No. 23-329

In The
Supreme Court of the United States

CHONG AND MARILYN YIM, KELLY LYLES,
EILEEN, LLC, and RENTAL HOUSING
ASSOCIATION OF WASHINGTON,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a public policy foundation devoted to individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are implicated. Among GI's foremost priorities is the protection of the rights of property owners, including landlords who offer property on the rental market. GI has represented property owners and appeared as amicus curiae in state and federal courts in defense of these rights. *See, e.g.*, *Ariz. Creditors Bar Ass'n v. Arizona*, No. 1 CA-CV-22-0765 (Ariz. App.) (pending); *Protect Our Ariz. v. Fontes*, 522 P.3d 678 (Ariz. 2023); *Kinzel v. Ebner*, 205 N.E.3d 1225 (Ohio App. 2023); *Hobbs v. City of Pacific Grove*, 301 Cal. Rptr.3d 274 (App. 2022); *Goodman v. City of Tucson*, No. C2008-1560 (Pima Co. Super. Ct., Nov. 2, 2009). GI appeared as amicus in the state court litigation stage of this case, *Chong Yim v. City of Seattle*, 451 P.3d 675 (Wash. 2019). GI scholars have also published important scholarship on the significance of property rights in general and of rental property owners in particular. *See* Timothy & Christina Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* (2nd ed. 2016); Trevor Bratton, *Rent Out of*

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[1] Pursuant to Rule 37, counsel for amicus affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than amicus, its members, or counsel, made any monetary contribution to its preparation or submission. All parties received notice of amicus' intention to file at least ten days before the due date.

Control (Goldwater Institute, Jan. 12, 2021).[2] GI believes its experience and policy expertise will assist this Court in considering the petition.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

The right to exclude isn't just "one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)—it's actually the most fundamental aspect of that right, and has been recognized as such since the dawn of the Anglo-American common law. It puts the "private" in private property.[3]

Depriving someone of the right to choose who may access her land is an extreme intrusion on her autonomy—one that can be justified only in the weightiest circumstances. Yet, thanks to this Court's decades-long neglect of the pivotal importance of private property rights, federal and state judges and lawmakers are now in disarray regarding the nature and limits of an

[2] https://www.goldwaterinstitute.org/policy-report/rentcontrol/.

[3] *See* Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 Harv. J.L. & Pub. Pol'y 593, 619–20 (2008) ("The right to exclude gives property its structural basis, a structure that derives from the social and moral basis of the institution, and remains intrinsically tied to the notion of inviolability. . . . Inviolability refers to the idea that certain entities (things and persons) are considered off-limits, by default, to everyone.").

owner's right to exclude. The confusion has reached the point where some courts, including the Ninth Circuit here, have simultaneously acknowledged the centrality of the right to exclude to the "property" protected by the Fifth Amendment's Just Compensation Clause—and denied that it is a fundamental element of the "property" protected by the same Amendment's Due Process of Law Clause—an incoherent position.

One deleterious result of that incoherence is that countless people who might otherwise offer land to rent will choose not to, or will be forced to protect themselves financially by demanding higher security deposits and other forms of up-front insurance that make it prohibitively difficult for many innocent would-be renters to find places to live. These innocent would-be renters are, therefore, the ultimate victims of unconstitutional, unjust, and unwise policies facilitated by judicial confusion over the scope of owners' rights.

Security for private property—including meaningful protection of the right to exclude—is not just warranted by constitutional language and principles of justice, and is not just deeply rooted in this nation's history and tradition, but is also essential to a thriving rental market. Given the housing shortage in major American cities (which is exacerbating the ongoing homelessness crisis), it is imperative that this Court act to protect property owners' freedom of choice.

ARGUMENT

I. The decision below worsens existing circuit splits, sowing confusion among lower courts and the legal community.

The right to exclude is probably the most fundamental element of ownership. *See* 2 W. Blackstone, *Commentaries* *2 (defining property as "that sole and despotic dominion" exercised over things "in total exclusion of the right of any other individual"). Even outspoken enemies of private property, such as Jean-Jacques Rousseau—who considered property the quintessential evil of civilized society—regarded the right to exclude as the core principle of ownership. *See Discourse on the Origin of Inequality* 348 (Robert M. Hutchins, et al., ed., Chicago: Encyclopedia Britannica, 1971) (1755) (arguing that "the real founder of civil society" was the first person to exclude others from privately owned land).

Of course, this Court has repeatedly described this right as a "fundamental" element of ownership, *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); or an "essential" part of private property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

Yet this Court has also repeatedly relegated private property to the status of a second-class right, most obviously by according it only the paltry protection of

"rational basis" scrutiny. *See*, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting) ("Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not."). The consequence has been that, notwithstanding this Court's repeated professions of belief in the importance of private property[4]—and despite the fact that private property is referenced more than any other right in the Bill of Rights[5]—the true scope of constitutional security for this right remains unclear to judges, lawyers, and everyday Americans.

This creates, as discussed in Part III below, an enormous disincentive for property owners to rent out their land. It discourages participation in the market

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[4] *See*, *e.g.*, *Dolan*, 512 U.S. at 392 (noting that there's "no reason" to relegate private property to "the status of a poor relation" to other constitutional rights); *Lynch v. Household Fin. Corp*., 405 U.S. 538, 552 (1972) (acknowledging that "a fundamental interdependence exists between the personal right to liberty and the personal right in property"); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (listing property along with life, liberty, speech, press, religion, and assembly, as a "fundamental" right).

[5] In addition to the Fifth and Fourteenth Amendments' express use of the word "property," and the Fifth Amendment's Just Compensation Clause, the Fourth Amendment refers to "houses," "papers," and "effects" (which are all owned things), the Third Amendment references "homes," and the Second Amendment refers to the "keep[ing]" of arms, which, again means the ownership of property.

and forces landlords to increase the up-front demands they make on prospective renters.

But as far as law is concerned, the Ninth Circuit's ruling only worsens the existing doctrinal confusion. If left undisturbed by this Court, its declaration that "landlords do not have a fundamental right to exclude" for purposes of the Due Process Clause, App.2a, will mean this "fundamental element of the property right," *Cedar Point Nursery*, 141 S. Ct. at 2072, can be erased whenever "the government [can] offer a 'legitimate reason'" for doing so. App.27a.

The Ninth Circuit rationalized its conclusion on the theory that while the right to exclude is fundamental for purposes of the Just Compensation requirement, it is somehow not fundamental for purposes of the Due Process of Law Clause. In this respect, it joined the Eighth and Tenth Circuits, *see 301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1385 (8th Cir. 2022) (upholding restriction on rental property owners' rights); *ConocoPhillips Co. v. Henry*, 520 F. Supp.2d 1282, 1318–19 (N.D. Okla. 2007), *rev'd sub nom. Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009) (distinguishing between due process and takings to uphold state law forcing property owners to let guests take firearms onto their property).

But those decisions conflict with those of the Third Circuit, which asks whether the element of the property right in question qualifies as fundamental, in which case that right is protected by the Due Process of Law Clause. *See Nicholas v. Penn. State Univ.*, 227

F.3d 133, 140–41 (3d Cir. 2000). The Sixth Circuit, too, has held that elimination of the right to exclude can constitute a due process violation. *Golf Vill. N., LLC v. City of Powell*, 14 F.4th 611, 623 (6th Cir. 2021).

As the Petition observes (at 25–28), the Ninth Circuit's holding conflicts with decisions by other circuits, as well, which hold that the Just Compensation and Due Process of Law Clauses cover the same rights. *See also Bickerstaff Clay Prod. Co. v. Harris Cnty. Bd. of Comm'rs*, 89 F.3d 1481, 1490 (11th Cir. 1996) ("Bickerstaff's Takings Clause claim and its substantive due process claim are identical . . . if the scope of 'public use' under the Takings Clause and the scope of 'police power' under the substantive component of the Due Process Clause are the same. The Supreme Court's decision in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984), indicates that they are."); *Gamble v. Eau Claire Cnty*., 5 F.3d 285, 287 (7th Cir. 1993) ("*Midkiff* defines the public-use requirement in a manner that equates it to the requirement that a state not deprive a person of life, liberty, or property without a rational basis," which means "that a taking which falls outside the takings clause (viewed as a grant of power) because it flunks the public-use test may by the same token deny substantive due process.").

Even the Ninth Circuit itself is confused. In *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796–97 (9th Cir. 2002), it held that it violated Due Process of Law to take the corneas of dead children without their parents' consent, because that violated the right to

exclude—a right the court characterized as "fundamental." *Id.* at 789.

Still more bizarrely, this Court has used the presence of a right to exclude as a test for determining whether an alleged property right qualifies for protection under the Due Process of Law Clause. *See*, *e.g.*, *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999). So for the Ninth Circuit to say that the right to exclude is not the kind of fundamental interest protected by that Clause creates a circularity—one which allows the state to deprive a person of the right to exclude, because it is not the kind of interest protected by the Due Process of Law Clause, even though the right to exclude is a virtual *sine qua non* in determining whether the deprivation violates that Clause. This makes no logical sense.[6]

Of course, the Constitution protects the same "property" in both the Due Process of Law and Just Compensation Clauses, saying that no person shall be "deprived of . . . property without due process of law," and that "private property" shall not be taken, except for "public use" and upon payment of "just compensation." There's no reason to think the contours of "property" differ in these two Clauses, or that there's a

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[6] Consider also how this logic would work in the realm of patent law, where the right to exclude has been characterized as "the very definition of 'property,' " *Schenck v. Nortron Corp.*, 713 F.2d 782, 786 n.3 (Fed. Cir. 1983), and is considered a right of which the possessor "cannot be deprived without due process of law." *Johnson & Johnson, Inc. v. Wallace A. Erickson & Co.*, 627 F.2d 57, 59 (7th Cir. 1980).

category of property protected under one and not the other.

Yet the Ninth Circuit reached its conclusion that the right to exclude is not fundamental without engaging in *any* of the historical analysis that this Court has made crystal clear is required as part of the Due Process of Law inquiry. *See Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2242 (2022). That historical analysis would have revealed that the right to exclude is no less fundamental for purposes of the Due Process of Law Clause than it is for the Just Compensation Clause.

II. Not only do landlords have a "deeply rooted" right to choose tenants based on their merits—they typically have a *duty* to do so.

The right to exclude has been regarded as essential to private property since at least the days of ancient Rome. *See* John G. Sprankling, *International Property Law* 307 (2014) (noting that under the Digest of Justinian, ownership included the right to exclude). Hugo Grotius said five centuries ago that "the essential characteristic of private property is the fact that it belongs to a given individual *in such a way as to be incapable of belonging to any other individual*," *Commentary on the Law of Prize and Booty* 317 (Martine Julia van Ittersum, ed., Indianapolis: Liberty Fund, 2006) (emphasis added), and John Locke argued in the *Two Treatises* that although all people own the earth

in common in a state of nature, this commonality is eliminated once a person engages in productive labor with natural resources; when one exerts such labor—to which "nobody [else] has any right"—that exertion "excludes the common right of other men" over natural resources—that is, it creates the right to exclude. *Second Treatise* § 27 *in Two Treatises of Civil Government* 328–29 (Peter Laslett, rev. ed. 1963). *See also* Blackstone, *supra*.

These natural law explanations were translated into the Anglo-American common law system of real property via the owner's right to choose her tenants. This right was protected at common law first by the concept of the tenancy at will, and, when that harsh rule was modified, by the principle that a "landlord is not bound to renew without a covenant for the purpose." 4 J. Kent, *Commentaries on American Law* 107 (1830). While a landlord usually cannot *terminate* a lease arbitrarily, landlords *are* free to select their tenants in the first instance, and to do so arbitrarily. After all, to eliminate that right, and to constrain the landlord's right to choose whom to *retain* as tenants, runs dangerously close to an outright confiscation of her property for the private use of the tenant.[7]

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[7] In *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992), this Court rejected the argument that a law constraining the landlord's right to evict constituted a taking for private use or a violation of the right to exclude, because those constraints only applied after "[the] landowner decides to rent his land to tenants." It was because the owners had "voluntarily" chosen to rent that this

Thus the New York Supreme Court was summarizing centuries of common law when it observed that "[a]bsent a supervening statutory proscription, a landlord is free to do what he wishes with his property, and to rent or not to rent to any given person at his whim [except] . . . that he may not use race, creed, color, national origin, sex or marital status as criteria." *Kramarsky v. Stahl Mgmt.*, 401 N.Y.S.2d 943, 945 (Sup. Ct. 1977). This means a landlord "may decide not to rent to singers because they are too noisy, or not to rent to bald-headed men because he has been told they give wild parties . . . if that be his personal desire." *Id.*

In other words, a landowner's fundamental right to decide whom she will lease her property to is deeply rooted in our history and tradition.

But that choice isn't just a right—it's also a duty. Courts have held property owners liable in tort for failing to exercise selectivity over whom they allow on their premises. Thus in *Samson v. Saginaw Professional Building, Inc.*, 224 N.W.2d 843 (Mich. 1975), a tenant successfully sued a landlord for injuries sustained when the guest of another tenant battered her. The court said the battery was foreseeable and that the owner retained a "responsibility to insure that [common] areas are kept . . . reasonably safe for the use of his tenants and invitees." *Id*. at 849. The court said the owner had the "duty to ask" about the risk to tenants

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Court said the "regulation" had not crossed the line "into the unwanted physical occupation of land." *Id*. at 531.

caused by those invited on the property by other tenants. *Id.* at 850.

Other states have likewise held that landlords have an affirmative duty to take steps to prevent crimes on their property, including by inquiring into their criminal backgrounds. In *Hemmings v. Pelham Wood Limited Liability Limited Partnership*, 826 A.2d 443, 455 (Md. 2003), Maryland's highest court found that a landlord's "duty to use reasonable care for the tenant's safety within the common areas also may apply to injuries suffered from criminal acts within the leased premises." Many other states follow the same rule: "a landlord may now be held responsible for negligence in the selection of a tenant," *State v. Monarch Chemicals, Inc.*, 456 N.Y.S.2d 867, 868 (App. Div. 1982), or failing to take steps to ensure against criminal activities occurring on the land. *See, e.g.*, *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 654 (Cal. 1985); *Jackson v. Post Props., Inc.*, 513 S.E.2d 259, 261–62 (Ga. App. 1999); *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970).

In fact, under civil asset forfeiture laws, a landlord can *lose the property entirely* based on a tenant's involvement with contraband. *See, e.g.*, *United States v. 16 Clinton Street*, 730 F. Supp. 1265, 1267–68 (S.D.N.Y. 1990) (seizure of an entire building based on drug arrest on one floor). This is true even if the landlord had no involvement in, or knowledge of, criminality. *Compare Dobbins' Distillery v. United States*, 96 U.S. (6 Otto) 395, 399 (1877) (landlord's innocence was no defense to forfeiture) *with Austin v. United States*, 509

U.S. 602, 616 (1993) (forfeiture might be avoided where "the owner had done all that reasonably could be expected to prevent the unlawful use of his property").

Landlords risk other kinds of liability, also, depending on whom they rent to. They can, for example, be found liable for maintaining a nuisance based on the uses to which their renters put the property. *See*, *e.g.*, *Tetzlaff v. Camp*, 715 N.W.2d 256, 260–63 (Iowa 2006); *Sipe v. Dale*, 80 P.2d 569, 571–72 (Okla. 1938). Thus—in addition to their general obligation to maintain their properties in habitable condition, and to protect their own rights from the possible damage that an irresponsible, unsafe, or criminal tenant might inflict—landlords have affirmative duties regarding the character and activities of their tenants.

It is elementary that if someone has a duty, she must have the right to discharge that duty. *See* Henry B. Veatch, *Human Rights: Fact or Fancy?* 164–65 (1985). *See also Newman*, 287 F.3d at 790 n.5 (remarking upon "[t]he logical relationship between rights and duties" and noting that they are "different aspects of the same legal relation"). If a landlord can be penalized due to a tenant's criminal actions, then as a matter of fundamental Due Process of Law, she *must* have a right to investigate or inquire into the prospective tenant's criminal history.[8] To expose her to punishment

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[8] Thus in *Jankowski Lee & Assocs. v. Cisneros*, 91 F.3d 891, 895 (7th Cir. 1996), the court found a landlord liable for violating the Fair Housing Act when it refused accommodation to a handicapped tenant; the landlord claimed that it doubted the tenant was actually handicapped, to which the court replied: "If a

while depriving her of the ability to avoid it, violates the principles of fundamental fairness that underlie Due Process of Law. The risk of liability necessarily implies the owner's right to use the property in a manner that avoids such liability—i.e., to choose tenants based on individual merit.

Yet that is precisely the right the Seattle Ordinance overrides. The consequence is that a property owner is placed at risk of severe deprivation—even the entire confiscation of her land—but is barred from taking the steps necessary to protect herself. If that's not a violation of Due Process of Law, nothing is. *See Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 365 (1808) ("the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no controul"); *J. W. Goldsmith, Jr., Grant Co. v. United States*, 254 U.S. 505, 511–12 (1921) (noting "the anxious solicitude a court must feel" regarding "the injustice of making an innocent man suffer for the acts of a guilty one").

There's another aspect to the question of whether the right to exclude is "deeply rooted" for Due Process of Law purposes. The advent of "homesharing" technologies in recent years—best known through Homeaway and Airbnb.com—means that many people rent out *their own residences* on a short-term basis to tourists

landlord is skeptical of a tenant's alleged disability . . . it is incumbent upon the landlord to request documentation or open a dialogue."

or business travelers. This is allowed in Seattle—and the Ordinance challenged here contains an exception for some of these cases. Section 14.09.115(C) says landlords *can* decline to rent to people with criminal records if the property is a single-family dwelling occupied by the owner.

But otherwise, a property owner who chooses to rent out his or her home on a short-term basis, while not remaining on the property herself, is barred from denying a rental based on the person's criminal history.

This means **property owners are forced to rent out their own homes to known criminals against their will**. Yet nothing is more "deeply rooted" than "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." *Payton v. New York*, 445 U.S. 573, 601 (1980). If, as William Pitt is said to have remarked, "'[t]he poorest man may in his cottage bid defiance to all the forces of the Crown,'" then surely homeowners have a fundamental, "deeply rooted" right to refuse to allow criminals into their homes to sleep in their beds. *Miller v. United States*, 357 U.S. 301, 307 (1958) (citation omitted). The Seattle Ordinance's prohibition on the right to exclude thus applies even to people's own residences—plainly inflicting damage on a right that falls within the Due Process of Law protection. But this, too, went unconsidered by the court below.

III. The decision below will worsen the existing housing shortage and encourage further legalized trespasses.

If left undisturbed, the decision below will worsen an already severe housing crisis by establishing a vast disincentive for property owners to offer their property for rent. What's more, the decision below worsens an already dire situation in which state governments pass legislation that legalizes trespass in the service of their own political values, at the expense of property owners' right to choose.

A. Blocking landlords from basing decisions on a renters' individual merits will likely worsen discrimination and the housing shortage.

Forbidding landlords from basing rental decisions on applicants' criminal histories raises costs to property owners who rent out their property. It does this by increasing their risk of liability, property loss, tenant default, etc. By creating a major disincentive to property owners considering renting out their property, laws like the Seattle Ordinance are likely to worsen the existing housing shortage and increase racial discrimination.

Seattle has a housing shortage; one survey in 2021 concluded that the city lacks about 21,000 affordable housing units. Kevin Ramsey, et al., *City of Seattle: Market Rate Housing Needs and Supply Analysis*,

Berk, 48 (Apr. 2021).[9] A more recent analysis said the county must add 17,000 new homes per year for the next 20 years to meet demand. Heidi Groover, *King County Needs 17K New Homes Every Year to Address Housing Shortage*, Seattle Times (Mar. 3, 2023).[10]

But instead of increasing the supply, the Seattle Ordinance makes it more expensive and difficult for property owners to provide housing on the rental market.

Because laws of this sort are relatively new, little empirical research is available, but that which exists shows that landlords "greatly fear being sued by tenants or neighbors if criminal acts were to occur on [their] rental property," and are "concerned about their reputations in the community, and being known as willing to rent to released offenders may prevent those landlords from attracting other applicants or retaining current tenants." Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 Federal Probation J. 4 (2007).[11] Consequently, landlords want to be able to choose their tenants—and taking that right away is likely to deter them from renting their property at all.

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[9] https://www.seattle.gov/Documents/Departments/OPCD/OngoingInitiatives/HousingChoices/SeattleMarketRateHousingNeedsAndSupplyAnalysis2021.pdf.

[10] https://www.seattletimes.com/business/real-estate/king-co-needs-17k-new-homes-every-year-to-address-housing-shortage/.

[11] https://www.uscourts.gov/sites/default/files/71_1_4_0.pdf.

Some landlords will respond to this pressure by raising rent or demanding larger up-front payments such as security deposits. One ongoing research project has already found that the Seattle Ordinance "did not affect the likelihood of renting . . . but that housing spending increased for black [Washington] citizens by approximately $106." Meradee Tangvatcharapong, *Do Fair Housing Policies Help or Hinder? Evidence from Washington* (Oct. 2022).[12]

Another way landlords will respond is to resort to less precise indicia of renters' character. When deprived of information about the individual merits of prospective renters, many landlords resort to imperfect proxies such as racial stereotyping. One survey published earlier this year revealed that after Minneapolis restricted the use of background checks for renters, landlords appeared to engage in racial and ethnic discrimination instead. Marina Mileo Gorzig & Deborah Rho, *The Impact of Renter Protection Policies on Rental Housing Discrimination* Fed. Reserve Bank of Minneapolis (Apr. 10, 2023).[13]

These results are consistent with earlier research that found that a rule forbidding employers from doing credit checks tended to reduce employment opportunities for black job applicants, Alexander W. Bartik & Scott T. Nelson, *Deleting a Signal: Evidence from*

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[12] https://appam.confex.com/appam/2022/mediafile/ExtendedAbstract/Paper46163/Oct%202022.pdf.

[13] https://www.minneapolisfed.org/research/institute-working-papers/the-impact-of-renter-protection-policies-on-rental-housing-discrimination.

Pre-Employment Credit Checks (Univ. Chi., Working Paper No. 2019–137, Dec. 2019),[14] whereas policies that *expand* employers' opportunities to learn more about applicants (such as allowing drug-testing) tend to improve black employment. Abigail Wozniak, *Discrimination and the Effects of Drug Testing on Black Employment*, 97 Rev. Econ. & Statistics 548 (2015).

In 2016, the Brookings Institution found that laws forbidding employers from asking about job applicants' criminal backgrounds actually "increase racial disparities in employment outcomes." Jennifer L. Doleac, *"Ban the Box" Does More Harm Than Good*, Brookings Commentary (May 31, 2016).[15] Another study by scholars at Texas A&M and the University of Oregon found that these laws *decreased* the probability of employment for low-skilled young black men by 5.1 percent. Jennifer Dorleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes when Criminal Histories Are Hidden* (Aug. 2018).[16] "When [such laws] remove[ ] information about a criminal record from job applications," note the authors, "employers may respond by using the remaining observable information to try to guess who the ex-offenders are, and avoid interviewing them." *Id.* at 4.

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[14] https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_2019137.pdf.

[15] https://www.brookings.edu/articles/ban-the-box-does-more-harm-than-good/.

[16] https://justicetechlab.github.io/jdoleac-website/research/Doleac_Hansen_JOLE_preprint.pdf.

This finding was supported by still another analysis in 2020 that concluded that "in the absence of objective information, employers place weight on stereotypes about the characteristics of black workers that are generally negative and inaccurate." Steven Raphael, *The Intended and Unintended Consequences of Ban the Box*, 2021 Ann. Rev. Criminology 191 (2020).

Even where landlords do not take these steps, they must protect themselves somehow—and they will do so by raising the upfront costs for prospective renters. The obvious step is to increase rent as well as security deposits. But where this is not permitted—and in many places it is severely limited—landlords must resort to screening services. *See Tenant Background Checks Market*, Consumer Financial Protection Bureau, 22 (Nov. 2022).[17] These require would-be tenants to pay application fees, which increase the costs to prospective renters. But an application can be complicated, time-consuming, and possibly error-prone, too. *Id.* at 24.

In short, although policies like this Ordinance purport to serve the interests of renters, they actually worsen the situation for renters, or improve the lives only of those who already have secured a rental, at the expense of those who are seeking one.

[17] https://files.consumerfinance.gov/f/documents/cfpb_tenant-background-checks-market_report_2022-11.pdf.

B. The decision below enables political bodies to legalize trespassing by those acting in ways property owners find not just inappropriate but dangerous.

The decision below allows cities to compel property owners against their will to allow renters on their land without consideration of their criminal backgrounds, as part of a political movement popular on the political left. *See also Lamplighter Vill. Apartments LLP v. City of St. Paul*, 534 F. Supp.3d 1029 (D. Minn. 2021) (ordinance prohibiting inquiry into criminal backgrounds of prospective tenants); *301, 712, 2103, and 3151 LLC, supra* (same).

But the political right has engaged in the same tactics: adopting laws that force property owners to allow people on their property with firearms, against the owners' will. *See ConocoPhillips Co.*, *supra*; *W. Va. Coal. against Domestic Violence, Inc. v. Morrisey*, No. 2:19-cv-00434, 2023 WL 5659040 (S.D. W. Va. Aug. 31, 2023).

In both such situations, the result is the same: to deprive property owners of one of the most critical elements of constitutionally guaranteed private property, in the service of a political goal. *Morrisey* concerned a domestic violence shelter that was forced by a state law to allow people on their property with guns in their cars. A domestic violence shelter obviously has a legitimate interest in prohibiting people from entering their property with firearms. Yet, applying rational basis scrutiny, the district court upheld the

mandate—even while acknowledging that "the right to exclude another from one's property is an inviolable property right that is in no way abridged by the Second Amendment." *Id.* at 19 (citation omitted).

Instead of allowing political factions to inflict legalized trespasses on each other in the service of their own social and political desires, in a tit-for-tat that deprives all sides of their freedom to choose, the traditional rule is better by far: to allow property owners to decide for themselves who may and may not enter their land and on what conditions. This is not only the more efficient means of resolving disputes over what restrictions on property use are wisest—while simultaneously respecting diverse views on that subject—but it is also the means that is deeply rooted in this nation's history and tradition.

CONCLUSION

The petition should be *granted*.

Respectfully submitted,

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