[32] the Washington Supreme Court purports to apply the federal analysis to takings claims arising under the U.S. or Washington Constitution, or both.[33]

The federal takings analysis comprises three components.[34] First, in a test associated most closely with *Loretto*, a taking occurs where government requires an owner to suffer a permanent physical invasion of her property, however minor.[35] Second, using the test announced in *Lucas*, a government regulation takes property if it deprives an owner of all economically beneficial use.[36] Finally, if a regulation passes the first two tests, federal courts apply the *Penn Central* factors, including the economic impact of the regulation, interference with distinct investment-backed expectations, and the character of the governmental action (such as whether it is more like a physical invasion or an adjustment of the benefits and burdens of economic life to promote the

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[32] *Orion Corp. v. State*, *Orion*, 109 Wn.2d 621, 657, 747 P.2d 1062 (1987). The Washington Supreme Court has never performed a formal analysis to determine whether the Washington Constitution provides broader protection than does the U.S. Constitution in claims that a regulation takes property. *See generally* Roger D. Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 WASH. L. REV. 125, 177-82 (2011).

[33] *See. e.g. Margola* at 642, 646-49 (applying one analysis to a takings claim under the U.S. and Washington Constitutions); *Sintra v. City of Seattle*, 119 Wn.2d 1, 14, 829 P.2d 765 (1992) ("federal law is ultimately controlling"); *Orion* at 657 ("we will apply the federal analysis to review all regulatory takings claims"). *See generally* Wynne, 86 WASH. L. REV. at 146-50.

[34] *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005).

[35] *Id.* at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

[36] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 1027–32 (1992).

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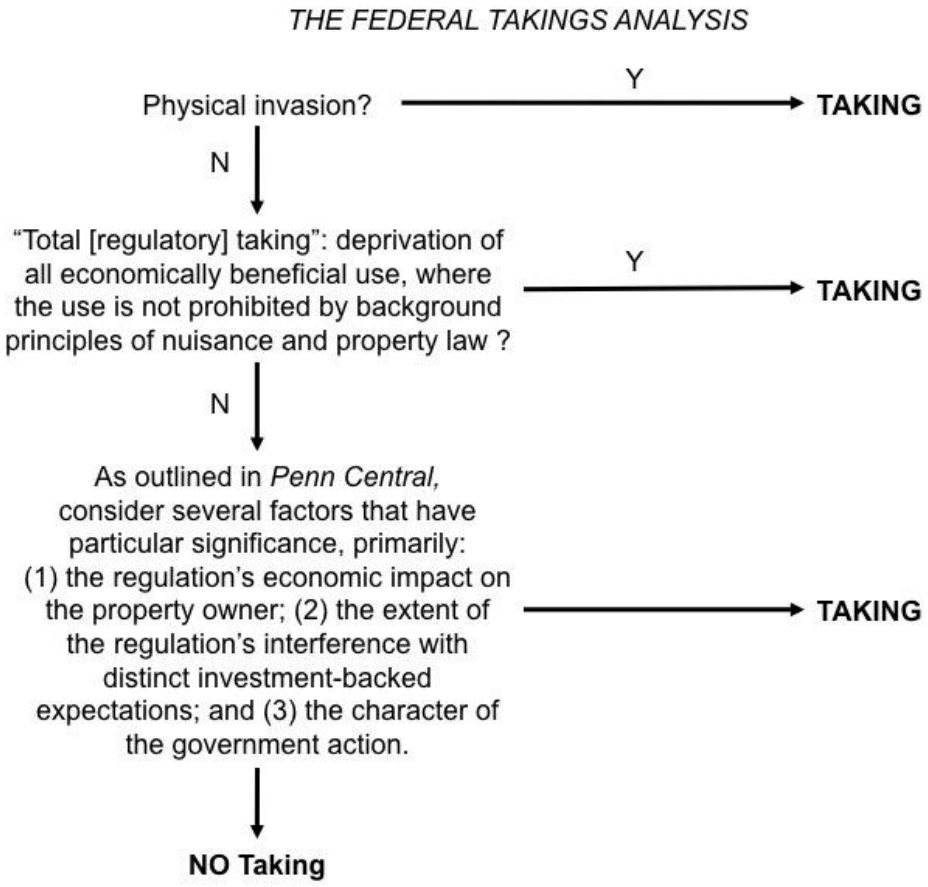
common good).[37] Graphically, the federal takings analysis arranges these elements in a simple, sequential order:[38]



The U.S. Supreme Court rejects claims that regulating the landlord-tenant relationship can amount to a taking:

> This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.[39]

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[37] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

[38] *See* Wynne, 86 WASH. L. REV. at 134.

[39] *Loretto*, 458 U.S. at 440.

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This is especially true of a claimed *per se* taking from a regulation denying a landlord the discretion to exclude particular individuals. "Because they voluntarily open their property to occupation by others, [landlords] cannot assert a *per se* right to compensation based on their inability to exclude particular individuals."[40]

The FIT Rule, which at most limits landlords' discretion to select tenants, is not a taking under the three-part federal analysis. The Rule is not a physical invasion under *Loretto*, which proscribes only regulations requiring a landlord to suffer the physical occupation of her property by a third party.[41] A landlord, by definition, has already opened her property to "invasion" by third parties. Because the FIT Rule at most limits a landlord's ability to select the invader, it is not a *Loretto* taking.[42]

The FIT Rule also fails to constitute a *Lucas* deprivation of all economically beneficial use. *Lucas* is reserved for the "extraordinary circumstance" where a regulation deprives the owner of 100% of the value of her property.[43] In this facial challenge, Plaintiffs allege no diminution in property value resulting from the FIT Rule.

The FIT Rule clears the *Penn Central* factors. A *per se* rule is incompatible with *Penn Central*,[44] and courts apply the factors to the entire property, not just to the attribute of property

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[40] *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992). *Accord id.* at 528-29; *FCC v. Florida Power Corp.*, 480 U.S. 245, 251-53 (1987); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980).

[41] *Loretto*, 458 U.S. at 440.

[42] *See Yee*, 503 U.S. at 532; *FCC*, 480 U.S. at 252-53.

[43] *Tahoe-Sierra*, 535 U.S. at 330; *Lucas*, 505 U.S. at 1017.

[44] *Tahoe-Sierra*, 535 U.S. at 321; *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988).

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ownership targeted by the challenged regulation.[45] The Supreme Court rejects a claim that curtailing the right to exclude others—admittedly "one of the essential sticks in the bundle of property rights"—can constitute a *per se* taking under *Penn Central*.[46] Any such claim must be assessed through application of the factors.[47] Plaintiffs' failure to demonstrate any economic loss precludes a *Penn Central* taking.[48]

2. The FIT Rule does not effect a taking under the incorrect Washington analysis, which Plaintiffs do not address.

Despite the Washington Supreme Court's avowed intent to follow the federal takings analysis, it crafted a decidedly different analysis and applied it to takings claims under the U.S. and Washington Constitutions.[49] This Court should call on the Supreme Court to reform Washington's takings jurisprudence, even though this Court must follow it. Applying that law here demonstrates the FIT Rule effects no taking.

The complex Washington analysis is best conveyed through a diagram:[50]

[45] *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017); *Tahoe-Sierra*, 535 U.S. at 326-27, 330-31; *Keystone*, 480 U.S. at 496-500; *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

[46] *PruneYard*, 447 U.S. at 82-83.

[47] *Id*.

[48] *See. e.g.*, *Laurel Park v. Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012); *Garneau v. City of Seattle*, 147 F.3d 802, 808 (9th Cir. 1998); *2910 Georgia Avenue LLC v District of Columbia*, 234 F. Supp. 3d 281, 299 (D.D.C. 2017).

[49] *See generally* Wynne, 86 WASH. L. REV. at 134-39.

[50] *See id*. at 135.

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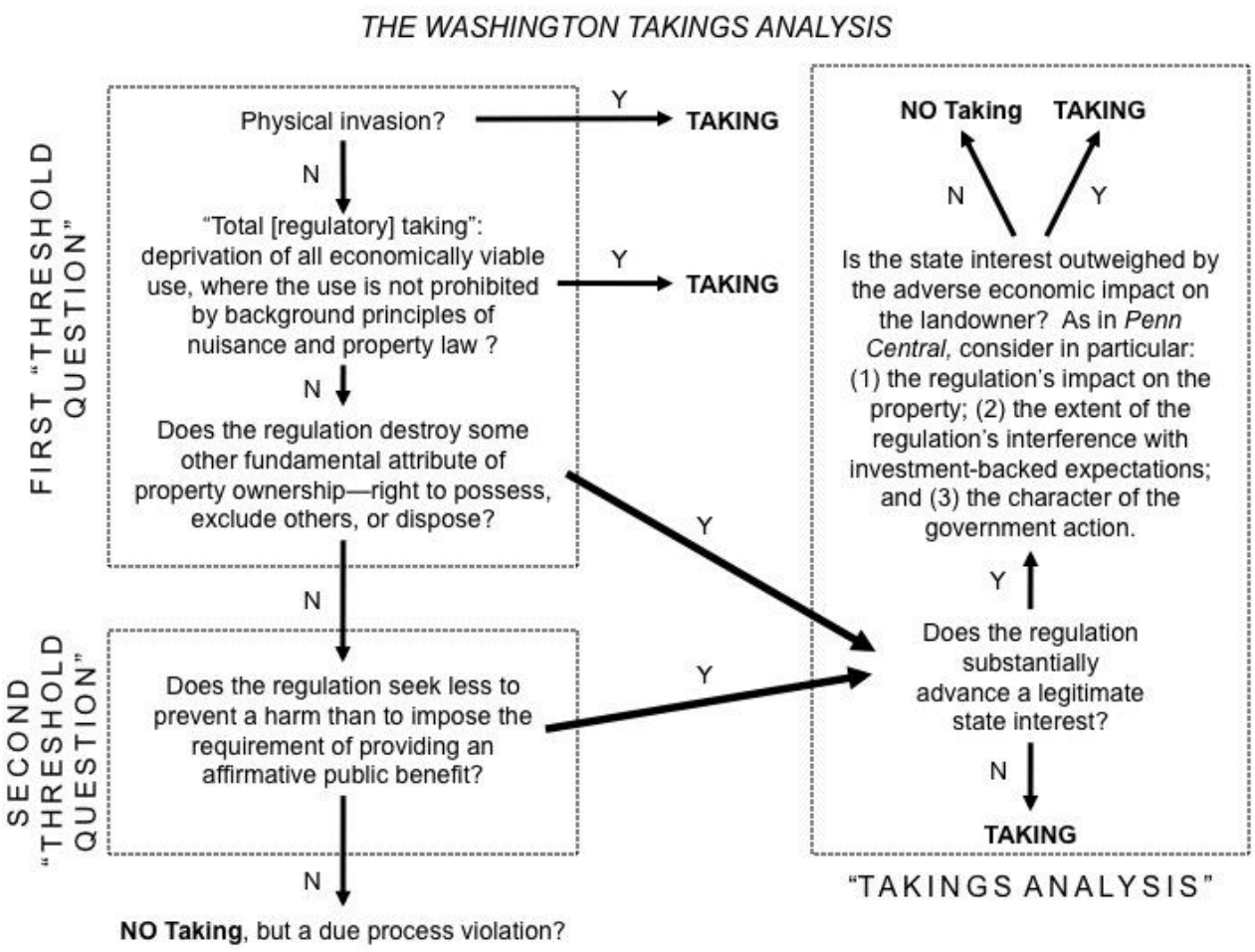

The analysis begins with the *Loretto* physical invasion and *Lucas* total deprivation elements of the federal analysis. These are the only two *per se* elements in the Washington analysis.[51] Again, Plaintiffs demonstrate neither element.

The third and fourth elements of the Washington analysis are threshold questions—if the answer to both is negative, the claim fails. Even if Plaintiffs could reach these elements, their claim would fail because both yield negative answers. One asks whether the challenged

[51] *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 645-49, 854 P.2d 23 (1993); *Guimont v. Clarke*, 121 Wn.2d 586, 602-03, 854 P.2d 1 (1993) ("if the owner alleges a 'physical invasion' or 'total taking' and fails to prove that either has occurred, then there is no *per se* constitutional taking").

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regulation "destroys" some fundamental attribute of property ownership, such as the right to exclude others.[52] Plaintiffs' claim requires a negative answer because the Washington Supreme Court follows federal law in holding that, where a landlord opens her property to tenants, an ordinance limiting the choice of tenants merely restricts—not destroys—a fundamental attribute.[53]

The other threshold question asks whether the regulation "seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit."[54] The FIT Rule generates a negative answer to this as well. The Rule merely safeguards the public welfare by requiring landlords to use an acknowledged best practice to reduce implicit bias in tenancy decision.

Even if Plaintiffs could coax an affirmative answer to one of the threshold questions, their claim would fail to yield a taking from the next unique Washington question: does the regulation substantially advance a legitimate state interest?[55] A negative answer means the regulation is a taking,[56] but the answer here is positive for the same reason the FIT Rule survives scrutiny under the "rational basis" due process test, as discussed later.

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[52] *Margola*, 121 Wn.2d at 643-44, 646.

[53] *Id*. at 648 (citing *Yee*: "the ordinance restricts, but does not destroy, Margola's right to exclude others from his property"); *Guimont*, 121 Wn.2d at 608 (citing *Yee*: because "[t]he Act on its face does not force park owners to allow others to occupy their land[,] the Act does not unconstitutionally infringe any other fundamental attribute of property ownership, such as the right to possess, exclude others, or dispose of property"); *Presbytery of Seattle v. King County*, 114 Wn. 2d 320, 333 n.21, 787 P.2d 907 (1990) (citing *Pruneyard*: "Not every infringement on a fundamental attribute of ownership will necessarily constitute a 'taking'.")

[54] *Guimont*, 121 Wn.2d at 603. *Accord Margola*, 121 Wn.2d at 645.

[55] *Presbytery*, 114 Wn.2d at 333.

[56] *Margola*, 121 Wn.2d at 645.

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Even if Plaintiffs could make it to the *Penn Central* factors at the end of the Washington analysis, their claim would fail for the same reasons it would fail under the federal analysis.

But Plaintiffs have not addressed the Washington takings analysis. They cannot carry their substantial burden of proving the FIT Rule effects a taking under it.

3. The lead opinion in *Manufactured Housing* is nonbinding, incorrect, and distinguishable.

Likely because their takings claim would fail under the federal and Washington analyses, Plaintiffs rely on the lead opinion in *Manufactured Housing*.[57] That reliance is misplaced because that opinion is nonbinding, incorrect, and distinguishable.

Manufactured Housing is the product of a Court that fractured 4-1-1-2-1: four justices signed the lead opinion; one joined in the result only; another issued a separate concurring opinion; two signed one dissenting opinion; and one issued a separate dissent. "A plurality opinion has limited precedential value and is not binding."[58]

The lead *Manufactured Housing* opinion misread the Washington analysis. The lead opinion concluded the challenged law would constitute a taking solely because it would deprive owners of the right of first refusal, which the lead opinion deemed a fundamental attribute of property ownership.[59] But no such rule exists. Under the Washington analysis, "[n]ot every infringement on a fundamental attribute of ownership will necessarily constitute a 'taking'."[60] The only way to prove a *per se* taking is to establish a *Loretto* physical invasion or a *Lucas*

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[57] Motion at 7-11 (relying on *Manufactured. Hous. Cmtys. of Wash. v. State*, 142Wn.2d 347 13 P.3d 183 (2000)).

[58] *Lauer v. Pierce County*, 173 Wn.2d 242, 258, 267 P.3d 988 (2011).

[59] *Manufactured Housing*, 142 Wn.2d at 368

[60] *Guimont*, 121 Wn.2d at 603 n.7. *Accord Presbytery*, 114 Wn.2d at 333 n.21.

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deprivation of all economically beneficial use.[61] Beyond that, even if a property owner establishes that a regulation destroys some other fundamental attribute of property ownership, the owner must still prove the regulation does not advance a legitimate state interest or fails application of the *Penn Central* factors.[62]

Even if the lead *Manufactured Housing* opinion were binding and correct, it is distinguishable. That case involved the right to sell property. Here, the right at stake is landlords' alleged right to choose a tenant and exclude others.[63] Courts have consistently rejected the existence of any such right. Again, courts start from the premise that the government cannot force a property owner to suffer invasion by third parties, but once that owner invites others to enter, the owner has no right—fundamental or otherwise—to select tenants or invitees free of governmental regulation.[64]

Yee is especially instructive because it abrogated a Ninth Circuit decision espousing the position Plaintiffs now advance. That decision, *Hall*, considered a law depriving a landlord of "practically all right to decide who occupies the property," leaving the landlord with "no meaningful say as to who will live on the property, now or in the future."[65] Echoing the conclusion Plaintiffs now urge, *Hall* found a taking because "the landlord loses forever a

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[61] *Guimont*, 121 Wn.2d at 602–03.

[62] *Margola*, 121 Wn.2d at 645 ("if the regulation infringes on a fundamental attribute of ownership, the court proceeds with its takings analysis" leading to the *Penn Central* factors). *Accord Guimont*, 121 Wn.2d at 603-04.

[63] Motion at 8 – 10. Plaintiffs gain nothing from noting a leasehold interest is a property interest that cannot be taken without just compensation—that is a right enjoyed by the tenant, not the landlord. *See* Motion at 9 (discussing *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 303-04 (1976)).

[64] *See, e.g., Yee*, 503 U.S. at 528-29, 531; *FCC*, 480 U.S. at 251-53; *PruneYard*, 447 U.S. at 82-83; *Margola*, 121 Wn.2d at 648; *Guimont*, 121 Wn.2d at 608.

[65] *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1276 (9th Cir. 1986).

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fundamental aspect of fee simple ownership: the right to control who will occupy his property and on what terms."[66] When *Yee*—a later dispute—reached the Supreme Court, the landlords there "relied almost entirely on *Hall*."[67] Abrogating *Hall*, the Supreme Court rejected the landlords' asserted categorical taking for the destruction of their right to choose their tenants: "Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals."[68] Plaintiffs cannot revive a right the Supreme Court declared dead.

If Plaintiffs were correct—if a limitation on a landlord's "fundamental right" to rent to the person of their choosing is a *per se* taking under *Manufactured Housing*—then all anti-discrimination rental laws would fail. Plaintiffs' argument does not depend on the landlords' reason for withholding the right of first refusal. They assert a "fundamental right" to choose or exclude tenants, the abrogation of which is a *per se* taking. A law preventing a landlord from refusing tenancy to a person because of sexual orientation, race, or religion effectively prevents the landlord from withholding a right of first refusal from someone the landlord may not prefer, perhaps because the applicant is neither straight, white, nor Christian. If a first-in-time requirement is a *per se* taking because it limits a landlord's "fundamental right" to choose or exclude, so too is a requirement not to choose or exclude on the grounds of sexual orientation, race, or religion.

Whatever validity *Manufactured Housing* retains, its logic does not extend to the illusory "fundamental right" of a landlord to choose or exclude tenants free of regulation.

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[66] *Id*. at 1279.

[67] *Yee*, 503 U.S. at 525.

[68] *Id.* at 531. *See Levald, Inc. v. City of Palm Deser*t, 998 F.2d 680, 685 (1993) (recognizing *Yee* overruled *Hall*).

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B. Plaintiffs' "private takings" claim is superfluous.

This Court need not entertain Plaintiffs' claim that the FIT Rule effects a prohibited "private taking." The Rule effects no taking, obviating any inquiry into its public or private nature.[69] And had Plaintiffs established a *per se* taking, the inquiry would end there. That would be a sufficient basis for the declaratory relief Plaintiffs seek, regardless of the "use" to which the City might put the "taken" property.[70]

C. The FIT Rule respects substantive due process guarantees.

Plaintiffs cannot meet their burden of proving beyond a reasonable doubt that the FIT Rule violates their due process rights.[71] The Rule passes muster under the rational-basis test used by Washington courts. Plaintiffs invoke a now-abandoned "undue oppression" test, but the Rule is constitutional even under that test.

1. The FIT Rule survives scrutiny under the deferential rational-basis test used by the Washington Supreme Court, which Plaintiffs do not address.

The due process clauses of the Washington and U.S. Constitutions are identical.[72] The Washington Supreme Court "has repeatedly iterated that the state due process clause is coextensive with and does not provide greater protection than the federal due process clause."[73]

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[69] *See, e.g., 2910 Georgia Avenue*, 234 F. Supp. 3d at 306 ("The public use requirement becomes relevant only if a taking has occurred.").

[70] The City reserves for an actual dispute its position that the public use requirement is relevant only to the taking of physical property interests.

[71] *See Island County*, 135 Wn.2d at 146-47 (burden of proof in constitutional challenges).

[72] Wash. Const. art. I, §3 ("No person shall be deprived of life, liberty, or property, without due process of law."); U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. Const. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

[73] *Nielsen v. Washington State Department of Licensing*, 177 Wn. App. 45, 52 n.5, 309 P.3d 1221 (2013).

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The Court reviewed the two clauses under the *Gunwall* factors and concluded they "do not favor an independent inquiry under article I, Section 3 of the state constitution."[74] Because the Washington due process clause imposes no greater restrictions on government action than does the federal clause, Plaintiffs' Washington due process claim must be evaluated under the federal due process test.[75]

Courts apply a deferential, rational-basis test, "the most relaxed form of judicial scrutiny."[76] The irreducible minimum of a substantive due process claim is failure to advance any governmental purpose.[77] A plaintiff faces the exceedingly high burden of proving the challenged regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[78] A court must presume the regulation to be valid—the plaintiff may overcome that presumption only by clearly showing arbitrariness and irrationality.[79] This test defers "to legislative judgments about the need for, and likely effectiveness of, regulatory actions" because the U.S. Supreme Court has "long eschewed . . .

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[74] *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996) (applying *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)). "In analyzing a substantive due process challenge, our Supreme Court has held the Washington due process clause does not afford broader protection than the Fourteenth Amendment." *State v. Shelton*, 194 Wn. App. 660, 666, 378 P.3d 230 (2016), *rev. denied*, 87 Wn. 2d 1002, 386 P.3d 1088 (2017).

[75] *See Oregon v. Hass*, 420 U.S. 714, 719 (1975) (where a state constitutional provision is no more restrictive than the federal provision, the state court must conform to federal law).

[76] *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 223, 143 P.3d 571 (2006).

[77] *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008).

[78] *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012).

[79] *Id.*

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heightened scrutiny when addressing substantive due process challenges to government regulation."[80]

Even if they addressed this deferential standard, Plaintiffs could not demonstrate a due process violation. The FIT Rule aims to advance a venerable governmental purpose: "Few state interests are more compelling than those surrounding the eradication of social disparity created by racial discrimination."[81] Plaintiffs' task would be especially difficult given that courts consistently uphold statutes advancing that interest by limiting property owners' ability to choose who comes upon their property once they open it to others. As far back as 1964, "the constitutionality of such state statutes [stood] unquestioned."[82]

Plaintiffs would find no basis to cast the FIT Rule as arbitrary or irrational. The Rule follows studies demonstrating implicit bias in tenancy decisions and requires a first-in-time decision-making approach touted as a best practice by landlord organizations, fair housing groups, and other real estate professionals. The Rule also finds support in a U.S. Supreme Court decision recognizing claims of disparate impact—stemming from facially neutral policies that produce racial disparity—under the federal Fair Housing Act ("FHA").[83] The Court reasoned such claims would help counter the effects of implicit bias:

> Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract **unconscious prejudices and disguised animus** that escape easy classification as disparate

[80] *Lingle*, 544 U.S. at 545.

[81] *Voris v. Washington State Human Rights Comm'n*, 41 Wn. App. 283, 290 (1985).

[82] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964).

[83] *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

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> treatment. In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.[84]

Plaintiffs do not recognize or apply the rational-basis test. They have failed to carry their substantial burden of proving the Rule, on its face, violates all landlords' due process rights.

2. Plaintiffs invoke the discredited "undue oppression" test.

Plaintiffs invoke the "undue oppression" test, a discredited 19th-century construct abandoned by the Washington Supreme Court in 2006. Case law mistakenly invoking it spanned nearly two decades, from 1986 to 2005.[85] It began when the Washington Supreme Court, relying on *Lawton v. Steele* from 1894, announced a three-pronged test: "(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 land owner."[86] This test, in which the subjective third prong is usually determinative, "lodges wide discretion in the court."[87]

Washington's "undue oppression" test was never an expression of a unique Washington constitutional provision—it was a misstatement of the federal test. Again, Washington has always maintained that the due process clauses of the U.S. and Washington Constitutions are coextensive.[88] Washington's unique test was born from case law assessing claims (often takings

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[84] *Id.* (emphasis added).

[85] *See Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 130-31, 118 P.3d 322 (2005); *West Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986).

[86] *Presbytery*, 114 Wn.2d at 330 (citing *Lawton v. Steele*, 152 U.S. 133 (1894)).

[87] *Id.*

[88] *See State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996); *State v. Shelton*, 194 Wn. App. 660, 666, 378 P.3d 230 (2016); *Nielsen*, 177 Wn. App. at 52 n.5.

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claims, not due process claims) raised solely under the U.S. Constitution, or under the U.S. and Washington Constitutions.[89] The Court then applied that test to purely federal claims and claims where no constitutional source was specified.[90] This test was not a declaration of state constitutional independence. It was an error.

Washington case law bookending this aberrant line of authority highlights the mistake. In the 1970s, in case law that remains valid, the Washington Supreme Court rejected the "undue oppression" test: "That a statute is unduly oppressive is not a ground to overturn it under the due process clause."[91] That rejection followed an exposition of the long road traveled by the U.S. Supreme Court to finally conclude due process requires deference to legislative determinations:

> This unfortunate history of the due process clause in the United States Supreme Court presents to this court a sobering lesson in the necessity for judicial deference to the legislature in the exercise of its police power to accomplish economic regulation.
>
> Were we to accept appellants' invitation to void the act here on substantive due process grounds, we would set a precedent for embarking upon a course already traveled and finally rejected by the United States Supreme Court.[92]

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[89] *See Presbytery*, 114 Wn.2d at 326-28, 330-31 (takings; both constitutions); *Orion*, 109 Wn.2d at 624-26, 646–49 (takings; both); *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987) (due process; no source specified); *West Main*, 106 Wn.2d at 52 (due process; federal only); *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 476-77, 647 P.2d 481 (1982) (takings; both).

[90] *See Viking Properties*, 155 Wn.2d at 117-18, 130-31 (unspecified); *Willoughby v. Department of Labor & Industries*, 147 Wn.2d 725, 732-34, 57 P.3d 611 (2002) (unspecified); *Asarco Inc. v. Department of Ecology*, 145 Wn.2d 750, 761-63, 43 P.3d 471 (2002) (federal); *Weden v. San Juan County*, 135 Wn.2d 678, 706-07, 958 P.2d 273 (1998) (unspecified); *Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 661-67, 946 P.2d 768 (1997) (unspecified); *Robinson v. City of Seattle*, 119 Wn.2d 34, 48, 51-52, 830 P.2d 318 (1992) (federal); *Sintra*, 119 Wn.2d at 6, 20-22 (federal).

[91] *Salstrom's Vehicles v. Department of Motor Vehicles*, 87 Wn.2d 686, 693, 555 P.2d 1361 (1976) (citing *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R.*, 393 U.S. 129, 143 (1968)).

[92] *Aetna Life Insurance Co. v. Washington Life & Disability Insurance Guaranty Ass'n*, 83 Wn.2d 523, 531-34, 520 P.2d 162 (1974).

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The death knell of Washington's mistaken "undue oppression" test came in *Amunrud* in 2006.[93] To resolve a due process claim under both the U.S. and Washington Constitutions, *Amunrud* signaled a return to the rational-basis test:

> The dissent erroneously claims this court must *also* evaluate whether the challenged law is "unduly oppressive on individuals," citing as primary authority, *Lawton v. Steele* . . . (1894) . . . . However, as explained above, the appropriate test for the court to apply under a rational basis inquiry is whether the law bears a reasonable relationship to a legitimate state interest.[94]

Amunrud ruled that imposing an "undue oppression" test "would require us to overturn nearly 100 years of case law in Washington" and return Washington law to the long-rejected *Lochner* era "in which elected legislatures were viewed as having limited power (police power) to enact laws providing for health, safety, and welfare of their citizens."[95] Stressing the need for deference, *Amunrud* warned: "A return to the *Lochner* era would . . . strip individuals of the many rights and protections that have been achieved through the political process."[96] The Washington Supreme Court has not invoked the "undue oppression" test since refusing to apply it in 2006.[97]

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[93] *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 143 P.3d 571 (2006). *See Jespersen v. Clark County*, 199 Wn. App. 568, 584 n.10, 399 P.3d 1209 (2017) (acknowledging the Supreme Court applied the "undue oppression" test before *Amunrud*). Scholarly criticism of Washington's peculiar due process test presaged the Court's clarification. *See* Susan Boyd, *A Doctrine Adrift: Land Use Regulation and the Substantive Due Process of* Lawton v. Steele *in the Supreme Court of Washington*, 74 WASH. L. REV. 69 (1999); Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 511-17 (2000).

[94] *Amunrud*, 158 Wn.2d at 226 (footnote omitted). *See also id.* at 211 (explaining the claim there was under both constitutions).

[95] *Id.* at 227-28 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

[96] *Id*. at 230.

[97] *See, e.g.*, *Dot Foods, Inc. v. State, Dept. of Revenue*, 185 Wn.2d 239, 372 P.3d 747 (2016) (applying the rational basis-test); *In re Detention of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014) (same). Without having to address the merits of the "undue oppression" test, the Court later rejected a stand-alone, "undue oppression" argument by factually distinguishing an earlier "undue oppression" decision. *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 254-60, 218 P.3d 180 (2009).

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Plaintiffs may not now resuscitate the "undue oppression" test. *Amunrud* rejects it for the deferential rational-basis test. But as Plaintiffs' confusion attests, the Washington Supreme Court could have been clearer. Plaintiffs are not alone; other courts have not uniformly received the message either. Although the Washington Court of Appeals has adhered to the rational-basis test since *Amunrud*,[98] it has also continued to mistakenly invoke the "undue oppression" test.[99] The Ninth Circuit Court of Appeals, attempting to apply what it assumed were unique "Washington principles of substantive due process" to a claim under the Washington Constitution, also incorrectly applied the "undue oppression" test without noting *Amunrud*.[100] This Court should call on the Washington Supreme Court to clarify this body of law by expressly overruling its "undue oppression" precedent.

3. The City would be entitled to judgment even under the "undue oppression" test.

Even if the "undue oppression" test were still valid, Plaintiffs would have failed to carry their burden of proving the FIT Rule violates it. When invoking that test, Washington courts presumed legislative enactments were constitutional because plaintiffs must prove their claim beyond a reasonable doubt.[101] That burden is especially difficult here because courts should

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[98] *E.g.*, *Haines-Marchel v. Washington State Liquor Control Bd.*, __ Wn. App. __, 406 P.3d 1199, 1216 at ¶55 (2017); *Olympic Stewardship Foundation v. State*, 199 Wn. App. 668, 720-21, 399 P.3d 562 (2017); *Jespersen*, 199 Wn. App. at 584-85; *State v. Shelton*, 194 Wn. App. at 666-67; *Nielsen*, 177 Wn. App. at 53; *Johnson v. Washington State Department of Fish and Wildlife*, 175 Wn. App. 765, 775-78, 305 P.3d 1130 (2013); *In re J.R.*, 156 Wn. App. 9, 18-19, 230 P.3d 1087 (2010).

[99] *E.g.*, *Fox v. Skagit County*, 193 Wn. App. 254, 278-79, 372 P.3d 784 (2016) (in *dicta* reciting the test only to reject the claim because the plaintiff did not analyze it); *Greenhalgh v. Department of Corrections*, 180 Wn. App. 876, 892, 324 P.3d 771 (2014); *Cradduck v. Yakima County*, 166 Wn. App. 435, 446-451, 271 P.3d 289 (2012); *Bayfield Resources Co. v. Western Wash. Growth Mgmt. Hearings Bd.*, 158 Wn. App. 866, 881-888, 244 P.3d 412 (2010).

[100] *Laurel Park Community, LLC v. City of Tumwater*, 698 F.3d 1180, 1193-95 (9th Cir. 2012).

[101] *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135, 1140 (1999).

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"consider it important that Plaintiffs have chosen to raise a *facial* challenge."[102] This Court must reject Plaintiffs' challenge if the Court can imagine any scenario under which the FIT Rule would not "unduly oppress" a landlord.

There is no dispute the Rule clears the first part of the test because it is aimed at achieving a legitimate public purpose.[103] Plaintiffs contest only the other two parts of the test.

a. The FIT Rule uses means reasonably necessary to achieve its purpose, even though Plaintiffs prefer other alternatives.

Under the second part of the test, Plaintiffs have not proven beyond a reasonable doubt that the FIT Rule fails to use means reasonably necessary to achieve its purpose. Instead of a first-in-time requirement, Plaintiffs say the City should educate landlords and enforce existing antidiscrimination laws.[104] That's not enough to sustain Plaintiffs' burden because "[t]he mere existence of other means…does not establish that the means chosen were not reasonably necessary"[105] Moreover, Plaintiffs' alternatives conflict with research showing that discrimination is not limited to overt or even conscious discrimination, so neither applicants nor landlords—even educated ones—will necessarily perceive instances of bias.

Plaintiffs level two primary arguments under the "reasonably necessary" part of the test, neither of which finds a foundation in law.[106] They claim the FIT Rule suffers from "overbreadth." But the Washington Supreme Court dismisses out of hand any overbreadth claim

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[102] *Laurel Park*, 698 F.3d at 1194-95.

[103] *See* Motion at 26 (Plaintiffs agree "the City has a legitimate interest in preventing discrimination"). *Accord* Motion 17 (offering no argument about the first part of the test).

[104] Motion at 22.

[105] *Margola*, 121 Wn.2d at 649.

[106] *See* Motion at 17-19.

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not rooted in First Amendment activity and has rejected an assertion that Washington's due process clause justifies extending the overbreadth doctrine beyond the First Amendment.[107] Even the Court of Appeals decision invoked by Plaintiffs ruled that no facial overbreadth claim exists outside the First Amendment context.[108]

Plaintiffs' critique of the FIT Rule for lacking a "meaningful limiting principle" is baffling. Nothing in due process jurisprudence requires a law to have a limiting principle to survive due process scrutiny. For the proposition that "a law is not reasonably necessary if its rationale and methodology have no meaningful limiting principle," Plaintiffs cite a Justice Scalia concurrence in *Beard*.[109] But *Beard* was a First Amendment case raising no due process issue,[110] and the passage arose in *Beard*'s dissent, not the sole concurring opinion, which Justice Thomas authored, not Justice Scalia.[111] The dissent invoked the "limiting principle" concept to quibble with a lawyer's justification for the challenged law, not to suggest the law itself must feature such a principle.[112]

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[107] *City of Bremerton v. Widell*, 146 Wn.2d 561, 578-79, 51 P.3d 733 (2002). *Accord City of Seattle v. Montana*, 129 Wn.2d 583, 598, 919 P.2d 1218 (1996) ("The overbreadth doctrine may not be employed unless First Amendment activities are within the scope of the challenged enactment.").

[108] *Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 768, 63 P.3d 142 (2002). Plaintiffs' reliance on *City of Seattle v. McCoy*, 101 Wn. App. 814, 4 P.3d 159 (2000), is odd because it does not mention overbreadth.

[109] Motion at 18 (citing "*Beard v. Banks*, 548 U.S. 521, 546…(2006) (Scalia, J., concurring)").

[110] *See Beard v. Banks*, 548 U.S. 521, 524-25 (2016).

[111] *Compare id.* at 536 (start of concurrence) *with id.* at 542 and 546 (start of, and relevant passage from, the dissent). Justice Scalia authored no opinion. Moreover, *Beard* was a plurality decision from an eight-justice panel, so not even the leading opinion would carry precedential value. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S. Ct. 2264 U.S. (1977) (judgment entered by an equally divided Court is not entitled to precedential weight).

[112] *Beard*, 548 U.S. at 546 (Stevens, J., dissenting).

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Plaintiffs' "limiting principle" standard appears to be an excuse to conjure a parade of horribles ending with the City preventing physicians from meeting with their patients.[113] The City does not have a "boundless view of its own power," as Plaintiffs allege.[114] The City's power is limited by constitutional boundaries that Plaintiffs fail to prove the FIT Rule crosses.

b. The FIT Rule, which mitigates a problem only landlords could create and does not lower property values, is not "unduly oppressive."

The Washington Supreme Court articulated a set of factors to aid the discretionary balancing act prompted by the "undue oppression" prong:

> On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.[115]

Plaintiffs recite those factors but do not assess most.[116] This failure leaves them unable to carry their burden: "[Case law] requires a court to balance numerous factors in determining if a regulation is unduly oppressive…. We generally do not address constitutional arguments that are not supported with adequate briefing."[117] At a minimum, Plaintiffs have abandoned any claim to

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[113] Motion at 18.

[114] *Cf. id*.

[115] *Presbytery*, 114 Wn.2d at 331.

[116] *See* Motion at 20-23.

[117] *Margola*, 121 Wn.2d at 649-50.

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the factors they did not address.[118] They may not claim those factors to meet their burden of proof.

Had Plaintiffs addressed all the factors, they would have failed to satisfy at least two. One court concluded "the 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."[119] The FIT Rule does not force landlords to stop using their properties for rental units and Plaintiffs allege no impact on their property value. "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."[120] Even if the FIT Rule imposed a direct cost on landlords, "it would be difficult to show undue oppression from the small [amount] involved here."[121]

Even the factors Plaintiffs address are not compelling. They note the availability of other means, not, as the factor requires, their feasibility.[122] They bemoan the "heavy" burden the FIT Rule imposes by limiting their discretion, but cite examples not borne out by the language of the FIT Rule, such as allegedly not being able to deny tenancy to someone who is belligerent or threatening.[123]

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[118] *See Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873 (2014) (discussing the burden a party moving for summary judgment).

[119] *Laurel Park*, 698 F.3d at 1194.

[120] *Id.* at 1195.

[121] *Margola*, 121 Wn.2d at 650.

[122] Motion at 24-25.

[123] Motion at 21-22.

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Plaintiffs rely primarily on *Sintra* for their assertion that "regulations that penalize property owners for a societal problem not of their making tend to violate due process."[124] *Sintra* is distinguishable. It was a "strictly economic" as-applied challenge to a law that combated homelessness by requiring developers to either replace any low-income housing they destroyed or pay a fee that, for the challenger, amounted to $218,000 to develop a $670,000 parcel.[125] In applying the "undue oppression" factors, the Court reasoned that "[t]he economic impact on Sintra is enormous" and "Sintra's property cannot be singled out as contributing to the problem of homelessness in any pronounced way; the lack of low income housing was brought about by a great number of economic and social causes which cannot be attributed to an individual parcel of property."[126]

Plaintiffs present a facial challenge unlike the as-applied challenge Sintra mounted. They allege no economic impact. And who other than landlords could be responsible for bias in tenancy decisions? Landlords' pockets are not being drained, especially not to address a problem created by others. They are merely being told to adopt procedures to address a problem no one else could cause. "It defies logic to suggest an ordinance is unduly oppressive when it only regulates the activity which is directly responsible for the harm."[127]

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[124] Motion at 21 (citing *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992)).

[125] *Sintra*, 119 Wn.2d at 7 n.1 and 22.

[126] *Id*. at 22.

[127] *Weden v. San Juan County*, 135 Wn.2d 678, 707, 958 P.2d 273 (1998).

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D. The FIT Rule does not violate Plaintiffs' free speech rights.

1. The FIT Rule imposes a disclosure requirement that passes muster under *Zauderer,* which Plaintiffs do not address.

Because the Washington and U.S. Constitutions offer commercial speech the same protection, Washington courts apply the federal analysis to claims a limitation on commercial speech violates the Washington Constitution.[128] When assessing the constitutionality of a requirement that commercial speakers disclose truthful information—as opposed to a requirement that restricts commercial speech—courts apply the deferential *Zauderer* test.[129]

Under *Zauderer*, the government may compel commercial speech if the government demonstrates the compelled disclosure meets a three-part test.[130] The FIT Rule's disclosure requirement clears that test.

First, the disclosure is purely factual, with no controversy about its accuracy.[131] The FIT Rule merely compels landlords to disclose the tenancy criteria landlords themselves develop.

Second, the disclosure is rationally related to a governmental interest that is more than trivial.[132] Again, the FIT Rule advances a substantial governmental interest in combatting bias in tenancy decisions. The disclosure requirement is part of the approach urged by landlord

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[128] *Bradburn v. North Cent. Regional Library Dist*., 168 Wn.2d 789, 800, 231 P.3d 166 (2010); *National Fed'n of Retired Persons v. Insurance Comm'r,* 120 Wn.2d 101, 119, 838 P.2d 680 (1992).

[129] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). *Accord American Beverage Association v. City and County of San Francisco*, 871 F.3d 884, 891 (9th Cir. 2017).

[130] *American Beverage*, , 871 F.3d at 894-95; *CTIA-The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105, 1115, 1118 (9th Cir. 2017). *See American Beverage*, 871 F.3d at 895 (government carries the burden of proof in free speech claims).

[131] *See American Beverage*, 871 F.3d at 892 – 93; *CTIA*, 854 F.3d at 1117 – 18.

[132] *See American Beverage*, 871 F.3d at 894-95; *CTIA*, 854 F.3d at 1117.

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organizations and other real estate professions as a best practice for curbing actual and implicit bias.

Finally, the disclosure does not unduly burden speech by effectively ruling out advertising in particular media or chilling commercial speech, such as where a forced disclosure promotes policies or views that are one-sided or contrary to the speaker's views.[133] The disclosure requirement does not rule out advertising in particular media; it just requires the disclosure to be included in certain media.[134] And the FIT Rule chills nothing. It merely commands landlords to disclose their tenancy criteria. That message cannot be contrary to their views because they control the message. Although Plaintiffs' amended complaint alleges the FIT Rule chills their speech,[135] their motion abandons that claim by not addressing it.[136]

2. The FIT Rule is not a speech restriction reviewed under *Central Hudson*.

Plaintiffs cite the wrong standard: *Central Hudson*'s test for assessing restrictions on commercial speech. The Supreme Court recognizes the "material differences between disclosure requirements and outright prohibitions on speech."[137] The Court's "discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech" because a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information in his

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[133] *See American Beverage*, 871 F.3d at 893 – 94.

[134] SMC 14.08.050.A.1.

[135] First Amended Complaint at 11, 15

[136] *See Admasu*, 185 Wn. App. at 40 (a moving party cannot prevail on a motion based on issues it fails to raise).

[137] *Zauderer*, 471 U.S. at 650.

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advertising is minimal."[138] The FIT Rule restricts no speech. Plaintiffs mistakenly claim it prohibits a landlord from adding "call to learn how to apply" or "email for further details."[139] The FIT Rule is procedural. On its face, it accords the landlord freedom to craft the "criteria" and the required "information." For example, and contrary to Plaintiffs' claim, nothing on the face of the Rule bars a landlord from saying any dog must be compatible with existing tenants, requiring a meeting with the applicant and dog to assess that criterion, and rejecting an applicant if the landlord determines the dog is aggressive or malodorous.[140]

Plaintiffs mistakenly suggest *Expressions Hair Design* ruled *Central Hudson* is the proper test.[141] The issue in *Expressions* was whether a law was a regulation of speech or price.[142] Having found it to be speech regulation, the Court refused to address whether it should be assessed under *Central Hudson* or *Zauderer*.[143] The Court remanded that issue to the Court of Appeals, which is still wrestling with whether the law restricts speech subject to *Central Hudson* or imposes a disclosure requirement subject to *Zauderer*.[144] *Expressions* is irrelevant because the FIT Rule directly regulates speech (obviating the issue *Expressions* addressed) through a

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[138] *Id*. at 651 & n.14.

[139] Motion at 24.

[140] *Cf.* Motion at 25.

[141] Motion at 23-24 (citing *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017)).

[142] *Expressions*, 137 S. Ct. at 1146-48.

[143] *Id*. at 1150-51.

[144] *Id*. at 1151. The Second Circuit Court of Appeals recently certified the case to a state court to help answer the question of whether the law prohibits speech or mandates a disclosure. *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 102-04 (2d Cir. 2017).

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disclosure requirement that must be assessed under *Zauderer* (answering the question still pending on remand in *Expressions*).

3. The FIT Rule would pass muster even under *Central Hudson.*

The FIT Rule would survive scrutiny even if the disclosure requirement were incorrectly deemed a speech "restriction" subject to the four-part *Central Hudson* test.[145]

First, commercial speech is worthy of constitutional protection only if it concerns lawful activity and is not misleading. Plaintiffs spin this as asking whether landlords' advertisements are "inevitably" related to unlawful activity or "inherently" misleading—adverbs not found in case law.[146] Plaintiffs forget theirs is a facial challenge, which a court must reject if there are any circumstances where the statute can constitutionally be applied.[147] The disclosure requirement adopts an industry-accepted best practice that prevents landlords from misleading prospective tenants into believing they will be assessed under established criteria. The only reason for landlord industry groups to suggest first-in-time decision-making as a best practice is because even they believe a circumstance may exist where a landlord, even unconsciously, could discriminate against a member of a protected class or mislead that person into believing they are being evaluated on nondiscriminatory criteria. Plaintiffs' *facial* challenge fails because they cannot disprove the existence of such a landlord, and because that landlord's "speech" would be misleading and further unlawful activity.

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[145] *See Central Hudson*, 447 U.S. at 566.

[146] Motion at 26.

[147] *See Washington State Repub. Party*, 141 Wn.2d at 282 n.14.; *Salerno*, 481 U.S. at 745 ("the challenger must establish that no set of circumstances exists under which the Act would be valid").

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Second, a restriction on commercial speech must relate to a substantial government interest. Plaintiffs concede the FIT Rule meets this part of the *Central Hudson* test.[148]

Third, the restriction must directly advance the government's interest. Although mere speculation will not suffice, this standard does not require empirical data.[149] It does not require what Plaintiffs demand: "individualized evidence that each of the landlords subject to the first-in-time rule discriminates, consciously or unconsciously."[150] Instead, the government may clear this standard by referring to studies, anecdotes, history, consensus, or even common sense.[151] Courts defer to a reasonable legislative belief that the restriction will advance the government's stated interest.[152] Here, consistent with studies, scholarship, and common sense—reinforced by a U.S. Supreme Court decision recognizing the role of implicit bias in housing decisions[153]—the City Council reasonably believes that implicit bias in tenancy decisions is real and that imposing an industry-accepted first-in-time best practice will materially advance the City's interest in preventing discrimination.

Finally, the restriction must be no more extensive than necessary to serve the government's interest. The Supreme Court clarified this is not a "least restrictive means" test—it requires only a reasonable fit between the legislature's ends and the means chosen to accomplish those ends.[154] The Court defers to legislative assessments of the fit:

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[148] Motion at 26.

[149] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001).

[150] Motion at 26 (citing no authority).

[151] *Lorillard*, 533 U.S. at 555.

[152] *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341-42 (1986).

[153] *Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2522.

[154] *Lorillard*, 533 U.S. at 556.

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> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision-makers to judge what manner of regulation may best be employed.
>
> … By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) "traditionally subject to governmental regulation[.]"[155]

Here, the City Council perceived a reasonable fit between the goal of preventing discrimination and the means of requiring landlords to adhere to an industry-accepted first-in-time requirement. Any limitations on landlords' commercial speech—which are nominal at most—are well within the bounds of the already heavily regulated landlord-tenant relationship. Because the Constitution does not require the City to use the least restrictive means, Plaintiffs gain nothing from pointing out other means the Council could have chosen.[156] Plaintiffs' preference for "training and intergroup contact" are especially irrelevant because "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective" in advancing the legislature's interest.[157] And Plaintiffs misplace their reliance on the *Mattress Outlet* plurality's treatment of the "no more extensive" prong.[158] That four-justice opinion has no

[155] *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480-81 (1989) (internal citations omitted).

[156] Motion at 28.

[157] *Posadas*, 478 U.S. at 343-44.

[158] Motion at 27-28 (citing *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 104 P.3d 1280 (2005)).

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precedential value[159] and its application of *Central Hudson* was rejected by the four-justice dissent[160] and has not been invoked by the Washington Supreme Court since.

VI. CONCLUSION

The FIT Rule codifies a best practice advanced by landlord organizations and other real estate professionals to address a problem that research and scholarship continue to substantiate: implicit bias in tenancy decisions. Plaintiffs should turn to the legislative branch with their concerns about the Rule and alternatives they believe the City Council or State Legislature should embrace.

The City respectfully asks this Court for summary judgment because Plaintiffs' resort to the judiciary falls short. They mount a facial constitutional challenge premised on incorrect legal standards and assumptions about the Rule. The City asks this Court to: recognize the correct standards and call on the Washington Supreme Court to bring much-needed clarity to Washington's law of takings and due process; apply those standards to uphold the FIT Rule against this facial challenge; and rule that the City would be entitled to judgment even under the incorrect standards Plaintiffs invoke.

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[159] *See* Lauer v. Pierce County, 173 Wn.2d 242, 258, 267 P.3d 988 (2011).

[160] *Mattress Outlet*, 153 Wn.2d at 518-29 (Madsen, J., dissenting).

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I certify that MS Word 2016 calculates all portions of this memorandum required by the Local Civil Rules to be counted contain 11,310 words, and separately calculates the figures contain a total of 235 words. The total of 11,545 words complies with the Order Granting Joint Motion and Adopting an Amended Case Schedule.

Respectfully submitted January 17, 2018.

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CERTIFICATE OF SERVICE

This certifies that I served a copy of this document on counsel of record in the manner stated below with the Clerk of the Court using the ECR system, which will send notification of the filing to:

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DATED January 17, 2018, at Seattle, Washington.

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APPENDIX
The FIT Rule and Related Seattle Municipal Code Sections

14.08.050 - First-in-time

A. Effective January 1, 2017, it is an unfair practice for a person to fail to:

1. provide notice to a prospective occupant, in writing or by posting in the office of the person leasing the unit or in the building where the unit is physically located and, if existing, on the website advertising rental of the unit, in addition to and at the same time as providing the information required by RCW 59.18.257(1), of:

   a. the criteria the owner will use to screen prospective occupants and the minimum threshold for each criterion that the potential occupant must meet to move forward in the application process; including any different or additional criteria that will be used if the owner chooses to conduct an individualized assessment related to criminal records.

   b. all information, documentation, and other submissions necessary for the owner to conduct screening using the criteria stated in the notice required in subsection 14.08.050.A.1.a. A rental application is considered complete when it includes all the information, documentation, and other submissions stated in the notice required in this subsection 14.08.050.A.1.b. Lack of a material omission in the application by a prospective occupant will not render the application incomplete.

   c. information explaining how to request additional time to complete an application to either ensure meaningful access to the application or a reasonable accommodation and how fulfilling the request impacts the application receipt date, pursuant to subsection 14.08.050.B and C.

   d. the applicability to the available unit of the exceptions stated in subsections 14.08.050.A.4.a and b.

2. note the date and time of when the owner receives a completed rental application, whether submitted through the mail, electronically, or in person.

3. screen completed rental applications in chronological order as required in subsection 14.08.050.A.2 to determine whether a prospective occupant meets all the screening criteria that are necessary for approval of the application. If, after conducting the screening, the owner needs more information than was stated in the notice required in subsection 14.08.050.A.1.b to determine whether to approve the application or takes an adverse action as described in RCW 59.18.257(1)(c) or decides to conduct an individualized assessment, the application shall not be rendered incomplete. The owner shall notify the prospective occupant in writing, by phone, or in person of what additional information is needed, and the specified period of time (at least 72 hours) that the prospective occupant has to provide the additional information. The owner's failure to provide the notice required in this subsection 14.08.050.A.3 does not affect the prospective occupant's right to 72 hours to provide additional information. If the additional information is provided within the specified period of time, the original

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submission date of the completed application for purposes of determining the chronological order of receipt will not be affected. If the information is not provided by the end of the specified period of time, the owner may consider the application incomplete or reject the application.

4. offer tenancy of the available unit to the first prospective occupant meeting all the screening criteria necessary for approval of the application. If the first approved prospective occupant does not accept the offer of tenancy for the available unit within 48 hours of when the offer is made, the owner shall review the next completed rental application in chronological order until a prospective occupant accepts the owner's offer of tenancy. This subsection 14.08.050.A.4 does not apply when the owner:

   a. is legally obligated to set aside the available unit to serve specific vulnerable populations;

   b. voluntarily agrees to set aside the available unit to serve specific vulnerable populations, including but not limited to homeless persons, survivors of domestic violence, persons with low income, and persons referred to the owner by non-profit organizations or social service agencies.

B. If a prospective occupant requires additional time to submit a complete rental application because of the need to ensure meaningful access to the application or for a reasonable accommodation, the prospective occupant must make a request to the owner. The owner shall document the date and time of the request and it will serve as the date and time of receipt for purposes of determining the chronological order of receipt pursuant to subsection 14.08.050.A.2. The owner shall not unreasonably deny a request for additional time. If the request for additional time is denied, the date and time of receipt of the complete application shall serve as the date and time of receipt pursuant to subsection 14.08.050.A.2. This subsection 14.08.050.B does not diminish or otherwise affect any duty of an owner under local, state, or federal law to grant a reasonable accommodation to an individual with a disability.

C. To maintain the prospective occupant's chronological position noted at the time of notice, the owner may require that the prospective occupant provide reasonable documentation of the need for additional time to ensure meaningful access along with the completed application. The owner must notify the prospective occupant at the time the owner grants any request for additional time if the owner will require submission of reasonable documentation. If such notice is given and reasonable documentation is not provided with the completed application, the owner may change the date and time of receipt from when the request was made to the date and time the complete application is submitted. This subsection 14.08.050.C applies only to requests for additional time based on the need to ensure meaningful access to the application. It does not apply to requests for reasonable accommodation.

D. First-in-time evaluation

The Department shall ask the City Auditor to conduct an evaluation of the impact of the program described in subsections 14.08.050.A-C to determine if the program should be maintained, amended, or repealed. The evaluation shall only be conducted on the basis of the program's impacts after 18 months of implementation. The evaluation should include an

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analysis of the impact on discrimination based on a protected class and impact on the ability of low-income persons and persons with limited English proficiency to obtain housing. The City Auditor, at their discretion, may retain an independent, outside party to conduct the evaluation. The evaluation shall be submitted to the City Council by the end of 2018.

E. Persons must comply with this Section 14.08.050 by July 1, 2017.

F. Nothing in this Section 14.08.050 shall apply to an accessory dwelling unit or detached accessory dwelling unit wherein the owner or person entitled to possession thereof maintains a permanent residence, home or abode on the same lot.

(Ord. 125228, § 1, 2016; Ord. 125114, § 5, 2016.)

* * * *

14.08.030 - Unfair practices forbidden.

Unfair practices as defined in this chapter are contrary to the public peace, health, safety and general welfare and are prohibited by the City in the exercise of its police power.

(Ord. 121593, § 3, 2004; Ord. 116818, § 3, 1993; Ord. 113610, § 3, 1987; Ord. 109050, § 1(part), 1980; Ord. 108205, § 2(part), 1979; Ord. 104839, § 3(1), 1975.)

* * * *

14.08.020 - Definitions

Definitions as used in this Chapter 14.08, unless additional meaning clearly appears from the context, shall have the meanings subscribed:

"Accessory dwelling unit" has the meaning defined in Chapter 23.84A.032's definition of "Residential use".

"Aggrieved person" includes any person who:

1. Claims to have been injured by an unfair practice prohibited by this Chapter 14.08; or

2. Believes that he or she will be injured by an unfair practice prohibited by this Chapter 14.08 that is about to occur.

"Alternative source of income" means lawful, verifiable income derived from sources other than wages, salaries, or other compensation for employment. It includes but is not limited to monies derived from Social Security benefits, supplemental security income, unemployment benefits, other retirement programs, child support, the Aged, Blind or Disabled Cash Assistance Program, Refugee Cash Assistance, and any federal, state, local government, private, or nonprofit-administered benefit program.

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"Blockbusting" means, for profit, to promote, induce, or attempt to promote or induce any person to, engage in a real estate transaction by representing that a person or persons of a particular race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, alternative source of income, or who participates in a Section 8 or other subsidy program, or who is disabled, or who is a disabled person who uses a service animal has moved or may move into the neighborhood.

"Charge" means a claim or set of claims alleging an unfair practice or practices prohibited under this Chapter 14.08.

"Charging party" means any person who files a charge alleging an unfair practice under this Chapter 14.08, including the Director.

"City" means The City of Seattle.

"City department" means any agency, office, board, or commission of the City, or any department employee acting on its behalf, but shall not mean a public corporation chartered under Chapter 3.110, or any contractor, consultant, or concessionaire or lessee.

"Commission" means the Seattle Human Rights Commission.

"Department" means the Seattle Office for Civil Rights.

"Detached accessory dwelling unit" has the meaning defined in Chapter 23.84A.032's definition of "Residential use".

"Director" means the Director of the Seattle Office for Civil Rights or the Director's designee.

"Disabled" means a person who has a disability.

"Disability" means the presence of a sensory, mental, or physical impairment that: is medically cognizable or diagnosable; or exists as a record or history; or is perceived to exist whether or not it exists in fact. A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, whether or not it limits the ability to work generally or work at a particular job, or whether or not it limits any other activity within the scope of this Chapter 14.08. For purposes of this definition, "impairment" includes, but is not limited to:

1. Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

2. Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"Discriminate" means to do any act which constitutes discrimination.

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"Discrimination" means any conduct, whether by single act or as part of a practice, the effect of which is to adversely affect or differentiate between or among individuals or groups of individuals, because of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, honorably discharged veteran or military status, alternative source of income, participation in a Section 8 or other subsidy program, the presence of any disability, or the use of a service animal by a disabled person.

"Dual-filed" means any charge alleging an unfair practice that is filed with both the Department of Housing and Urban Development and the Seattle Office for Civil Rights without regard to which of the two agencies initially processed the charge.

"Dwelling" means any building, structure, or portion thereof which is occupied as, or is designed or intended for occupancy as, a residence by one or more individuals or families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

"Ensuring meaningful access" means the ability of a person with limited English proficiency to use or obtain language assistance services or resources to understand and communicate effectively, including, but not limited to, translation or interpretation services.

"Gender identity" means a person's gender-related identity, appearance, or expression, whether or not traditionally associated with one's biological sex or one's sex at birth, and includes a person's attitudes, preferences, beliefs, and practices pertaining thereto.

"Hearing Examiner" means the Seattle Hearing Examiner.

"Housing costs" means the compensation or fees paid or charged, usually periodically, for the use of any housing unit. "Housing costs" include the basic rent charge and any periodic or monthly fees for other services paid to the owner by the occupant, but do not include utility charges that are based on usage and that the occupant has agreed in the rental agreement to pay, unless the obligation to pay those charges is itself a change in the terms of the rental agreement.

"Lender" means any bank, insurance company, savings or building and loan association, credit union, trust company, mortgage company, or other person or agent thereof, engaged wholly or partly in the business of lending money for the financing or acquisition, construction, repair, or maintenance of real property.

"Marital status" means the presence or absence of a marital relationship and includes the status of married, separated, divorced, engaged, widowed, single, or cohabiting.

"Occupant" means any person who has established residence or has the right to occupy real property.

"Owner" means any person who owns, leases, subleases, rents, operates, manages, has charge of, controls or has the right of ownership, possession, management, charge, or control of real property on their own behalf or on behalf of another.

"Parental status" means being a parent, step-parent, adoptive parent, guardian, foster parent, or custodian of a minor child or children under the age of 18 years, or the designee with written permission of a parent or other person having legal custody of a child or children

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under the age of 18 years, which child or children shall reside permanently or temporarily with such parent or other person. In addition, parental status shall refer to any person who is pregnant or who is in the process of acquiring legal custody of a minor child under the age of 18 years.

"Party" means the person charging or making a charge or complaint or upon whose behalf a complaint is made alleging an unfair practice, the person alleged or found to have committed an unfair practice, and the Seattle Office for Civil Rights.

"Person" means one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives, trustees, trustees in bankruptcy and receivers. It includes any owner, lessee, proprietor, manager, agent or employee, whether one or more natural persons, and any political or civil subdivision or agency or instrumentality of the City.

"Political ideology" means any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group. "Political ideology" includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not interfere with the property rights of the landowner as it applies to housing.

"Preferred employer program" means any policy or practice in which a person provides different terms and conditions, including but not limited to discounts or waiver of fees or deposits, in connection with renting, leasing, or subleasing real property to a prospective occupant because the prospective occupant is employed by a specific employer. "Preferred employer program" does not include different terms and conditions provided in city-funded housing or other publicly funded housing, for the benefit of city or public employees, housing specifically designated as employer housing which is owned or operated by an employer and leased for the benefit of its employees only, or any program affirmatively furthering fair housing. For purposes of this definition, "affirmatively furthering fair housing" means assisting homeless persons to obtain appropriate housing and assisting persons at risk of becoming homeless; retention of the affordable housing stock; and increasing the availability of permanent housing in standard condition and affordable cost to low-income and moderate-income families, particularly to members of disadvantaged minorities, without discrimination on the basis of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, honorably discharged veteran or military status, alternative source of income, participation in a Section 8 program or other subsidy program, the presence of any disability or the use of a service animal by a disabled person. "Affirmatively furthering fair housing" also means increasing the supply of supportive housing, which combines structural features and services needed to enable persons with special needs, including persons with HIV/AIDS and their families, to live with dignity and independence; and providing housing affordable to low-income persons accessible to job opportunities.

"Prospective borrower" means any person who seeks to borrow money to finance the acquisition, construction, repair, or maintenance of real property.

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"Prospective occupant" means any person who seeks to purchase, lease, sublease, or rent real property.

"Real estate agent, salesperson or employee" means any person employed by, associated with, or acting for a real estate broker to perform or assist in the performance of any or all of the functions of a real estate broker.

"Real estate broker" means any person who for a fee, commission, or other valuable consideration, lists for sale, sells, purchases, exchanges, leases or subleases, rents, or negotiates or offers or attempts to negotiate the sale, purchase, exchange, lease, sublease, or rental of real property of another, or holds themselves out as engaged in the business of selling, purchasing, exchanging, listing, leasing, subleasing, or renting real property of another, or collects the rental for use of real property of another.

"Real estate transaction" means the sale, purchase, conveyance, exchange, rental, lease, sublease, assignment, transfer, or other disposition of real property.

"Real estate-related transaction" means any of the following:

1. The making or purchasing of loans or providing other financial assistance:
    a. For purchasing, constructing, improving, repairing, or maintaining real property, or
    b. Secured by real property; or
2. The selling, brokering, or appraising of real property; or
3. The insuring of real property, mortgages, or the issuance of insurance related to any real estate transaction.

"Real property" means dwellings, buildings, structures, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and any interest therein.

"Respondent" means any person who is alleged to have committed an unfair practice prohibited by this Chapter 14.08.

"Section 8 or other subsidy program" means short or long term federal, state or local government, private nonprofit, or other assistance programs in which a tenant's rent is paid either partially by the program (through a direct arrangement between the program and the owner or lessor of the real property), and partially by the tenant or completely by the program. Other subsidy programs include but are not limited to HUD-Veteran Affairs Supportive Housing (VASH) vouchers, Housing and Essential Needs (HEN) funds, and short-term rental assistance provided by Rapid Rehousing subsidies.

"Service animal" means an animal that provides medically necessary support for the benefit of an individual with a disability.

"Sexual orientation" means actual or perceived male or female heterosexuality, bisexuality, or homosexuality, and includes a person's attitudes, preferences, beliefs, and practices pertaining thereto.

"Steering" means to show or otherwise take an action which results, directly or indirectly, in steering a person or persons to any section of the City or to a particular real property in a

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manner tending to segregate or maintain segregation on the basis of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, sexual orientation, gender identity, political ideology, alternative source of income, participation in a Section 8 or other subsidy program, the presence of any disability, or the use of a service animal by a disabled person.

"Verifiable" means the source of income can be confirmed as to its amount or receipt.

"Honorably discharged veteran or military status" means:

1. A veteran, as defined in RCW 41.04.007; or

2. An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(Ord. 125228, § 1, 2016; Ord. 125114, § 2, 2016; Ord. 124829, § 4, 2015; Ord. 123527, § 6, 2011; Ord. 123014, § 7, 2009; Ord. 121593, § 2, 2004; Ord. 119628, § 7, 1999; Ord. 118392, § 34, 1996; Ord. 116818, § 2, 1993; Ord. 114864, § 1, 1989; Ord. 113610, § 2, 1987; Ord. 113144, § 2, 1986; Ord. 112903, § 10, 1986; Ord. 108205, § 1, 1979; Ord. 104839, § 2, 1975.)

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