NO. 95813-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CHONG and MARILYN YIM, KELLY LYLES, BETH BYLUND, CNA APARTMENTS, LLC, and EILEEN, LLC

Respondents,

v.

THE CITY OF SEATTLE,

Appellant.

BRIEF OF *AMICUS CURIAE* GOLDWATER INSTITUTE IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

KAREN LOUISE OSBORNE, WSBA #51433
KOsborne Law
9721 NE Livingston Mountain Ct.
Camas, WA 98607-7737
(360) 907-2593

Amicus Curiae Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

I. INTRODUCTION

The City of Seattle has adopted a "first-in-time" rule for landlords in the city. This rule requires them to rent their property to the first "qualified" applicant, even if there are relevant differences among applicants that would render a later applicant a better fit for the property. Seattle landlords have brought a multi-faceted challenge to the ordinance, but this brief will focus on their arguments under Article I, § 3, the due process clause of the Washington Constitution.

The Goldwater Institute urges this Court to affirm the trial court's decision and hold that the substantive due process analysis adopted in *Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320 (1990), is still good law. To do otherwise, and adopt the rational-basis review urged by the City, would needlessly overrule decades of precedent and weaken the private property rights of every Washingtonian.

As demonstrated in Respondent Yim's briefing, this Court has never overruled *Presbytery*. It certainly did not do so in *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208 (2006), as Appellant argues. This brief explains why the Court should continue to apply the *Presbytery* test to provide the proper protections for private property rights under the state constitution. As shown below, state constitutions protect individual rights above and beyond the constitutional minimum established by the U.S.

Constitution, and this Court should decline the Appellant's invitation to effectively adopt the less-protective federal standard—a standard so extremely lenient that it has been called "tantamount to no review at all," *FCC v. Beach Commc'ns*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring), and has been likened to a judge "cup[ping] [her] hands over [her] eyes and then imagin[ing] if there could be anything right with the statute." *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring). This Court is not required to embrace such "abdication of meaningful judicial review," *Arthur D. Little, Inc. v. Comm'r of Health & Hosps. of Cambridge*, 481 N.E.2d 441, 455 (Mass. 1985), and it should not do so, because Appellant's preferred rational basis review would grant governments on every level the power to infringe on private property rights for the pettiest of reasons. This Court should decline to eviscerate the separation of powers in that way—or to undermine the meaningful protection for individual rights provided by substantive due process. *Presbytery* should be upheld and the trial court's ruling should be affirmed.

II. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Goldwater Institute (the "Institute") was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and

individual responsibility through litigation, research, policy briefings and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

Among the Institute's principal goals is defending private property rights. Toward that goal, the Institute is currently representing the plaintiffs in several property rights cases around the country, including *Seattle Vacation Home, LLC v. City of Seattle, Washington*, No. 18-2-15979-2, King County, Washington Superior Court (filed June 26, 2018), *Nichols v. City of Miami Beach, Florida*, No. 2018-021933-CA-01, 11th Judicial Circuit, Miami-Dade County, Florida (Filed June 26, 2018), and *Hobbs v. City of Pacific Grove, California*, No. 18CV002411, Monterey County, California Superior Court (filed June 26, 2018). The Institute's current case against the City of Seattle is, in particular, directly relevant to this matter, as the plaintiff in that case has raised a substantive due process challenge to a land-use regulation. The outcome of this case will directly impact the outcome of that case.

III. ISSUE OF INTEREST TO *AMICUS CURIAE*

Whether this Court should jettison the longstanding test for evaluating substantive due-process challenges to restrictions on private

property rights, which was adopted in *Presbytery*, and replace it instead with rational-basis review.

IV. ARGUMENT

This appeal presents a stark choice: Continue the longstanding Washington tradition of providing meaningful protection to private property rights; or adopt a new, weakened form of rational-basis review akin to the practical abandonment of the judiciary's proper role. This Court should take the first route. It was correct to adopt the "unduly oppressive" analysis in *Presbytery of Seattle v. King County*, and it should continue to apply that analysis for substantive due process claims involving property rights. Adopting the rubber-stamp federal version of rational-basis review would qualify as "judicial surrender" of the right of Washington property owners to peaceably use and enjoy their property. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 96 (Tex. 2015) (Willett, J., concurring).

Washington uses a two-track approach when analyzing land-use regulations. A regulation is analyzed under the takings track if the regulation "constitutes a per se taking or destroys one or more of the fundamental attributes of property ownership." Josephine L. Ennis, *Making Room: Why Inclusionary Zoning Is Permissible Under Washington's Tax Preemption Statute and Takings Framework*, 88 Wash.

L. Rev. 591, 618 (2013). At the conclusion of a successful takings challenge, the owner is entitled to just compensation. If a regulation does not constitute a taking, then it is analyzed under the substantive due process track, which looks at whether "the regulation protects the public interest in health, safety, the environment, or fiscal integrity (general welfare), that is, whether the regulation is a proper exercise of police power." *Id*. At the conclusion of a successful substantive due process challenge, the ordinance or statute will be declared invalid. This appeal involves the second, substantive due process track, which arises under Article I, § 3 of the Washington Constitution.

A. This Court should not adopt federal constitutional jurisprudence without good reason to do so.

Washington's substantive due process analysis for land-use regulations is unique. Some commentators—and Appellant—portray this uniqueness as a problem that needs to be remedied. But this is not a bug, but a feature. State constitutions serve as independent guarantors of individual liberty, and it is their proper role to provide greater protection for individual rights than the U.S. Constitution. *State v. Gunwall*, 106 Wash. 2d 54, 59 (1986), *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("The legal revolution which has brought federal law to

the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."). Indeed, state courts have long "constru[ed] state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased." *Id.* at 495..

This Court has made this point emphatically in other areas of law, and has emphasized that the state constitution should be read as providing greater protections than the federal version where there is "articulable, reasonable and reasoned" justification for doing so. *Gunwall*, 106 Wash. 2d at 63. Such justification exists here.

To begin with, the federal rational basis test is the product of unique historical and legal experiences at the *federal* level, that do not translate well to the context of Washington State Constitutional law. This Court should decline therefore, to simply adopt that test as its own without good reason.

First, federal courts fashioned their version of the rational basis test in part because of the structural difference between the state and federal levels of government. The federal government has limited, enumerated powers, relating primarily to national subjects such as foreign relations and interstate trade. Matters not entrusted to the federal government are

left to the states, meaning states have what *The Federalist* calls "numerous and indefinite" powers over "the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people." *The Federalist* No. 45 at 313 (J. Cooke, ed. 1961). With greater power comes the need for greater protection. So state constitutions also provide more security against government abuse than the federal Constitution does. The federal Constitution creates a basic *minimum* of legal security for rights such as free speech, due process, and security against searches and seizures—a "floor" below which the states may not fall. But states can and must provide increased protections, to coincide with their greater authority.

Secondly, federal courts fashioned their extremely lenient version of the rational basis test in part to avoid imposing a one-size-fits-all national standard on states that have different political and social institutions. State courts have the benefit of historical experiences that enable them to tailor legal rules in ways that do not necessarily exist in the federal system. State constitutions and legal opinions are the product of historical experiences occurring long after the 1787 Constitution was written—meaning that state legal institutions can take account of more specific circumstances than federal courts. *See* Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41, 87 (2006) ("state

constitutions and constitutional decisions help to create a sense of cultural statehood."). This factor has, again, led *federal* courts to be highly restrained in their application of the due process clause—precisely to allow state courts greater room for vigorous enforcement of that provision.

Third, state constitutional law is easier to change than is the federal system, meaning that if voters are dissatisfied with the decision of a state court interpreting state law, they have greater recourse than they do when federal courts decide matters of federal constitutional law. Greater judicial restraint might be more justified in the latter circumstance than in the former. *See* Jeffrey S. Sutton, *51 Imperfect Solutions* 17 (2018) ("U.S. Supreme Court Justices generally appreciate the risks associated with rulings that prevent the democratic processes from working in fifty-one different jurisdictions. … Innovation by one state court necessarily comes with no risks for other States and fewer risks for that State.")

While these considerations may counsel greater restraint at the *federal* level, they point toward more vigorous judicial enforcement of state constitutional provisions. What's more, it makes little sense for state courts to copy a jurisprudence from a *different* legal system that *postdates* its own constitution. *See State v. Lupo*, 984 So. 2d 395, 408 (Ala. 2007) (Parker, J., concurring) ("The citizens of Alabama expect this Court to decide cases based on the timeless meaning of … the Alabama

Constitution of 1901, not merely on the basis that '[t]he day is gone' for a certain school of jurisprudence."); *Patel*, 469 S.W.3d at 98 (Willett, J., concurring) ("[E]ven if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom."). The federal rational basis test was created in 1934 in *Nebbia v. New York*, 291 U.S. 502 (1934), half a century after the writing of the Washington Constitution. It makes no more sense to follow federal jurisprudence on this matter, therefore, than to follow Canadian law.

Not only is there no reason for this Court to adopt federal rational basis jurisprudence, but there are powerful reasons not to do so—reasons that easily meet the "articulable, reasonable and reasoned" requirement of *Gunwall,* 106 Wash. 2d at 63.

The federal rational basis test has been rightly called "a misnomer, wrapped in an anomaly, inside a contradiction … less objective reason than subjective rationalization." *Patel*, 469 S.W.3d at 98 (Willett, J. concurring). To cite one example of its enigmatic nature, federal courts have not yet resolved the degree to which actual evidence *matters* under the federal rational basis test. In *Beach Commc'n*, the U.S. Supreme Court said that facts were "entirely irrelevant," 508 U.S. at 315, but only a year

later, it said that "even [under] the standard of rationality as we so often have defined it," a challenged law "must find some footing in the realities." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Courts and commentators struggling with this paradox have suggested subdividing rational basis into two new categories—rational basis and "rational basis with bite," *see, e.g.*, Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L.J. 779 (1987). But the Supreme Court has rejected that effort. *See Heller*, 509 U.S. at 321.

Thus nobody really knows what the federal version of rational basis really means. In practice, it has usually led to a near complete abdication to legislative assertions of power. As one scholar puts it:

> Unlike strict and intermediate scrutiny, [rational basis review] does not involve a search for truth but rather an exercise in creativity. Instead of trying to determine what the government is *really* up to, as they do in other cases, judges applying rational basis review are required to accept—and even help invent—purely imaginary explanations for the government's actions.

Clark M. Neily, III, *Terms of Engagement* 50 (2013) (emphasis in original).

This excessive deference has resulted in legal pathology: it has, as Judges Brown and Sentelle noted in *Hettinga v. United States*, disabled courts in their constitutional obligation to ensure that the legislative process respects constitutional boundaries. The independent judiciary was

created in order to limit "the destructive potential of factions (now known as special or group interests)," 677 F.3d 471, 481 (D.D.C. 2012) (Brown, J., concurring), yet the rubber-stamp style deference federal courts often employ "allows the legislature free rein to subjugate the common good and individual liberty to the electoral calculus of politicians, the whim of majorities, or the self-interest of factions." *Id.* at 482–83. Even obvious examples of unjustifiable, self-interested factionalism—legislation that does not serve a public interest even in theory—has been held constitutional under this excessively deferential approach. *See, e.g.*, *Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004) (upholding licensing law that served expressly to protect existing industry against competition, without even a pretense of protecting public interests). The judiciary exists "to guard the constitution and the rights of individuals" from the dangers of factionalism and "to keep the [legislature] within the limits assigned to their authority" by the Constitution, *Federalist* No. 78, *supra* at 525, 527. But the federal rational basis test fails to do that.

Not only does such extreme deference simply ratify the abuse of power by the other branches but it also expands the risk of judicial malfeasance, notwithstanding the pretense of restraint. The failure to enforce a constitutional provision is just as "activist" as the aggressive reinterpretation of a provision. This has led some critics to note that the

"picking and choosing" in which federal courts engage when deciding when to apply federal rational basis or another standard of review "unquestionably involves policymaking rather than neutral legal analysis." *United States v. Carlton*, 512 U.S. 26, 41 (1994) (Scalia, J., concurring).

In sum, the idea that this Court should adopt the "supine" federal version of rational basis, *Patel*, 469 S.W.3d at 99, fails every test. It would be anachronistic, because the authors of Washington's Constitution cannot have expected that a legal theory devised a half-century later would be applied to interpret the document's provisions. It would be foreign, because the federal test was devised to interpret the federal, not the state Constitution. It would be contrary to sound public policy, because the federal test fails to protect individual rights to the extent that even the federal Constitution calls for, let alone the Washington Constitution. And it would not be in the best interest of the law, since the vague and shifting contours of the federal rational basis test are poorly understood even by federal courts themselves. This Court should decline to adopt it, and should retain its existing state law test.

B. The existing Washington approach properly balances private property rights with legitimate regulation.

Private property is the bedrock of individual liberty. "[A] fundamental interdependence exists between the personal right to liberty

and the personal right in property. Neither could have meaning without the other." *Manufactured Hous. Communities of Wash. v. State*, 142 Wash. 2d 347, 378 n.3 (2000) (quoting *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)). As such, substantial constitutional protection for private property is desirable for a free and prosperous society. This Court recognized this in *Presbytery*, when it established the current test for analyzing substantive due process claims relating to land-use regulations. An impermissible land-use regulation is one "that goes beyond preventing a public harm and actually enhances a publicly owned right in property," 114 Wash. 2d at 329, and "seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit." *Robinson v. City of Seattle*, 119 Wash. 2d 34, 49 (1992). The test itself is straightforward:

> [T]he court should engage in the classic 3–prong due process test and ask: (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. In other words, 1) there must be a public problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the regulation must not be unduly oppressive upon the person regulated. The third inquiry will usually be the difficult and determinative one.

Presbytery, 114 Wn.2d at 330–31 (internal quotations omitted). This commonsense test allows the government leeway to enact orderly land-use

policies, while still protecting property owners from overreaching and intrusive regulations that do not serve a legitimate public purpose. And that test has not stopped Washington cities and counties from regulating—or from expanding, as recent explosive growth around the state demonstrates.

Appellant City of Seattle now argues that these constitutional rules should be (or already have been) thrown out in favor of the less-protective rational-basis test. Appellant has argued that rational basis review requires the plaintiff to "show a law lacks a rational foundation in the public welfare." City of Seattle's Reply at 2. That, however, is an invocation of the federal rational basis test that invites judges to manufacture *admittedly fictitious* justifications for a statute and then uphold real statutes based on such fictions—leading to the pathologies noted above.

This Court should not jettison *Presbytery* and adopt such standard for laws that impact the rights of Washington property owners. It should instead follow the longstanding rule that a *taking* occurs when there is a per se appropriation of property, or when a regulation destroys a fundamental aspect of private property ownership.

This case is about the second kind of property rights analysis, when a taking has *not* occurred, but the government is using its power to

restrict someone's use of their property under the police power. Here, "the state is allowed to act as the agent of the public at large in responding to threats that neighbors impose." Richard A. Epstein, *Missed Opportunities, Good Intentions: The Takings Decisions of Justice Antonin Scalia*, 6 Brit. J. Am. Legal Stud. 109, 128 (2017). But if the state is acting as an agent of the public at large in legislating the use of property, it should also be required to make the same kind of showing that one neighbor would need to make against another in a nuisance action. At a minimum, this would involve a preponderance of the evidence standard—which is effectively what the *Presbytery* standard requires.

The alternative—for which Appellant argues—is allowing the government to act as an agent of the public (by restricting various uses of private property), but discarding both any requirement that it either provide any evidence of need for regulation, and any requirement that courts look at the burden actually placed on the individual landowner. "If private actors do *not* have a valid cause of action against their neighbor, then the government, as their agent, cannot rise above their position by claiming some novel set of rights." *Id.* (emphasis original). Rational basis review would upend this Court's longstanding rule to no end, other than further empowering the government to control Washingtonians and their private property without meaningful judicial oversight.

V. CONCLUSION

Adopting a federal rational-basis approach would needlessly disturb decades of stable property rights jurisprudence in this state, and would open the door for regulatory overreach unmoored from evidence and legitimate purpose. The only reason to accept such a lax standard of review would be to grant local authorities ever-more power to regulate an increasingly broad array of land-use activities. This Court should reject any temptation to adopt such an approach. The existing *Presbytery* test correctly balances private property rights and the government's need to regulate. The decision of the trial court should be affirmed.

Respectfully submitted this 26th day of April, 2019.

/s/ Karen Louise Osborne
Karen Louise Osborne, WSBA #51433
KOsborne Law
9721 NE Livingston Mountain Ct.
Camas, WA 98607-7737
(360) 907-2593
Karen.Osborne@KOsborneLaw.com

Amicus Curiae Counsel

Certificate of Service

On the date below, I filed and mailed the foregoing Motion for Leave to File *Amicus Curiae* Brief directed to:

PETER S. HOLMES
Seattle City Attorney
Roger D. Wynne
Sara O'Connor-Kriss
SEATTLE CITY ATTORNEY'S OFFICE
701 Fifth Ave., Ste. 2050
Seattle, WA 98104-7097
Attorneys for Appellant

Ethan W. Blevins
Brian T. Hodges
PACIFIC LEGAL FOUNDATION
10940 Northeast 33rd Pl., Ste. 210
Bellevue, WA 98004
Attorneys for Respondents

Jackson Wilder Maynard, Jr.
Hannah Sells Marcley
BUILDING INDUSTRY ASSOCIATION
OF WASHINGTON
111 21st Ave SW
Olympia, WA 98501
Attorneys for Amicus Curiae
Building Industry Association
of Washington

Kelly A. Mennemeier
FOSTER PEPPER PLLC
111 Third Avenue, Ste. 3000
Seattle, WA 98101
Counsel for Amici Curiae
National Apartment Association and
Washington Multi-Family Housing Association

John J. McDermott
NATIONAL APARTMENT ASSOCIATION
4300 Wilson Boulevard, Ste. 800
Arlington, VA 22203
Counsel for Amici Curiae
National Apartment Association and
Washington Multi-Family Housing Association

I declare under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

Dated April 26, 2016,

/s/ Karen Louise Osborne_____
Karen Louise Osborne