No. 21-35567

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHONG AND MARILYN YIM, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF SEATTLE, WASHINGTON,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington, No. 2:18-cv-00736-JCC
(Hon. John C. Coughenour)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests *amicus* because the right to due process, especially with respect to property rights, is vital to a free and prosperous society and because the Seattle law prohibiting landlords from learning the criminal history of potential tenants violates owners' fundamental right to exclude others from their properties.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Chong and MariLyn Yim represent a large swath of America's landlords: hard-working, middle-class, and victims of undue legal burdens on their dealings with tenants and lease applicants. Seattle's Fair Chance Housing Ordinance (FCHO) is one such burden, preventing landlords from inquiring into the criminal background of lease applicants, potentially exposing them to dangerous tenants, and

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. Pursuant to Ninth Circuit Local Rule 29-2(a), all parties have been notified and have consented to the filing of this brief.

forcing them to host unwelcome guests. Courts in the past, including the Supreme Court, excused impositions of this sort by applying the lenient "rational basis" standard of review. *See, e.g.*, *Pennell v. San Jose*, 485 U.S. 1, 13 (1988) (upholding rent control ordinance based on tenant need "because we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare"). Richard Epstein has provided perhaps the most scathingly accurate definition of rational basis review, as the "approach . . . which sustains legislation so long as any barely respectable reason can be given in its favor." Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 218 (2014). While rational basis has in the past wreaked havoc on property rights, two Supreme Court rulings, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) and *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), together establish that, under the Due Process Clause, fundamental aspects of property (*e.g.*, the right to exclude) warrant a greater level of scrutiny into the purpose of a challenged regulation, as well as the manner in which it is achieved.

ARGUMENT

SEATTLE'S PROHIBITION ON LANDLORDS' REQUESTING POTENTIAL TENANTS' CRIMINAL HISTORIES TRIGGERS HEIGHTENED SCRUTINY, WHICH IT FAILS

Seattle's prohibition on landlords' excluding certain tenants through inquiries into their criminal history deprives them of their fundamental right to exclude others from their properties. While this scheme might pass muster under the uber-deferential rational basis approach, *Lingle* and *Cedar Point* subject interferences of this kind to a far more exacting standard. *Cedar Point* clarified that the "right to exclude," as a "fundamental element of the property right . . . cannot be balanced away." 141 S. Ct. at 2077. While the Court focused on the right to exclude's relevance to the Fifth Amendment's Takings Clause, the Fourteenth Amendment's Due Process Clause also protects this fundamental right.

Due process claims against interferences with property rights trigger the "substantially advances" test. First articulated in *Agins v. Tiburon*, 447 U.S. 255 (1980), *Lingle* outlined the test's current iteration: "The 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation is *effective* in achieving some legitimate public purpose." 544 U.S. at 542 (emphasis original). As Professor Steven Eagle put it, "*Lingle* stands for the proposition that both asserted government *takings* of property, and asserted government *deprivations* of property without due process of law, raise separate, legitimate legal issues to be

resolved using different legal standards." Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. Rev. 899, 900 (2007).

No doubt *Lingle*'s due process protection of property rights rises above mere rational basis review. For one, the Court could have stopped at its takings analysis, as petitioner Chevron dismissed its due process claims before seeking certiorari. 544 U.S. at 549 (Kennedy, J., concurring). Instead, it took the extra step of confirming that the "substantially advances" test was still relevant to public burdens on private property. Second, *Lingle*'s means-ends analysis asks "whether a regulation is *effective* in achieving some legitimate public purpose." *Lingle*, 544 U.S. at 542. Rational basis review has no such requirement. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.").

Insofar as it burdens the government with proving its ends are legitimate (and not just that the means are well-tailored to achieving those ends), applying proper means-ends scrutiny can mean that "a land use regulation that does not rationally advance a permissible public purpose . . . is not an exercise of the police power at all." Alan Romero, *Ends and Means in Takings Law After* Lingle v. Chevron, 23 J. Land Use & Envtl. L. 333, 335 (2008) (discussing the boundaries of a state's police powers in the land-use context).

Lingle affirmed that means-end scrutiny can be applied to infringements on property rights through the Due Process Clause, and *Cedar Point* now helps clarify which types of property rights are "fundamental" and thus deserving of heightened scrutiny in the due process analysis. The right to exclude certainly qualifies: "[W]e have stated that the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Cedar Point*, 141 S. Ct. at 2072 (quoting *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176, 179–180 (1979)).

Cedar Point built on *Loretto v. Teleprompter Manhattan CATV Corp.*, a watershed case decided decades prior, in which the Court held that a permanent physical invasion of property is "perhaps the most serious form of invasion of an owner's property interests." 458 U.S. 419, 435 (1982). "To borrow a metaphor," wrote Justice Marshall in *Loretto*, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle taking a slice of every strand." *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)). The *Loretto* Court saw physical invasions as especially egregious because "the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.* (citation omitted).

Loretto and now *Cedar Point* show the Court's eagerness to preserve a higher level of protection for property's fundamentals, whether an owner is seeking to

defend theirs via a takings or due process claim. And this protection bears a far greater resemblance to the "strict scrutiny" protection courts afford substantive due process rights than it does to the run-of-the-mill rational basis to which unoppressive regulations are subject.

Under *Lingle*—adding *Cedar Point*'s recent clarification—the usurpation of fundamental property rights is a disfavored means to even legitimate ends, rendering Seattle's FCHO unconstitutional on its face. As Petitioners explained in their motion for summary judgment: "Selecting a tenant is a fundamental attribute of property ownership." Pl. Motion for Summary Judgment at 17, *Yim, et al. v. City of Seattle* (W.D. Wash. July 6, 2021) (No. 18-736). Owners "have a valid property interest in selecting their tenants," *id.* at 18, in the same way that disruptive houseguests can be told to leave. And the FCHO's disruption of this right is illegitimate even by the city's standards: "The City's own research indicates that people with a criminal history do best in supportive public housing programs like those provided by the Seattle Housing Authority"—a department that is conspicuously exempt from the FCHO, which "underscores the arbitrary nature of the Ordinance." *Id.* at 20.

The ordinance would therefore fail under *Lingle* alone. And while the district court strangely cited *Cedar Point*'s recent vintage to discount the ruling—"decided well after [Plaintiffs'] filed their complaint," *Yim v. City of Seattle*, 2021 U.S. Dist.

LEXIS 125633, at *5 (W.D. Wash. July 6, 2021)—its lesson for this case is clear (and no less applicable because it was recently decided):

> [T]he right to exclude is [not] an empty formality, subject to modification at the government's pleasure. . . . With regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained.

141 S. Ct. at 2078.

Whittled to its essential premise and applied here, that passage demands a deeper dive into the bona fides of Seattle's stated purpose in enacting the FCHO and into the essential *fairness* of that purpose. Plaintiffs-appellants have offered several reasons why this is the case, which do not bear repeating. *See generally* Pl.-App. Br. It is worth noting, however, that these factors offend an important constitutional principle: That an interference with property rights does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While the *Armstrong* Court was referring to the Takings Clause's purpose, there is no reason to exempt an offensive regulation from this principle simply because an owner claims a due process rather than takings violation. If Seattle sees a problem with the housing of convicted criminals, there are many ways to alleviate that problem besides forcing some landlords to bear all the costs.

Lingle clarified that although means-ends analysis is no longer applicable to takings claims, there is still a place for that heightened standard in the property context. *Cedar Point*, in turn, elevated the "fundamental element[s] of the property right" to a position where they "cannot be balanced away." 141 S. Ct. at 2077. Together these two cases require this Court to protect Seattle landlords' right to exclude from an ordinance that not only fails to "substantially advance a legitimate state interest," but targets property's "*sine qua non*" in the process. *Id.* at 2073 (quoting Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998)).

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiffs-Appellants, this Court should reverse the court below.

Respectfully submitted,

DATED: November 5, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 29(a)(2) because it contains 1,761 words, excluding the parts exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Ilya Shapiro*
November 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Ilya Shapiro*
November 5, 2021