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.

CITY OF SEATTLE, WASHINGTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. MI's constitutional studies program aims to preserve the Constitution's original public meaning. MI has a particular interest in policy and legal analysis that impacts life in America's cities. To that end, it has historically sponsored scholarship regarding quality-of-life issues, property rights, and housing policy.

This case interests *amicus* because it involves a law that impinges on landlords' liberty. Seattle's Fair Chance Housing Ordinance deprives landlords of their freedom to rent private property to whom they choose and to exclude violent felons from their property, in violation of the Fourteenth Amendment. Seattle's Ordinance is an arbitrary exercise of power that contravenes originalist notions of substantive due process.

INTRODUCTION AND SUMMARY OF ARGUMENT

Seattle's city council "has made [landlords' lives] increasingly unsustainable. In recent years, the city has passed laws removing landlord discretion over tenant selection, banning criminal background checks, allowing tenants to invite others to live on the premises against the landlords' will, and banning evictions during the winter." Ethan Blevins, *Seattle Housing: A*

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

Study in Crisis Creation, The Counselors of Real Estate (Jan. 8, 2021), https://tinyurl.com/ykeyhnmk. This case concerns Seattle's Fair Chance Housing Ordinance, Municipal Code § 14.09, et seq. (2017), prohibits landlords from inquiring into or taking "adverse action" based on potential tenants' criminal history.

Chong Yim and other petitioners are local landlords who own and manage small rental properties in Seattle. They often share their residences with their tenants—living in the same building—and want to ensure that these homes remain safe for themselves, their children, and all tenants. Together with the Rental Housing Association of Washington, a nonprofit trade organization, the Yims challenged the Ordinance's constitutionality, claiming that the no-inquiry provision violated their right to free speech and that the adverse-action provision violated substantive due process. At base, they argued that Seattle's ordinance infringed their fundamental right to exclude people from their property and, alternatively, that there was a disconnect between its means and ends.

The district court granted summary judgment to Seattle after finding that the city ordinance regulates speech, not conduct, and that the speech it regulates is commercial speech. The court applied an intermediate level of scrutiny and found the ordinance to be a reasonable means of achieving the city's objectives.

The district court recharacterized (and mischaracterized) the landlords' assertion of their fundamental rights to exclude dangerous persons from their property. Ignoring the landlords' safety concerns, the court found that the landlords' right "to rent their property to whom they choose, at a price they choose, subject to reasonable anti-discrimination measures" was not a

fundamental right and was, therefore subject to rational basis review. *Yim v. City of Seattle*, 451 P.3d 694, 696 (Wash. 2019).

After years of subsequent litigation, the Ninth Circuit concluded that the ordinance did impinge on the First Amendment, but rejected the claim that it violated any substantive due process rights. *Yim v. City of Seattle*, 63 F. 4th 783 (9th Cir. 2023).

This case presents an ideal opportunity for the Court to clarify its oft-murky substantive due process doctrine with respect to intrusions on private property. It's axiomatic that the right to exclude is a core part of private property, and yet here the city restricts that right in an arbitrary manner. A municipality may have an interest in housing those previously convicted of crimes, but regardless of any "magic words" about the type of judicial scrutiny to apply in such cases, that interest has to be quite strong to overcome an owner's right to exclude from his home those whose past conduct suggests they may pose a threat to his family.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT SEATTLE'S ORDINANCE DOESN'T VIOLATE SUBSTANTIVE DUE PROCESS

A. The right to exclude people from one's property is a fundamental right.

The right to exclude people from one's private property is a long-recognized and fundamental right. *See e.g., Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539 (2005) (identifying "the owner's right to exclude others from entering and using her property" as "perhaps the most fundamental of all property interests"); *Kaiser*

Aetna v. United States, 444 U. S. 164, 176 (1979) (calling the right to exclude "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); *Int'l News Service v. Assoc. Press,* 248 U. S. 215, 250 (1918) ("An essential element of individual property is the legal right to exclude others from enjoying it.") (Brandeis, J., dissenting).

Some landlords seek to exclude dangerous felons from their property in order to maintain a safe environment for themselves, their children, and other tenants. Seattle's arbitrary incursion into the landlords' fundamental right to exclude persons from their property violates their due process rights.

B. Substantive due process bars arbitrary exercises of power.

Current understanding of due process differs dramatically "from the original meaning of the constitutional text." Max Crema & Lawrence B. Solum, *The Original Meaning of Due Process of Law in the Fifth Amendment*, 108 Va. L. Rev. 447, 447 (2022) (explaining that in 1791, "process" was understood to be akin to "the modern sense that the word has when used in the phrase 'service of process'" and "did not extend to all legal procedures, much less to all laws that impact liberty or privacy. *See also,* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 210-11 (2004) (exploring Justice McReynolds's contention in *Meyer v. Nebraska* that "liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary").

The original function of the Due Process Clause was to bar arbitrary exercises of power. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An*

Originalist Theory of the Due Process of Law, 60 Wm. & Mary L. Rev. 1599, 1631 (2018). An arbitrary statute is "one that is not within what Hamilton referred to as the 'just and constitutional' powers of the legislature to enact." *Id*. at 1646 (citing The Federalist No. 80) (Alexander Hamilton)).

When looking at substantive due process, one should ask whether the state "exercised arbitrary power" under the pretext of exercising legitimate power"? *Id*. at 1673.[2] Such arbitrary exercises of power "*rest upon mere will* rather than constitutionally proper reasons." *Id*. at 1600 (emphasis added).

C. Seattle's ordinance is arbitrary and violates landlords' fundamental rights.

Seattle's ordinance is a glaring example of an arbitrary exercise of power based merely on the city council's will. It places undue burdens on landlords by preventing them from inquiring into the criminal background of lease applicants and thus potentially exposes them, their children, and other tenants to dangerous felons. The city provided no evidence to support any reason—rational, compelling, or otherwise—for why it decided to deprive petitioners of this basic right.

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[2] This Court's substantive due process cases reflect the desire to avoid arbitrary exercises of state power. Although this Court is reluctant to expand the doctrine, *see, e.g., Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), the Court recognizes substantive due process as applying to personal rights. *See, e.g*., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

With its laundry list of impermissible adverse actions,[3] Seattle imperils the physical safety of landlords and their families while depriving them of their fundamental right to exclude; it exercises arbitrary power under the pretext of exercising legitimate power.

II. LOWER-COURT CONFUSION CALLS OUT FOR THIS COURT'S GUIDANCE

The Ninth Circuit's finding that the landlords' substantive due process rights were not violated when Seattle deprived them of the right to exclude highlights a circuit split in constitutional interpretation.

The Eighth, Ninth, and Tenth Circuits acknowledge the right to exclude as a fundamental

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[3] Seattle Municipal Code § 14.09.010 presents a laundry list of adverse actions that can't be taken based on criminal history:

> A. Refusing to engage in or negotiate a rental real estate transaction; B. Denying tenancy; C. Representing that such real property is not available for inspection, rental, or lease when in fact it is so available; D. Failing or refusing to add a household member to an existing lease; E. Expelling or evicting an occupant from real property or otherwise making unavailable or denying a dwelling; F. Applying different terms, conditions, or privileges to a rental real estate transaction, including but not limited to the setting of rates for rental or lease, establishment of damage deposits, or other financial conditions for rental or lease, or in the furnishing of facilities or services in connection with such transaction; G. Refusing or intentionally failing to list real property for rent or lease; H. Refusing or intentionally failing to show real property listed for rent or lease; I. Refusing or intentionally failing to accept and/or transmit any reasonable offer to lease, or rent real property; J. Terminating a lease; or K. Threatening, penalizing, retaliating, or otherwise discriminating against any person for any reason prohibited by Section 14.09.025.

right in takings cases, but not in due process cases. *See e.g., Yim v. City of Seattle*, 63 F. 4th 783 (9th Cir. 2023); *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377,1385 (8th Cir. 2022); *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009). On the other hand, the Third and Sixth Circuits recognize that such fundamental rights are protected by the Due Process Clause. *See, e.g.*, *Nicholas v. Penn. State Univ.*, 227 F.3d 133, 140–41 (3d Cir. 2000); *Golf Vill. N., LLC v. City of Powell*, 14 F.4th 611, 623 (6th Cir. 2021).

Confusion also exists regarding the origins of substantive due process. Is substantive due process part of both the Fifth and Fourteenth amendments? Does due process mean the same thing in both clauses? Contrast*, e.g.*, *Malinski v. New York*, 324 U.S. 401, 415 (1945) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.") (Frankfurter, J., concurring) with Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 415 (2010) (concluding that "one, and only one, of the two Clauses—the Fourteenth Amendment Due Process Clause—encompassed a recognizable form of substantive due process").

Legal scholars of all ideological stripes are increasingly calling for clarification from this Court about its substantive due process doctrine. *See*, *e.g.*, Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 NYU L Rev. 1902, 1964 (2021) ("It is remarkable that after all these decades the originalists on the Court have never discussed whether the Due Process Clause imposes substantive constraints on government as a matter of original understanding,

nor have they acknowledged the growing body of originalist scholarship recognizing that due process has substantive meaning.").

This case presents an ideal opportunity to provide that clarity and reconcile the circuit split.

CONCLUSION

Seattle's Fair Chance Housing Ordinance constitutes an arbitrary exercise of power that victimizes landlords. By preventing homeowners from excluding certain tenants through inquiries into their criminal history, the ordinance deprives them of their fundamental right to exclude others from their property.

When it comes to substantive due process, the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125. The time has come for the Court to revisit its substantive due process cases in the context of property rights and provide such guideposts. Arbitrary exercises of power should have no home within our constitutional order.

Respectfully submitted,

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