No. 78437-0

SUPREME COURT OF WASHINGTON

CITY OF DES MOINES,

Respondent,

v.

GRAY BUSINESSES, LLC,

Petitioner.

MEMORANDUM OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE WASHINGTON CHAPTER IN SUPPORT OF PETITION FOR DISCRETIONARY REVIEW

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Institute for Justice ("IJ") is a nonprofit, public interest legal center committed to defending and strengthening the essential foundations of a free society, including private property rights. IJ has litigated property rights cases throughout the United States and was lead counsel for the property owners in *Kelo v. City of New London,* __ U.S. __, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), regarding condemnation of private property for the benefit of private interests. In the wake of *Kelo,* IJ has dedicated itself to ensuring that state constitutional guarantees of property ownership free of unfair governmental interference remain vibrant. This case goes to the very origin of property rights and is therefore of vital interest to IJ's Washington Chapter. The right to lease private property for one's chosen use is an inherent right of the citizen — a natural right, in other words — and a fundamental attribute of property ownership that, contrary to the Court of Appeals' decision, may not be derogated or destroyed without just compensation.

STATEMENT OF THE CASE

IJ adopts both the Counter Statement of the Case contained in Gray Businesses' Amended Response Brief and the Statement of the Case contained in its Petition for Discretionary Review.

ARGUMENT

In this case, the Court of Appeals correctly recognized a number of factual and legal propositions on its way to the wrong conclusion. The court correctly recognized that by prohibiting Gray Businesses, LLC ("Gray") from leasing space in the Pine Terrace Trailer Village ("Pine Terrace") to any additional tenants — even to replace existing mobile homes that might move away — the City of Des Moines ("City") "destroy[ed] Gray's right to lease Pine Terrace for mobile home use." *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 613, 124 P.3d 324 (2005). The court again properly recognized that if the government "destroys or derogates a fundamental attribute of property ownership, including the right . . . to dispose of property, . . . there is a per se taking." *Id.* at 611 (citing *Guimont v. Clarke*, 121 Wn.2d 586, 602, 854 P.2d 1 (1993)). The court erred, however, when it held that Gray's right to lease Pine Terrace for mobile home use was a state-created, "contingent" right that could be destroyed without compensation.

As this Court has held in decisions dating back to Washington's founding days, the right to lease one's property is a natural right recognized, though not created, by the Washington Constitution. It is not, as the Court of Appeals held, a positive right that exists at the sufferance of government. Because "the decision of the Court of Appeals is in conflict with" this Court's longstanding precedent concerning the nature

of the right to dispose of property, and because the nature of that right is "a significant question of law under the Constitution of the State of Washington" and "an issue of substantial public interest," review by this Court is imperative. RAP 13.4(b) (1), (3) & (4).

A. The Right To Lease Private Property Is A Natural Right, Not A Positive Or Contingent Right.

Property rights are inherent, not positive. The right to lease one's property — whether for mobile home or any other use — inheres in the individual. It does not exist by legislative grace or sufferance.

1. The Washington Constitution Affirms Natural Rights Philosophy As The Touchstone Of Our Governance.

Washington's framers subscribed to a philosophy of natural rights, whereby certain rights "*inhere in the citizenry* rather than emanate from the state." *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 439, 780 P.2d 1282 (1989) (Utter, J., concurring) (emphasis added); *see also State v. Rivers*, 129 Wn.2d 697, 727, 921 P.2d 495 (1996) (Sanders, J., dissenting) ("The framers of our constitution subscribed to notions of natural or fundamental rights when drafting the constitution . . . ."). As the Supreme Court of the Washington Territory observed shortly before the Convention, "[t]he science of government . . . is a machine for the protection of the natural rights of the individual." *Thornton v. Territory*, 3 Wash. Terr. 482, 493, 17 P. 896 (1888).

The framers not only operated under a natural rights understanding, they memorialized that understanding in the text of the Constitution. Indeed, "the very first enactment of our state constitution," Article I, section 1, "is the declaration that governments are established to protect and maintain individual rights." *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (citation omitted).

After cataloging many, but certainly not all, of those "individual rights" (including private property rights, *see* art. I, § 16), the framers ended Article I with an instruction: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." Wash. Const. art I., § 32. "Section 32 was proposed by George Turner, who[] . . ., like others of his day, believed that constitutional interpretation often required a return to natural law principles . . . ." *Seeley v. State*, 132 Wn.2d 776, 810, 940 P.2d 604 (1997). "The notion of fundamental principles was central to natural law theories at the time," and Section 32 "indicates that the framers looked to other, *non-governmental sources* for the origin of the rights listed in the constitution." *Southcenter*, 113 Wn.2d at 439 (Utter, J., concurring) (emphasis added).

2. Our Constitution And Judicial Precedent Recognize Property Ownership As A Natural Right.

A significant right inhering in the individual is the right to acquire, enjoy, and dispose of his property. As W. Lair Hill, author of the Convention's working draft, explained, the right "to acquire and own property" is "deemed and declared to be sacred and inviolable" — "inherent in the constitution of things, . . . bottomed upon absolute principles which no government can rightfully deny, control or infringe." W. Lair Hill, *The "Bill of Rights," General Principles Admitted as Axioms in our Constitutions*, Morning Oregonian, July 4, 1889, at 9.

Indeed, just three years after the 1889 Convention, this Court expressly recognized "the natural right of the owner of property to dispose of it as he sees fit." *Nyman v. Berry*, 3 Wash. 734, 737, 29 P. 557 (1892). Within the decade, the Court exercised the "recurrence to fundamental principles" commanded by Article I, section 32 to make clear that property rights inhere in the individual and do not emanate from the state:

> [I]t would seem to be a propitious time for a recurrence to fundamental principles. . . . [T]he right to property is before and higher than any constitutional sanction . . . . [I]n considering state constitutions, we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them.

Dennis v. Moses, 18 Wash. 537, 571, 52 P. 333 (1898) (internal quotation marks and citations omitted).[1]

3. The Right To Lease Is A Fundamental Attribute Of The Natural Right Of Property Ownership.

"Property in a thing consists not merely in its ownership and possession but in *the unrestricted right of . . . disposal.*" *Manufactured Hous. Cmtys. of Wash. v. State*, 142 Wn.2d 347, 364, 13 P.3d 183 (2000) (emphasis in original; internal quotation marks and citations omitted). In fact, "Washington courts have consistently recognized that the right to dispose of property is among the *fundamental attributes* of property ownership[.]" *Dep't of Labor and Indus. v. Mitchell Bros. Truck Line, Inc.*, 113 Wn. App. 700, 707, 54 P.3d 711 (2002) (emphasis added; alteration in original; internal quotation marks and citation omitted).

The right of disposal, in turn, includes the right to *lease* property, as the Court of Appeals acknowledged and the City conceded. *Gray Businesses*, 130 Wn. App. at 613 (recognizing that "the right to lease one's property is a fundamental attribute of ownership"); *id.* at 614

[1] This Court has repeatedly reiterated this fundamental principle of constitutional law. *E.g.*, *State v. Boren*, 36 Wn.2d 522, 532, 219 P.2d 566 (1950) ("[T]o own and manage property is a natural right." (internal quotation marks and citation omitted)); *St. Germain v. Bakery & Confectionery Workers' Union, No. 9, of Seattle*, 97 Wash. 282, 289, 166 P. 665 (1917) ("To destroy his business in this manner is just as reprehensible as it is to physically destroy his property. Either is a violation of a natural right, the right to own, and peaceably enjoy, property." (internal quotation marks and citation omitted)). *But see Bowes v. City of Aberdeen*, 58 Wash. 535, 542, 109 P. 369 (1910) (stating, in *dicta*, that "the right of property is a legal right and not a natural right").

(recognizing "an owner's inherent right to sell or lease its property to anyone it chooses"). Other courts have affirmed this view. *E.g.*, *Alaska v. United States*, 32 Fed. Cl. 689, 699 (1995) (recognizing that the "right to dispose" includes the right to "lease"); *see also Manufactured Hous.*, 142 Wn.2d at 368 ("The ability to . . . transfer property is a fundamental aspect of property ownership."); *Mitchell Bros.*, 113 Wn. App. at 707-08 (recognizing that the "right to dispose of property" includes "the power to sell or convey one's interest," as well as "other, more non-traditional, methods" of alienation (citations omitted)).

4. The Right To Lease May Not Be Destroyed Or Derogated Without Just Compensation.

Like other aspects of property ownership, the right to lease is subject to — but not a creation of — the police power. "[T]he police power," however, "is not unlimited and, when stretched too far, is a power most likely to be abused." *Manufactured Hous.*, 142 Wn.2d at 354 (internal quotation marks and citation omitted).

To protect the natural property rights of Washingtonians from an overzealous police power, the Washington courts have drawn a clear line: if the government "destroys or derogates any fundamental attribute of property ownership[,] including the right . . . to dispose of property," it has effected a taking *per se* and just compensation is required. *Guimont*, 121

Wn.2d at 602; *see also Manufactured Hous.*, 142 Wn.2d at 355. This bright line "marks the principal distinction between" permissible regulation "for public health, comfort, and safety" and regulation that "deprive[s] a citizen of his natural rights." *State v. Walker*, 48 Wash. 8, 10, 92 P. 775 (1907) (concerning natural right to pursue an occupation).

B. The Court of Appeals Ignored The Natural Rights Origin Of Property Ownership.

Here, the Court of Appeals ignored the natural rights origin of property ownership and thus allowed the City to unconstitutionally take Gray's property without compensation. Although the court properly recognized that "the right to lease one's property is a fundamental attribute of ownership" and government action that "destroys or derogates a fundamental attribute of property ownership . . . is a per se taking," *Gray Businesses*, 130 Wn. App. at 611-12, 613, it wrongly concluded that the natural right to lease is not in play in this case. According to the court, this case concerns the "right to lease property *for mobile home use*," a supposedly state-created, "contingent" right. *Id.* at 613, 614.

This defining-down and defining-away of Gray's property right belies Washington's natural rights tradition. In concluding that the City did not destroy or derogate a fundamental attribute of ownership, the Court of Appeals improperly conflated the City's police power to regulate

with the very *origin* of the right itself. *See id.* at 614. According to the court, the right to lease property for mobile home use is not a natural or inherent right, but rather a creature of statute and local regulation. *Id.*

The court's reasoning contravenes more than a century's worth of precedent affirming "the *natural* right of the owner of property to dispose of it as he sees fit." *Nyman*, 3 Wash. at 737 (emphasis added). Gray's right to lease its property for mobile home — or any other — use is not, as the Court of Appeals held, "derived from . . . state statute and local regulations." *Gray Businesses*, 130 Wn. App. at 614. Like all natural rights, property rights "inhere in the citizenry rather than emanate from the state." *Southcenter*, 113 Wn.2d at 439 (Utter, J., concurring).

Indeed, Gray's right to lease Pine Terrace *cannot* be "derived from" City regulation: *Pine Terrace appears to pre-date the City's 1959 incorporation and Gray owned it prior to the City's annexation of the area in which it is located*. *Gray Businesses*, 130 Wn. App. at 604. Gray's right is not a creation, and does not exist at the sufferance, of the City.

It makes no difference, as the Court of Appeals supposes, that a mobile home park owner "must have a business license and comply with applicable regulations." *Id.* at 614. The existence of regulation does not render the right to "lease property for mobile home use . . . contingent." *Id.* At most, it demonstrates that the government may impose certain

regulations on mobile home park use. It does not mean, as the Court of Appeals concluded, that the right to lease property for mobile home (or any other) use is a *creation* of that power. The government may regulate the exercise of a natural right to advance health or safety, and it may derogate that right if *it pays just compensation*, but the thing regulated is a natural right nonetheless. Its derogation or destruction is therefore a compensable taking under Article I, section 16.

CONCLUSION

Because the decision of the Court of Appeals conflicts with this Court's longstanding precedent concerning the natural rights origin of property ownership, and because the nature of that right is a significant question of constitutional law and an issue of substantial public interest, this Court should grant review.

RESPECTFULLY submitted this 24th day of April 2006.

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DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On April 24, 2006, a true copy of the foregoing *Memorandum of Amicus Curiae Institute for Justice Washington Chapter in Support of Petition for Discretionary Review* was placed in envelopes addressed to the following persons:

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which envelopes with postage thereon fully prepaid were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Seattle, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 24th day of April 2006 at Seattle, Washington.

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