No. 23-329

IN THE

Supreme Court of the United States

CHONG YIM, *et al.*,
Petitioners,

v.

CITY OF SEATTLE, WASHINGTON,
Respondent.

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

BRIEF OF CITIZEN ACTION DEFENSE FUND AND WASHINGTON BUSINESS PROPERTIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

This *amicus* brief is submitted by the **Citizen Action Defense Fund** ("CADF") and the **Washington Business Properties Association** ("WBPA"). CADF is an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation in cases to advance free markets, restrain government overreach, or defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs when the state enacts laws that violate the state or federal constitutions, when government officials take actions that infringe upon the First Amendment or other constitutional rights, and when agencies promulgate rules in violation of state law.

WBPA is a member-based non-profit organization advocating for property owners against burdensome taxation and encroaching regulation of property. It is a broad coalition of businesses and professional associations focused on commercial, residential, and retail real estate, and property rights in Washington state. WBPA represents the interests of business owners to state and local legislative bodies, news media, and the general public. It is actively involved in the Legislature and local governments on any legislation affecting property rights and property taxation.

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[1] Pursuant to Rule 37, counsel for *amici* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of *amici*'s intention to file.

Amici have a strong interest in the outcome of this case as they are committed to the protection of property rights in Washington State and throughout the United States. Specifically, *amici* worry that if the lower court's opinion in this case stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.

INTRODUCTION AND SUMMARY OF ARGUMENT

Seattle's "Fair Chance Housing Ordinance" ("FCHO") prohibits rental owners from inquiring into the criminal histories of lease applicants, with a few narrow exceptions. In so doing, the FCHO threatens more than the physical safety of Seattleites who wish to engage in the residential leasing business. It is also a patent violation of their constitutional "right to exclude" others from their property. This right has long been a *fundamental* element of ownership—dating from the salad days of the Anglo-American legal tradition, and was, before that, a mainstay of ancient and medieval Western legal codes. As the Court recently made clear in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), the Constitution continues to robustly protect the right:

> The right to exclude is "one of the most treasured" rights of property ownership. According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." In less exuberant terms, we 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."

Id. at 2072 (internal citations omitted).

Here, however, the Ninth Circuit used the fact that Petitioners brought their claims under the Due Process Clause of the Fourteenth Amendment to distinguish it from *Cedar Point*, which involved a takings claim instead: "[T]he Supreme Court has never recognized the right to exclude as a 'fundamental' right in the context of the Due Process Clause." *Yim v. City of Seattle*, 63 F.4th 783, 787 (9th Cir. 2023). This is only true in the pedantic sense that the Court has never written: "The right to exclude is a fundamental element of property under both the Takings and Due Process Clauses." It hasn't said so because there should be no reason to. No other constitutional right is subject to that sort of distinction. Nor should any property right be. There is *zero* historical or precedential evidence to suggest that the right to exclude was, or should now be, treated differently based upon the cause of action under which a claimed violation thereof is brought (especially when no other constitutional right faces this threshold test). Quite the opposite. The Court has time and again recognized the right as "fundamental" because it is *essential* to preserve the substance of property, *not* because the Takings Clause specifically protects it. The right has the protection of the entire Constitution, a fact that *amici* urges the Court to make explicit. Not because it is necessary, but so that lower courts, like the Ninth Circuit has here, cannot engage in clausal hair-splitting to minimize the force of that right.

For Petitioners—average residents of Seattle who wish simply to rent out units within their homes—this is more than a mere intellectual exercise in constitutional interpretation. The Yims own a triplex where they live in one unit and rent the other two units. On many occasions, the rental units are shared by roommates. The tenants often ask the Yims to run a background check on potential roommates. The building has a common garden shared by all the renters and the Yim family. Kelly Lyles is an artist who relies on the income from her single Seattle rental property to make ends meet. She carefully screened rental applications for indicia of reliability because she could not afford the costs and delays created by a tenant who fails to timely pay rent. As a survivor of a violent crime and a single woman who is frequently onsite, Lyles highly values her safety and the that of her two tenants who share the home's common areas, including the kitchen and laundry room. Scott and Renee Davis, who own and manage Eileen, LLC, also hold the security of their tenants in the highest regard when evaluating new tenants for their seven-unit building, which has a common storage and laundry area in the basement.

Like many private landlords, the Yims, Lyles, and Davises are willing to rent to individuals with minor or nonviolent criminal histories but would exclude applicants whose serious criminal histories create an unreasonable safety risk to their tenants, families, properties, and themselves. This is a commonsense response because "[r]ecidivism is a serious public safety concern … throughout the Nation," *Ewing v. California*, 538 U.S. 11, 26 (2003), and "residential proximity to a dangerous person generally increases the risk of being victimized by that person." Charles W. Cunningham, Note, *The Duty of a Landlord to*

Exercise Reasonable Care in the Selection and Retention of Tenants, 30 Stan. L. Rev. 725, 737 n.40 (1978) (citing federal government and other studies).

In this brief, *amici* provide a history of the right to exclude. This history demonstrates that the right long predates the Constitution, and has been within the pantheon of Anglo-American law since at least 1215. The Court regularly—and properly—relies upon legal history and tradition to site fundamental rights, even those not explicitly included in the Constitution's text (*cf.*, the right to free speech). *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2246–48 (2022). After contextualizing the right to exclude within our long legal history, *amici* will then discuss how the trampling of that right in this case opens all housing providers in Seattle to dangers no individual under constitutional protection should have to abide. As such, it is an ideal vehicle through which the Court can make it clear to the Ninth and other circuits that fundamental rights are fundamental *no matter the manner in which they have been violated*.

ARGUMENT

I. The "Right to Exclude" Others From One's Property Is a Longstanding and Fundamental Attribute of the Anglo-American Conception of Ownership

A. The Right to Exclude Is the Sine Qua Non of Ownership

In a celebrated article, Professor Thomas Merrill once called the "right to exclude" "more than just 'one of the most essential' constituents of property—it is

[its] *sine qua non*"—*i.e.*, ownership could not exist without it. Thomas W. Merrill, *Property and the Right to Exclude,* 77 Neb. L. Rev. 730, 730–31 (1998). This is especially so in the Anglo-American conception of property, though the right has been a mainstay of most legal and cultural frameworks since the dawn of civilization. *See* Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 Chi.-Kent L. Rev. 321, 341 (1995) ("The foundational norm of private property" being "the right to control entry. On this legal issue there is much textual evidence from Mesopotamia and Israel, the two civilizations for which law codes have been found."). The right to exclude as the *sine qua non* of ownership has been central to *Western* legal theory since at least the Greek Golden Age and the *Pax Romana*. *See* Aristotle, *Rhet.*, 1361a (c. 4th cent. BCE) (writing that a thing "is our own if it is in our power to dispose of it or not"); Juan Javier Del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 San Diego Int'l L.J. 301, 316 (2011) ("Roman property law typically gives a single property holder a bundle of rights with respect to everything in his domain, to the exclusion of the rest of the world.").

In light of what had already been its long history, it is no surprise that the "right to exclude" was among the core freedoms English King John's rebellious barons demanded from him in the Magna Carta (1215)—the "Great Charter" that put a (granted, *temporary*) stop to their uprising. Specifically, the Great Charter includes that "[n]o free man shall be seized or imprisoned, or stripped of his rights *or possessions* . . . except by the lawful judgments of his equals or by the law of the land." Magna Carta art. 39 (cleaned up) (emphasis added).

By the 1600s, after centuries of violent struggle between kings, nobles, and crowds for overall political hegemony across European nations, many "Enlightenment" thinkers began gravitating towards the most rights-based theories of government theretofore conceived. Most prominent among those spearheading this welcome shift was English philosopher John Locke, who soon after the Glorious Revolution of 1688 declared that the "great and chief end" for which men "unite into commonwealths" is to ensure the "preservation of their property." John Locke, *Second Treatise of Government*, IX § 123 (1689) (cleaned up). Locke himself found inspiration in the writings of Dutchman Hugo Grotius, who earlier offered that "no man could justly take from another, what he had thus first taken to himself." Hugo Grotius, *De Jure Belli ac Pacis* § II.II.II (1625)

Shortly after ratification, Madison professed his full endorsement of his intellectual forebears' understanding of *property*, declaring "[t]his being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." James Madison, "Property," in *James Madison: Writings* 515 (Jack N. Rakove, ed., 1999) (1792). And in this he was hardly alone.

B. The Original Public Meaning of Property

Summarizing the classical-liberal contours of public authority, preeminent legal scholar Richard Epstein declared that "the proper ends under the police power are those of the private law of nuisance, no more and no less." Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 353 (2014). Epstein did not

devise this approach in a vacuum. Rather, it reflects the consensus understanding of government—and the limitations thereon, especially with respect to property rights—shared between the Constitution's Framers and among late-eighteenth and early-to-mid-nineteenth centuries American courts tasked with interpreting their words. Together, their conception of the Takings Clause and *property* in general comprise the former's original public meaning, a theory of interpretation that, with some ebbs and flows, has proven the most durable means of constitutional interpretation. Precisely because it asks what the document was popularly understood to mean *at ratification*. *See* Jack N. Rakove, *Original Meanings* 339–68 (1996).

The Framers, following in Locke's footsteps, understood the necessity for robust constitutional protection of property. James Madison, the chief author of the Constitution (including of the Takings Clause), already enamored of Locke and Grotius (among others), relied upon eminent English jurist William Blackstone's definition of *property—viz.*, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." W. Blackstone, *Commentaries on the Laws of England* *2 (1768); Madison, *supra*, at 515 ("This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.").

The Court has wholeheartedly endorsed the Blackstonean definition of *property* as essentially the right to exclude, most recently in *Cedar Point*. 141

S.Ct. at 2072. Chief Justice Roberts eloquently wrote: ""The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." "Discourses on Davila," in 6 *Works of John Adams* (C. Adams ed., 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017).

Four decades earlier, a majority of the justices acknowledged, "in less exuberant terms," *id.*, that the right to exclude is "*universally* held to be a fundamental element of the property right" that is "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) (emphasis added). *See also Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others . . ."); *United States v. Causby*, 328 U.S. 256 (1946) (agreeing that military flyovers into skies about private farmland, without compensating the owner, is a takings violation); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (similar to *Causby*, but involving the military's firing cannons over private airspace).

C. Seattle's FCHO and Other Violations of the Right to Exclude Are Subject to a Heightened Scrutiny, Whether Under the Takings or Due Process Clause

Given the central role property rights have played in the Anglo-American legal tradition (from at least 1215 on), together with the original public meaning of the Takings and Due Process Clauses as robustly protecting the right to exclude, it makes sense that claimed violations thereof deserve a heightened scrutiny relative to abridgments of freedoms not explicitly recognized in the Constitution, or those nonfundamental to the classical-liberal sense of government—*e.g.*, entitlements. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court implicitly adopted a *per se* rule on physical occupations, noting that its previous "cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. 419, 435 (1982). But it was not until *Cedar Point* that the rule was made explicit: "Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred"—*i.e.*, it is a taking no matter what is the "character of the government action," be it big or small, purposeful or pointless. 141 S.Ct. at 2072.

The majority in *Cedar Point* crucially distinguished between the "physical appropriation of property" ala *Loretto* (which involved the running of television cable on top of private apartments), and governmental trespasses or occupations that are conditions for "the grant of a benefit such as a permit, license, or registration." The latter will often involve

state actions designed specifically to prevent or minimize the nuisant use of one's property, which has never been within the common-law ambit of ownership. *See* Scott M. Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 Wash. U. L.Q. 1, 10 (1978) ("*Sic utere* [*tuo alienum non laedas*]"—roughly, 'do not use your land so as to injure others'—is the fountainhead maxim from which both the common law of nuisance and the police power arose. As originally applied, *sic utere* 'operated to protect real property from what the courts thought were injuries resulting from the use of another of his real property.' That is, the courts used *sic utere* principles to resolve cost spillover conflicts between the existing uses of neighboring landowners. This relationship in tort between property owners originally caused the maxim and the emerging police power to be defined in terms of the prevention of harms.").

The distinction between takings and anti-nuisance or benefit-conditional "government health and safety inspection regimes" is simple enough, and certainly does not complicate the high standard of review that the *per se* rule imposes on physical occupations. While the application of the rule to Seattle's FCHO is reserved for the merits, at this stage *amici* urge the Court to consider the importance of reviewing an appeals-court ruling that, post-*Cedar Point*, ignores heightened scrutiny wholesale, instead subjecting a claimed (and in our view, clear) violation of a fundamental right to an uber-lenient rational-basis review.

The Ninth Circuit held that the "landlords do not have a fundamental right to exclude," *Yim*, 63 F.4th at 787, on the grounds that "the Supreme Court has never recognized the right as a 'fundamental' right *in the context of the Due Process Clause*." *Id.* at 798 (emphasis added). To reach this conclusion, the majority there focused on the precise cause of action under which Petitioners brought their claims, entirely discounting the substantive question of whether the right to exclude, as one that long predates the Constitution, has its *comprehensive* protection. This precisely ignores *Cedar Point*'s third sentence, which plainly states that "[t]he question presented is whether the access regulation constitutes a per se physical taking under the Fifth *and* Fourteenth Amendments." 141 S.Ct. at 2069.

It also ignores the deep-rooted place the right to exclude occupies in the pantheon of Anglo-American common-law tradition, and the breadth of constitutional protections this status affords. *See Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 570 (1972) ("We do say that the *Fifth and Fourteenth Amendment rights of private property owners*, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other.") (emphasis added).

Seattle's FCHO clearly runs afoul of these factors—whether claims against it are brought under takings or due-process actions. *See Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (holding that the Fourteenth Amendment—including the Due Process Clause—"has been read broadly to extend protection to any

significant property interest"); *United States v. Carlton*, 512 U.S. 26, 41–42 (1994) (Scalia, J., concurring) (noting that "the Due Process Clause explicitly applies to 'property'"). And whether brought under the Takings or Due Process Clause, claims involving fundamental rights must be reviewed using a heightened standard of scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (holding that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"). Especially those, like property and its essential right to exclude, that are "deeply rooted in the traditions and conscience of our people as to be ranked as fundamental," *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937).

On that last point it is useful to quote Madison once more:

> If the United States means to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

Madison, *supra*, at 517.

The FCHO offers rental owners a Hobson's choice between their freedom to choose (in this case, to engage in a particular type of commercial transaction)

on the one hand, and their personal safety (and potential liability as landlords) on the other (*see infra*))—to seek to help achieve a public-policy outcome that the Court's "*Armstrong* principle" rightly demands be equitably distributed across the public writ-large. *Armstrong v. United State*s, 364 U.S. 40, 49 (1960) (declaring that the Takings Clause was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). It is time the courts held Seattle to this standard, too.

II. Criminal Record Checks Serve a Legitimate Public Purpose in Several Social and Economic Contexts

Criminal record checks are utilized in numerous facets of life—and for justifiable reason. Research indicates that recidivism rates among the formerly incarcerated remain stubbornly high—with little to only moderate disparities between the category of violent crime committed (*e.g.*, burglary versus murder and everything in between). *See* Mariel Alper et al., *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014)*, Bur. Jus. Stats., 1 (2018) (finding 83.4% of all prisoners released in 2005 were rearrested at some point through 2014; 71% of prisoners released across 34 states in 2012 were rearrested within the next five years). While high recidivism rates are a serious policy failure that deserves smart solutions involving both government and the private sector, it should never fall on individual Americans to attempt to solve such a systemic issue through countless, atomized

transactions—like leasing a spare unit in their home to a tenant with a violent criminal history; especially if doing so involves violating those individuals' constitutional rights.

The use of criminal record checks in various social and economic settings illustrates that such atomization is far from the preferred method for reducing recidivism across the board. There is no reason why what is good for the geese—*e.g.*, local, state, and federal governments; and private employers—should not also be good for the gander of small rental owners. Those who Seattle seeks to saddle with an outsized portion of what is, according to the *Armstrong* principle, properly a *fully public* burden. 364 U.S. at 49.

From this standpoint, it is at best incongruent for Seattle to prohibit owners from doing what governments elsewhere *require* property managers to do, or that employers engage in everywhere on a regular basis. Below is just a small sample of the myriad federal laws, state licensing rules, employer policies, and statutory or common-law duties against certifying, hiring, or hosting the exact class that the FCHO now demands Seattle rental owners transact with. The breadth and depth of several of these examples—inside and outside of the housing space—illustrate the FCHO's radical departure from longstanding rules and norms.

In order to receive federal funding to host low-income tenants, for example, public housing administrators *must* reject applicants who were convicted of, or are presently engaging in, certain drug crimes. 24 C.F.R. § 982.553. In Minnesota, owners must by law ensure that none of their property

managers have certain criminal histories. Minn. Stat. § 299C.68; § 299C.67, subd. 4 (2023). Meanwhile, many homeowners' associations and other private residential groups require purchasers to covenant against future sales to registered sex offenders and others whose presence threatens neighborhood safety. Lior Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich. L. Rev. 1835, 1844 (2006).

On top of all these, there is a panoply of state and common-law rules holding owners responsible for third-party harms visited upon tenants and other guests for failure to diligently restrict violent parties from their premises. *See Minnesota v. Carter*, 525 U.S. 83, 101 (1998) (Kennedy, J., concurring) ("I would expect that most, if not all, social guests legitimately expect that, in accordance with social custom, the homeowner will exercise her discretion to include or exclude others for the guests' benefit."); *Kline v. 1500 Mass. Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970) (finding landlords are liable for third-party bad acts if they had notice and reason to believe such danger existed). *See also* Arthur E. Petersen, *The Landlord's Liability for Criminal Injuries—The Duty to Protect*, 24 Tulsa L.J. 261 (1988).

Several federal agencies require criminal record checks as well. The Maritime Transportation Security Act requires them for all "unescorted" persons engaged in shipping. 46 U.S.C. § 70105. Truck drivers transporting hazardous materials, too. 49 U.S.C. § 5103a. Insurance companies are prohibited from employing those convicted of insurance fraud. 18 U.S.C.A. §1033(e). Nor can firms under the supervision of the Federal Deposit Insurance

Corporation hire those convicted of certain financial crimes. 12 U.S.C. § 1829. Many states have similar rules. In Washington, the state can deny occupation licenses to those previously convicted of crimes relating to their work in that field. Rev. Code Wash. 9.96A.020. Most of the states have *at least* the same standard as Washington does, whereas several allow *any* criminal conviction as grounds for denial. *Barred From Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders*, Inst. for Justice, https://rb.gy/bpszbe (last visited Nov. 11, 2023).

All of these federal and state measures make sense, of course. The public deserves protection from workers with a proven record of violating their professional trust. But they also deserve that same feeling of safety in their homes. The statutory and caselaw rules against housing certain criminals and dangerous individuals makes this clear—if it was not already. But Seattle's FCHO actively prevents owners from taking similar safety precautions. This case thusly demonstrates that the Ninth Circuit's hair-splitting is not merely an academic anomaly. It has a very real impact on individuals seeking only to engage in commerce while continuing to protect themselves, their neighbors, and their families.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant review of the Petition, reverse the Ninth Circuit panel, and remand the case for further proceedings in accordance with the Court's longstanding recognition that the right to exclude is a fundamental right of ownership, under either the Takings or Due Process Clause.

Respectfully submitted,

NOVEMBER 2023

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