No. 99771-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE WASHINGTON FOOD INDUSTRY ASSOCIATION, et al.,

Respondents,

v.

THE CITY OF SEATTLE,

Petitioner.

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Other Cases

Other Authorities

IDENTITY AND INTEREST OF AMICUS

The Institute for Justice is a non-profit public interest law firm committed to defending the essential foundations of a free society in courts throughout the United States, including Washington, where IJ maintains an office in Seattle. IJ regularly litigates and files amicus briefs in cases involving the application of the rational basis test to challenges to a broad range of laws, including laws that harm those in poverty. *See, e.g.*, *Catherine H. Barber Mem'l Shelter, Inc. v. Town of N. Wilkesboro*, 5:20-cv-00163-KDB-DCK, 2021 WL 6065159 (W.D.N.C. Dec. 20, 2021); *Homeless Charity v. City of Akron*, CV-2018-10-4270 (Ohio Ct. Common Pleas Summit Cnty. 2019). As a result, IJ has an interest in ensuring that courts properly apply the rational basis test and are apprised of various contexts in which the test arises.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case laid out in Respondents' Brief.

ARGUMENT

The Court should reject the city of Seattle's (the "City") extremely deferential version of rational basis review and affirm the Superior Court's denial of the City's motion to dismiss. The City's analysis is flawed from the outset because it misapprehends the scope of rational basis review. The test applies in any case not involving a suspect classification or a fundamental right, not just to challenges involving "remedial economic legislation." Opening Brief ("Op. Br.") 2. Courts regularly apply the test to laws that deprive people of limited financial means of things like their ability to vote (*Jones v. Governor of Fla.*, 975 F.3d 1016 (11th Cir. 2020)), drive a car (*Mendoza v. Garrett*, 358 F. Supp. 3d 1145 (D. Or. 2018)), or secure temporary housing. (*Catherine H. Barber Mem'l Shelter*, 2021 WL 6065159)). The City's extremely deferential standard

would, if adopted, immunize such laws from challenge and cement their disproportionate impact on people of limited financial means.

This misconception is exacerbated by the fact that the test the City asks this Court to adopt is not rational basis review—it is no review at all. While the City cites broadly deferential language from courts to support its position, there is a gulf between the rhetoric courts use and how they apply the rational basis test in practice. A recent Institute for Justice victory on behalf of a homeless shelter and other cases across the country demonstrate how courts do deny motions to dismiss, engage with evidence at summary judgment or trial, and sometimes rule for plaintiffs. This Court should not implement a form of rational basis review that is inconsistent with its actual application in courts across the country.

I. The rational basis test applies to people of limited financial means in non-business contexts.

The City justifies its extremely deferential rational basis test, at times explicitly, on the erroneous premise that such an approach is necessary to act as a bulwark against private business interests "routinely invalidating social and economic legislation." Op. Br. 15. The City warns, for instance, that denying its motion to dismiss—that is, merely permitting discovery—is "a dangerous retreat to the last Gilded Age," *id.* 2, and to "discredited *Lochner*-era economic liberty claims privileging private business interests over public welfare," *see id.* 68.

That characterization misconstrues the range of legislation to which the rational basis test applies. The rational basis test is not neatly contained to private businesses challenging remedial economic legislation; it applies to ***any*** governmental actions "that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).

Those dividing lines are, at best, unclear and difficult to determine,[1] and people of limited financial means usually find themselves on the non-suspect/non-fundamental side. This is because, except in limited circumstances, poverty is not a suspect classification.[2] It is also because of the judicial system's inherent difficulty in recognizing things that are of vital importance to the poor. Those in poverty likely view the need for a driver's license to get to work, or a professional or business license to earn a living, or the need for shelter, far differently from the courts who have deemed such things to not be "fundamental."

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[1] The list of rights deemed "fundamental" includes the specific liberties listed in the Bill of Rights, and the rights to marry, have children and direct their education and upbringing, use contraception, engage in intimate relations, and obtain an abortion. *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). Beyond these rights and others like them, whether something is "fundamental" is anyone's guess.

[2] *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

The cases bear out the fact that the rational basis test extends far beyond economic regulation of corporate interests. For instance, courts have applied the rational basis test in these non-economic contexts:

- Challenges to an executive proclamation imposing entry restrictions primarily on immigrants from majority-Muslim countries[3];
- Laws preventing terminally ill cancer patients and other patients from accessing medicinal marijuana[4];
- Laws disadvantaging non-English-speaking criminal defendants[5];
- Challenges to a federal program's refusal to provide funds for abortion[6];
- Challenges to regulations on abortion providers that allegedly limited access to abortions[7];

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[3] *Trump v. Hawaii*, 138 S. Ct. 2392, 2420, 201 L. Ed. 2d 775 (2018).

[4] *Seeley v. State*, 132 Wn.2d 776, 807-08, 940 P.2d 604 (1997) (cancer patients); *see also Gonzalez v. Raich*, 545 U.S. 1, 6 & 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).

[5] *State v. Marintorres*, 93 Wn. App. 442, 452, 969 P.2d 501 (1999).

[6] *Doe v. United States*, 419 F.3d 1058, 1063 (9th Cir. 2005).

[7] *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782, 204 L. Ed. 2d 78 (2019).

- Age discrimination[8];
- Poverty discrimination[9];
- Laws discriminating based on disability[10];
- Laws preventing DACA recipients from obtaining driver's licenses[11];
- Laws suspending or rescinding driver's licenses for failure to pay court debt[12];
- Laws preventing released felons from regaining voting for failure to pay court debt[13];

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[8] *Gregory v. Ashcroft*, 501 U.S. 452, 470, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991).

[9] *San Antonio Indep. Sch. Dist.*, 411 U.S. at 29; *see also Lehr v. City of Sacramento*, 2:07-cv-01565, 2009 WL 10690809, at *3-4 (E.D. Cal. June 12, 2009).

[10] *Copelin-Brown v. N.M. State Pers. Off.*, 399 F.3d 1248, 1255-56 (10th Cir. 2005).

[11] *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1065 (9th Cir. 2014).

[12] *Robinson v. Long*, 814 F. App'x 991 (6th Cir. 2020) (upholding Tennessee's driver's license suspension statute); *Fowler v. Benson*, 924 F.3d 247 (6th Cir. 2019) (same for Michigan); *White v. Shwedo*, C.A. No. 2:19-3083, 2020 WL 2315800 (D.S.C. May 11, 2020) (South Carolina); *Motley v. Taylor*, 451 F. Supp. 3d 1251 (M.D. Ala. 2020) (Alabama); *Johnson v. Jessup*, 381 F. Supp. 3d 619 (M.D.N.C. 2019) (North Carolina); *Mendoza*, 358 F. Supp. 3d at 1171 (Oregon).

[13] *Jones*, 975 F.3d at 1032.

- Laws denying expungement of a criminal record for failure to pay court debt[14];

- Laws excluding all former felons from certain employment licenses[15];

- Military policies discriminating against servicemembers based on HIV-positive status[16];

- Challenges brought by sexual-assault and domestic-violence victims against allegedly discriminatory police enforcement[17];

- Challenges brought by minority neighborhoods or Native American tribes against allegedly discriminatory provision of city services[18];

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[14] *Madison v. State*, 161 Wn.2d 85, 108-09, 163 P.3d 757 (2007); *State v. Doe*, 927 N.W.2d 656 (Iowa 2019).

[15] *Barletta v. Rilling*, 973 F. Supp. 2d 132, 137 (D. Conn. 2013).

[16] *Roe v. Shanahan*, 359 F. Supp. 3d 382, 423 (E.D. Va. 2019), *aff'd sub nom. Roe v. Dep't of Def.*, 947 F.3d 207 (4th Cir. 2020), *as amended* (Jan. 14, 2020).

[17] *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999) (domestic violence victims); *Chase v. Nodine's Smokehouse, Inc.*, 3:18-cv-00683, 2020 WL 8181655, at *20 (D. Conn. Sept. 29, 2020), *appeal dismissed sub nom. Chase v. Penney*, 20-3234-CV, 2021 WL 4519707 (2d Cir. Oct. 4, 2021) (sexual assault victims).

[18] *Comm. Concerning Cmty. Imp. v. City of Modesto*, CV-F-04-6121, 2007 WL 2204532, at *14 (E.D. Cal. July 30, 2007), *aff'd*, 583 F.3d 690 (9th Cir. 2009) (minority neighborhoods); *Fallon Paiute-Shoshone Tribe v. City of*

- Zoning regulations eliminating shelters for unhoused individuals[19];
- Challenges to a school district's alleged failure to intervene to stop bullying[20]; and
- Challenges to police department's allegedly discriminatory predictive-policing program.[21]

In other words, the test that this Court adopts here will apply to cases that have nothing to do with *Lochner*-style economic regulation.

In sum, despite the City's focus on large business interests, the rational basis test affects, and often directly harms, people of limited financial means in contexts having nothing to

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Fallon, 174 F. Supp. 2d 1088, 1094-95 (D. Nev. 2001) (Native American tribe).

[19] *Catherine H. Barber Mem'l Shelter*, 2021 WL 6065159; *Homeless Charity v. City of Akron*, CV-2018-10-4270.

[20] *Sutherlin v. Indep. Sch. Dist. No. 40*, 960 F. Supp. 2d 1254, 1265 (N.D. Okla. 2013).

[21] *Taylor v. Nocco*, 8:21-cv-00555-SDM-CPT (M.D. Fla. Aug. 4, 2021); *see also Brunson v. Murray*, 843 F.3d 698, 708 (7th Cir. 2016)

do with business. In considering how to apply the test, this Court should consider the full range of cases in which the test will apply.

II. The City's rational basis test does not reflect how courts apply the test in practice.

The City errs not only on the scope of cases to which the rational basis applies, but also how the courts apply the test. The City's test would effectively eliminate judicial review in rational basis cases.[22] The City zeroes in on deferential language, notably from *FCC v. Beach Communications, Inc.*, to argue that courts should essentially abandon review of government actions. 508 U.S. 307, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993). Under the City's view, courts cannot consider the government's actual motives, allegations that asserted

[22] As relevant here, Washington courts apply the same rational basis test applied by federal courts. *See, e.g.*, *In re Estate of Hambleton*, 181 Wn.2d 802, 823, 335 P.3d 398 (2014); *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997).

rationales are pretextual, or any facts or evidence.[23] If courts can imagine a basis for government action, then "judicial review should [be] at an end." Op. Br. 32.[24]

Rhetoric aside, this is not how courts apply the rational basis test in practice.[25] Amicus's recent summary judgment victory in *Catherine H. Barber Memorial Shelter*, is instructive. *See* 2021 WL 6065159, at *10-17. There, after a non-profit homeless shelter's attempt to relocate was stymied by the town

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[23] Op. Br. 28 ("[A] reviewing court need not concern itself with the *actual* basis for the legislation."); *id.* 34-35; *id.* 60.

[24] Other deferential descriptions nonetheless approve considering the facts. *See, e.g.*, *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) ("As relaxed and tolerant as the rational basis standard is, however, the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional."); *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.").

[25] *See, e.g.*, Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J.L. & Pub. Pol'y 373, 378-82 (2016) (describing cases citing the test's traditional articulation, but nonetheless engaged in meaningful judicial review).

zoning board, the shelter sued, claiming, among other things, that the board violated the Equal Protection Clause of the Fourteenth Amendment by denying the shelter's application for a conditional use permit that similarly situated organizations (*e.g.*, emergency shelters) are not required to have. *Id.* at *1. The court reviewed the claim under the rational basis standard, and yet the plaintiff-homeless shelter prevailed on summary judgment. *Id.* at *11, 17.

The court engaged with the record and determined plaintiff's shelter was similarly situated to the other land uses not required to secure a permit. *See id.* at *12-13.[26] It did the same when assessing the rationality of the differential

[26] The court was doubly engaged: It looked for actual evidence of the supposed difference between uses (e.g., emergency shelters were supposedly "temporary," but no regulations "require[d] that [emergency shelters] operate on a temporary basis"). And it looked for actual evidence of the supposed difference's link to the board's objectives (e.g., emergency shelters were limited to individuals who became homeless for specific reasons, but the "reason for why" a person became homeless "has no bearing on the intensity of the land use"). *See Catherine H. Barber Memorial Shelter*, at *12-13.

treatment: The "significant public opposition" to plaintiff's relocation held no water because the public's testimony "dealt in rumors and fear, not facts."[27] The "traffic and safety" concerns—overnight hours, proximity to the highway, and prevalence of pedestrians—failed because every nearby land use could operate at all hours and "would have the same issue of proximity to the highway," and because regulations required "sidewalks to protect pedestrians" so "it d[id] not follow" that more pedestrians necessarily "create[] a rational safety concern." *Id.* at *15-16.

Finally, the town's claim that the shelter could be treated differently because it would not be in "harmony" with nearby land uses was twice irrational. First, the justification was in "serious question" because the town's zoning regulations meant "the alleged harmonious location for [the shelter's] permitted use only exists in theory, but not reality." *Id.* at *16. Second,

[27] *Id.* at *15; *see also id.* at *14-15 & n.18 (surveying testimony at hearing and affidavits).

the board relied on public testimony that expressed concern over "the *people* who might be at the homeless shelter and not the *land use* relevant to the Zoning ordinance." *Id.* at *17.

In ruling for the plaintiff, the court explained its critical role in protecting the rights of people of limited financial means, even on rational basis review:

> Courts correctly show deference to state zoning regulations. ***But such deference cannot be an excuse for the Court to abdicate its duty to protect the constitutional rights of all people. While homeless individuals face many challenges, attaining equal protection of the law under the Constitution ought not be one of them***. ***North Wilkesboro intentionally treated the Shelter differently from other similarly situated uses, and there is no rational basis for the difference in treatment***. This is impermissible under the Fourteenth Amendment.

Id. at *17 (citations omitted; emphasis added).

As *Catherine H. Barber Memorial Shelter* makes clear, contrary to the City's arguments, courts do not always grant motions to dismiss, they often consider record evidence at summary judgment or trial, and, most important, plaintiffs occasionally win rational basis cases.

A. Plaintiffs can, and do, survive motions to dismiss in rational basis cases.

Courts generally must accept as true all well-pleaded allegations.[28] That is true even in rational basis cases.[29] The City even cites rational basis cases in which the court rejected motions to dismiss because well-pleaded allegations must be taken as true. *See, e.g.*, Op. Br. 30 n.61 (citing *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 587-92 (9th Cir. 2008) for proposition that rational basis review "would not preclude a meaningful challenge to purely arbitrary legislation lacking an articulable rational basis").[30]

In *Behrens*, for example, a cattle rancher brought equal protection claims alleging his ranch was denied a lease due to "discrimination based on [its] perceived connection to

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[28] *See, e.g.*, *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987); *see also* Op. Br. 59.

[29] *See, e.g.*, *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) ("[a]ccepting . . . allegations as true" in rational basis case).

[30] *See also* Op. Br. 35 n.76 (citing *Fowler*, which rejected dismissal where plaintiffs alleged pretext).

conservationists" and due to the government's "desire to protect prior lessees from competition." 546 F.3d at 584. The government appealed the denial of its motion to dismiss, arguing the cattle rancher's "allegations of pretext and animus [we]re irrelevant under Equal Protection law, because [the government had] articulated legitimate reasons for rejecting Lazy Y's bids"—namely, avoiding administrative costs. *See id.* at 587, 591. Approving at least "some inquiry into the rationale for the classification" in rational basis cases,[31] the court affirmed because conceivable rational justifications do not "necessarily defeat[]" claims "of bias against conservationists and market newcomers." *See id.* at 591, 592-93.

Under the City's test, *Behrens* should not, and could not, have been decided as it was. The court would have been forced to accept the "administrative cost" rationale, notwithstanding the well-pleaded allegations of pretext, or to imagine other

[31] *See* 546 F.3d at 590-91 (collecting cases).

potential rationales for denying the rancher's lease.[32] But the *Behrens* court did not do those things, meaning that the rational basis test is not as deferential as the City claims.

Behrens is not alone: Rational basis plaintiffs survive motions to dismiss in Washington state courts,[33] the Ninth Circuit,[34] and elsewhere.[35]

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[32] The court likely could have imagined some justification, such as that government can address problems incrementally by "addressing itself to the phase of the problem which seems most acute to the legislative mind." *See* Op. Br. 33-34 (quoting *Beach Commc'ns*, 508 U.S. at 316)).

[33] *See, e.g.*, *Nielsen v. Wash. State Dep't of Licensing*, 177 Wn. App. 45, 60-61, 309 P.3d 1221 (2013) (reversing dismissal of challenge to statute prohibiting judicial review of agency's license-revocation decisions as a condition to receiving limited driving privileges during revocation period).

[34] *See, e.g.*, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508-09 (9th Cir. 1990); *Bldg. 11 Invs. LLC v. City of Seattle*, 912 F. Supp. 2d 972, 984 (W.D. Wash. 2012); *Levin Richmond Terminal Corp. v. City of Richmond*, 482 F. Supp. 3d 944, 967 (N.D. Cal. 2020); *ARMLA One, Inc. v. City of Los Angeles*, 2:20-cv-7965, 2020 WL 8372965, at *6 (C.D. Cal. Dec. 9, 2020); *Martins Beach 1, LLC v. Turnbull-Sanders*, 16-cv-5590, 2018 WL 5623701, at *7 (N.D. Cal. Aug. 13, 2018); *Sacramento County Retired Emps. Ass'n v. County of Sacramento*, CIV S-11-0355, 2012 WL 1082807, at *5 (E.D. Cal. Mar. 31, 2012); *Dragovich v. U.S. Dep't of Treasury*, 764 F. Supp. 2d 1178, 1190-91 (N.D. Cal.

B. Courts often consider record evidence at summary judgment or trial.

Courts do not always ignore the facts in rational basis cases. Instead, courts often permit the parties to engage in

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2011); *Stamas v. County of Madera*, CV F 09-0753, 2010 WL 2556560, at *6 (E.D. Cal. June 21, 2010); *Lehr*, 2009 WL 10690809, at *3-4.

[35] *See, e.g.*, *Stratta v. Roe*, 961 F.3d 340, 361 (5th Cir. 2020); *Shanahan*, 359 F. Supp. 3d at 423; *Ecotone Farm LLC v. Ward*, 639 F. App'x 118, 124-25 (3d Cir. 2016); *Bush v. City of Utica*, 558 F. App'x 131, 134 (2d Cir. 2014); *Wilson v. Birnberg*, 667 F.3d 591, 600 (5th Cir. 2012); *Geinosky v. City of Chicago*, 675 F.3d 743, 749 (7th Cir. 2012); *Mathers v. Wright*, 636 F.3d 396, 400-01 (8th Cir. 2011); *Amador v. Mnuchin*, 476 F. Supp. 3d 125, 152-53 (D. Md. 2020), *as amended* (Oct. 1, 2020); *Olympian Grp. LLC v. City of Markham*, 18-cv-4919, 2020 WL 5820024, at *9 (N.D. Ill. Sept. 30, 2020); *Farm Lab. Org. Comm. v. Stein*, 1:17cv1307, 2018 WL 3999638, at *27 (M.D.N.C. Aug. 21, 2018), *adopted*, 2018 WL 4518696 (Sept. 20, 2018); *Baldwin v. Town of W. Tisbury*, 16-cv-10736, 2017 WL 3940932, at *4 (D. Mass. Sept. 7, 2017); *Bos. Taxi Owners Ass'n v. City of Boston*, 180 F. Supp. 3d 108, 118-19 (D. Mass. 2016); *Mary Hitchcock Mem'l Hosp. v. Cohen*, 15-cv-453, 2016 WL 1735818, at *11 (D.N.H. May 2, 2016); *Crafted Keg, LLC v. Sec'y of the Fla. Dep't of Bus. & Pro. Regul.*, 2:14-CV-14430, 2015 WL 11254293, at *2 (S.D. Fla. Jan. 15, 2015); *Sutherlin*, 960 F. Supp. 2d at 1265; *Doe v. Jindal*, 11-388, 2011 WL 3925042, at *8 (E.D. La. Sept. 7, 2011).

discovery and then go on to engage meaningfully with evidence at summary judgment and trial.

The City's test, however, would never permit discovery to proceed, let alone permit courts to make factual determinations. In its view, facts—even those relating to whether the government's justifications are pretextual—are "entirely irrelevant for constitutional purposes." Op. Br. 34-35 (quoting *Beach Commc'ns.*, 508 U.S. at 315)). This is so even though the City would require plaintiffs to disprove every "conceivable basis" for government action.[36] Under the City's view, a plaintiff must also meet this burden without the benefit of discovery.

The City cannot be right. Courts have refused to dismiss claims at the pleadings stage specifically because having more facts would be helpful.[37] Other courts make factual findings at

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[36] Op. Br. 30-31 (quoting *Beach Commc'ns.*, 508 U.S. at 315))

[37] *See, e.g.*, *Guerrero v. Cal. Dep't of Corr. & Rehab.*, C 13-05671, 2014 WL 5474950, at *3 (N.D. Cal. Oct. 29, 2014) (noting that whether defendant's actions "pass muster under

summary judgment (*i.e.*, material factual disputes do or do not exist) based on evidence and facts developed in discovery.[38] Some courts conclude that determining the actual facts is sufficiently important that factual findings should be deferred until after a trial where evidence is presented.[39] Courts would

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rational basis review . . . would benefit from further development of the record"); *Fajardo*, 179 F.3d at 700-01 & n.2 (reversing judgment on the pleadings and remanding for evidentiary hearing); *Stamas*, 2010 WL 2556560, at *6 (stating county's actual objective and "[w]hether defendants had a 'rational basis'" for their actions were "factual determinations not properly before the Court in a motion to dismiss"); *Crafted Keg*, 2015 WL 11254293, at *2 (rejecting dismissal and stating "the appropriate result here is to permit Plaintiff to conduct discovery").

[38] *See, e.g.*, *Fallon Paiute-Shoshone Tribe*, 174 F. Supp. 2d at 1094 (reviewing transcripts of city-council sessions and officials' deposition testimony); *Gerhart v. Lake County*, 637 F.3d 1013, 1023-24 (9th Cir. 2011) (considering letter drafted by government officials); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 546 n.2 (9th Cir. 2004) (reviewing depositions and legislative history).

[39] *See, e.g.*, *Miguel v. Guess*, 112 Wn. App. 536, 554-56, 51 P.3d 89 (2002) (reversing summary judgment and remanding equal protection claims for trial, after reviewing policies and affidavits, because plaintiff "raised a material issue" concerning

do none of that if the City were correct that facts are "entirely irrelevant" in rational basis cases.

C. Plaintiffs can, and do, win rational basis cases.

The City's test makes it essentially impossible for any plaintiff to win a rational basis case. Even if the plaintiff makes it to trial, she must "negat[e] *every* conceivable basis which might support" the government. *See* Op. Br. 30-31 (quoting *Beach Commc'ns*, 508 U.S. at 315)). If applied literally, plaintiffs realistically would never win because violations would occur only when neither the government and its lawyers,

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pretext); *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 947 (9th Cir. 2004), *overruled on other grounds by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (reversing and remanding for trial); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (reversing summary judgment and remanding for trial because plaintiffs' affidavits "raised triable issues of fact surrounding the very existence of" the government's justification); *Contasti v. City of Solana Beach*, 09cv1371, 2012 WL 4109207, at *11 (S.D. Cal. Sept. 18, 2012) (concluding there was "a triable issue of fact" whether government action was "based on an improper motive" (quotations omitted)).

nor the courts at every level, could imagine a set of facts that justifies the government's conduct.

That cannot be the rational basis test that courts apply in practice because plaintiffs can, and do, win these cases in this State,[40] the U.S. Supreme Court,[41] the Ninth Circuit,[42] and elsewhere.[43]

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[40] *E.g.*, *DeYoung*, 136 Wn.2d at 149 (striking down statute of repose for medical malpractice actions); *Hunter v. N. Mason High Sch.*, 85 Wn.2d 810, 818-19, 539 P.2d 845 (1975) (reversing dismissal for government and striking down nonclaims statute); *Nielsen*, 177 Wn. App. at 60-61 (reversing dismissal and striking down statutory waiver of right to judicial review); *Wash. Pub. Emps. Ass'n v. State*, 127 Wn. App. 254, 268, 110 P.3d 1154 (2005) (reversing summary judgment and striking down state's differential pay schedules); *Marintorres*, 93 Wn. App. at 452 (striking down court rule imposing interpreter costs against non-English speakers, but not other plaintiffs who needed interpreters); *Simpson v. State*, 26 Wn. App. 687, 695, 615 P.2d 1297 (1980) (reversing summary judgment and ordering tax credit extended to plaintiffs).

[41] *United States v. Windsor*, 570 U.S. 744, 774-75, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013); *id.* at 793-94 (Scalia, J., dissenting) (noting that the Court relied on rational basis review); *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *United States v. Morrison*, 529 U.S. 598, 614-15, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000); *Village of Willowbrook v. Olech*, 528 U.S. 562, 565, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (per curiam); *Romer v. Evans*,

517 U.S. at 634-35; *United States v. Lopez*, 514 U.S. 549, 567, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995); *Quinn v. Millsap*, 491 U.S. 95, 108, 109 S. Ct. 2324, 105 L. Ed. 2d 74 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 345, 109 S. Ct. 633, 102 L. Ed. 2d 688 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985); *Williams v. Vermont*, 472 U.S. 14, 24-25, 105 S. Ct. 2465, 86 L. Ed. 2d 11 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880, 105 S. Ct. 1676, 84 L. Ed. 2d 751 (1985); *Plyler v. Doe*, 457 U.S. 202, 230, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *Zobel v. Williams*, 457 U.S. 55, 61-63, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159, 159, 97 S. Ct. 2162, 52 L. Ed. 2d 223 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 5821, 37 L. Ed. 2d 782 (1973); *James v. Strange*, 407 U.S. 128, 141-42, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972); *Lindsey v. Normet*, 405 U.S. 56, 76-78, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971); *Reed v. Reed*, 404 U.S. 71, 76-77, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971); *Turner v. Fouche*, 396 U.S. 346, 363-64, 90 St. Ct. 532, 24 L. Ed. 2d 567 (1970).

[42] *E.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008) (summary judgment for plaintiff); *Cooper-Harris v. United States*, 965 F. Supp. 2d 1139, 1141 (C.D. Cal. 2013) (same); *HRPT Props. Tr. v. Lingle*, 715 F. Supp. 2d 1115, 1142 (D. Haw. 2010) (same); *Fallon Paiute-Shoshone Tribe*, 174 F. Supp. 2d at 1094-95 (same); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1118 (S.D. Cal. 1999) (same); *cf. Ariz. Dream Act*

Coal. v. Brewer, 757 F.3d 1053, 1065 (9th Cir. 2014) (preliminary injunction for plaintiff); *Diaz v. Brewer*, 656 F.3d 1008, 1014-15 (9th Cir. 2011) (same); *Doe v. Wasden*, 1:20-cv-452, 2021 WL 4129144, at *16 (D. Idaho Sept. 8, 2021) (same); *Driggs v. Comm'r of Soc. Sec. Admin.*, CV-18-03915, 2020 WL 2791858, at *5 (D. Ariz. May 29, 2020) (reversing agency order, which followed a merits hearing, and remanding for further administrative proceedings); *In re Levenson*, 587 F.3d 925, 934 (9th Cir. 2009) (Reinhardt, J.) (ordering award of unpaid benefits in judicial employment dispute resolution system).

[43] *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (trial victory for plaintiffs); *Craigmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (same); *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 928 (W.D. Pa. 2020) (same); *United States v. Vaello-Madero*, 956 F.3d 12, 32 (1st Cir. 2020), *cert. granted,* 141 S. Ct. 1462 (2021) (summary judgment for plaintiff); *Catherine H. Barber Mem'l Shelter*, 2021 WL 6065159, at *17 (same); *Gill v. Off. of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396-97 (D. Mass. 2010), *aff'd sub nom. Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 682 F.3d 1 (1st Cir. 2012) (same); *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1035 (10th Cir. 2007) (same); *Copelin-Brown*, 399 F.3d at 1255-56 (same); *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 894 (W.D. Tex. 2015) (same); *Barletta*, 973 F. Supp. 2d at 137 (same); *Vaquería Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484 (1st Cir. 2009) (preliminary injunction for plaintiff); *Farm Lab. Org. Comm.*, 2018 WL 3999638 at *28 (same); *Roe*, 359 F. Supp. 3d at 423 (same); *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 419 & 421-22 (Ky. 2005), *overruled on other*

CONCLUSION

The Court should reject the City's proposed rational basis test. It minimizes the scope of cases to which the rational basis test applies by ignoring cases affecting people of limited financial means. It urges this Court to depart from the way courts perform rational basis review in practice. Instead of adopting the City's view that rational basis review means no review at all, this Court should affirm the decision of the Superior Court and remand the case to that court for full factual development.

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grounds by Calloway Cnty. Sheriff's Dep't v. Woodall, 607 S.W.3d 557 (Ky. 2020); *State v. Limon*, 122 P.3d 22, 38 (Kan. 2005); *People v. Walters*, 913 N.Y.S.2d 893, 903 (City Ct. 2010).

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Respectfully submitted January 3, 2022.

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I hereby certify that on January 3, 2022, the foregoing BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENTS was filed through the Court's electronic filing system, which will cause a copy to be served on all parties of record.

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