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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHONG YIM; MARILYN YIM; KELLY LYLES; EILEEN, LLC; RENTAL HOUSING ASSOCIATION OF WASHINGTON, *Plaintiffs-Appellants*, v. CITY OF SEATTLE, a Washington municipal corporation, *Defendant-Appellee*.	No. 21-35567 D.C. No. 2:18-cv-00736-JCC OPINION

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted May 17, 2022
Seattle, Washington

Filed March 21, 2023

Before: Kim McLane Wardlaw, Ronald M. Gould, and Mark J. Bennett, Circuit Judges.

Opinion by Judge Wardlaw;
Concurrence by Judge Wardlaw;
Partial Concurrence by Judge Bennett;

Partial Concurrence and Partial Dissent by Judge Gould

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OPINION

WARDLAW, Circuit Judge:

In 2017, the City of Seattle enacted the Fair Chance Housing Ordinance, Seattle, Wash., Municipal Code (S.M.C.) § 14.09, *et seq.* (2017) (Ordinance). The Ordinance prohibits landlords from inquiring about the criminal history of current or potential tenants, and from taking adverse action, such as denying tenancy, against them based on that information.

Shortly after the Ordinance was passed, Plaintiffs, several landlords who own small rental properties and a landlord trade association that provides background screening services, filed this action against the City, alleging violations of their federal and state rights of free speech and substantive due process. On cross-motions for summary judgment, the district court upheld the constitutionality of the Ordinance.

We conclude that the Ordinance's inquiry provision impinges upon the First Amendment rights of the landlords, as it is a regulation of speech that does not survive intermediate scrutiny. However, we reject the landlords' claim that the adverse action provision of the Ordinance violates their substantive due process rights. The landlords do not have a fundamental right to exclude, and the adverse action provision survives rational basis review. We therefore affirm in part and reverse in part the district court's order. Because the Ordinance contains a severability

provision, we remand this case to the district court to determine whether the presumption in favor of severability is rebuttable and for other proceedings consistent with this opinion.

I.

A.

The barriers people with a criminal history face trying to find stable housing are well-documented. Approximately 90% of private landlords conduct criminal background checks on prospective tenants, and nearly half of private landlords in Seattle say they would reject an applicant with a criminal history. As a result, formerly incarcerated persons are nearly 10 times as likely as the general population to experience homelessness or housing insecurity,[1] and one in five people who leave prison become homeless shortly thereafter.

Seattle currently faces a housing crisis. Almost 12,000 people experience homelessness each night in the City, which has one of the most expensive rental markets in the United States. In 2022, the City's waiting lists for subsidized housing range from one to eight years. As amici recognize, "[c]riminal history screening exacerbates . . . affordability challenges by disqualifying persons from rental housing even when they have the financial means to afford the housing and could live there successfully." Br. of Amici Curiae Nat'l Housing L. Project, Shriver Ctr. on Poverty Law, Tenant L. Center, Formerly Incarcerated & Convicted

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[1] *See* Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, Prison Policy Initiative, https://www.prisonpolicy.org/reports/housing.html (Aug. 2018) (last visited Aug. 29, 2022).

People, and Families Movement & Just Cities Inst. (Shriver Am. Br.) 26.

This "prison to homelessness pipeline" has a host of negative effects on communities. Persons without stable housing are significantly more likely to recidivate, with one study estimating that people with unstable housing were up to seven times more likely to re-offend.[2] They are less likely to be able to find stable employment and access critical physical and mental healthcare.[3] And, as amici explain, "the sheer number of children who have a parent with a criminal record necessarily means that the damaging impacts of a criminal record touch multiple generations." Br. of Amici Curiae Pioneer Hum. Servs., Tenants Union of Wash., Fred T. Korematsu Ctr. for L. & Equality, and ACLU of Wash. (Pioneer Am. Br.) 8 (citation omitted). Housing instability can make "family reunification post-incarceration 'difficult if not impossible,'" and often results in children being placed in foster care. *Id*. (citation omitted).

These consequences are not borne equally by all Americans. In the United States, people of color are significantly more likely to have a criminal history than their white counterparts. Discriminatory law enforcement practices have resulted in people of color being "arrested, convicted and incarcerated at rates [that are] disproportionate to their share of the general population."[4] In 2014, for example, African

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[2] *See* Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Records Checks, Race, and Disparate Impact*, 93 Ind. L. J. 421, 432–33 (2018).

[3] *Id*. at 434.

[4] *Id*. at 423 (alteration in original) (quoting U.S. Dep't of Hous. & Urb. Dev., *Office of General Counsel Guidance on Application of*

Americans comprised 12% of the total population, but 36% of the total prison population.[5] As of 2018, one in nine Black men ages 20–34 was incarcerated, and one in three Black men had spent time in prison over the course of his lifetime.[6]

Seattle is no exception. Data from the Seattle Police Department show that "Black persons are stopped at a rate that is 4.1 times that of non-Hispanic white persons and Indigenous persons are stopped a rate that is 5.8 times that of non-Hispanic white persons." Pioneer Am. Br. 7. While the overall population in King County, home to Seattle, is just 6.8% Black, the population of the King County jail is 36.6% Black, according to a 2021 report released by the County Auditor's Office.[7] And while Native Americans are 1.1% of the King County population, they number 2.4% of the County's jail population.

The correlation between race and criminal history can result in both unintentional and intentional discrimination on the part of landlords who take account of criminal history. A landlord with a policy of not renting to tenants with a criminal history might

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Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 2 (2016)).

[5] *Id.* at 424 (citing U.S. Dep't of Hous. & Urb. Dev., *supra*, at 3).

[6] *Id.* (citing Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 Vand. L. Rev. 71, 81 (2016)).

[7] *See* Lewis Kamb, *Audit of King County Jails Finds Racial Disparities in Discipline, Says 'Double-Bunking' Leads to Violence*, Seattle Times (Apr. 6, 2021) https://www.seattletimes.com/seattle-news/audit-of-king-county-jails-finds-racial-disparities-in-discipline-says-double-bunking-leads-to-violence/#:~:text=A%20disproportionate%20number%20of%20Black,been%20convicted%20of%20a%20crime (last visited Sept. 30, 2022).

not bear any racial animus, but the policy could nevertheless disproportionately exclude people of color. On the flip side, a landlord who does not wish to rent to non-white tenants could mask discriminatory intent with a "policy" of declining to rent to tenants with a criminal history. A 2014 fair housing test conducted by the Seattle Office of Civil Rights found evidence of the latter practice, reporting that testers belonging to minority groups were frequently asked about their criminal history, while similarly situated white testers were not. It also found incidents of differential treatment based on race in housing 64% of the time, including incidences of this practice.

The cumulative effects of racialized discrimination in housing on homelessness are hard to measure. However, it is striking that while Seattle is just 7% Black, Seattle's unhoused population is 25% Black.[8]

B.

After comprehensively studying this problem, in 2017, the City enacted the Fair Chance Housing Ordinance. The City stated two purposes for enacting the Ordinance: (1) "address[ing] barriers to housing faced by people with prior records;" and (2) lessening the use of criminal history as a proxy to discriminate against people of color who are disproportionately represented in the criminal justice system. Seattle, Wash., Ordinance 125393 at 5 (Aug. 23, 2017) (codified at S.M.C. §§ 14.09.010–.025). In enacting the Ordinance, the City found that "racial inequities in

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[8] *See How Seattle's Homelessness Crisis Stacks Up Across the Country and Region*, Seattle Times (June 27, 2021) https://projects.seattletimes.com/2021/project-homeless-data-page (last visited Sept. 30, 2022).

the criminal justice system are compounded by racial bias in the rental applicant selection process," and that "higher recidivism . . . is mitigated when individuals have access to safe and affordable housing." *Id*. at 2–3.

The Ordinance prohibits landlords from requiring disclosure or inquiring about "any arrest record, conviction record, or criminal history" of current or prospective tenants, and from taking adverse action against them based on that information.[9] S.M.C. § 14.09.025(A). An "adverse action" includes, among other things, "[r]efusing to engage in or negotiate a rental real estate transaction," "denying tenancy," "[e]xpelling or evicting an occupant," and applying different rates or terms to a rental real estate transaction. *Id.* § 14.09.010.

The Ordinance's inquiry provision includes four exceptions relevant here. First, all landlords may inquire about a prospective tenant's sex offender status and take certain adverse actions based on that information. *Id*. §§ 14.09.025(A)(2), 14.09.115(B). Second, so as not to conflict with federal law, the adverse action requirement does not apply to "landlords of federally assisted housing subject to federal regulations that require denial of tenancy." *Id*. § 14.09.115(B). Third, the provision "shall not apply to the renting, subrenting, leasing, or subleasing of a single family dwelling unit in which the owner or

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[9] During the height of the COVID-19 pandemic, the City amended the Ordinance to also prohibit landlords from taking adverse actions against tenants based on evictions that occurred during the state of emergency. *See* S.M.C. § 14.09.026. As a result, the ordinance was renamed the "Fair Chance Housing and Evictions Records Ordinance." *Id.* § 14.09.005.

subleasing tenant or subrenting tenant occupy part of the single family dwelling unit." *Id.* § 14.09.115(C). Fourth, neither provision applies to "the renting, subrenting, leasing or subleasing of an accessory dwelling unit or detached accessory dwelling unit [in which] the owner or person entitled to possession [of the dwelling] maintains a permanent residence, home or abode on the same lot." *Id.* § 14.09.115(D).

Seattle is not the only jurisdiction to have adopted legislation restricting reliance on criminal history backgrounds by landlords. Other cities, including Berkeley, Oakland and Ann Arbor, have adopted ordinances similar to Seattle's.[10] However, the vast majority of jurisdictions have adopted ordinances that permit landlords to consider at least some of a potential tenant's criminal history, albeit with some additional protections.[11]

C.

Several months after Seattle passed the Ordinance, the landlords and their trade organization (collectively, "landlords") sued the City challenging its constitutionality. Plaintiffs Chong and MariLyn Yim, Kelly Lyles, and Eileen, LLC are local landlords who own and manage small rental properties in Seattle. Plaintiff Rental Housing Association of Washington (RHA) is a nonprofit trade organization for landlord members, most of whom own and rent residential

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[10] *See* Berkeley, Cal., Mun. Code § 13.106.040, *et seq.*; Oakland, Cal., Mun. Code § 8.25.010, *et seq.*; Ann Arbor, Mich., Mun. Code, Title IX, Chapter 122, § 9:600, *et seq*.

[11] *See* National Housing Law Project, *Fair Chance Ordinances: An Advocate's Toolkit* 38–40 (2019), https://www.nhlp.org/nhlp-publications/fair-chance-ordinances-an-advocates-toolkit (last visited Sept. 30, 2022).

properties in Seattle. RHA provides professional screening services, including background checks, on potential tenants to its some 5,300 members.

The landlords initially filed their suit in state court, facially challenging two provisions of the statute. First, they challenged the "inquiry provision," which bars landlords from asking about a tenant's criminal history, alleging that it violated their First Amendment rights as well as their corollary rights under the Washington State Constitution. The landlords contend that the inquiry provision should be deemed non-commercial speech subject to strict scrutiny, which it cannot survive, or alternatively, if deemed commercial speech subject to intermediate scrutiny, it fails as not narrowly tailored to the government's stated purposes.

Second, the landlords challenged the "adverse action provision," which bars landlords from taking adverse action against a tenant based on the tenant's criminal history, alleging that the provision violates their rights under the Substantive Due Process Clause, as well as their corollary rights under the Washington State Constitution. They argue that the statute infringed landlords' fundamental right to exclude persons from their property, and is thus subject to strict scrutiny, or alternatively, the provision cannot survive rational basis review because of an alleged disconnect between its ends and means.

Once the City removed the case to federal court, it proceeded rapidly. The parties stipulated that "discovery and trial [were] unnecessary," and filed cross-motions for summary judgment as well as a stipulated record. Before deciding the motions, the

district court certified three questions to the Washington State Supreme Court regarding the standards of review accorded to the state constitution's substantive due process rights. The Washington State Supreme Court answered the certified questions, and, in a decision issued in January 2020, held that Washington State substantive due process claims are subject to the same standards as federal due process claims, and that the "same is true of state substantive due process claims involving land use regulations and other laws regulating the use of property." *Yim v. City of Seattle*, 194 Wash.2d 682, 686 (2019). Therefore, the Washington court held that the standard of review for the landlords' substantive due process challenge to the Ordinance is rational basis review. *Id.*

On July 6, 2021, the district court granted summary judgment in favor of the City, upholding the Ordinance. On the First Amendment claims, the district court held as a threshold matter that the landlords had standing to challenge the application of the provision to inquiries about only prospective tenants, not current tenants. Moving to the merits, the district court held that the inquiry provision did implicate the First Amendment, but that it regulated commercial speech, which subjected it to intermediate scrutiny. Applying intermediate scrutiny, the district court upheld the Ordinance, reasoning that Seattle had asserted substantial interests, that the Ordinance directly advanced those interests, and that it was narrowly drawn to achieve them. On the substantive due process claim, the district court held that the landlords' asserted 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. It was therefore subject to rational basis review, which it readily survived. The landlords filed this timely appeal.

II.

The grant of summary judgment is reviewed de novo. *Sandoval v. County of Sonoma*, 912 F.3d 509, 515 (9th Cir. 2018). "We determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir. 2002) (citing *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001)).

III.

On appeal, the landlords reassert their argument that the inquiry provision of the Ordinance violates the First Amendment,[12] as applied to prospective tenants.[13] They also argue that the adverse action provision impermissibly interferes with their fundamental property right to exclude prospective tenants based on their criminal history.

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[12] Before the district court, "[t]he parties assume[d] that the free speech clause in Washington's constitution [was] coextensive with the First Amendment in this context and the Court assume[d] the same." This assumption is not contested on appeal.

[13] The district court held that the landlords had standing to challenge the application of the provision to inquiries about prospective tenants only. The landlords do not appeal this holding.

A.

Before determining the constitutionality of the inquiry provision, we must determine the scope of the speech it regulates. The parties dispute the persons to whom the inquiry provision applies, that is, which individuals the provision prohibits from inquiring about prospective tenants' criminal history. *See United States v. Williams*, 553 U.S. 285, 293 (2008) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). The City contends that the provision bars landlords from inquiring into the criminal history of their own prospective tenants, while the landlords contend that it more broadly bars anyone in Seattle from inquiring into the criminal history of any person who happens to be seeking to rent any apartment for any reason, whether to transact business or not.

The dispute stems from the way the City defines "person" in the Ordinance. The inquiry provision prohibits "any person" from asking about a prospective occupant's criminal history:

> It is an unfair practice for any *person* to . . . inquire about . . . any arrest record, conviction record, or criminal history of a prospective occupant except pursuant to certain exceptions.

S.M.C. § 14.09.025(A), (2) (emphasis added). Section 14.09.010 of the Ordinance defines "person" as one or more "individuals" or "organizations." The landlords argue that because the definition of "person" in the Ordinance is not limited to "the landlord or occupant of the unit the prospective tenant is seeking to rent," the Ordinance prevents anyone, not just the landlord

or occupant in question, from inquiring about that person's criminal history. That is, so long as a person is actively seeking an apartment, and is thus a "prospective tenant," the provision bars anyone from looking into that person's criminal history, even people unrelated to the transaction, such as the City, a journalist, or a firearms dealer. The City, relying on statutory context, legislative history and common sense, argues that the definition of "person" is limited to the landlord or occupant of the unit the prospective tenant is seeking to rent.

We conclude that the City has the better of the argument. We are required to interpret terms "in the context of the Ordinance as a whole," and nothing about the Ordinance's text, purpose, or legislative history indicates that the City intended it to regulate anything other than rental housing. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1274 (9th Cir. 2017). For example, the title of the Ordinance is the "Fair Chance *Housing* Ordinance," *see* Seattle, Wash., Ordinance 125393 (emphasis added), and Chapter 14.09, where the Ordinance was eventually codified, is titled "Use of Screening Records in *Housing*." S.M.C. § 14.09 (emphasis added). "Fair chance housing" is then defined as "practices to reduce barriers to *housing* for persons with criminal records." *Id.* § 14.09.010 (emphasis added).

Other textual provisions support the conclusion that the City intended to limit the Ordinance to the landlord-tenant context. The text explicitly provides that every application for a rental property "shall state that *the landlord* is prohibited from requiring disclosure, asking about, rejecting an applicant, or taking an adverse action based on any arrest record,

conviction record, or criminal history." *Id.* § 14.09.020 (emphasis added). Section 14.09.025, entitled "Prohibited use of criminal history," prohibits "any person" from "carry[ing] out an adverse action" based on sex offender registry information, "unless *the landlord* has a legitimate business reason for taking such action." *Id.* § 14.09.025 (emphasis added).

"[W]e are not required to interpret a statute in a formalistic manner when such an interpretation would produce a result contrary to the statute's purpose or lead to unreasonable results." *United States v. Combs*, 379 F.3d 564, 569 (9th Cir. 2004). The very purpose of the Ordinance was to reduce barriers to housing and housing discrimination by barring landlords from considering an applicant's criminal history. *See* S.M.C. § 14.09.010. Additionally, the landlords' broad interpretation of the Ordinance would prohibit background checks on prospective tenants in all contexts, including for firearm sales or in the employment context, which are explicitly permitted in other areas of the Seattle Municipal Code. *Id.* §§ 12A.14.140 (permitting background checks for firearm sales), 14.17.020 (permitting employers to perform criminal background checks on job applicants). A housing ordinance that bars most legally permitted criminal background checks would lead to an "unreasonable or impracticable result[]." *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999).

Here, the text, context, and purpose of the statute undermine the landlords' view, and demonstrate that the inquiry provision bans *landlords* from inquiring into the criminal history of tenants applying to inspect, rent, or lease their properties.

B.

The district court held that the Ordinance regulates speech, not conduct, and that the speech it regulates is commercial speech. The district court then applied an intermediate level of scrutiny to hold that the Ordinance was constitutional as a "reasonable means of achieving the City's objectives and does not burden substantially more speech than is necessary to achieve them." The parties on appeal dispute whether the Ordinance regulates commercial speech and calls for the application of intermediate scrutiny, or whether the Ordinance regulates non-commercial speech and is subject to strict scrutiny review. We need not decide that question, however, because we conclude that the Ordinance does not survive the intermediate scrutiny standard of review. Because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011), we do not decide whether the Ordinance regulates commercial or non-commercial speech. Assuming, without deciding, that the Ordinance regulates commercial speech, we apply the intermediate scrutiny standard codified in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).[14] Under *Central*

[14] To the extent the landlords argue that even if the inquiry provision regulates commercial speech, the court should apply strict rather than intermediate scrutiny because it is "content based," this argument is refuted by our precedent, which holds that content-based restrictions of commercial speech are subject to intermediate scrutiny as well. *See Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 820 (9th Cir. 2013) (applying intermediate scrutiny to "content-based restrictions" of commercial speech).

Hudson, courts must analyze: (1) whether the "commercial speech" at issue "concern[s] lawful activity" and is not "misleading"; (2) "whether the asserted government interest is substantial" in regulating the speech; (3) "whether the regulation directly advances the governmental interest asserted"; and (4) "whether it is not more extensive than is necessary to serve that interest." *Id.* at 566.

"Any First Amendment interest . . . is altogether absent when the commercial activity itself is illegal, and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376, 389 (1973). It is undisputed that the Ordinance does not prohibit misleading speech.[15] Rather, it prohibits inquiring about information that is of record, and most likely accurate. While criminal records may be "associated with unlawful activity," reviewing and obtaining criminal records is generally a legal activity. A prohibition on reviewing criminal records therefore is not speech that "proposes an illegal transaction" and does not escape First Amendment scrutiny under *Central Hudson*. *Valle Del Sol*, *Inc.*, 709 F.3d at 821.

The City's stated interests—reducing barriers to housing faced by persons with criminal records and the use of criminal history as a proxy to discriminate on the basis of race—are substantial. The landlords do

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[15] The City does not concede that the statute does not regulate speech that "concerns unlawful activity or is misleading." However, its argument is circular: "Because the adverse-action provision bans landlords from using criminal history in selecting tenants, the inquiry provision's prohibition on asking for criminal history regulates speech related to unlawful activity."

not challenge the importance of these interests. Therefore, we evaluate whether the Ordinance directly and materially advances the government's substantial interests, and whether it is narrowly tailored to achieve them.

i.

To be sustained, the Ordinance must directly advance a substantial state interest, and "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564. A restriction "directly and materially advances" the government's interests if the government can show "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995) (citations omitted). There is no dispute that the harms the City points to—a crisis of homelessness among the formerly incarcerated and landlords' use of criminal history as a proxy for race—"are real," or that the City's purpose was to combat racial discrimination. The only question is whether the part of the policy the City enacted to address them, the inquiry provision, does so in a meaningful way.

We have observed that a statute cannot meaningfully advance the government's stated interests if it contains exceptions that "undermine and counteract" those goals. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). "One consideration in the direct advancement inquiry is underinclusivity . . . *Central Hudson* requires a logical connection between the interest a law limiting commercial speech advances and the exceptions a law makes to its own application." *Valle Del Sol Inc.*, 709 F.3d at 824

(internal quotation marks and citation omitted). For example, in *Rubin*, the Supreme Court considered a federal regulation which banned brewers from advertising the strength of their beer using numbers, but allowed them to do so using "descriptive terms" with the goal of preventing brewers from competing in "strength wars" over alcohol content. *Rubin*, 514 U.S. at 489. The Court struck down the regulation, holding that the rule did not do anything meaningful to prevent brewers from competing on alcohol content because the exception—allowing brewers to communicate the exact same information about alcohol content, just in words instead of numbers—completely swallowed the rule. *Id.*

The landlords contend that the inquiry provision does not "materially advance" the City's interests because "[t]he Ordinance's exception for federally assisted housing renders it fatally underinclusive." That is, even assuming a policy barring all landlords from inquiring about a person's criminal history would directly advance the City's goals, an otherwise identical policy including the federal exemption would not. In support of that argument, they observe that many persons with a criminal record have federal housing vouchers.

However, as written, the Ordinance excludes only the adverse action provision from applying to federally assisted housing. S.M.C. § 14.09.115(B) (providing that "Chapter 14.09 shall not apply to an *adverse action* taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy") (emphasis added). The only provision that would appear to exempt federal housing from the inquiry provision is the first

exemption, which generally provides that the Ordinance "shall not be interpreted or applied to diminish or conflict with any requirements of state or federal law." *Id.* § 14.09.115(A).

"It is well established that a law need not deal perfectly and fully with an identified problem" in order to directly and materially advance the government's interests. *Contest Promotions, LLC v. City & Cnty. of San Francisco*, 874 F.3d 597, 604 (9th Cir. 2017); *see also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 435 (2015) (warning that the "[t]he State should not be punished for leaving open more, rather than fewer, avenues of expression, especially when there is no indication of a pretextual motive for the selective restriction of speech"). In this case, however, the adverse action exemption is well-justified by the City's interest in preventing federal law from preempting the Ordinance. Federally assisted housing providers are required under federal regulations to deny tenancy for tenants who have certain convictions. *See*, *e.g.*, 24 C.F.R. §982.553(a)(1)(ii)(C) (denying admission if a "household member has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing."). If the City had enacted an ordinance potentially preempted by federal regulation, the City would have risked having to later revise its own laws.

While the Ordinance might better achieve its goals if it applied to more types of landlords, there is no evidence that exempting federal landlords from the adverse action provision undermines the effectiveness of subjecting private landlords to the inquiry

provision. In fact, the exemption may strengthen the Ordinance by avoiding conflict with federal law.

ii.

However, we must disagree with the district court that the Ordinance is "narrowly drawn" to achieve the City's stated goals. *Central Hudson*, 447 U.S. at 565 (internal quotation marks and citation omitted).

"[I]f the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* at 564. Courts therefore must consider "[t]he availability of narrower alternatives," which accomplish the same goals, but "intrude less on First Amendment rights." *Ballen v. City of Redmond*, 466 F.3d 736, 743 (9th Cir. 2006).[16] "In requiring that [the

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[16] The landlords propose a number of alternative policies, none of which is a reasonable substitute for the Ordinance. First, they argue that the City could have omitted the inquiry provision entirely, and simply passed the adverse action provision. However, if landlords are allowed to access criminal history, just not act on it, it makes the Ordinance extremely difficult to enforce, and makes it more likely that unconscious bias will impact the leasing process. *See* Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. Chi. L. For. 209, 218 (2020) ("Legislatures' interest in stopping discrimination before the fact is especially strong because after-the-fact enforcement is frequently slow, costly, and ineffective."). Second, the landlords argue that the City should address its "own biased policing practices," which it pegs as a source of the racial disparities in criminal history. However, as the Third Circuit has observed, "[i]ntermediate scrutiny . . . does not require that the City adopt such regulatory measures only as a last alternative." *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 156 (3d Cir. 2020). Third, the landlords suggest that the City could have adopted a "certification program," where persons with a criminal history

restriction] be 'narrowly tailored' to serve an important or substantial state interest, we have not insisted that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989) (cleaned up) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). In considering the "fit between the legislature's ends and the means chosen to accomplish those ends," the fit must not necessarily be the "least restrictive means," but "reasonable" and through "a means narrowly tailored to achieve the desired objective." *Id.* at 480 (cleaned up).

In order to conclude that the inquiry provision was "narrowly drawn" to achieve the City's goals related to housing access and racial discrimination, we therefore must find that the City "carefully calculated the costs and benefits associated with the burden on speech," *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (internal quotation marks omitted), and that the inquiry provision struck a "reasonable" balance between the interests of various parties. *Fox*, 492 U.S. at 480. Here, the inquiry provision—a complete ban on any discussion of

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could provide landlords with an official certificate that demonstrates a consistent pattern of law-abiding behavior. However, as the City observes in its brief, that alternative was considered during the Ordinance's passage, and rejected because its sweep would be too narrow. Finally, the landlords suggest that Seattle build more public housing. However, in order to survive intermediate scrutiny, the content of a challenged regulation must reflect that a City weighed the "costs and benefits" of a particular regulation, and the costs of building new housing are astronomical. *Discovery Network*, 507 U.S. at 417.

criminal history between the landlords and prospective tenants—is not "in proportion to the interest served" by the Ordinance in reducing racial injustice and reducing barriers to housing. *Id.* (citation omitted). Other cities have enacted similar ordinances to achieve the same goals of reducing barriers to housing and racial discrimination as Seattle. While we do not address the constitutionality of any of these ordinances, none of them forecloses all inquiry into criminal history by landlords, as does Seattle's blanket ban on any criminal history inquiry.[17]

The ordinances adopted by those other jurisdictions fall into two main categories. The first type of ordinance ("Type I")—adopted by Cook County,[18] San Francisco,[19] Washington, D.C.,[20] Detroit,[21] and the State of New Jersey[22]—requires landlords to conduct an initial screening of potential tenants without looking at their criminal history and

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[17] Respectfully, Judge Gould's dissent confuses the Ordinance's ends with its means. Seattle's "substantial interest[]" was not in "reducing discrimination against anyone with a criminal record." The Ordinance's stated goal was to "address barriers to housing faced by people with prior records" and reduce racial discrimination against people of color who are disproportionately represented in the criminal justice system. Those goals can be accomplished by means other than the Ordinance's: a near-blanket prohibition on any inquiry about a tenant's criminal history. A blanket ban on speech goes "*much further* than is necessary to serve the interest asserted." *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (emphasis added). None of the referenced ordinances bans all inquiry into criminal history.

[18] Cook County, Ill., Code § 42-38.

[19] S.F., Cal., Admin. Code §§ 87.1–.11.

[20] D.C. Code §§ 42-3541.01–.09.

[21] Detroit, Mich., City Code § 26-5-1.

[22] N.J. Admin. Code §§ 13:5-1.1–2.7.

to notify applicants whether they pass that initial screening. At that point, landlords are permitted to order a criminal background check, but must provide the applicant with a copy of the report, give them a chance to provide mitigating information, and may consider only a limited subset of offenses. Cook County permits landlords to consider any convictions within the last three years; San Francisco and Washington, D.C. permit landlords to consider any convictions sustained within the past seven years; and the State of New Jersey creates a sliding scale, allowing landlords to consider fourth degree offenses within the past year, second or third degree offenses within the last four years, first degree offenses within the last six years, and a short list of extremely serious offenses including murder and aggravated sexual assault no matter when they occurred.

The second type of ordinance ("Type II")—adopted by Portland[23] and Minneapolis[24]—allows landlords to *either* consider an applicant's entire criminal history, but complete a written individualized evaluation of the applicant, and explain any rejection in writing, *or* consider only a limited subset of offenses—misdemeanor convictions within the last three years or felony convictions within the last seven years—without any additional procedures.

The inquiry requirement in both types of ordinances imposes a significantly lower burden on landlords' speech. As *amici* assert, screening before the Ordinance often examined "the presence of violent offenses in a criminal history" and the "type of crime

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[23] Portland, Or., City Code § 30.01.086.
[24] Minneapolis, Minn., City Code § 244.2030.

and length of time since the crime was committed." Br. of Amici Curiae Consumer Data Indus. Ass'n & the Pro. Background Screening Ass'n at 8; GRE Downtowner Am. Br. at 5. These ordinances would permit the landlords to ask a potential tenant about their most recent, serious offenses, which is the information a landlord would be most interested in. Neither ordinance imposes any additional costs on the City.

Indeed, the record demonstrates that Seattle considered a narrower version of the Ordinance, as well as many fair housing ordinances from other jurisdictions, and rejected those versions with little stated justification. The first version of the Seattle Ordinance permitted landlords to inquire about *some* criminal convictions, while still banning them from asking about: "arrests not leading to convictions; pending criminal charges; convictions that have been expunged, sealed, or vacated; juvenile records, including listing of a juvenile on a sex offense registry; and convictions older than two years from the date of the tenant's application." Yet, when it decided to broaden the inquiry provision to a blanket ban, the Council offered the tenuous explanation that landlords did not insist on background checks a decade ago, so therefore there was "no evidence that criminal history is an indicator of a bad tenant." A decade ago, however, the technology did not exist to readily screen potential tenants—much as routine credit checks on tenants did not exist a few decades ago. Like with credit checks, as soon as the technology existed, landlords insisted on using it to screen tenants because they were concerned about tenants with a criminal history. From the record before us, Seattle offered no reasonable explanation why the

more "narrowly tailored" versions of the bill could not "achieve the desired objective" of reducing racial barriers in housing. *Fox*, 492 U.S. at 480.

Because a number of other jurisdictions have adopted legislation that would appear to meet Seattle's housing goals, but is significantly less burdensome on speech, we conclude that the inquiry provision at issue here is not narrowly tailored, and thus fails intermediate scrutiny.[25]

IV.

Next, the landlords challenge the "adverse action provision" of the Ordinance on the grounds that it violates their Fourteenth Amendment Substantive Due Process right to exclude persons from their property.[26]

The landlords argue that we should apply strict scrutiny to the Ordinance because the right to exclude is "fundamental." However, the Supreme Court has never recognized the right to exclude as a "fundamental" right in the context of the Due Process Clause. *Cf. Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (referring to the right to exclude as "a fundamental element of the property right" in the context of a takings clause analysis (citation omitted)); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (same); *Knick v. Twp. of Scott, Pa.*, 139 S.

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[25] The constitutionality of the other ordinances is not an issue before us, and we do not opine on that question.

[26] The Washington Supreme Court has held that the "state substantive due process claims are subject to the same standards as federal substantive due process claims." *Yim v. City of Seattle*, 451 P.3d 694, 696 (Wash. 2019). So, the analysis of both claims is identical.

Ct. 2162, 2174 (2019) (same); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (same). And we have clearly held that "[t]he right to use property as one wishes is also not a fundamental right." *Slidewater LLC v. Wash. State Dept. of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021).

Under our precedent, when a law infringes on a non-fundamental property right, we apply rational basis review. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) ("In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes, but instead look to whether the governmental body could have had no legitimate reason for its decision." (internal quotation marks, citations, and emphasis omitted)). The landlords argue that we should apply a slightly heightened form of scrutiny, relying on *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), a case about the Takings Clause in which the Supreme Court held that the "[substantially advances] formula prescribes an inquiry in the nature of a due process, not a takings, test, and that has no proper place in our takings jurisprudence." *Id.* at 540. While *Lingle* rejected a form of heightened scrutiny in Takings Clause challenges, it did not address or change the standard for substantive due process challenges, and we have continued to apply rational basis scrutiny to substantive due process challenges that concern non-fundamental property rights. *See Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012) (holding that where an ordinance did not impinge on a fundamental right, "to establish a substantive due process violation, the [Plaintiffs needed to] show that Bainbridge's ordinances . . . were

'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.'" (quoting *Kawaoka*, 17 F.3d at 1234)); *Shanks v. Dressel*, 540 F.3d 1082, 1088–89 (9th Cir. 2008) (rejecting a substantive due process claim because appellants failed to show the government action was "constitutionally arbitrary").

To survive rational basis review, the government must offer a "legitimate reason" for passing the ordinance. *Kawaoka*, 17 F.3d at 1234 (citations omitted). Here, Seattle offers two legitimate rationales for its policy: reducing barriers to housing faced by persons with criminal records and lessening the use of criminal history as a proxy to discriminate on the basis of race. The landlords fail to seriously challenge the obvious conclusion that the adverse action provision is legitimately connected to accomplishing those goals. Therefore, we find the adverse action provision easily survives rational basis review.

V.

We note that the Ordinance contains a severability clause, S.M.C. § 14.09.120, which states that:

> The provisions of this Chapter 14.09 are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection, or portion of this Chapter 14.09, or the application thereof to any landlord, prospective occupant, tenant, person, or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this Chapter 14.09, or the

> validity of its application to other persons or circumstances.

Absent any legislative intent to the contrary, a severability clause ordinarily "creates a presumption that if one section is found unconstitutional, the rest of the statute remains valid." *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998). The parties should have an opportunity to brief and argue before the district court whether there is evidence in the record that overcomes the presumption of severability. *See, e.g.*, *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 860–61 (9th Cir. 2017) (affirming a district court ruling that a legislative provision was unconstitutional but severable). We therefore remand this case to the district court.

VI.

For all the reasons stated above we **REVERSE** the district court in part, **AFFIRM** the district court in part, and remand to the district court for further proceedings consistent with this opinion.

WARDLAW, Circuit Judge, concurring:

While the majority opinion assumes, but does not decide, that the Ordinance regulates commercial speech, I would agree with the district court that the speech it regulates is commercial speech.

Commercial speech is "usually defined as speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (citation omitted). However, that definition is "just a starting point," and courts "try to give effect to a common-sense distinction between

commercial speech and other varieties of speech." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (internal quotation marks and citations omitted). Indeed, "[o]ur commercial speech analysis is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017) (internal quotation marks and citations omitted).

To distinguish between commercial and non-commercial speech, we apply the three-factor test derived from the Supreme Court's decision in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). We must determine whether: (1) "the speech is an advertisement," (2) "the speech refers to a particular product," and (3) "the speaker has an economic motivation." *Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bolger*, 463 U.S. at 66–67). Each of these factors, standing alone, is insufficient to determine that speech is commercial in nature, but when all three are present, a conclusion that the speech at issue is commercial is strongly supported. *Bolger*, 463 U.S. at 67; *see also Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012). When we consider these factors, we look not only to the speech itself, but examine the entire context in which it appears. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (assuming that "the information on beer labels constitutes commercial speech").

The district court correctly concluded that the very core of the Ordinance here—a prohibition on requiring disclosure or making inquiries about criminal history

generally on rental applications—falls squarely within the realm of commercial speech. Although not advertising per se, a rental application at its core "does no more than propose a commercial transaction." *United Foods*, 533 U.S. at 409; *see also Ariix,* 985 F.3d at 1116 ("A publication that is not in a traditional advertising format but that still refers to a specific product can either be commercial speech—or fully protected speech."). A rental application allowing prospective tenants to inspect a property and make inquiries about their criminal history relates to a "specific product:" rental housing. *Bolger*, 463 U.S. at 66.

As to *Bolger*'s third factor, "regardless of whether [the parties] have an economic motivation . . . their regulated speech can still be classified as commercial" under *Bolger*. *First Resort*, 860 F.3d at 1273. However, in weighing this factor, courts assess "whether the speaker acted *primarily* out of economic motivation, not simply whether the speaker had *any* economic motivation." *Ariix*, 985 F.3d at 1116. Here, the landlords' inquiries about prospective tenants' criminal history are primarily economically motivated.

Courts have generally found that speech associated with deciding whether to engage in a particular commercial transaction—such as extending a lease, obtaining credit reports, or securing real estate—is motivated primarily by economic concerns. For example, in *San Francisco Apartment Ass'n v. City & Cnty. of San Francisco*, we held that all of the speech between a landlord and a tenant about entering into a buyout agreement was motivated primarily by economic concerns because "it

relates solely to the economic interests of the parties and does no more than propose a commercial transaction." 881 F.3d 1169, 1176 (9th Cir. 2018); *accord Campbell v. Robb*, 162 F. App'x 460, 469 (6th Cir. 2006) (holding that statements "made by a landlord to a prospective tenant describing the conditions of rental" are "part and parcel of a rental transaction," and thus motivated primarily by economic concerns). Similarly, in *Anderson v. Treadwell*, the Second Circuit determined that New York regulations limiting in-person solicitations by real estate brokers concerned commercial speech with a primary economic motivation, even if the communications in question included general "information regarding market conditions, financing and refinancing alternatives, and purchase/sale opportunities." 294 F.3d 453, 460 (2d Cir. 2002).

Courts have also generally found that consumer credit reports, compiled for the purpose of targeted marketing or calculating interest rates, constitute commercial speech. In *Trans Union Corp. v. F.T.C.*, for example, the D.C. Circuit held that restrictions on the sale of targeted marketing lists based on consumer credit reports should be subject to intermediate scrutiny because the reports were "solely of interest to the company and its business customers." 245 F.3d 809, 818 (D.C. Cir. 2001); *see also Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) ("[C]onsumer credit reports . . . are 'commercial speech.'"); *U.D. Registry, Inc. v. State of Cal.*, 50 Cal. Rptr. 3d 647, 660 (Cal. Ct. App. 2006) (assuming that "credit reports are commercial speech" and collecting cases that show "other courts have treated credit reports as commercial speech.").

Moreover, courts have found that speech related to hiring constitutes commercial speech. In *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, for example, the Third Circuit found that a potential employer's questions about a job applicant's salary history were motivated primarily by economic concerns "[b]ecause the speech occur[ed] in the context of employment negotiations," and was thus "part of a proposal of possible employment." 949 F.3d 116, 137 (3d Cir. 2020) (internal quotation marks omitted); *see also Valle del Sol, Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013) (holding that provisions regulating the "hiring, picking up and transporting [of] workers" impacted speech "soliciting a commercial transaction or speech necessary to the consummation of a commercial transaction"); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rel.*, 413 U.S. 376, 387 (1973) (concluding that employers placing employment advertisements in sex-designated newspaper columns was in "the category of commercial speech").

Here, landlords' inquiries about a prospective tenant, including their criminal history, are aimed at answering one question: whether the applicant is one with whom the landlords should enter into a commercial transaction that will financially benefit them. Like the landlord in *San Francisco Apartment Association*, a business seeking a credit report in *Trans Union*, and the employer in *Greater Philadelphia*, landlords ultimately use an applicant's criminal history to "propose a commercial transaction" and further their own economic interests. *San Francisco Apartment Ass'n*, 881 F.3d at 1176.

The landlords disagree, arguing that while landlords might be primarily motivated by economic concerns when they ask some questions on a rental application (for example, questions about income, credit score or rental history), when they ask about criminal history, they are primarily motivated by concerns about their own safety and the safety of their other tenants. For example, the Yims assert that they include a question about potential tenants' criminal history because they live in one of the units of the triplex they rent out, and they want to make sure their children are safe. Similarly, Lyles asserts that she asks potential tenants about their criminal history because she frequently interacts with tenants in person, including to collect rent or fix problems in the unit, and wants to ensure her safety. These noncommercial interests, the landlords argue, are "inextricably intertwined" with commercial interests. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

However, while some landlords may have safety in mind, as well as questions about financial risk and reliability, all of the information they glean about applicants is used to decide whether to enter into a *commercial* transaction with them. There is no question that "the creation and dissemination of information" is protected speech and requiring disclosure of information is as well. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011). However, it is also true that the particular information sought here—criminal history—is input primarily for economic reasons. Indeed, the Ordinance explicitly allows owners living "on the same lot" or property as their tenants to inquire about and take adverse action against prospective tenants based on criminal

history, presumably to allow landlords to address personal, rather than economic, concerns. S.M.C. § 14.09.115(D). And even landlord *amicus* stresses its economic interests in obtaining prospective tenant's criminal history, including the "[c]osts associated with a single eviction," occupancy declines in rentals due to safety concerns, and security costs. Br. of Amicus Curiae GRE Downtowner, LLC at 7 ("GRE Downtowner Am. Br."). The City has simply chosen to remove the criminal history inquiry from the ultimate commercial decision.

The landlords cannot identify one aspect of the transaction between them and prospective tenants that is noncommercial in nature. They therefore point to the professional screening services provided by plaintiff RHA to argue that speech between the landlords and RHA is not commercial because RHA is not a party to the rental transaction. But, like the credit reports discussed in *Trans Union*, RHA sells its screening services to landlords—at various prices depending on the extent of the background search—which RHA obtains through a third party. Thus, the landlords are engaging in a separate commercial transaction with an economic motive when they request the type of screening package and purchase it for a particular prospective applicant. The speech attendant to that particular transaction—purchasing a criminal screening—is speech "that does no more than propose a commercial transaction." *United Foods*, 533 U.S. at 409. It is therefore "quintessential commercial speech," as the district court held.

Sorrell does not compel a contrary conclusion. As an en banc panel of our court has held, nothing in *Sorrell* changes the applicability of the *Bolger* test or

the relevance of *Central Hudson*. *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 841, 847–48 (9th Cir. 2017) (en banc) (holding that "*Sorell* did not modify the *Central Hudson* standard" and that "content- and speaker-based" regulations of commercial speech are subject to the same test as any other kind of commercial speech). In *Sorrell*, the Supreme Court considered a First Amendment challenge to a Vermont statute which prohibited pharmaceutical manufacturers and marketers from obtaining data from third parties about doctors' prescription practices for the purpose of marketing the pharmaceutical companies' products. 564 U.S. at 563–64. The Court first held that the Vermont statute was a "content- and speaker-based restriction," and that "[t]he First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Id.* at 566, 571 (cleaned up). The Court then assumed without deciding that the statute regulates commercial speech, applied the *Central Hudson* test, and decided that the Vermont statute did not survive intermediate scrutiny. *Id.* at 571. Far from creating a per se rule that "a law that imposes content-and-speaker-based restrictions" is noncommercial speech subject to strict scrutiny, the *Sorrell* court applied intermediate scrutiny to the law at issue, as the majority opinion does here.

Therefore, the Ordinance regulates commercial speech and is subject to an intermediate standard of review, which it fails to survive.

BENNETT, Circuit Judge, concurring in part and concurring in the result:

I concur in the majority opinion, except for Part III.B.i and footnote 16, and I concur in the result. I write separately, however, because I would find that strict scrutiny applies because the Ordinance, on its face, is a content- and speaker-based restriction of *noncommercial* speech. And the Ordinance clearly fails strict scrutiny.

I. Strict Scrutiny Applies

Sorrell v. IMS Health Inc., 564 U.S. 552 (2011), compels the conclusion that strict scrutiny applies. In *Sorrell*, a Vermont law "prohibit[ed] pharmacies . . . from disclosing or otherwise allowing prescriber-identifying information to be used for marketing" and barred "pharmaceutical manufacturers and detailers from using the information for marketing." *Id.* at 563. The law allowed "pharmacies [to] sell the information to private or academic researchers, but not . . . to pharmaceutical marketers." *Id.* (citation omitted).

The Supreme Court held the law unconstitutional. *Id.* at 557. The Court found that the law enacted "content-[ ]and speaker-based restrictions," *id.* at 563, because it forbade "sale subject to exceptions based . . . on the content of a purchaser's speech. For example, those who wish[ed] to engage in certain 'educational communications' [could] purchase the information. The measure then bar[red] any disclosure when recipient[s] . . . [would] use the information for marketing," *id.* at 564 (citation omitted). "The statute thus disfavor[ed] marketing, that is, speech with a particular content." *Id.* The law also "disfavor[ed] specific speakers" such as pharmaceutical manufacturers, as they could not "obtain prescriber-identifying information, even though the information

[could] be purchased or acquired by other speakers with diverse purposes and viewpoints." *Id.* Thus, the Court held that "[t]he law on its face burdens disfavored speech by disfavored speakers." *Id.*

In holding the law unconstitutional, the Court rejected Vermont's argument that "heightened judicial scrutiny [was] unwarranted because its law [was] a mere commercial regulation." *Id.* at 566. While recognizing that "the First Amendment does not prevent restrictions . . . imposing incidental burdens on speech," the Court rejected Vermont's contention because Vermont's law imposed "more than an incidental burden on protected expression." *Id.* at 567. Thus, under *Sorrell*, a law that imposes content-and speaker-based restrictions on noncommercial speech is subject to strict scrutiny.

This case mirrors *Sorrell*. Just like the Vermont law, which barred disclosure of prescriber-identifying information to marketers but permitted disclosure to researchers for educational communications, *see id.* at 563–64, the Ordinance bars a group's access to information that is available to another group (landlords' access to criminal history, which is available to the public) and bans a group's use of such information for a certain purpose (landlords evaluating prospective tenants). Indeed, this criminal history information is available to everyone *except* a landlord seeking information about a prospective tenant.[1] Thus, as in *Sorrell*, the Ordinance is a content- and speaker-based regulation.

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[1] The City does not (and cannot) deny plaintiffs' contention that "[a]ll 50 states provide publicly available criminal background information for a wide range of purposes."

And just like the Vermont law, the Ordinance does not regulate commercial speech. When commercial speech is "inextricably intertwined" with noncommercial speech it "sheds its commercial character and becomes fully protected speech." *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012) (quoting *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988)). There are plainly a substantial number of real-life instances when the Ordinance regulates noncommercial speech. For example, it would regulate when landlords ask third parties without economic interests about prospective tenants. This would include querying publicly available information, or even doing a Google search for a prospective tenant's prior convictions. *See Sorrell*, 564 U.S. at 569 (quoting with approval *Los Angeles Police Dep't v. United Reporting Pub. Corp.*, 528 U.S. 32, 42 (1999) (Scalia, J., concurring) ("[A] restriction upon access that *allows* access to the press . . . , but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech." (alterations in original))). That landlords have some commercial interests does not transform every one of their inquiries about a prospective tenant's prior behaviors, including prior convictions for violent crimes, into commercial speech. *See id.* at 566–67 (holding that a restriction on "speech result[ing] from an economic motive" is not "a mere commercial regulation"). A landlord who prioritizes the safety of other tenants through inquiries about, for example, whether a prospective tenant has ever been convicted of assaulting a fellow tenant, or selling heroin to a fellow tenant's child, is not engaging in commercial speech simply because the landlord charges rent to

tenants.[2] Because the Ordinance regulates noncommercial speech, any commercial speech "sheds its commercial character and becomes fully protected speech." *Dex Media*, 696 F.3d at 958.

In short, *Sorrell* controls, and our analysis should end there. Indeed, because the Ordinance does not regulate commercial speech, there is no need to apply the *Bolger*[3] factors to the Ordinance at all. *See IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1122 (9th Cir. 2020) (acknowledging that the *Bolger* factors are relevant only if there is a "close" question as to whether the speech at issue is commercial). The Ordinance is a content- and speaker-based restriction of noncommercial speech and so strict scrutiny applies.

II. The Ordinance Necessarily Fails Strict Scrutiny

As the majority opinion holds, assuming without deciding that intermediate scrutiny applies, the Ordinance fails intermediate scrutiny. Maj. Op. at 18–20, 23–28. The Ordinance then necessarily fails strict scrutiny, which I believe is applicable. To reinforce that the Ordinance would not survive strict scrutiny,

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[2] "[T]here is no need to determine whether *all* speech hampered by [the Ordinance] is commercial," *Sorrell*, 564 U.S. at 571 (emphasis added), because "the entirety [of the regulated speech] must be classified as noncommercial" if "pure speech and commercial speech" are "inextricably intertwined," *id.* (cleaned up). Thus, even if some inquiries about the criminal records of prospective tenants could, as a theoretical matter, be classified as commercial speech, such hypothetical commercial speech is inextricably intertwined with an almost limitless number of inquiries about the criminal records of prospective tenants that are not remotely commercial in nature.

[3] *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

I highlight other reasons why it fails intermediate scrutiny.

A. The Ordinance does not directly advance the City's asserted interest because the Ordinance contradicts that interest and is unconstitutionally underinclusive.

Under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), "we must determine whether the regulation directly advances the governmental interest asserted." In doing so, "we must look at whether the [challenged speech regulation] advances [the asserted state] interest in its general application," not limited to the plaintiffs. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 904 (9th Cir. 2009). "Another consideration in the direct advancement inquiry is 'underinclusivity[.]' . . . [Under *Central Hudson*,] a regulation . . . [with] exceptions that 'undermine and counteract' the interest the government claims it adopted the law to further . . . cannot 'directly and materially advance its aim.'" *Id.* at 904–05 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)). Thus, "*Central Hudson* requires a logical connection between the interest a law limiting commercial speech advances and the exceptions a law makes to its own application." *Id.* at 905.

The City argues that people with criminal histories "tend to struggle with housing," and criminal records "are disproportionately held by minorities." The City argues that the Ordinance directly advances its interest in "reduc[ing] landlords' ability to . . . deny[] tenancy based on criminal history" by "reducing landlords' ability to obtain applicants' criminal histories." In order to advance such an interest, this

protection must logically be extended to anyone with a criminal history, regardless of the offense or disposition involved. Consistent with this asserted position, the Ordinance bars "any person" from "[r]equir[ing] disclosure [of,] inquir[ing] about, or tak[ing] an adverse action against a prospective occupant . . . based on . . . criminal history." Seattle, Wash., Municipal Code (S.M.C.) § 14.09.025(A)(2).

But the Ordinance permits all landlords to both inquire about and take adverse action based on a prospective occupant's sexual offenses, which contradicts the City's stated interest in reducing housing discrimination against those who have "already paid their debt to society." While the Ordinance prohibits anyone from requiring disclosure of, inquiring about, or taking an adverse action against a prospective occupant based on "criminal history," the Ordinance's definition of criminal history "does not include status registry information." S.M.C. § 14.09.010. "Registry information" is defined as "information solely obtained from a county, statewide, or national sex offender registry." *Id*. Thus, the Ordinance allows any landlord to inquire about whether a prospective occupant is a registered sex offender. The Ordinance also permits "an adverse action based on registry information of a prospective adult occupant" if a landlord shows "a legitimate business reason" for the adverse action. S.M.C. § 14.09.025(A)(3).

The Ordinance fails the direct advancement test due to inconsistency, because it lacks "a logical connection between the interest a law limiting commercial speech advances and the exceptions a law makes to its own application." *Metro Lights*, 551 F.3d at 905. The City asserts an interest in preventing

"[c]riminal records [from] being used . . . to reconvict . . . [those] who have already paid 'their' debt to society." But the City fails to show why legal protection based on such an interest should extend to some people with criminal histories (for example, someone convicted of murdering his previous landlords) but not to others (sex offenders).

Indeed, the City's own defense of its exclusion highlights the inconsistency between its asserted interest and the exclusion. According to the City, plaintiffs "overlook" the fact that it "took a balanced approach . . . by requiring a landlord to show that rejecting a person on the sex offender registry 'is necessary to achieve a substantial, legitimate, nondiscriminatory interest' by demonstrating a nexus to resident safety in light of such factors as: the number, nature, and severity of the convictions . . . ." (quoting S.M.C. § 14.09.010). If a landlord is permitted to exclude a sex offender by showing "a nexus to resident safety," why should landlords not be allowed to exclude or even inquire about, for example, prospective tenants convicted for murdering their neighbors or previous landlords?[4] Because the Ordinance's exceptions undermine the City's stated interests in curbing housing discrimination against those with criminal histories and protecting resident safety, the Ordinance fails the direct advancement

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[4] Plaintiffs cite *City of Bremerton v. Widell*, 51 P.3d 733, 739 (Wash. 2002), in which the court posited that if a landlord may be held liable for the foreseeable criminal acts of third parties, "[i]t would seem only reasonable that the landlord should at the same time enjoy the right to exclude persons who may foreseeably cause such injury." Under the Ordinance, a landlord is forbidden from even the most routine due diligence as to prior convictions that could put any landlord on notice of easily foreseeable violent criminal acts of certain prospective tenants.

test and thus fails intermediate scrutiny. *See Metro Lights*, 551 F.3d at 905.

The Ordinance is also underinclusive in its treatment of federally funded public housing. The relevant exemption provision reads:

> This Chapter 14.09 shall not be interpreted or applied to diminish or conflict with any requirements of state or federal law, including but not limited to Title VIII of the Civil Rights Act of 1968, the Federal Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., as amended; the Washington State Fair Credit Reporting Act, chapter 19.182 RCW, as amended; and the Washington State Criminal Records Privacy Act, chapter 10.97 RCW, as amended. In the event of any conflict, state and federal requirements shall supersede the requirements of this Chapter 14.09.

S.M.C. § 14.09.115(A).

As the district court determined, this provision "appears to exempt federally funded public housing providers from the inquiry provision" of the Ordinance. Because the Ordinance appears to exempt landlords of federally assisted housing from the inquiry provision, the City defies its own asserted interest in reducing housing discrimination with respect to prospective occupants of federally assisted housing.

The Ordinance is also underinclusive (and illogical to the point of irrationality) in that it allows inquiry as to criminal conduct, but not criminal convictions. As counsel for the City admitted at oral argument, a

landlord can ask a prospective tenant if he favors selling heroin to children or assaulting his landlords, but not if he has ever had been convicted of doing so. Oral Arg. at 28:12–28:38. It makes no sense that, for example, a landlord could inquire about a prospective tenant's prior violent behavior or probability of violent behavior toward fellow tenants, but could not inquire about—and could not base a rental decision on—that same prospective tenant's multiple *convictions* for prior violent behavior toward fellow tenants.

In sum, the Ordinance's exceptions concerning registered sex offenders undermine the City's asserted interests in resident safety and in reducing housing discrimination. The Ordinance also does not advance the City's asserted interest in reducing housing discrimination because it is underinclusive with respect to both prospective occupants of federally assisted housing and inquiries about criminal *conduct* rather than *conviction*. Thus, the Ordinance "cannot directly and materially advance" the City's interests because the exemptions "undermine and counteract the interest the government claims it adopted the law to further," and so fails intermediate scrutiny. *Metro Lights*, 551 F.3d at 905 (citation and internal quotation marks omitted).

B. The Ordinance also does not survive intermediate scrutiny because its speech restrictions are not sufficiently narrow.

To survive intermediate scrutiny, the restriction "must not be 'more extensive than is necessary to serve [the alleged state] interest.'" *Metro Lights*, 551 F.3d at 903 (quoting *Central Hudson*, 447 U.S. at 566). For example, the rules challenged in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of*

Ohio, 471 U.S. 626, 632 (1985) "prohibit[ed] the use of illustrations in advertisements run by attorneys" and "limit[ed] the information that [could] be included in such ads to a list of 20 items." Ohio argued that the rules are "needed to ensure that attorneys . . . do not use false or misleading advertising to stir up meritless litigation against innocent defendants." *Id.* at 643. The Supreme Court held that the challenged rules were overbroad:

> [A]cceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But . . . , broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations.

Id. at 649.

Under *Zauderer*, the Ordinance's restrictions on speech are overbroad. The district court "accept[ed] Plaintiffs' interpretation" that the Ordinance "prohibits landlords from asking individuals other than prospective occupants about [prospective

occupants'] criminal history, and these conversations are not commercial speech because they are not proposals to engage in commercial transactions." Thus, the Ordinance bans a substantial amount of noncommercial speech under the reasoning that some amount of commercial speech (for example, questions in rental applications asking prospective occupants directly about their criminal histories) may contribute to housing discrimination against people with criminal histories. Such a restriction is unconstitutionally overbroad according to *Zauderer*. *See* 471 U.S. at 649.

The Supreme Court has emphasized the requirement that commercial speech restrictions be no more extensive than necessary especially when a restriction "provides only the most limited incremental support for the interest asserted." *Bolger*, 463 U.S. at 73. In *Bolger*, the challenged restriction on commercial speech "prohibit[ed] the mailing of unsolicited advertisements for contraceptives." *Id*. at 61. An asserted government interest was "aiding parents' efforts to discuss birth control with their children." *Id*. at 73. The Supreme Court, despite recognizing the interest to be "substantial," found that the challenged law "provide[d] only the most limited incremental support for the interest asserted" and that "a restriction of this scope is more extensive than the Constitution permits." *Id.*

Applying *Bolger* to this case reinforces that the Ordinance's restrictions on speech are overbroad. As discussed above, the Ordinance does not directly and materially advance the City's asserted interests because its exemptions undermine those asserted interests, just as the law challenged in *Bolger* provided only "limited incremental support for the

interest asserted." *Id.* And just as the *Bolger* Court found that "purging all mailboxes of unsolicited material that is entirely suitable for adults" to achieve such a level of protection goes beyond what the Constitution permits, *id.*, banning a substantial amount of noncommercial speech (contacting third parties without economic interests) for the level of protection offered by the Ordinance is unconstitutionally overbroad.

Central Hudson specifically held in its discussion of the narrowness test that the government cannot "completely suppress information when narrower restrictions on expression would serve its interest as well." 447 U.S. at 565. The City thus cannot "completely suppress" one group of citizens from accessing information that is freely available to another group of citizens, when much narrower alternatives to such a drastic measure would serve the City's asserted interests at least as effectively as the Ordinance would.

As the plaintiffs argued, a narrower alternative would be to permit landlords to inquire about prospective occupants' criminal history, but to retain the Ordinance's prohibition on landlords taking adverse actions based on that information. Because this narrower alternative would prohibit landlords from discriminating against people with criminal histories, it would advance the City's objective of "regulat[ing] the use of criminal history in rental housing."

There is yet another narrower alternative.[5] The City conceded that the Ordinance permits landlords to inquire about and to take adverse actions on the basis of whether a prospective occupant is a sex offender. But the City asserted that it "took a balanced approach," requiring landlords to "demonstrat[e] a nexus to resident safety" before taking adverse actions based on sex offender offenses. Because murdering a landlord or other tenants bears at least as heavily on resident safety as sexual assault, the Ordinance could permit landlords to inquire about, and take adverse actions on the basis of, criminal history concerning certain violent offenses (like the murder or assault of landlords or tenants) or certain drug offenses (like selling heroin to children or fellow tenants who were children), using the same "balanced approach" that it uses for sexual offenses. This alternative could enhance the City's asserted interest in promoting resident safety and would be a narrower speech restriction than the Ordinance's current form, as the alternative would permit landlords to inquire about and act based on one additional form of criminal offense.

* * *

The majority opinion holds that the Ordinance is unconstitutional, assuming without deciding that intermediate scrutiny applies. While I concur with that determination, I believe that *Sorrell* requires us to apply strict scrutiny because the Ordinance is a content- and speaker-based restriction of

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[5] This alternative assumes arguendo that the City should be allowed to limit landlords' access to prospective occupants' criminal history information.

noncommercial speech, and the Ordinance clearly fails strict scrutiny.

GOULD, Circuit Judge, concurring in part and dissenting in part:

I am pleased to concur in Parts I, II, III(A), III(B)(i), and IV of the majority opinion. I also agree with Judge Wardlaw that Seattle's inquiry provision regulates commercial speech and is subject to intermediate scrutiny. I respectfully dissent, however, from the majority's conclusion that the inquiry provision is not narrowly tailored, and from the resulting judgment that the provision is unconstitutional.[1] *See* Part III(B)(ii). In my view, the opinion's reasoning on this point is unpersuasive and out of line with commercial speech precedent. I would instead hold that the inquiry provision survives intermediate scrutiny and affirm the district court in full.

I

Along with Judge Wardlaw, I conclude that the inquiry provision regulates commercial speech. The majority opinion, assuming this point without deciding, dutifully recites the familiar standards of such scrutiny: that Seattle bears the burden of showing that the inquiry provision "directly advances" a "government interest [that] is substantial" in a way that "is not more extensive than is necessary to serve

[1] In light of today's result, I also agree with the court that remand to the district court to consider severability is appropriate. However, as I conclude in this dissent that Seattle's ordinance does not violate the constitution, I contend that remand is unnecessary.

that interest." Op. at 19 (citations omitted). And the opinion rightly concludes that the inquiry provision directly advances Seattle's two undisputedly substantial interests: "reducing barriers to housing faced by persons with criminal records and the use of criminal history as a proxy to discriminate on the basis of race." Op. at 20–23.

Unfortunately, that's when the opinion loses me. The opinion goes on to say that Seattle's inquiry provision is not narrowly tailored because there are two other types of housing ordinances that have recently been enacted by a handful of other jurisdictions "to achieve the same goals of reducing barriers to housing and racial discrimination as Seattle." Op. at 25. It then summarizes the provisions of these ordinances, both of which allow landlords to access some (or all) of a prospective tenant's criminal record. Op. at 25–27. It expressly reserves the question of whether these alternative provisions are even constitutional, Op. at 25, but nonetheless faults Seattle for allegedly "tenuous" reasoning in declining to adopt an earlier version of its inquiry provision that resembled these alternatives, Op. at 27–28. In conclusion, the opinion holds that, because these alternatives (1) "appear[] to meet Seattle's housing goals," but (2) are "significantly less burdensome on speech," they thus (3) show that the inquiry provision is not narrowly tailored. Op. at 28.

I respectfully do not join this line of reasoning as it raises far more questions than answers about what exactly is wrong with the inquiry provision. Below, I highlight the three main areas where I contend the opinion falls short.

First, the opinion's assertion that the alternative laws "appear[] to meet Seattle's housing goals" is all

well and good, but there is nothing in the record (or otherwise) from which we could reasonably reach that conclusion. The fact that five cities, one county, and the State of New Jersey enacted these alternative measures in an attempt to address some of the same issues as Seattle does not mean that they *will* "accomplish the same goals[.]" Op. at 23 (citing *Ballen v. City of Redmond*, 466 F.3d 736, 743 (9th Cir. 2006)). In fact, the majority identifies no data or evidence that these alternatives have been, or will be, effective *at all*, let alone as effective as Seattle's inquiry provision. The opinion's reasoning rests entirely on one federal panel's take as to what works in housing policy based on summaries of statutes alone. How is this anything other than a federal court "second-guess[ing]" the considered judgment of a democratically elected local government? *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989).

And it is a dubious take at that. If anything, it is more reasonable to assume that the alternatives will be *less* effective. Both alternatives permit landlords to access at least some of a prospective tenant's criminal history. Taking seriously the notion that permitting landlords to access criminal history would make it *"extremely difficult to enforce*" the law's prohibition on discrimination—as the opinion does, albeit elsewhere, Op. at 23 n. 16 (emphasis added)—these alternatives open the door for more undetectable (and unenforceable) violations. How does the mere existence of *less* effective alternative laws demonstrate that there are "*numerous* and *obvious* less-burdensome alternatives" that would accomplish the same goals as the inquiry prohibition?[2] *City of*

[2] Moreover, the opinion is not even sold on the constitutionality of these alternatives. They appear to raise distinct constitutional

Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n. 13 (1993) (emphasis added).

Second, the opinion's reasoning as to the inquiry provision's burden on speech is lacking. "In general, 'almost all of the [commercial speech] restrictions disallowed under [the narrow tailoring] prong have been *substantially excessive*, disregarding *far* less restrictive and more precise means.'" *Hunt v. City of Los Angeles*, 638 F.3d 703, 717 (9th Cir. 2011) (quoting *Fox*, 492 U.S. at 479) (emphasis added). Courts have struck down only those laws that go "*much further* than is necessary to serve the interest asserted." *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (emphasis added) (holding law prohibiting "trademarks like . . . 'Down with racists,' 'Down with sexists,' 'Down with homophobes'" was not narrowly tailored to interest in preventing disparaging language from disrupting the orderly flow of commerce); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948 (9th Cir. 2011) (en banc) (holding law "prohibit[ing] 'signbearers on sidewalks seeking patronage or offering handbills'" was not narrowly tailored to interest in promoting the flow of traffic in the streets).[3]

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issues of their own that are not before us, nor have been tested in any other court as far as I can tell. The opinion does not persuade me that a law of uncertain constitutionality is an "obvious" alternative.

[3] The same is true for the examples relied on by Judge Bennett's partial concurrence. *See Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626 (1985) (holding bans on illustrations and non-approved information in attorney advertisements were not narrowly tailored to interest in combatting manipulative advertisements intended to stir up litigation); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61,

On this front, the opinion takes issue with the fact that the inquiry provision bars landlords from accessing records of a prospective tenant's recent or violent offenses. Op. at 27. But one of Seattle's substantial interests is reducing discrimination against *anyone* with a criminal record—not just those with old or nonviolent records. Restricting access to records of recent or violent offenses is at the core of, and no less necessary to accomplishing, Seattle's aims than restricting access to older and less violent criminal records. How is restricting access to information at the heart of the discrimination that Seattle aims to eliminate "substantially excessive" in relation to Seattle's goals? *Hunt*, 638 F.3d at 717. How would excluding such records from the scope the inquiry provision make Seattle's law "more precise"? *Id.*

Finally, the opinion's characterization of Seattle's reasoning in enacting the inquiry provision as "tenuous" is unfounded. The record before us links to a public recording of the hearing at which Seattle considered whether the inquiry provision should include recent offenses.[4] At this hearing, the proponent of an amendment to include recent offenses in the provision's scope noted that (1) widespread access to criminal records is a modern phenomenon, yet (2) there was "no evidence" in the studies or other evidence before the city that this change in access led

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73–74 (1983) (holding ban on "unsolicited advertisements for contraceptives" was not narrowly tailored to interest in "aiding parents' efforts to discuss birth control with their children.").

[4] City of Seattle, Civil Rights, Utilities, Economic Development, and Arts Committee (Aug. 8, 2017), https://www.seattlechannel.org/mayor-andcouncil/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x79673 at 1:02:15–1:17:50.

to better (or worse) outcomes for landlords or tenants. Accordingly, the proponent reasoned that access to criminal records—new or old—had only opened the door to unwarranted discrimination. The record shows that several other members of Seattle's city council endorsed this view. After a considered discussion, the change was adopted unanimously, as was the ultimate legislation later.

What exactly about Seattle's reasoning was "tenuous"? It (roughly) echoes a line of reasoning familiar to this Court: a conclusion reached after evaluating the results of a kind of "natural experiment" created by a change in circumstances. *Cf. McShannock v. JP Morgan Chase Bank NA*, 976 F.3d 881, 892 (9th Cir. 2020) (noting natural experiment created by change of law in Second Circuit). Here, Seattle reached its conclusion after comparing the evidence before it on the state of the rental market before, and after, the advent of widespread access to criminal records. The opinion may disagree with Seattle's read of this evidence, but it does not explain how it came to that conclusion. That is an unpersuasive basis for overruling Seattle's considered effort to tackle a vexing local issue.

II

I believe our precedent requires us to uphold the inquiry provision. There is a "reasonable" fit between the inquiry provision and Seattle's aims. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995). And Seattle's version of the inquiry provision is not "substantially excessive" in relation to Seattle's goals. *Hunt*, 638 F.3d at 717. The inquiry provision restricts only landlords' access to prospective tenants' criminal records—the precise information upon which Seattle wants to stop landlord discrimination. It goes no

further. It does not bar landlord inquiries into a prospective tenant's rental history, income history, character references, job history, *etc.* A landlord could ask for references from recent landlords. A landlord could ask previous landlords "Hey, did this tenant ever do anything to make you or your other tenants feel unsafe?" "These ample alternative channels for receipt of information about" prospective tenants' ability to safely and successfully lease an apartment demonstrate that the law's sweep is neither disproportionate nor imprecise. *Fla. Bar*, 515 U.S. at 634.

The targeted nature of the inquiry provision is analogous to a recent Third Circuit case upholding an inquiry prohibition on prospective job applicants' salary history. *Greater Phila. Chamber of Com. v. City of Phila.*, 949 F.3d 116, 154 (3d Cir. 2020). There, the Third Circuit held that the law at issue was narrowly tailored to Philadelphia's interest in remedying wage discrimination and promoting wage equity as the law "only prohibits employers from inquiring about a single topic, while leaving employers free to ask a wide range of other questions," and it does so only "at a specific point in time—after a prospective employee has applied for a job and before s/he is hired[.]" *Id.* I believe the Third Circuit's reasoning is far more grounded in both the facts of the case and in commercial speech precedent than that of today's result.

The alternatives offered by the landlords, and the opinion, do not undermine the constitutionality of the inquiry provision. For all the reasons set forth in the opinion's footnote 16, *see* Op. at 23 n.16, the landlords' alternatives do not proportionately and adequately address Seattle's aims. And, as set forth in the

preceding section, there is no basis from which we could reasonably conclude that the majority's alternatives would achieve Seattle's aims. The alternatives simply do less. Here, the district court got it exactly right:

> Plaintiffs argue that [Seattle] should have pursued different objectives: perhaps allowing landlords to continue to reject any tenant based on criminal history so long as the landlord makes an individualized assessment of each tenant's criminal history or perhaps prohibiting landlords from considering non-violent crimes or crimes committed several years ago but allowing them to consider recent crimes. Reasonable people could disagree on the best approach, but the Court's role is not to resolve those policy disagreements; it is to determine whether there are numerous obvious and less burdensome methods of achieving the City's objectives.
>
> If the Court were to accept Plaintiffs' logic, it would mean that commercial speech restrictions would rarely survive constitutional challenge because plaintiffs could always argue the government should have applied a restriction to fewer people. If, for example, the City had enacted Plaintiffs' proposal to prohibit landlords from asking about only crimes that were more than two years old, another plaintiff could argue that it should have been three years, or three-and-a-half, or four, and so on.

Yim v. City of Seattle, 2021 WL 2805377, at *13–14 (W.D. Wash. July 6, 2021). Today's result opens the door to exactly this kind of vicious cycle.

III

The record before us shows that Seattle's elected officials did precisely what intermediate scrutiny asks them to do: "carefully calculate[] the costs and benefits associated with the" inquiry provision. *Discovery Network*, 507 U.S. at 417 (cleaned up). Seattle's representatives compiled and considered data, studies, and public input on this issue. They talked through their reasoning. And they ultimately reached a consensus. The inquiry provision may or may not be "the single best" solution to Seattle's problems, *Fox*, 492 U.S. at 480, but it is a reasonable, informed, and targeted attempt. That is all our precedent asks. For that and the foregoing reasons, I respectfully dissent from the decision to strike down the inquiry provision.

Filed July 6, 2021

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHONG YIM, *et al.*, Plaintiffs, v. CITY OF SEATTLE, Defendant.	CASE NO. C18-0736-JCC ORDER

This matter comes before the Court on the parties' cross motions for summary judgment (Dkt. Nos. 23, 33). Having thoroughly considered the parties' briefing and the relevant record, and oral argument from the parties, hereby GRANTS the City of Seattle's motion and DENIES Plaintiffs' motion for the reasons explained herein.

I. INTRODUCTION

In late 2017, the City of Seattle enacted the Fair Chance Housing Ordinance, Seattle Municipal Code § 14.09 *et seq.*, which, at its core, prohibits landlords from asking anyone about prospective or current tenants' criminal or arrest history and from taking adverse action against them based on that information.[1] A few months after the Ordinance took

[1] During the COVID-19 pandemic, the City amended the Ordinance to also prohibit landlords from taking adverse action

effect, three landlords and the Rental Housing Association ("RHA"), a trade group comprised of "over 5,300 landlord members," (Dkt. No. 24 at 5), filed the present suit, alleging that the Ordinance violates their federal and state substantive due process rights and their federal and state free speech rights.

The section of the Ordinance Plaintiffs challenge contains three provisions that the Court will refer to as the "adverse action provision," the "requirement provision," and the "inquiry provision." *See* S.M.C. § 14.09.025(A)(2). The adverse action provision prohibits "any person" from "tak[ing] an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history."[2] *Id.* The requirement provision prohibits "any person" from "[r]equir[ing] disclosure" of "a prospective occupant, a tenant, or a member of their household['s] . . . arrest record, conviction record, or criminal history," and the inquiry provision prohibits "any person" from "inquir[ing] about" the same information, even if it is not required. *Id.*

Plaintiffs argue that the adverse action provision violates their federal and state substantive due

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based on evictions occurring during or shortly after the state of emergency caused by the pandemic. *See* S.M.C. § 14.09.026. As a result, the City also renamed the Ordinance the "Fair Chance Housing and Eviction Records Ordinance." *See* S.M.C. § 14.09.005. Because only the criminal history provisions are relevant here, and because the parties use the previous name, the Court refers to the Ordinance as the "Fair Chance Housing Ordinance."

[2] "Adverse action" is defined to include, among other things, refusing to rent to the person, evicting the person, or charging higher rent. S.M.C. § 14.09.010.

process rights and that the inquiry provision violates their federal and state free speech rights. (Dkt. No. 48 at 11.) Plaintiffs argue that both provisions are unconstitutional on their face, and that the Court should prohibit the City from enforcing them against anyone. The Court will not do so because neither provision violates Plaintiffs' substantive due process or free speech rights and Plaintiffs have not shown that the Ordinance is unconstitutional on its face.

II. PROCEDURAL BACKGROUND

The parties stipulated that "discovery and a trial are unnecessary" and that the Court should resolve this matter based on the parties' cross motions for summary judgment, which are based on a stipulated record. (Dkt. Nos. 9 at 2, 24, 33-1–33-13.) The parties further stipulated that if the Court determines that there is a genuine issue of material fact, it should resolve the disputed factual issue based on the record before it, without holding a trial. (Dkt. No. 9 at 2–3.)

III. LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law," and a dispute of fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

IV. DISCUSSION

A. Substantive Due Process

The Fourteenth Amendment of the United States Constitution provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This provision "guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989), *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). The Washington Constitution provides the same protection. *See* Wash. Const. art. I, § 3. The Court certified several questions regarding Plaintiffs' state substantive due process claims to the Washington Supreme Court, which concluded that "state substantive due process claims are subject to the same standards as federal substantive due process claims." *Yim v. City of Seattle*, 451 P.3d 694, 696 (Wash. 2019). Therefore, the Court's analysis of both claims merges.[3]

"To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property." *Nunez v. City of L.A.*, 147 F.3d 867, 871 (9th Cir. 1998). Plaintiffs allege that the City has deprived them of their "right to rent their property to whom

[3] The Court agrees with the parties that the Washington Supreme Court's analysis of federal law in *Yim* is not binding on this Court and therefore the Court analyzes Plaintiffs' due process claims independently.

they choose, at a price they choose, subject to reasonable anti-discrimination measures."[4] (Dkt. No. 1-1 at 3.) The source of this property right is not clear. Plaintiffs originally cited Washington law, (*id*), but after the Washington Supreme Court answered the Court's certified questions Plaintiffs cited two different U.S. Supreme Court opinions: one that is nearly one-hundred years old, (*see* Dkt. No. 70 at 4 n.1 (citing *Terrace v. Thompson*, 263 U.S. 197, 215 (1923)), and another that was decided well after they filed their complaint, (*see* Dkt. No. 84 (citing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)). But the Supreme Court has made clear that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Because the City does not dispute that such a property right exists or that the Ordinance deprives Plaintiffs of that right, the Court assumes without deciding that the Ordinance deprives Plaintiffs of a property right.[5]

The parties disagree about the next step of the analysis. Plaintiffs argue that because a property right is involved, the Court must examine whether the Ordinance "substantially advances" a legitimate public purpose, (Dkt. Nos. 23 at 24, 48 at 30–32),

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[4] Plaintiffs do not argue that the Ordinance affects the RHA's property rights, so the Court understands only the landlord Plaintiffs to assert substantive due process claims.

[5] The Ordinance does not regulate price, so the Court focuses exclusively on landlords' alleged right to rent to whom they choose.

meaning the Court must determine whether the Ordinance "is *effective* in achieving some legitimate public purpose," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005). The City argues that the Court's analysis should be more deferential, and that it must determine "only whether the government could have harbored a rational [and legitimate] reason for adopting the law." (Dkt. No. 69 at 3.) According to the City, its *actual* purpose in enacting the Ordinance and the Ordinance's actual effectiveness in achieving that purpose are not relevant to the due process analysis. (*Id.* at 9.) The City is correct.

Nearly a century ago, the Supreme Court held that a municipal ordinance does not violate a property owner's substantive due process rights unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The Court has repeatedly reaffirmed this rule. *See, e.g.*, *Nebbia v. People of N.Y.*, 291 U.S. 502, 537 (1934) ("If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ."); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124–25 (1978) (upholding statute that bore "a reasonable relation to the State's legitimate purpose" and declining to analyze "the ultimate economic efficacy of the statute"). Most recently, in *Lingle*, the Court confirmed that it has "long eschewed [the] heightened scrutiny" that the substantially advances test requires "when addressing substantive due process challenges to government regulation." 544 U.S. at 545. Instead, courts must defer "to legislative judgments about the

need for, and likely effectiveness of, regulatory actions." *Id.* It is no surprise then that the Ninth Circuit has continued to apply the rational basis test to property-based substantive due process claims after *Lingle*. *See, e.g.*, *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) ("The irreducible minimum of a substantive due process claim challenging land use regulation is failure to advance *any* governmental purpose.") (emphasis added).

To determine whether the Ordinance violates Plaintiffs' substantive due process rights, the Court must determine whether the Ordinance could advance any legitimate government purpose. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) ("In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes, but instead look to whether 'the governmental body *could* have had no legitimate reason for its decision.'") (quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993)). The Court need not stray into the hypothetical, however, because the City's *actual* reasons for enacting the statute are legitimate, and, as discussed in detail below, the Ordinance directly advances those legitimate purposes. *See infra* Section B(3)(c). Therefore, with respect to the substantive due process claims, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS the City's motion for summary judgment.

B. Free Speech

Plaintiffs' central claims are their free speech claims. The parties assume that the scope of the free speech clause in Washington's constitution is

coextensive with the First Amendment in this context and the Court will assume the same. (*See* Dkt. Nos. 23 at 9 n.2, 33 at 13 n.38.) Before turning to the merits of Plaintiffs' claims, the Court must first define the scope of their challenge.

The Court understands Plaintiffs to challenge only the inquiry provision on free speech grounds.[6] That provision prohibits "any person" from "inquir[ing] about . . . a prospective occupant, a tenant, or a member of their household['s] . . . arrest record, conviction record, or criminal history." S.M.C. § 14.09.025(A)(2). Plaintiffs challenge the inquiry provision on its face, meaning they request that the Court enjoin the City from enforcing it against *anyone*, not just the plaintiffs before the Court. (*See* Dkt. No. 1-1 at 18–19.) "To succeed in a typical facial attack, [Plaintiffs] would have to establish 'that no set of circumstances exists under which [the Ordinance] would be valid,' or that [it] lacks any 'plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 472 (2010) (internal citations omitted). In the First Amendment context, however, a plaintiff may assert an overbreadth challenge, which is less demanding than a typical facial challenge. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008). To succeed on their overbreadth challenge, Plaintiffs must show that "a

[6] To the extent Plaintiffs challenge the requirement provision, the Court concludes that it does not violate the First Amendment because it governs conduct and only incidentally burdens speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."); *see also Rumsfeld v. F. for Acad. and Inst'l Rts., Inc.*, 547 U.S. 47, 62 (2006).

substantial number of [the Ordinance's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6).

Plaintiffs' theory has shifted over the course of the litigation. In their opening brief, Plaintiffs assert only a traditional facial challenge and do not mention the overbreadth doctrine. (*See* Dkt. No. 23.) Twenty-one pages into their combined reply and response to the City's motion, however, Plaintiffs introduce a two-paragraph overbreadth argument for the first time. (*See* Dkt. No. 48 at 28–29.) Ordinarily "arguments raised for the first time in a reply brief are waived," *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010), but the Court will consider the overbreadth argument here because the brief in which it was introduced is also Plaintiffs' response to the City's motion for summary judgment and the City had an opportunity to respond to it.

Although Plaintiffs purport to challenge the inquiry provision in its entirety, the Court concludes that Plaintiffs lack Article III standing to challenge the inquiry provision with respect to inquiries about current tenants.[7] To establish Article III standing to challenge the tenants provision, Plaintiffs must demonstrate that they have suffered an injury in fact that is fairly traceable to that provision and that is

[7] The parties purport to stipulate to Plaintiffs' standing, (Dkt. No. 24 at 3), but "consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2," *Commodity Future Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). *See also Sosna v. Iowa*, 419 U.S. 393, 398 (1975) (parties "may not by stipulation invoke the judicial power of the United States").

likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also California v. Texas*, 141 S. Ct. 2104, 2119–20 (2021) (holding that a plaintiff lacks standing to challenge a statutory provision if he or she cannot demonstrate that that particular provision caused his or her injuries).

In the First Amendment context, a plaintiff can establish an injury in fact by showing that a statute chilled his or her speech. *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013). A plaintiff may also establish an injury in fact by "demonstrat[ing] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). To do so, the plaintiff must demonstrate a concrete "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.*; *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution" suffices. *Thomas*, 220 F.3d at 1139. In sum, to have standing to challenge the tenants provision, Plaintiffs must show that the statute has already chilled their speech or that they have concrete plans to ask current tenants about their criminal history in the future but have refrained because of a realistic risk of the City enforcing the Ordinance against them. At summary judgment, Plaintiffs must establish standing with "affidavit[s] or other evidence." *Lujan*, 504 U.S. at 561.

Plaintiffs have not met their burden. The landlord plaintiffs do not allege that they have ever asked a current tenant about his or her criminal history in the past, nor do they allege that they intend to do so in the future. Further, nothing in the record shows that the RHA has ever run a background check on a current tenant or that it has concrete plans to do so in the future. Indeed, the fact that the RHA requires landlords to submit a "rental applicant's application" before running a background check suggests that the RHA runs background checks only on prospective occupants.[8] (Dkt. No. 24 at 6.) Therefore, none of the plaintiffs have demonstrated that they have standing to challenge the tenants provision. Accordingly, the Court DISMISSES Plaintiffs' free speech claims aimed at the tenants provision, and the Court's analysis of Plaintiffs' free speech claims will focus exclusively on the prospective occupants provision.

1. The Ordinance Regulates Speech and the First Amendment Applies.

The City argues that the inquiry provision does not implicate the First Amendment because it regulates conduct, not speech. (*See* Dkt. Nos. 33 at 14–16, 50 at 5–6.) The Court disagrees. The inquiry provision directly regulates speech: it prohibits "any person" from "inquir[ing] about . . . a prospective occupant, a

[8] To be sure, it is possible that some landlords require current tenants to apply to renew their leases each year and that these landlords purchase background reports regarding these tenants from the RHA, but nothing in the record shows that to be the case, and the Court cannot conclude that the RHA has standing based on speculation. *Lujan*, 504 U.S. at 561. Further, even if Plaintiffs had produced this evidence, they would have standing only if these individuals would fall under the tenants provision instead of or in addition to the prospective occupants provision.

tenant, or a member of their household['s] . . . arrest record, conviction record, or criminal history." S.M.C. § 14.09.025(A)(2). Therefore, it implicates the First Amendment because it regulates what people can *ask*, not just what they can do. To the extent there is any doubt about the effect of the Ordinance, its disclaimer provision dispels it by requiring landlords to state on their rental applications "that the landlord is prohibited from . . . *asking about* . . . any arrest record, conviction record, or criminal history . . . ." S.M.C. § 14.09.020 (emphasis added).

The inquiry provision is a content-based restriction on speech because it prohibits landlords from asking about certain content: prospective occupants' criminal history. *See Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009). Therefore, it is subject to heightened scrutiny. *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 957 (9th Cir. 2012). The level of scrutiny turns on the nature of the regulated speech. *Id.* If the Ordinance governs non-commercial speech, as Plaintiffs argue, the provision is subject to strict scrutiny. *Id.* If the Ordinance governs commercial speech, as the City argues, the provision is subject to intermediate scrutiny. *Id.*

2. <u>At its Core, the Inquiry Provision Regulates Commercial Speech</u>.

The Court starts with the core of the inquiry provision, which prohibits landlords from asking prospective occupants or other entities, like the RHA, about prospective occupants' criminal histories. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484–85 (1989) ("It is not . . . generally desirable to proceed to an overbreadth issue unnecessarily—that

is, before it is determined that the statute would be valid as applied."). Plaintiffs argue that the inquiry provision does not regulate commercial speech because "the commercial speech doctrine applies only to 'speech which does no more than propose a commercial transaction,'" (Dkt. No. 48 at 14 (quoting *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66 (1983)), and "criminal history is not a proposal to engage in a commercial transaction," (Dkt. No. 48 at 15). This argument suggests Plaintiffs misunderstand the commercial speech doctrine.

Plaintiffs are correct that "the core notion of commercial speech" is "speech which does no more than propose a commercial transaction." *Bolger,* 463 U.S. at 66 (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). But when evaluating whether a statute governs commercial speech, courts look to the context in which the speech appears, not just to the speech in isolation. *See, e.g., Bolger*, 463 U.S. at 67–68 (explaining that speech about public issues "in the context of commercial transactions" is entitled to less First Amendment protection than the same speech in other contexts). Thus, the Supreme Court has held that a rule governing the use of CPA and CFP designations in accountant advertising regulated commercial speech even though the terms "CFA" and "CFP," in isolation, do not propose a commercial transaction. *See Ibanez v. Fla. Dep't of Bus. and Pro. Regul.*, 512 U.S. 136, 142 (1994). Similarly, the Ninth Circuit has held that statutes regulating companies' use of words like "biodegradable" and "recyclable" in their advertising and physicians' use of the term "board certified" governed commercial speech, even though the words "biodegradable," "recyclable," and

"board certified" do not propose commercial transactions. *See Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (board certified); *Assoc. of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 728–29 (9th Cir. 1994) (biodegradable, recyclable); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995) (assuming that "information on beer labels constitutes commercial speech"). These cases demonstrate that when determining whether speech proposes a commercial transaction, the Court must look to the context in which the speech appears, not just to the speech in isolation.

Further, "speech that does not propose a commercial transaction on its face can still be commercial speech." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021). For example, in *Bolger* itself the Supreme Court held that "an eight-page pamphlet discussing at length the problem of venereal disease and the use and advantages of condoms in aiding the prevention of venereal disease" was commercial speech even though it did not expressly propose a transaction and the only commercial element was a statement at the bottom of the last page explaining that "the pamphlet [was] contributed as a public service by Youngs, the distributor of Trojan-brand prophylactics." 463 U.S. at 62 n.4, 68. In *Ariix*, the Ninth Circuit held that a book that purported to "describe[] the science of nutritional supplements and provide[] [objective] ratings for various nutritional supplement products" was commercial speech because it was actually "a sophisticated marketing sham" that promoted a particular manufacturer's products but did not expressly propose a commercial transaction. 985 F.3d at 1115, 1118. And in *Jordan v. Jewel Food Stores,*

Inc., the Seventh Circuit held that advertisements that promote "brand awareness or loyalty" are commercial speech even if they do not expressly propose a transaction. 743 F.3d 509, 518 (7th Cir. 2014).

"Because of the difficulty of drawing clear lines between commercial and noncommercial speech, the Supreme Court in *Bolger* outlined three factors to consider." *Ariix*, 985 F.3d at 1115. There, the Court considered whether the speech (1) occurred in the context of an advertisement, (2) referred to a specific product, and (3) whether the speaker spoke primarily because of his or her economic motivation. *See Bolger*, 463 U.S. at 671; *Ariix*, 985 F.2d at 1116–17. The "*Bolger* factors are important guideposts, but they are not dispositive." *Ariix*, 985 F.3d at 1116. Speech may be commercial speech even if fewer than all three factors are present. *See Bolger*, 463 U.S. at 67 n.14.

With these principles in mind, the Court turns to the core of the statute here.[9] A prospective occupant is "any person who seeks to lease, sublease, or rent real property." S.M.C. § 14.09.010. Most instances in

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[9] The Supreme Court has also recognized a second, broader category of commercial speech: speech "related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). This second definition has been criticized from the start, *see id.* at 579–80 (Stevens, J. concurring in the judgment) (arguing that this definition of commercial speech is "too broad"), but the Supreme Court has not expressly overruled this portion of *Central Hudson* so lower courts must continue to apply it. *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011). Nevertheless, because most, if not all, of the speech the inquiry provision regulates falls within the first definition, the Court need not examine this broader definition.

which a landlord asks someone seeking to rent property about his or her criminal history are commercial speech. For example, the record suggests that some landlords included questions about criminal history on their rental applications before the Ordinance was enacted.[10] Rental applications fall squarely within the core notion of commercial speech: they are documents that propose a commercial transaction between a landlord and a prospective occupant. Therefore, when the City regulates what landlords can ask in their rental applications, it regulates commercial speech. Landlords also engage in commercial speech when they ask prospective occupants about their criminal history while showing them the property or discussing its features and the terms of the rental. In those circumstances, the purpose of the speech is to advertise a particular product—property rental—and the landlord's motivation for speaking is primarily economic. Thus, many core applications of the statute constitute commercial speech. *See, e.g., Campbell v. Robb*, 162 F. App'x 460, 469 (6th Cir. 2006) (holding that "a statement made by a landlord to a prospective tenant describing the conditions of rental" falls within the core definition of commercial speech); *S.F. Apartment Ass'n v. City and Cnty. of S.F.*, 881 F.3d 1169, 1176 (9th Cir. 2018) (holding that "a discussion between a landlord and a tenant about the possibility of entering into a buyout agreement is commercial speech"); *see*

[10] According to the stipulated facts, after the Ordinance was enacted, the RHA "created a new model application for tenancy for Seattle Landlord members that . . . omits questions about criminal history." (Dkt. No. 24 at 7.) The previous model application is not in the record, but the clear implication is that the previous version asked about criminal history.

also Greater Phila. Chamber of Com. v. City of Phila., 949 F.3d 116, 137 (3d Cir. 2020) (holding that City ordinance prohibiting employers from asking applicants about their salary history regulates commercial speech).

Plaintiffs argue that many landlords seek criminal history information from the RHA, and that speech between landlords and the RHA is not commercial speech because the RHA is not a party to the underlying rental transaction between the landlord and tenant. (*See* Dkt. No. 48 at 17.) But that framing overlooks that the only speech the Ordinance restricts between a landlord and the RHA is a proposal to engage in *a separate* commercial transaction—the purchase of a background report.

The RHA's website advertises various "Screening Products" landlords can purchase, including a "Background Screening" package for "$25 per applicant" and a "Seattle Premium" screening package for "$45 per applicant."[11] *See* Rental Housing Association of WA, *Screening Products*, RHAWA.org (July 6, 2021, 8:10 AM), https://www.rhawa.org/tenant-screening##. A landlord wishing to purchase a background report may do so by logging onto the RHA's online system and entering an "applicant's name, date of birth, and social security number" and submitting "the rental applicant's application" and "the applicant's consent to be screened." (Dkt. No. 24 at 6–7.) In addition, the

[11] The Court takes judicial notice of the website pursuant to Federal Rule of Evidence 201(c)(1) because the parties cannot reasonably question the accuracy of the RHA's website regarding this point. Fed. R. Evid. 201(b)(2).

landlord must pay for the report.[12] After a landlord purchases a report, the RHA obtains a background report from a company called Innovative Software Solutions and provides a copy to the landlord without any "alter[ation] or reformat[ting] by the RHA." (*Id.*) Landlords may also request the report by e-mail or by fax. (*Id.* at 6.) In short, landlords pay the RHA to serve as a middleman between them and Innovative Software Solutions.

The speech the Ordinance covers—a landlord specifying the background check he or she wishes to purchase—is quintessential commercial speech. It boils down to the landlord asking, "Can I purchase a background report for this particular applicant?" Therefore, these applications of the statute also regulate commercial speech.

3. The Core of the Statute is Constitutional.

When evaluating the permissibility of government restrictions on commercial speech, the Court must evaluate four factors. First, the Court must determine whether the speech concerns unlawful activity or is misleading. *Central Hudson*, 447 U.S. at 566. If so, it is not entitled to First Amendment protection and the

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[12] The stipulated facts omit the fact that landlords must pay for the reports, and Plaintiffs' briefing characterizes the communication between a landlord and the RHA as a "request" or "query." (Dkt. Nos. 24 at 5–7, 48 at 10.) Plaintiffs' briefing also refers generically to "screening companies . . . offer[ing] information for a price," (Dkt. No. 23 at 13), and landlords purchasing background reports, (Dkt. No. 48 at 15), but studiously avoids drawing attention to the fact that *the RHA* sells background reports. Whether that framing was intentional or inadvertent, there is no dispute that to obtain a background report from the RHA, a landlord must *purchase* the report, not just "request" criminal history information.

government may ban it "without further justification." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). If not, the government may regulate the speech if it satisfies the following three-part test: "First, the government must assert a substantial interest in support of the regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'" *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 624 (1995) (quoting *Central Hudson*, 447 U.S. at 564–65).

a. The Ordinance Does Not Regulate Speech that is Misleading or that Concerns Unlawful Activity.

The inquiry provision does not target misleading speech. Indeed, the central purpose of the Ordinance is to prevent landlords from learning and using *true* information about prospective occupants' criminal histories. The Ordinance also does not regulate speech concerning unlawful activity. That limitation "has traditionally focused on . . . whether the speech proposes an illegal transaction . . . instead of whether the speech is associated with unlawful activity." *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 821 (9th Cir. 2013). The speech at issue here does not propose an illegal transaction.

b. The City's Interests in Reducing Barriers to Housing for People with Criminal Records and Combatting Racial Discrimination in Housing are Substantial.

When determining whether the government's interest in regulating commercial speech is substantial, the Court may consider only "the

interests the [government] itself asserts." *Edenfield*, 507 U.S. at 768. In other words, the Court may not supply hypothetical interests that the government could have but did not offer. *Id.* Further, the Court need not accept the interests the government offers "if it appears that the stated interests are not the actual interests served by the restriction." *Id.*

The City argues the Ordinance advances two interests: "reduc[ing] barriers to housing faced by people with criminal records and . . . lessen[ing] the use of criminal history as a proxy to discriminate against people of color disproportionately represented in the criminal justice system."[13] (Dkt. No. 33 at 20.) Plaintiffs all but concede that these interests are substantial, and the Court agrees that they are.

Plaintiffs appear to argue that the Court should not consider the City's professed interest in combatting racial discrimination because that interest did not actually motivate the City in enacting the Ordinance. (*See* Dkt. No. 48 at 8–9 (arguing that "[r]acial discrimination is not the issue here").) However, the Ordinance's recitals identify "racial inequities in the criminal justice system [that] are compounded by racial bias in the rental applicant selection process" as one of the reasons the City enacted the Ordinance. (Dkt. 33–12 at 57.) Further, the record shows that the City was concerned with racial discrimination when it was considering the

[13] Although the City does not state it as clearly, the City advances a third interest: counteracting the disparate impact the use of criminal history in housing decisions has on people of color, even absent intentional discrimination. (*See, e.g.*, Dkt. No. 33 at 8–9.) Because the Court concludes the other two interests are substantial, the Court need not examine this third interest.

legislation. In May 2017, the Director of Seattle's Office for Civil Rights sent a letter to the City Council's Civil Rights Committee that identified "Racial equity" as "Goal 2" of the proposed legislation. (Dkt. No. 33-6 at 19.) Two months later, the Office for Civil Rights moved "Racial equity" to "Goal 1." (Dkt. No. 33-7 at 7.) Plaintiffs do not cite any evidence suggesting that the City's professed interest in combatting racial discrimination is just a *post hoc* litigating position. Therefore, there is no genuine dispute that one of the reasons the City enacted the Ordinance was to combat racial discrimination.[14]

Plaintiffs also argue that the Ordinance's limited exemption for federally funded housing demonstrates that both of the City's proffered interests are pretextual and that its actual purpose in enacting the Ordinance was to burden private landlords while advantaging City-owned public housing. (*See* Dkt. Nos. 23 at 14–17, 48 at 23–25.) This argument strains credulity. While it is true that a statute's underinclusiveness could raise "doubts about whether the government is in fact pursuing the interest it invokes," the narrow exemption Plaintiffs complain about does not. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011). That exemption provides:

> This Chapter 14.09 shall not apply to an adverse action taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy, including but not limited to when any member of the household is subject to

[14] To the extent there is a genuine dispute, the Court resolves the dispute in favor of the City and finds that one of the reasons the City enacted the Ordinance was to combat racial discrimination.

> a lifetime sex offender registration requirement under a state sex offender registration program and/or convicted of manufacture or production of methamphetamine on the premises of federally assisted housing.

S.M.C. § 14.09.115(B). Although the City likely intended it to do so, this provision does not actually exempt federally funded public housing providers from the inquiry provision, which is the only provision Plaintiffs challenge on free speech grounds. It states only that the Chapter does not apply "to an adverse action taken by" a public housing provider; it never says that the Chapter does not apply to an inquiry by the provider. The provision that appears to exempt federally funded public housing providers from the inquiry provision is the first exemption, which provides that the Ordinance "shall not be interpreted or applied to diminish or conflict with any requirements of state or federal law." S.M.C. § 14.09.115(A). Regardless, both provisions support the City's explanation that it sought to avoid enacting an Ordinance that could be preempted by federal law; they do not show that the City intended to burden private landlords while advantaging publicly funded housing. (*See* Dkt. No. 50 at 10.)

c. The Ordinance Directly Advances the City's Interests in Reducing Barriers to Housing for People with Criminal Records and Combatting Racial Discrimination.

The City bears the burden of showing that the Ordinance directly advances its proffered interests. *Edenfield*, 507 U.S. at 770. "This burden is not satisfied by mere speculation or conjecture; rather, a

governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770–71. The City's burden is not a heavy one. The City must show only that it did not enact the Ordinance "based on mere 'speculation and conjecture.'" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (quoting *Edenfield*, 507 U.S. at 770). When making that determination the Court's role is not "to reweigh the evidence *de novo*, or to replace [the City's] factual predictions with [its] own." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994). It is only to ensure that "the municipality's evidence . . . fairly support[s] the municipality's rationale for its ordinance." *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002).

The Supreme Court has not provided detailed guidance in a commercial speech case about what kind evidence is required. At one end of the spectrum, the Court held in *Edenfield* that the government fails to meet its burden when it offers "*no* evidence or anecdotes in support of its restriction." *Fla. Bar*, 515 U.S. at 628 (characterizing *Edenfield*). At the other end of the spectrum, the Court held in *Florida Bar* that "a 106-page summary of [a] 2-year study" that contained "both statistical and anecdotal" evidence supporting the government's conclusion sufficed. *Id.* at 626–29. Plaintiffs suggest that *Florida Bar* set the constitutional floor, and that the Court must strike down the Ordinance unless the City provides evidence similar to the 106-page summary of the study in that case. (*See* Dkt. No. 48 at 19.) The Court disagrees.

The Supreme Court has held that "the validity of restrictions on commercial speech should not be

judged by standards more stringent than those applied to expressive conduct . . . or to relevant time, place, or manner restrictions." *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993). Thus, when faced with gaps in its commercial speech jurisprudence, the Court has looked to those "other First Amendment contexts" for guidance. *Fla. Bar*, 515 U.S. at 628; *see also Edge Broad.*, 509 U.S. at 429–31; *Fox*, 492 U.S. at 477–79. In *Alameda Books*, Justice O'Connor, writing for four justices, explained that the government is not required to justify a time, place, or manner restriction with "empirical data" because a "municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." 535 U.S. 425, 439–40 (2002). Justice Kennedy concurred in the judgment and in the plurality's analysis of "how much evidence is required," *id.* at 449, ultimately concluding that "a city must have latitude to experiment, at least at the outset, and that very little evidence is required," *id.* at 451. Accordingly, in addition to or instead of empirical data, the government may rely on anecdotes, "history, consensus, and 'simple common sense.'" *Fla. Bar*, 515 U.S. at 628 (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992).

i. The Ordinance Directly Advances the City's Interest in Reducing Barriers to Housing for Individuals with Criminal Records.

Plaintiffs concede that the record demonstrates "that many people have criminal records, that such records are disproportionately held by minorities, that

stable housing helps these individuals to re-integrate into society, and that those with a criminal history tend to struggle with housing." (Dkt. No. 48 at 19.) Plaintiffs argue, however, that the City has not shown that the Ordinance directly advances its interest in reducing barriers to housing for people with criminal records because the record does not show "that landlords frequently reject potential tenants solely because of their criminal records." (*Id.*)

Before turning to the record, the Court makes two observations. First, the City is not required to show that landlords reject potential tenants "solely" because of their criminal records. If a prospective occupant's criminal record is one of several factors that contributes to a landlord's decision to refuse to rent to him, the City could reasonably conclude that the Ordinance would materially reduce barriers to housing for those with criminal records. Second, the City is not required to show that landlords reject applicants based on criminal history "frequently." While the City must show that housing discrimination against individuals with criminal records is real, the City is not required to wait for some threshold number of residents to face discrimination before acting. With these clarifications, the Court turns to the record, which contains both empirical and anecdotal evidence demonstrating that some landlords in Seattle rejected potential tenants based on their criminal records before the Ordinance was enacted.[15]

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[15] Because the three categories of evidence the Court examines suffice to show that the inquiry provision directly advances the City's interests, the Court need not examine every piece of evidence the City considered before enacting the Ordinance.

First, the City cites to a 1997 study in which the author surveyed ex-offenders and property managers in Seattle about barriers to housing for people released from prison. *See* Jacqueline Helfgott, *Ex-offender Needs Versus Community Opportunity in Seattle, Washington*, 61 Fed. Probation 12 (1997). Out of 196 property managers surveyed, 43% "said that they would be inclined to reject an applicant with a criminal conviction." *Id.* at 20. The most common reason property managers were inclined to reject applicants with criminal records was to ensure the safety of the community, and the second most common reason was that "ex-offenders are not wanted on the property or in the neighborhood because they have bad values." *Id.* One landlord commented, "I don't like these people. They should all stay in jail." *Id.* This finding was consistent with the survey of ex-offenders, who reported that "housing was the[ir] most difficult need to meet," in part, because of "discrimination as a result of ex-offender status." *Id.* at 16.

Second, the City considered anecdotal evidence from members of the public. On May 23, 2017, the City heard from a social worker assisting individuals in a law enforcement diversion program who testified that "a majority" of the "over 400" people in the program are "unable to access the rental market because of their criminal histories." *Civil Rights, Utilities, Economic Development & Arts Committee 5/23/17*, SEATTLE CHANNEL (May 23, 2017), http://www.seattlechannel.org/mayor-and-council/city-council/2016/2017-civil-rights-utilitieseconomic-development-and-arts-committee/?videoid=x76441 (28:00–30:04). She reported that "on a daily basis" she has "conversations with landlords who say, 'We don't accept individuals here with any drug conviction. We don't accept

individuals here with any theft conviction.'" *Id.* at 28:23–28:34. A housing case manager with Catholic Community Services whose "job boils down to calling private landlords and asking if they're willing to rent to someone with [certain] conviction[s]," *id.* at 24:01–24:18, reported that although Catholic Community Services "offers a guaranteed payment of up to a certain dollar amount for landlords during a certain period of time . . . it is still extremely difficult for [the organization] to house the people [it] work[s] with, with criminal backgrounds," *Civil Rights, Utilities, Economic Development & Arts Committee 7/13/17*, SEATTLE CHANNEL (May 23, 2017), http://www.seattlechannel.org/mayor-andcouncil/city-council/2016/2017-civil-rights-utilities-economic-development-and-artscommittee/?videoid=x78912 (1:50:18–1:50:53). The City also heard from individuals who testified that they had been denied housing based on their criminal histories. (*See* Dkt. No. 34 at 5.)

Third, the City was aware that some landlords were asking prospective occupants about their criminal history. *See* Dkt. No. 33-12 at 56; *see also* Helfgott at 20 (finding that 67% of property managers surveyed "indicated that they inquire about criminal history on rental applications"). Landlords do not often include questions on their rental applications just because they are curious, and the City was entitled to use common sense to infer that the reason landlords were asking for that information during the application process was to use it to screen applicants.

Plaintiffs argue the City could not have reasonably concluded that any landlords had refused to rent to people based on their criminal history because the evidence it considered shows only "correlation, not

causation" and did not "control for . . . other variables," such as limited credit history, that might be causing individuals with criminal records to struggle to secure housing. (Dkt. No. 48 at 22.) This argument is not persuasive.

First, in *Alameda Books* the Supreme Court held that the government may rely on evidence that is "consistent with" the government's theory and it is not required to "prove that its theory is the only one that can plausibly explain the data." *See* 535 U.S. at 435–39. In other words, the government is not required to isolate the other variables and conclusively establish that its theory about why a particular social problem is occurring is the only cause before legislating. *See id.* at 436–37 (holding that the government "does not bear the burden of providing evidence that rules out every theory . . . that is inconsistent with its own."). That alternative theories may also explain the evidence does not render the Ordinance unconstitutional.

Second, the City *did* consider evidence showing that some landlords took adverse action against prospective occupants based on their criminal history. The City heard testimony from people who were told directly by landlords that they would not rent to people who had been convicted of certain crimes. It also considered the Helfgott study, which reported that the two primary reasons landlords were not inclined to rent to individuals with criminal histories were to ensure the safety of the community and because people with criminal records were not welcome because they have bad values. Therefore, although it was not required, the City considered evidence showing that criminal history *itself* is a

barrier to housing, even when considered in isolation from other variables like credit history.

Plaintiffs complain that the evidence the City considered is not reliable because the public comments were "unsworn" and the Helfgott study is "dated" and has "a small sample size." (Dkt. No. 48 at 19, 21.) But the Supreme Court has not limited the kind of evidence a legislature may consider. In fact, it has expressly rejected some of the arguments Plaintiffs make now. For instance, in *Florida Bar*, the Court held, over the dissent's objection, that the government was entitled to rely on a report that summarized survey results with "few indications of the sample size . . . and no copies of the actual surveys employed." 515 U.S. at 628. And in *Alameda Books*, the Court held that the government was entitled to rely on a survey that was several years old. 535 U.S. at 430. At bottom, the Court's role is to determine whether *the legislature* could have reasonably concluded from the evidence before it that prohibiting landlords from asking about criminal history would materially advance its interest in reducing barriers to housing for people with criminal histories. Based on the evidence above, the City's conclusion was reasonable.

ii. The Ordinance Directly Advances the City's Interest in Combatting Racial Discrimination in Housing.

Plaintiffs do not argue that the Ordinance fails to directly advance the City's interest in combatting racial discrimination and the record shows that it does. In 2014, Seattle's Office for Civil Rights conducted fair housing testing by having "paired testers posing as prospective renters . . . measure the

differences in the services they received from leasing agents, as well as information about vacancies, rental rates, and other conditions." Press Release, Seattle Office for Civil Rights, City Files Charges Against 13 Property Owners for Alleged Violations of Rental Housing Discrimination (June 9, 2015), https://www.seattle.gov/Documents/Departments/CivilRights/socr-pr-060915.pdf. "The matched pairs of testers had similar rental profiles in every respect except for their race or disability." *Id.* Even so, "African American and Latino testers were told about criminal background and credit history checks more frequently than the white testers." *Id.* In 2017, as the City Council was developing the Ordinance, the Director of Seattle's Office for Civil Rights shared this information with the Council, noting that, "[i]n some cases, African Americans were told they would have to undergo a criminal record check when similarly situated white counterparts were not." (Dkt. Nos. 33-6 at 19, 33-7 at 8.) The City could reasonably conclude from this evidence that some landlords were using criminal history as a pretext for racial discrimination and that prohibiting landlords from considering criminal history would reduce racial discrimination.

4. There is a Reasonable Fit Between the Inquiry Provision and the City's Objectives.

To justify the inquiry provision, the City must establish a "reasonable fit" between that provision and the City's objectives. *Fox*, 492 U.S. at 480. To satisfy this standard, the government must show that the fit between the ends it seeks and the means it used "is not necessarily perfect, but reasonable; that [the government's approach] represents not necessarily the single best disposition but one whose scope is 'in

proportion to the interest served.'" *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). One "relevant consideration in determining whether the 'fit' between ends and means is reasonable" is whether "there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). At the same time, the reasonable fit inquiry does not "require elimination of all less restrictive alternatives." *Fox*, 492 U.S. at 478; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (holding that a speech restriction does not fail intermediate scrutiny "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative"). Because the government "need[s] leeway," *id.* at 481, to exercise its "ample scope of regulatory authority," *id.* at 477, regarding commercial speech, the Supreme Court has held that commercial speech restrictions that go "only marginally beyond what would adequately have served the governmental interest," *id.* at 479, do not violate the First Amendment. A commercial speech restriction fails the reasonable fit inquiry only if it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 478 (quoting *Ward*, 491 U.S. at 799). In other words, "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. The Supreme Court has "been loath to second-guess the Government's judgment to that effect." *Fox*, 492 U.S. at 478.

With these principles in mind, the Court concludes that the Ordinance is a reasonable means of achieving the City's objectives and does not burden substantially more speech than is necessary to achieve them. The Ordinance burdens a limited amount of speech—inquiries about prospective occupants' criminal history—and most, if not all, of the speech that the City has regulated serves to advance its goals. Plaintiffs argue that the City could have pursued a host of purportedly less-speech-restrictive measures to achieve its objective in reducing barriers to housing for people with criminal records, but most of Plaintiffs' proposals would not achieve the City's objectives and none of them show that the City's choice to enact the Ordinance was an unreasonable means of pursuing them.

Before turning to Plaintiffs' proposals, the Court observes that Plaintiffs do not dispute that the Ordinance is a reasonable means of achieving the City's interest in combatting landlords' use of criminal history as a pretext for racial discrimination. Plaintiffs do not offer any alternative policies the City could have pursued to achieve this goal, much less numerous obvious alternatives, and the City's fair housing testing shows that existing federal, state, and local laws prohibiting racial discrimination in housing have not been sufficient to solve the problem. Therefore, the Court concludes that the Ordinance is a reasonable means of achieving the City's goal of combatting the use of criminal history as a pretext for racial discrimination.

Although the Court need not "sift[] through all the available or imagined alternative means of" achieving the City's objectives, it will discuss several of

Plaintiffs' suggestions to explain why they do not show that the Ordinance was an unreasonable means of pursuing the City's objectives. *Ward*, 491 U.S. at 797. Plaintiffs first suggest that the City could have "reform[ed] Washington tort law to better protect landlords from liability for crimes committed by their tenants." (Dkt. No. 23 at 18.) But the City does not have the power to change state law, and this alternative would do nothing to reduce barriers to housing erected by landlords who discriminate against individuals with criminal histories for reasons other than concerns about potential tort liability. For instance, many landlords in the Helfgott study reported that they would be inclined to refuse to rent to individuals with criminal records because "they have bad values." Helfgott, 61 Fed. Probation at 20. Reforming Washington tort law would have no impact on these landlords. Plaintiffs' suggestion that the City could "indemnify or insure landlords willing to rent to individuals with a criminal history" suffers from the same defect. (*Id.* at 19.)

Plaintiffs also offer several suggestions that would allow landlords to continue to discriminate against some individuals with criminal histories but not everyone. Specifically, Plaintiffs suggest that the City could have allowed landlords to continue to ask about all crimes but not arrests, "serious offenses" but not other crimes, or all crimes committed within two years of the date of a prospective occupant's rental application. (*Id.*) Along similar lines, Plaintiffs suggest that the City could have exempted more landlords from the Ordinance or could have required landlords to consider applicants' criminal history on a case-by-case basis rather than entirely prohibiting them from considering it. (*Id.* at 20–21.) The problem

with these suggestions is that they would require the City to substitute Plaintiffs' objectives for the City's.

In enacting the Ordinance, the City made a policy decision to prohibit landlords from considering *any* crimes, no matter how violent or how recent. Plaintiffs argue that the City should have pursued different objectives: perhaps allowing landlords to continue to reject any tenant based on criminal history so long as the landlord makes an individualized assessment of each tenant's criminal history or perhaps prohibiting landlords from considering non-violent crimes or crimes committed several years ago but allowing them to consider recent crimes. Reasonable people could disagree on the best approach, but the Court's role is not to resolve those policy disagreements; it is to determine whether there are numerous obvious and less burdensome methods of achieving *the City's* objectives.

If the Court were to accept Plaintiffs' logic, it would mean that commercial speech restrictions would rarely survive constitutional challenge because plaintiffs could always argue the government should have applied a restriction to fewer people. If, for example, the City had enacted Plaintiffs' proposal to prohibit landlords from asking about only crimes that were more than two years old, another plaintiff could argue that it should have been three years, or three-and-a-half, or four, and so on. The Supreme Court has not analyzed commercial speech restrictions this way. For instance, in *Florida Bar*, the Court determined that the Florida Bar's regulation prohibiting personal injury lawyers from "sending targeted direct-mail solicitations to victims and their relatives" within 30 days of "an accident or disaster" was "reasonably well

tailored," without requiring the bar to explain why it did not adopt a 28 or 29-day ban that would have burdened less speech. 515 U.S. at 620, 633. At bottom, the reasonable fit test "allow[s] room for legislative judgments" and the legislature's judgment here was that prohibiting landlords from considering *all* crimes was the best way to achieve the City's interests. *Edge Broad.*, 509 U.S. at 434.

A. The Ordinance is Not Substantially Overbroad.

Having concluded that the statute is constitutional in its core applications, Plaintiffs' traditional facial challenge fails. *See Stevens*, 559 U.S. at 472. The Court now must turn to whether the statute is facially unconstitutional under the less-demanding overbreadth standard. Plaintiffs argue that even if the statute is constitutional at its core, it is substantially overbroad for two reasons: First, the Ordinance prohibits landlords from asking individuals and entities other than prospective occupants and the RHA about prospective occupants' criminal history, such as former landlords or the courts. (Dkt. No. 48 at 28.) Second, Plaintiffs argue, the statute is so broad that it prohibits *anyone* from investigating the criminal history of any prospective occupant or tenant. (*See id.* at 28–29.) Thus, according to Plaintiffs, the Ordinance prohibits journalists from investigating the criminal history of anyone who happens to be a renter and prohibits firearm dealers and employers from running background checks on gun purchasers or prospective employees who are renters. (*Id.*) Neither argument is persuasive.

Prohibiting the government from enforcing a statute that is constitutional in its core applications

but arguably unconstitutional in others is "strong medicine" that courts use "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). To prevail on their overbreadth challenge, Plaintiffs "must demonstrate from the text of [the Ordinance] and from actual fact that a substantial number of instances exist in which the [Ordinance] cannot be applied constitutionally." *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988). When a statute is overbroad but not substantially overbroad, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615–16. Thus, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

Plaintiffs argue that the statute is substantially overbroad because it prohibits landlords from asking individuals other than prospective occupants about their criminal history, and these conversations are not commercial speech because they are not proposals to engage in commercial transactions. (Dkt. No. 48 at 28.) The City does not dispute that the statute covers these inquiries, so the Court accepts Plaintiffs' interpretation. Even so, the Court need not analyze whether these hypothetical applications of the Ordinance would be constitutional because even assuming they are not, Plaintiffs have not shown "from actual fact that a substantial number of [those] instances exist." *N.Y. State Club Ass'n*, 487 U.S. at 14; *see also Wash. State Grange*, 552 U.S. at 449–50 ("In determining whether a law is facially invalid, [courts]

must be careful not to . . . speculate about 'hypothetical' or 'imaginary' cases."). Plaintiffs do not claim to have ever contacted a former landlord or court for criminal history information, nor do they provide any evidence that other landlords have. Therefore, Plaintiffs have not shown on this record that *any* landlord has done so, much less a substantial number of landlords. *See id.*

Plaintiffs also argue that the statute extends well beyond the housing context because it prohibits "any person" from asking about a prospective occupant's criminal history. Thus, Plaintiffs argue, the statute prohibits journalists, firearm dealers, and employers from investigating the criminal history of anyone who happens to be a renter. (Dkt. No. 48 at 29.) The Court agrees that the inquiry provision, which applies to "any person," could be interpreted to cover these inquiries. But, because the Court is construing a City ordinance, it may defer to the City's plausible interpretation of the Ordinance, including any limiting construction the City has adopted. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563 (2011); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."); S.M.C. § 14.09.085 (providing that the City Attorney's Office—the City's counsel in this litigation—shall enforce the Ordinance). The City argues that the Ordinance applies only in the context of housing transactions because it is entitled the "Fair Chance Housing Ordinance." (Dkt. No. 50 at 7.) Although the title of the Ordinance is a thin reed on which to rest a limiting construction, and the precise boundaries of

the Ordinance under the City's interpretation are not clear, the City's interpretation is not implausible. *See* S.M.C. § 1.04.030 ("the names and headings of titles, chapters, subchapters, parts, . . . and sections of the Seattle Municipal Code [are] part of the law"). Therefore, the Court accepts the City's limiting construction that the statute does not apply to journalists or firearm dealers or employers running background checks.

Because Plaintiffs have not shown "from the text of [the Ordinance] and from actual fact that a substantial number of instances exist in which the [Ordinance] cannot be applied constitutionally," their overbreadth challenge also fails. *N.Y. State Club Ass'n*, 487 U.S. at 14.

V. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS the City's motion for summary judgment.

DATED this 6th day of July 2021.

s/ John. C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON, Plaintiffs, v. THE CITY OF SEATTLE, Defendant.	NO. 96817-9 En Banc Filed NOV 14 2019

YU, J.—This case concerns the facial constitutionality of Seattle's Fair Chance Housing Ordinance, which provides in relevant part that it is an unfair practice for landlords and tenant screening services to "[r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history," subject to certain exceptions. SEATTLE MUNICIPAL CODE (SMC) 14.09.025(A)(2). The plaintiffs claim that

on its face, this provision violates their state constitutional right to substantive due process and their federal constitutional rights to free speech and substantive due process. WASH. CONst. art. I, § 3; U.S. CONST. amends. I, V, XIV.

The merits of the plaintiffs' claims are not before us. Instead, we have been certified three questions by the federal district court regarding the standard that applies to the plaintiffs' state substantive due process claim: (1) "What is the proper standard to analyze a substantive due process claim under the Washington Constitution?" (2) "Is the same standard applied to substantive due process claims involving land use regulations?" and (3) "What standard should be applied to Seattle Municipal Code [chapter] 14.09 ('Fair Chance Housing Ordinance')?" Order, No. C18-0736-JCC, at 2–3 (W.D. Wash. Feb. 5, 2019).

This court has not previously adopted heightened standards for substantive due process challenges to laws regulating the use of property as a matter of independent state law, and we are not asked to do so in this case. Therefore, we answer the district court's questions as follows: Unless and until this court adopts heightened protections as a matter of independent state law, state substantive due process claims are subject to the same standards as federal substantive due process claims. The same is true of state substantive due process claims involving land use regulations and other laws regulating the use of property. Therefore, the standard applicable to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance is rational basis review.

FACTUAL AND PROCEDURAL BACKGROUND

In 2014, the mayor of Seattle and the Seattle City Council convened an advisory committee "to evaluate potential strategies to make Seattle more affordable, equitable, and inclusive." Doc. 33-12, at 59 (Stipulated R.). The committee recommended "a multi-pronged approach of bold and innovative solutions to address Seattle's housing affordability crisis," particularly as related to "barriers to housing faced by people with criminal records." *Id.* at 59–60. Based on the committee's report and its own findings, the Seattle City Council enacted the Fair Chance Housing Ordinance, chapter 14.09 SMC.

Several Seattle landlords and the Rental Housing Association of Washington (which provides tenant screening services) challenged the ordinance's facial constitutionality in King County Superior Court. Their challenge focuses on SMC 14.09.025(A)(2), which makes it an unfair practice for landlords and tenant screening services to "[r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history," subject to certain exceptions. The plaintiffs claim that this provision facially violates their federal free speech rights and their state and federal substantive due process rights.

Defendant city of Seattle (City) removed the case to federal district court, and the parties filed cross motions for summary judgment based on stipulated facts and a stipulated record. The district court has not yet ruled on the summary judgment motions because the parties dispute the standard of review that applies to the plaintiffs' state substantive due

process claim. The plaintiffs contend that the Fair Chance Housing Ordinance deprives property owners of "a fundamental property interest" and is therefore subject to heightened scrutiny. Doc. 23, at 21. The City contends that rational basis review applies.

The district court noted that another pending case involving a different Seattle ordinance, *Chong Yim v. City of Seattle,* No. 95813-1 (Wash. Nov. 14, 2019) *(Yim* I), raises a similar dispute regarding the standard that applies to state substantive due process claims in Washington. Therefore, "wary about applying a potentially inaccurate standard under state law," the district stayed this case and certified to us three questions regarding the applicable standard of review. Order at 2.

ISSUES

A. "What is the proper standard to analyze a substantive due process claim under the Washington Constitution?" *Id.*

B. "Is the same standard applied to substantive due process claims involving land use regulations?" *Id.*

C. "What standard should be applied to Seattle Municipal Code [chapter] 14.09 ('Fair Chance Housing Ordinance')?" *Id.* at 3.

ANALYSIS

Article I, section 3 of the Washington State Constitution provides, "No person shall be deprived of life, liberty, or property, without due process of law." Our state due process protection against "the arbitrary exercise of the powers of government" has both procedural and substantive components. *State v.*

Cater's Motor Freight Sys., Inc., 27 Wn.2d 661, 667, 179 P.2d 496 (1947). The procedural component provides that "[w]hen a state seeks to deprive a person of a protected interest," the person must "receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation." *Amunrud v. Bd. of Appeals,* 158 Wn.2d 208, 216, 143 P.3d 571 (2006). Meanwhile, the substantive component of due process "protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Id.* at 218–19. This case concerns only the substantive component.

In a substantive due process claim, courts scrutinize the challenged law according to "a means-ends test" to determine if "a regulation of private property is effective in achieving some legitimate public purpose." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (emphasis omitted). The level of scrutiny to be applied depends on "the nature of the right involved." *Amunrud*, 158 Wn.2d at 219. "State interference with a fundamental right is subject to strict scrutiny," which "requires that the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 220. Meanwhile, "[w]hen state action does not affect a fundamental right, the proper standard of review is rational basis," which requires only that "the challenged law must be rationally related to a legitimate state interest." *Id.* at 222.

The plaintiffs characterize the right involved here as a "fundamental property interest[]," specifically, "the right of each residential landlord to rent her property to a person of her own choice." Pls.' Resp. Br.

at 15–16. They do not contend that this right requires the application of strict scrutiny, but they do not concede that rational basis review applies either. Instead, the plaintiffs argue that there is a third type of review, which applies in substantive due process challenges to laws restricting "fundamental property rights" or "traditional 'old property' rights." *Id.* at 15 n.6. This third type of review, the plaintiffs contend, is "some form of intermediate scrutiny," which exceeds rational basis review by requiring that laws regulating the use of property must either substantially advance a government interest (the "substantially advances test") or not be unduly oppressive on the property owner (the "unduly oppressive test"). *Id.* at 39.

The level of scrutiny that applies to the plaintiffs' state substantive due process claim is a constitutional question that we decide as a matter of law. *Amunrud*, 158 Wn.2d at 215. We hold that rational basis review applies, and we clarify that the cases cited by the plaintiffs can no longer be interpreted as requiring heightened scrutiny because their "legal underpinnings" have "disappeared." *W. G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014).

A. In answer to the first two certified questions, independent state law does not require heightened scrutiny in article I, section 3 substantive due process challenges to laws regulating the use of property

"[T]he protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with

our sovereignty." *State v. Coe*, 101 Wn.2d 364, 374, 679 P.2d 353 (1984). Therefore, this court has a duty to recognize heightened constitutional protections as a matter of independent state law in appropriate cases. *O'Day v. King County*, 109 Wn.2d 796, 801–02, 749 P.2d 142 (1988). Nevertheless, "[t]his court traditionally has practiced great restraint in expanding state due process beyond federal perimeters." *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991). Accordingly, we have never before required heightened scrutiny in substantive due process challenges to laws regulating the use of property as a matter of independent state law. In light of the arguments presented in this case, we decline to do so now.

We recognize that in a number of cases, this court has recited the "unduly oppressive" test, which appears to exceed rational basis review by asking "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990); *see also, e.g.*, *Tiffany Family Tr. Corp. v. City of Kent*, 155 Wn.2d 225, 238, 119 P.3d 325 (2005); *Orion Corp. v. State*, 109 Wn.2d 621, 651, 747 P.2d 1062 (1987). We have never explicitly rejected the "unduly oppressive" test, although we have noted that it "has limited applicability even in land use cases." *Amunrud*, 158 Wn.2d at 226 n.5. We have also occasionally suggested that a "substantial relation" test applies and that this test requires heightened scrutiny by asking whether police power regulations bear a "'real or substantial relation'" (as opposed to a merely rational relation) to

legitimate government purposes. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 694, 169 P.3d 14 (2007) (plurality opinion) (quoting *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 313, 147 P. 11 (1915)); *see also, e.g., Remington Arms Co. v. Skaggs*, 55 Wn.2d 1, 5–6, 345 P.2d 1085 (1959).

However, this precedent is based on opinions of the United States Supreme Court, not on independent state law. Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 513–15 (2000). The "unduly oppressive" test is derived from an 1894 opinion, *Lawton v. Steele*:

> To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

152 U.S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385 (1894); *see also Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594–95, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962). Meanwhile, the "substantial relation" test is derived from an 1887 opinion, *Mugler v. Kansas*:

> If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the

> duty of the courts to so adjudge, and thereby give effect to the Constitution.

123 U.S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205 (1887). We have never held that any form of heightened scrutiny is independently required by article I, section 3 of the Washington State Constitution, and the parties do not ask us to do so now.[1]

Because the heightened scrutiny apparently required by some of our precedent derives from federal law, we need not consider whether such heightened scrutiny is "incorrect and harmful." *W. G. Clark*, 180 Wn.2d at 66. Instead, we may consider whether the federal "legal underpinnings of our precedent have changed or disappeared altogether." *Id.* As discussed below, the federal legal underpinnings of our precedent have disappeared because the United States Supreme Court requires only rational basis review in substantive due process challenges to laws regulating the use of property. In the absence of a *Gunwall*[2] analysis or any other principled basis for departing from federal law, we decline to do so at this time.

The district court's first two certified questions are "What is the proper standard to analyze a substantive due process claim under the Washington

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[1] Two amici in *Yim* I appear to argue that article I, section 3 does provide enhanced substantive protections beyond those guaranteed by the federal due process clauses. *See* Br. of Amicus Curiae Goldwater Inst. *(Yim* I) at 5; Br. of Amicus Curiae Rental Hous. Ass'n of Wash. (*Yim* I) at 13. However, neither filed an amicus brief in this case and neither provides a principled basis on which to recognize enhanced protections as a matter of independent state law.

[2] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Constitution?" and "Is the same standard applied to substantive due process claims involving land use regulations?" Order at 2. We answer that unless and until this court adopts a heightened standard as a matter of independent state law, article I, section 3 substantive due process claims are subject to the same standards as federal substantive due process claims. The same is true for substantive due process claims involving land use regulations. Our precedent suggesting otherwise can no longer be interpreted as requiring a heightened standard of review as a matter of independent state law.[3]

B. In answer to the third certified question, we hold that rational basis review applies to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance

Because the plaintiffs do not advance an independent state law argument, the parties' primary dispute is the minimum level of scrutiny required by the federal due process clauses. Although this issue is arguably not a question of "local law," RCW 2.60.020, we exercise our discretion to address it because it is necessary to provide complete answers to the certified questions in this case. *See Broad v. Mannesmann Anlagenbau, AG*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000). The plaintiffs contend that federal substantive

[3] Attached as an appendix is a list of this court's precedent that can no longer be interpreted as requiring a heightened standard of review. We caution that this list is not exclusive and that any holding by this court or the Court of Appeals that heightened scrutiny is required in state substantive due process challenges to laws regulating the use of property is no longer good law. We express no opinion as to whether the outcome of any particular case would have been different had it explicitly applied rational basis review.

due process law requires heightened scrutiny of laws regulating the use of property and that it does so because "fundamental attribute[s] of property" are recognized as "fundamental right[s] subject to heightened scrutiny" for substantive due process purposes. Pls.' Resp. Br. at 31. Therefore, the plaintiffs reason, their state substantive due process challenge to the Fair Chance Housing Ordinance cannot be subject to deferential rational basis review.

We disagree. As a matter of current federal law, the "unduly oppressive" and "substantial relation" tests are not interpreted as requiring heightened scrutiny, and the "substantially advances" test has been explicitly rejected. Instead, a law regulating the use of property violates substantive due process only if it "fails to serve any legitimate governmental objective," making it "arbitrary or irrational." *Chevron U.S.A.*, 544 U.S. at 542; *see also Kentner v. City of Sanibel*, 750 F.3d 1274, 1280–81 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 950 (2015); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir.), *cert. denied*, 568 U.S. 1041 (2012). This test corresponds to rational basis review. In addition, the use of property has not been recognized as a fundamental right for substantive due process purposes. Therefore, the standard that applies to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance is rational basis review.

1. The "unduly oppressive" test is no longer interpreted as requiring heightened scrutiny

The plaintiffs correctly point out that the United States Supreme Court has never explicitly overruled the "unduly oppressive" language that originated in

Lawton and was repeated in *Goldblatt*. However, the plaintiffs fail to recognize that the United States Supreme Court does not interpret this language as requiring heightened scrutiny. To the contrary, the United States Supreme Court has made it clear in its 2005 *Chevron U.S.A.* decision that *Lawton* and *Goldblatt* should be interpreted as applying a deferential standard that corresponds to rational basis review.

The reason *Goldblatt* may appear to require heightened scrutiny is that *Goldblatt* was decided during a period of "doctrinal blurring that has occurred between due process and regulatory takings." *Orion Corp.*, 109 Wn.2d at 647. A "regulatory taking" occurs when a government restriction on the use of private property is so onerous that the regulation amounts to "a de facto exercise of eminent domain requiring just compensation." *Id.* at 645. For many years, United States Supreme Court cases did not clearly differentiate between the tests for determining (1) when a regulation is so burdensome that it effectively takes private property and (2) when a regulation arbitrarily interferes with the use of property in violation of substantive due process. *See Chevron U.S.A.*, 544 U.S. at 541–42.

Goldblatt was one such case. Its "unduly oppressive" test, which asks who must bear the economic burden of a regulation, *Amunrud*, 158 Wn.2d at 226 n.5, reflects concerns implicated by the takings clause, such as "the *magnitude or character of the burden* a particular regulation imposes upon private property rights" and "how any regulatory burden is *distributed* among property owners." *Chevron U.S.A.,* 544 U.S. at 542. It does not reflect the

core concern of substantive due process, which is "whether a regulation of private property is *effective* in achieving some legitimate public purpose." *Id.*

While *Goldblatt* "does appear to assume that the inquiries are the same" for both regulatory takings and substantive due process claims, the United States Supreme Court has recognized that "that assumption is inconsistent with the formulations of our later cases." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 n.3, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). As such, *Goldblatt* has been cited most often for takings principles, not due process principles. *E.g., Lucas v.* S.C. *Coastal Council*, 505 U.S. 1003, 1022, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124–27, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

To the extent *Goldblatt* does appear to require heightened scrutiny of laws regulating the use of property for substantive due process purposes, the United States Supreme Court has clarified that it does not. Instead, *Goldblatt* has been interpreted as "applying a deferential 'reasonableness' standard." *Chevron U.S.A.*, 544 U.S. at 541 (internal quotation marks omitted) (quoting and citing *Goldblatt*, 369 U.S. at 594–95; *Lawton*, 152 U.S. at 137). This deferential standard protects against "arbitrary or irrational" restrictions on property use. *Id.* at 542; *see also id.* at 548 (Kennedy, J., concurring).

The "arbitrary or irrational" standard is not heightened scrutiny. It corresponds to rational basis review, which requires only that "the challenged law must be rationally related to a legitimate state

interest." *Amunrud*, 158 Wn.2d at 222. The plaintiffs do not cite, and we cannot find, any post-*Chevron U.S.A.* decision in which the United States Supreme Court has held the "unduly oppressive" test requires heightened scrutiny in substantive due process challenges to laws regulating the use of property.

As we have already held, "[t]hat a statute is unduly oppressive is not a ground to overturn it under the due process clause." *Salstrom's Vehicles, Inc. v. Dep't of Motor Vehicles*, 87 Wn.2d 686, 693, 555 P.2d 1361 (1976). Today, we reaffirm that holding and clarify that the "unduly oppressive" test recited in many of our cases can no longer be interpreted as requiring heightened scrutiny in substantive due process challenges to laws regulating the use of property.

2. The "substantially advances" test has been rejected and the "substantial relation" test is no longer interpreted as requiring heightened scrutiny

As an alternative to the "unduly oppressive" test, the plaintiffs contend that laws regulating the use of property must be scrutinized in accordance with the "substantially advances" test, which the plaintiffs characterize as "a form of heightened scrutiny that closely mirrors this Court's understanding of the unduly oppressive test." Pls.' Resp. Br. at 38. We disagree. Since at least 1934, federal law has required only deferential rational basis review.

The plaintiffs point to the United States Supreme Court's 2005 decision in *Chevron U.S.A.* to argue that a heightened "substantially advances" test is required. However, *Chevron U.S.A.* actually states "that the 'substantially advances' formula was *derived*

from due process" and holds "that it has no proper place in our takings jurisprudence." 544 U.S. at 540 (emphasis added). *Chevron U.S.A.* does not hold that a heightened "substantially advances" test reflects current federal substantive due process law, and it clearly does not.

The "substantially advances" test was set forth in a takings case, *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). However, the test was derived from two *Lochner*-era[4] substantive due process cases, *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928), and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). Both *Nectow* and *Ambler Realty Co.* do state that zoning regulations must have a "'*substantial relation* to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Nectow*, 277 U.S. at 187–88 (emphasis added) (quoting *Ambler Realty Co.*, 272 U.S. at 395). Nevertheless, both cases also state that a regulation fails this test only if it "'has *no* foundation in reason and is a mere *arbitrary or irrational* exercise of power.'" *Id.* at 187 (emphasis added) (quoting *Ambler Realty Co.*, 272 U.S. at 395). This language is arguably contradictory, as the "substantial relation" test may appear to require heightened scrutiny, while the "arbitrary or irrational" test suggests that deferential rational basis review applies. However, any confusion has long since been resolved because the United States

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[4] *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), *abrogated by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937).

Supreme Court does not interpret the "substantial relation" test as requiring heightened scrutiny.

Since at least 1934, the United States Supreme Court has recognized that "the use of property and the making of contracts are normally matters of private and not of public concern," but "[e]qually fundamental with the private right is that of the public to regulate it in the common interest." *Nebbia v. New York*, 291 U.S. 502, 523, 54 S. Ct. 505, 78 L. Ed. 940 (1934). Laws regulating the use of property are therefore not subject to heightened scrutiny:

> The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *see also Greater Chi. Combine & Ctr., Inc. v. City of Chicago*, 431 F.3d 1065, 1071 (7th Cir. 2005) ("[O]ur precedent has routinely applied [*Ambler Realty Co.*] as a rational basis rule for substantive due process and equal protection challenges to municipal ordinances.").

Thus, according to current United States Supreme Court precedent, a law that regulates the use of property violates substantive due process only if it "fails to serve any legitimate governmental objective,"

making it "arbitrary or irrational." *Chevron U.S.A.*, 544 U.S. at 542. Even where a law restricts the use of private property, "ordinances are 'presumed valid, and this presumption is overcome only by a clear showing of arbitrariness and irrationality.'" *Samson*, 683 F.3d at 1058 (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994)); *see also Kentner*, 750 F.3d at 1280–81.

As noted above, this test corresponds to rational basis review, which requires only that "the challenged law must be rationally related to a legitimate state interest." *Amunrud*, 158 Wn.2d at 222. The plaintiffs do not cite, and we cannot find, any post-*Chevron U.S.A.* decision in which the United States Supreme Court has held the "substantial relation" or "substantially advances" tests require heightened scrutiny in substantive due process challenges to laws regulating the use of property. To the contrary, as recently as 2017, the United States Supreme Court reiterated "that the test articulated in *Agins*—that regulation effects a taking if it 'does not substantially advance legitimate state interests'—was improper *because it invited courts to engage in heightened review of the effectiveness of government regulation*." *Murr v. Wisconsin*, 582 U.S. __, 137 S. Ct. 1933, 1947, 198 L. Ed. 2d 497 (2017) (emphasis added) (internal quotation marks omitted) (quoting *Chevron U.S.A.*, 544 U.S. at 540).

3. The use of property is not recognized as a fundamental right for substantive due process purposes

Finally, the plaintiffs argue that heightened scrutiny is required because the "fundamental attribute[s] of property" are recognized as

"fundamental right[s]" for substantive due process purposes—not so fundamental as to require strict scrutiny, but fundamental enough to require "some form of intermediate scrutiny." Pls.' Resp. Br. at 31, 39. None of the cases the plaintiffs cite could fairly be read to make such a holding.

Without question, the federal due process clauses do require "heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). However, our Court of Appeals recently held that the use of property is not a fundamental right for substantive due process purposes: "Just as the right to pursue a particular profession is not a fundamental right but is a right that is nevertheless subject to reasonable government regulation, so, for substantive due process purposes, is the right to use one's property." *Olympic Stewardship Found. v. Envt'l & Land Use Hr'gs Office*, 199 Wn. App. 668, 720–21, 399 P.3d 562 (2017) (citation omitted) (citing *Amunrud*, 158 Wn.2d at 220), *review denied*, 189 Wn.2d 1040, *cert. denied*, 139 S. Ct. 81 (2018). Both this court and the United States Supreme Court declined to review this holding.

Nevertheless, the plaintiffs contend *Olympic Stewardship* was incorrect, relying on cases from this court and the United States Supreme Court that discuss the importance of property rights, primarily in the context of takings cases. *See* Pls.' Resp. Br. at 2, 16–17, 31, 39; Pls.' Second Statement of Additional

Auth.[5] We do not question that property rights are important. However, as noted above, the United States Supreme Court has also made it clear that takings claims and substantive due process claims are different matters involving different considerations. *Chevron U.S.A.*, 544 U.S. at 541–42. None of the cases cited by the plaintiffs actually addresses the question of whether the use of property is a fundamental right for substantive due process purposes, and they certainly do not make such a holding.

The plaintiffs also cite many cases from this court and the United States Supreme Court applying the "substantial relation" or "unduly oppressive" tests as evidence that the use of property is a fundamental right. Pls.' Resp. Br. at 2–3, 13–15, 17–22, 32, 37–39; Pls.' Statement of Additional Auths. at 14–15.[6]

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[5] Citing *Knick v. Township of Scott*, 588 U.S. __, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019) (takings); *Nollan*, 483 U.S. at 833 (takings); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979) (takings); *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972) (procedural due process); *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 365, 38 S. Ct. 504, 62 L. Ed. 1156 (1918) (just compensation); *City of Bremerton v. Widell*, 146 Wn.2d 561, 572, 51 P.3d 733 (2002) (criminal trespass); *Mfd. Hous. Cmtys. of Wash. v. State*, 142 Wn.2d 347, 363–65, 13 P.3d 183 (2000) (plurality opinion) (takings); *Guimont v. Clarke*, 121 Wn.2d 586, 595, 854 P.2d 1 (1993) (takings); *City of Des Moines v. Gray Bus., LLC*, 130 Wn. App. 600, 613–14, 124 P.3d 324 (2005) (takings); *State Farm Fire & Cas. Co. v. English Cove Assocs.,* 121 Wn. App. 358, 365, 88 P.3d 986 (2004) (insurance contract interpretation).

[6] Citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (substantial relation); *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion) (substantial relation); *Goldblatt*, 369 U.S. at 594–95 (unduly oppressive); *Wash. ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121, 49 S. Ct. 50,

However, as discussed above, both tests are now interpreted as deferential standards corresponding to

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73 L. Ed. 210 (1928) (substantial relation); *Nectow*, 277 U.S. at 187–88 (substantial relation); *Ambler Realty Co.*, 272 U.S. at 395 (substantial relation); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531, 37 S. Ct. 190, 61 L. Ed. 472 (1917) (substantial relation); *Chi., Burlington & Quincy Ry. Co. v. Illinois*, 200 U.S. 561, 593, 26 S. Ct. 341, 50 L. Ed. 596 (1906) (substantial relation); *Jacobson v. Massachusetts*, 197 U.S. 11, 31, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (substantial relation); *Minnesota v. Barber*, 136 U.S. 313, 320, 10 S. Ct. 862, 34 L. Ed. 455 (1890) (substantial relation); *Tiffany Family Tr. Corp.*, 155 Wn.2d 225 (unduly oppressive); *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005) (unduly oppressive); *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733, 57 P.3d 611 (2002) (unduly oppressive); *Asarco, Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 762, 43 P.3d 471 (2002) (unduly oppressive); *Christianson v. Snohomish Health Dist.*, 133 Wn.2d 647, 661, 672 n.11, 946 P.2d 768 (1997) (unduly oppressive); *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997) (unduly oppressive); *Rivett v. City of Tacoma*, 123 Wn.2d 573, 580–81, 870 P.2d 299 (1994) (unduly oppressive); *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 649–50, 854 P.2d 23 (1993) (unduly oppressive); *Guimont*, 121 Wn.2d at 609 (unduly oppressive); *Robinson v. City of Seattle*, 119 Wn.2d 34, 55, 830 P.2d 318 (1992) (unduly oppressive); *Presbytery*, 114 Wn.2d at 330–31 (unduly oppressive); *Orion Corp.*, 109 Wn.2d at 646–47 (unduly oppressive); *W. Main Assocs. v. City of Bellevue*, 106 Wn.2d 47, 52, 720 P.2d 782 (1986) (unduly oppressive); *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 477, 647 P.2d 481 (1982) (unduly oppressive); *State ex rel. Rhodes v. Cook*, 72 Wn.2d 436, 439, 433 P.2d 677 (1967) ("The test when lawful activity upon private property is involved has been said to be more stringent."); *Remington Arms Co.*, 55 Wn.2d at 5 ("'clear, real, and substantial connection'" required (quoting 16 C.J.S. *Constitutional Law* § 195 (1956))); *City of Seattle v. Ford*, 144 Wash. 107, 111, 115, 257 P. 243 (1927) (holding regulation at issue went "'beyond what is necessary'" and was "excessive" (quoting 1 CHRISTOPHER G. TIEDEMAN, STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY 5 (1900))).

rational basis review. Therefore, the application of these tests does not indicate that the use of property is a fundamental right for substantive due process purposes.

In sum, the "unduly oppressive" test recited in our precedent can no longer be interpreted as requiring heightened scrutiny because its legal underpinnings have disappeared. The plaintiffs also do not show that laws regulating the use of property must be subject to heightened scrutiny as a matter of current federal law or that the use of property is a fundamental right for substantive due process purposes. Therefore, in answer to the third certified question, we hold that rational basis review applies to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance.

CONCLUSION

Based on the foregoing, we answer the certified questions as follows: Unless and until this court recognizes a principled basis for adopting heightened protections as matter of independent state law, state substantive due process claims are subject to the same standards as federal substantive due process claims. The same is true of state substantive due process claims involving land use regulations and other laws regulating the use of property. Therefore, the standard applicable to the plaintiffs' state substantive due process challenge to the Fair Chance Housing Ordinance is rational basis review.

s/ YU, J.

WE CONCUR:

s/ WIGGINS, J.

s/ JOHNSON, J.	
	s/ GONZALEZ, J.
s/ OWENS, J.	s/ GORDON-McCLOUD, J.

APPENDIX

The following is a nonexclusive list of Washington Supreme Court cases that may no longer be interpreted as requiring heightened scrutiny in article I, section 3 substantive due process challenges to laws regulating the use of property:

Abbey Rd. Grp., LLC v. City of Bonney Lake, 167 Wn.2d 242, 218 P.3d 180 (2009) (plurality opinion)

Allen v. City of Bellingham, 95 Wash. 12, 163 P. 18 (1917)

Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 143 P.3d 571 (2006)

Asarco, Inc. v. Dep't of Ecology, 145 Wn.2d 750, 43 P.3d 471 (2002)

Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 169 P.3d 14 (2007) (plurality opinion)

Brown v. City of Seattle, 150 Wash. 203, 272 P. 517, 278 P. 1072 (1928)

Christianson v. Snohomish Health Dist., 133 Wn.2d 647, 946 P.2d 768 (1997)

City of Olympia v. Mann, 1 Wash. 389, 25 P. 337 (1890)

City of Seattle v. Ford, 144 Wash. 107, 257 P. 243 (1927)

City of Seattle v. Montana, 129 Wn.2d 583, 919 P.2d 1218 (1996) (plurality opinion)

City of Seattle v. Proctor, 183 Wash. 293, 48 P.2d 238 (1935)

City of Seattle v. Ross, 54 Wn.2d 655, 344 P.2d 216 (1959)

City of Spokane v. Latham, 181 Wash. 161, 42 P.2d 427 (1935)

Convention Ctr. Coal. v. City of Seattle, 107 Wn.2d 370, 730 P.2d 636 (1986)

Cougar Bus. Owners Ass'n v. State, 97 Wn.2d 466, 64 7 P .2d 481 (1982)

Covell v. City of Seattle, 127 Wn.2d 874, 905 P.2d 324 (1995)

Crane Towing, Inc. v. Gorton, 89 Wn.2d 161, 570 P.2d 428 (1977)

Duckworth v. City of Bonney Lake, 91 Wn.2d 19, 586 P.2d 860 (1978)

Ellestad v. Swayze, 15 Wn.2d 281, 130 P.2d 349 (1942)

Erickson & Assocs. v. McLerran, 123 Wn.2d 864, 872 P.2d 1090 (1994)

Guimont v. Clarke, 121 Wn.2d 586, 854 P.2d 1 (1993)

Hass v. City of Kirkland, 78 Wn.2d 929, 481 P.2d 9 (1971)

Hauser v. Arness, 44 Wn.2d 358, 267 P.2d 691 (1954)

Homes Unlimited, Inc. v. City of Seattle, 90 Wn.2d 154, 579 P .2d 1331 (1978)

Horney v. Giering, 132 Wash. 555, 231 P. 958 (1925)

Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 49 P.3d 867 (2002)

Lenci v. City of Seattle, 63 Wn.2d 664, 388 P.2d 926 (1964)

Lutz v. City of Longview, 83 Wn.2d 566, 520 P.2d 1374 (1974)

Manos v. City of Seattle, 173 Wash. 662, 24 P.2d 91 (1933)

Margola Assocs. v. City of Seattle, 121 Wn.2d 625, 854 P.2d 23 (1993)

Markham Advert. Co. v. State, 73 Wn.2d 405, 439 P.2d 248 (1968)

Maytown Sand & Gravel, LLC v. Thurston County, 191 Wn.2d 392, 423 P.3d 223 (2018)

McNaughton v. Boeing, 68 Wn.2d 659, 414 P.2d 778 (1966)

Myrick v. Bd. of Pierce County Comm'rs, 102 Wn.2d 698, 677 P.2d 140, 687 P.2d 1152 (1984)

Orion Corp. v. State, 109 Wn.2d 621, 747 P.2d 1062 (1987)

Patton v. City of Bellingham, 179 Wash. 566, 38 P.2d 364 (1934)

Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 907 (1990)

Ragan v. City of Seattle, 58 Wn.2d 779, 364 P.2d 916 (1961)

Remington Arms Co. v. Skaggs, 55 Wn.2d 1, 345 P.2d 1085 (1959)

Rivett v. City of Tacoma, 123 Wn.2d 573, 870 P.2d 299 (1994)

Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992)

Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 935 P.2d 555 (1997)

Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992)

State ex rel. Brislawn v. Meath, 84 Wash. 302, 147 P. 11 (1915)

State ex rel. Faulk v. CSG Job Ctr., 117 Wn.2d 493, 816 P.2d 725 (1991)

State ex rel. Modern Lumber & Millwork Co. v. MacDuff, 161 Wash. 600, 297 P. 733 (1931)

State ex rel. Rhodes v. Cook, 72 Wn.2d 436, 433 P.2d 677 (1967)

State ex rel. Spokane Int'l Ry. Co. v. Kuykendall, 128 Wash. 88, 222 P. 211 (1924)

State ex rel. Warner v. Hayes Inv. Corp., 13 Wn.2d 306, 125 P.2d 262 (1942)

State v. Bowen & Co., 86 Wash. 23, 149 P. 330 (1915)

State v. Conifer Enters., Inc., 82 Wn.2d 94, 508 P.2d 149 (1973)

State v. Fabbri, 98 Wash. 207, 167 P. 133 (1917)

State v. Van Vlack, 101 Wash. 503, 172 P. 563 (1918)

Tiffany Family Tr. Corp. v. City of Kent, 155 Wn.2d 225, 119 P.3d 325 (2005)

Town of Woodway v. Snohomish County, 180 Wn.2d 165, 322 P.3d 1219 (2014)

Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 733 P.2d 182 (1987)

Viking Props., Inc. v. Holm, 155 Wn.2d 112, 118 P.3d 322 (2005)

Wash. Kelpers Ass'n v. State, 81 Wn.2d 410, 502 P.2d 1170 (1972)

Weden v. San Juan County, 135 Wn.2d 678, 958 P.2d 273 (1998)

W. Main Assocs. v. City of Bellevue, 106 Wn.2d 47, 720 P.2d 782 (1986)

Willoughby v. Dep't of Labor & Indus., 147 Wn.2d 725, 57 P.3d 611 (2002)

STEPHENS, J. (concurring in part, dissenting in part)—I agree with the majority's answers to the first two certified questions, but I write separately because the third certified question does not involve a matter of state law and is therefore not appropriately before this court.

"[C]ertified questions should be confined to uncertain questions of state law." *City of Houston v. Hill*, 482 U.S. 451, 471 n.23, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) (citing 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248 (1978)). Any federal court may certify a "question of local law" to this court, RCW 2.60.020, but "[t]he decision whether to answer a certified question . . . is within [our] discretion," *Broad v. Mannesmann Anlagenbau, AG*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000) (citing *Hoffman v. Regence Blue Shield*, 140 Wn.2d 121, 128, 991 P.2d 77 (2000); RAP 16.16(a)). At times, we have "declined to

answer certified questions where . . . any attempt to answer would be improvident." *United States v. Hoffman*, 154 Wn.2d 730, 748, 116 P.3d 999 (2005) (citing *Hoffman*, 140 Wn.2d at 128).

Here, the district court asks us (1) what standard of scrutiny generally applies to a substantive due process claim under the Washington Constitution, (2) whether that same standard of scrutiny applies to substantive due process claims involving land use regulations, and (3) what standard of scrutiny should be applied to Seattle's Fair Chance Housing Ordinance, chapter 14.09 Seattle Municipal Code. *See* Order, No. C18-0736-JCC, at 2–3 (W.D. Wash. Feb. 5, 2019). As the majority cogently explains in response to the first two certified questions, the standard of scrutiny applicable to substantive due process claims under the Washington Constitution is identical to the standard applicable to such claims under the federal constitution. But then, despite recognizing that "the parties' primary dispute [under the third certified question] is the minimum level of scrutiny required by the federal due process clauses," the majority provides a fairly encompassing analysis of federal substantive due process precedent and proposes a conclusion under "current federal law." Majority at 11–12.

The majority justifies its decision to answer a question of federal law by claiming "it is necessary to provide complete answers to the certified questions in this case." *Id.* at 11 (citing *Broad*, 141 Wn.2d at 676). But "certified questions should be confined to uncertain questions of state law." *Hill*, 482 U.S. at 471 n.23. There is nothing to be gained by offering the district court our interpretation of federal law, when that court must make its own decision and will

undoubtedly consider further arguments from the parties about whether our (nonbinding) interpretation is right or wrong. Moreover, there is no requirement for us to provide complete—or, indeed, any—answers to certified questions. *See Broad*, 141 Wn.2d at 676 ("The decision whether to answer a certified question pursuant to chapter 2.60 RCW is within the discretion of the court." (citing *Hoffman*, 140 Wn.2d at 128; RAP 16.16(a))). We frequently limit certified questions, change them, or simply decline to answer—and that is when state law questions are presented. We have all the more reason to decline to answer a question that requires interpretation of uncertain federal law.

I would decline to answer the third certified question here and accordingly dissent from that portion of the majority's opinion.

s/ Stephens, J.

s/ Fairhurst, C.J.

s/ Madsen, J.

FILED
JAN 9 2020
WASHINGTON STATE
SUPREME COURT

THE SUPREME COURT OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON, Plaintiffs, v. CITY OF SEATTLE, Defendant.	**ORDER DENYING FURTHER RECONSIDERATION** No. 96817-9

The Court considered the "CITY OF SEATTLE'S MOTION FOR RECONSIDERATION TO DELETE TWO SENTENCES" and the "PLAINTIFFS' ANSWER TO CITY OF SEATTLE'S MOTION TO RECONSIDER TO DELETE TWO SENTENCES". The Court entered an order amending opinion in the above cause on January 9, 2020.

Now, therefore, it is hereby

ORDERED:

That further reconsideration is denied.

DATED at Olympia, Washington this 9th day of January, 2020.

For the Court

s/ Stephens, C.J.
CHIEF JUSTICE

FILED
MAY 30 2023
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHONG YIM; et al. Plaintiffs-Appellants, v. CITY OF SEATTLE, a Washington municipal corporation, Defendant-Appellee.	No. 21-35567 D.C. No. 2:18-cv-00736-JCC Western District of Washington, Seattle ORDER

Before: WARDLAW, GOULD, and BENNETT, Circuit Judges.

The panel has unanimously voted to deny Appellees' petition for rehearing en banc, as well as Appellants' conditional cross-petition for rehearing en banc. The full court has been advised of the petitions, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35. The petitions for rehearing en banc are **DENIED.**

CITY OF SEATTLE
ORDINANCE 125393

* * * * *

Chapter 14.09 - Use of Criminal Records in Housing

14.09.005 Short title

This chapter 14.09 shall constitute the "Fair Chance Housing Ordinance" and may be cited as such.

14.09.010 Definitions

* * * * *

"Adverse action" means:

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.

* * * * *

"Conviction record" means information regarding a final adjudication or other criminal disposition adverse to the subject. It includes but is not limited to dispositions for which the defendant received a deferred or suspended sentence, unless the adverse disposition has been vacated or expunged.

"Criminal background check" means requesting or attempting to obtain, directly or through an agent, an individual's conviction record or criminal history record information from the Washington State Patrol or any other source that compiles, maintains, or reflects such records or information.

"Criminal history" means records or other information received from a criminal background check or contained in records collected by criminal justice agencies, including courts, consisting of identifiable descriptions and notations of arrests, arrest records, detentions, indictments, informations, or other formal criminal charges, any disposition arising therefrom, including conviction records,

waiving trial rights, deferred sentences, stipulated order of continuance, dispositional continuance, or any other initial resolution which may or may not later result in dismissal or reduction of charges depending on subsequent events. The term includes acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release, any issued certificates of restoration of opportunities and any information contained in records maintained by or obtained from criminal justice agencies, including courts, which provide individual's record of involvement in the criminal justice system as an alleged or convicted individual. The term does not include status registry information.

* * * * *

14.09.025 – Prohibited use of criminal history

A. It is an unfair practice for any person to:

1. Advertise, publicize, or implement any policy or practice that automatically or categorically excludes all individuals with any arrest record, conviction record, or criminal history from any rental housing that is located within the City.

2. Require disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in Section 14.09.115.

3. Carry out an adverse action based on registry information of a prospective adult occupant,

an adult tenant, or an adult member of their household, unless the landlord has a legitimate business reason for taking such action.

4. Carry out an adverse action based on registry information regarding any prospective juvenile occupant, a juvenile tenant, or juvenile member of their household.

5. Carry out an adverse action based on registry information regarding a prospective adult occupant, an adult tenant, or an adult member of their household if the conviction occurred when the individual was a juvenile.

* * * * *

14.09.040 – Violation

The failure of any person to comply with any requirement imposed on the person under this Chapter 14.09 is a violation.

* * * * *

14.09.100 – Civil penalties in cases alleging violations of this Chapter 14.09

A. In cases either decided by the Director or brought by the City Attorney alleging a violation filed under this Chapter 14.09, in addition to any other award of damages or grant of injunctive relief, a civil penalty may be assessed against the respondent to vindicate the public interest, which penalty shall be payable to The City of Seattle and the Department. Payment of the civil penalty may be required as a term of a conciliation agreement entered into under subsection 14.09.080.A or may be ordered by the Hearing Examiner in a decision rendered under Section 14.09.090.

B. The civil penalty assessed against a respondent shall not exceed the following amount:

1. $11,000 if the respondent has not been determined to have committed any prior violation;

2. $27,500 if the respondent has been determined to have committed one other violation during the five-year period ending on the date of the filing of this charge; or

3. $55,000 if the respondent has been determined to have committed two or more violations during the seven-year period ending on the date of the filing of this charge; except that if acts constituting the violation that is the subject of the charge are committed by the same person who has been previously determined to have committed acts constituting a violation, then the civil penalties set forth in subsections 14.09.100.B.2 and 14.09.100.B.3 may be imposed without regard to the period of time within which those prior acts occurred.

Filed September 28, 2018

Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHONG and MARILYN YIM, KELLY LYLES, EILEEN, LLC, and RENTAL HOUSING ASSOCIATION OF WASHINGTON, Plaintiffs, vs. THE CITY OF SEATTLE, a Washington municipal corporation, Defendant.	No. 2:18-cv-0736-JCC STIPULATED FACTS AND RECORD

A. Agreement.

For purposes of forthcoming cross motions for summary judgment, the parties stipulate to the following facts and will limit themselves to these facts and the attached documents unless the parties agree to additional facts or documents.

The stipulated facts and attached documents are numbered consecutively. The parties may cite the stipulated facts by paragraph number (using "SF" for "stipulated fact") and the attached documents by page number (using "SR" for "stipulated record").

Although Defendant City of Seattle ("City") is unable to confirm the facts regarding individual plaintiffs (SF 1–18), the City stipulates to those facts for purposes of the cross motions for summary judgment. The City also agrees Plaintiffs have established standing to maintain this action.

Nothing in this stipulation precludes either party from: characterizing the attached documents or relying on facts the documents support; citing published material, such as articles in periodicals or papers posted online; citing legislation or legislative history from other jurisdictions; asking the court to take judicial notice of adjudicative facts under FRE 201; or arguing that certain stipulated facts are immaterial to this dispute.

B. Agreed Facts and Record.

Plaintiffs and their interests in this dispute.

1. Chong and MariLyn Yim, Kelly Lyles, and Eileen, LLC, are plaintiff landlords who own and manage small rental properties in Seattle and are subject to Seattle's Fair Chance Housing Ordinance.

2. Chong and MariLyn Yim own a duplex and a triplex within Seattle city limits. They and their three children live in one of the units in the triplex. The Yims rent out the other two units in the triplex and both units in the duplex. The Yims share a yard with their renters in the triplex, and the Yim children are occasionally at home alone when the renters are at home.

3. Currently, the four units that the Yims rent out in Seattle are occupied. A single woman occupies

one of the two rented units in the triplex, and a couple occupies the other. Three roommates live in one of the duplex units, and two roommates occupy the other duplex unit. Occasionally, the duplex tenants need to find a new roommate. Some of the new roommates were strangers to the tenants before moving in. Prior to the Fair Chance Housing Ordinance, the Yims regularly requested criminal background screening of rental applicants, including new-roommate applicants.

4. The Yims and their children could not afford to live in Seattle without the rental income from these properties. The Yims consider prospective tenants on a case-by-case basis and are willing to rent to individuals with a criminal history depending on the number of convictions, the severity of the offenses, and other factors they deem relevant to the safety of the Yims, their children, and their other tenants.

5. Kelly Lyles is a single woman who, in addition to the dwelling unit in which she resides, owns and rents a house in West Seattle. Ms. Lyles considers prospective tenants on a case-by-case basis. Ms. Lyles understands the needs of individuals recovering from addiction and would consider an applicant who did not otherwise satisfy her screening criteria if the applicant was part of a recovery program.

6. Ms. Lyles is a local artist who relies on rental income to afford living in Seattle. The $1,300 in rent she receives monthly makes up most of her income. Ms. Lyles cannot afford to miss a month's rental payment from her tenant and cannot afford an unlawful detainer action to evict a tenant who

fails to timely pay. As a single woman who frequently interacts with her tenants, she considers personal safety when selecting her tenants.

7. Ms. Lyles rents her home to a PhD student at the University of Washington. With Ms. Lyles's permission, that tenant has subleased the basement to a single, divorced woman.

8. Scott Davis and his wife own and manage Eileen, LLC, through which they operate a seven-unit residential complex in the Greenlake area of Seattle. The Davises would consider applicants with a criminal history based on the circumstances of the crime(s) and the safety needs of the other tenants.

9. The Rental Housing Association of Washington ("RHA") is a statewide non-profit organization established in 1935. RHA has over 5,300 landlord members, most of whom own and rent residential properties in Seattle. Most RHA members rent out single-family homes, often on a relatively short-term basis due to the landlord's work, personal, or financial needs. As part of the RHA membership application, landlords must list the zip codes in which they own and rent residential property.

10. RHA provides professional screening services. Landlords must become RHA members to utilize these services. Additionally, tenants can purchase a reusable screening report from RHA.

11. Landlord members who wish to receive screening services must also go through a certification process verifying that they maintain ownership of

at least one rental property. They can so certify by providing two of any of the following documents: a county tax assessor's bill, deed, escrow closing statement, flood certification, property insurance, title insurance, or a utility bill.

12. Two full-time employees work in RHA's screening department. RHA contracts with Judicial Information Services and Innovation Software Solutions to provide an array of background information on rental applicants.

13. Members can request three different types of screening packages: Basic, Background Screening, and Premium. The Basic package includes the applicant's credit report and previous address. The Background Screening package includes multi-state criminal background, multi-state eviction history, and address history. The Premium package combines the Background Screening and Basic packages.

14. A sample Premium screening report displays the type and format of data on RHA's reports. SR 0001–SR 0006. The report, with RHA's logo at the top, first displays an executive summary of the types of screening in the report and the status of each screening, such as "completed" or "adverse." SR 0001. The report includes address history, employment history, credit history, eviction history, and criminal history. SR 0003–0006.

15. The criminal history displays a multistate and federal criminal background. SR 0004–0006. For any given offense, the report lists the relevant jurisdiction, a short description of the offense, disposition and disposition date, sentence length,

probation length, and an assortment of other minor details in an "additional information" section.

16. RHA members can make a screening request through email, fax, or RHA's online system. The request must provide the rental applicant's application, including the applicant's consent to be screened. Regardless of the means a landlord uses to request a screening (email, fax, or RHA's online system), RHA provides the landlord member the same information.

17. If the landlord requests a background check via email or fax, RHA staff will submit the applicant's name, date of birth, and social security number through Innovative Software Solutions, and the online system will pull the background check information provided by Judicial Information Services. RHA staff does not alter or re-format the information provided by Innovative Software Solutions. Instead, they send a PDF document of the information as displayed by Innovative Software Solutions to the requesting landlord. If a landlord requests background check services through RHA's online system, the landlord directly inserts the applicant's name, date of birth, and social security number, but RHA staff still reviews the report before delivering it to the landlord. If information retrieved through Innovative Software Solutions contains criminal history, RHA staff contacts the court(s) with the relevant records directly to verify the records' accuracy.

18. Because of the Fair Chance Housing Ordinance and because the Background Screening and

Premium packages offer criminal histories, RHA has added Seattle-specific versions of those packages that omit criminal histories. An example of a report provided as part of the Seattle Premium package is included as SR 0007–0013. A landlord leasing property located within the City of Seattle ("Seattle Landlord") can obtain either the Seattle Premium package or the Seattle Background Screening package, which are substantially similar to the non-Seattle packages aside from the omission of criminal history.[1] If a Seattle Landlord requests one of the packages that includes criminal history, RHA staff denies the request and notifies the landlord of the Fair Chance Housing Ordinance via email. An example of an email denying a screening request and notifying the landlord of the Fair Chance Housing Ordinance is included as SR 0014 (attachments omitted). In response to the Fair Chance Housing Ordinance, RHA also created a new model application for tenancy for Seattle Landlord members that contains mandatory disclosures and omits questions about criminal history, an example of which is included as SR 0015–0016. Additionally, the RHA webpage where landlords can request screening services displays a notice about the screening limits

[1] The example Seattle Premium package report (SR 0007–0013) and example non- Seattle Premium package report (SR 0001–0006) differ slightly in other respects not germane to this dispute. For purposes of this dispute, the salient difference is how each treats criminal history.

imposed by the Fair Chance Housing Ordinance. A screenshot of the notice is included as SR 0017.[2]

Activity before adoption of the Fair Chance Housing Ordinance.

19. On July 13, 2015, the Seattle City Council's Housing and Affordability and Livability Agenda ("HALA") Committee issued its Final Advisory Committee Recommendations to City Mayor Edward B. Murray and the rest of the City Council. SR 0018–0093.

20. In October 2015, the City Council adopted Resolution 31622. The Resolution included one attachment: the Council Work Plan for HALA Recommendations. SR 0094–0107.

21. On June 13, 2016, the City Council adopted Resolution 31669. The Resolution included four attachments: Appendix F-11 of the HALA recommendations; "Selecting a Tenant Screening Agency: Guideline for Property Management in Affordable Housing"; Engrossed Senate Bill 6413; and "Recommended Best Practices to Do and Not Do in Drafting and Implementing a Criminal Conviction Screening Policy." SR 0108–0133.

22. In a January 19, 2016 press release, Mayor Murray announced that he had convened a 19-member Fair Chance Housing Committee. SR 0134–0136.

23. On February 16, 2016, City Councilmembers Lisa Herbold, M. Lorena Gonzalez, Debora Juarez, and

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[2] SF 9–18 constitute the facts on which RHA relies to adjudicate its as-applied First Amendment claim. The other Plaintiffs do not present an as-applied First Amendment claim.

Mike O'Brien submitted a memorandum to Mayor Murray related to the Fair Chance Housing Committee. SR 0137–0139.

24. In December 2014, the entity then known as the Committee to End Homelessness King County (now known as All Home), released a report titled "Family Homelessness Coordinated Entry System Analysis and Refinement Project." SR 0140–0218.

25. On May 23, 2017, the Seattle Office of City Rights ("SOCR") made a presentation to the City Council's Civil Rights, Utilities, Economic Development, and Arts Committee ("CRUEDA") regarding the Fair Chance Housing Stakeholder Process, which included a slide show (SR 0219-0225) and a May 17, 2017 memorandum from SOCR Director Patty Lally. SR 0226–0230.

The Fair Chance Housing Ordinance (Ord. 125393)

26. On June 20, 2017, Mayor Murray transmitted legislation to the City Council, which was ultimately assigned Council Bill Number ("CB") 119015 (SR 0231–0259), along with a cover letter. SR 0260–0261. The version of the bill Mayor Murray transmitted was labeled "D3b" in the bill's header, indicating it was at least the third iteration of the document at that time. When entered into the City Council's electronic legislation system, that version was deemed "version 1," indicating it was the first version uploaded to that system.

27. On June 26, 2017, the Council referred CB 119015 to the CRUEDA Committee. SR 0262–0263.

28. On July 13, 2017, the CRUEDA Committee held a special meeting to discuss CB 119015, which included a presentation, panel discussion, and public hearing. The agenda included several supporting documents, including: a Racial Equity Toolkit (SR 0264–0271); the Mayor's June 20, 2017 letter (*see* SR 0260–0261); a July 10, 2017 SOCR memorandum (SR 0272–0278); and a slide show. SR 0279–0295.

29. On July 24, 2017, Council Central Staff submitted a memorandum to the CRUEDA Committee for discussion at its July 25, 2017 meeting, which included seven proposed amendments to CB 119015. SR 0296–0320.

30. One proposed amendment was to create a separate Clerk's File for the documents and research supporting CB 119015. *Id.* The documents and research supporting CB 110915 ultimately became Clerk's File number 320351. SR 0321–0546.

31. On August 8, 2017, the CRUEDA Committee met and unanimously passed all seven proposed amendments and recommended that the full City Council pass CB 1109015 as amended. SR 0547–0548.

32. At the full Council's August 14, 2017 meeting, Councilmember Lisa Herbold moved to substitute version 5 of CB 119015 (labeled "D5" in the bill's header and reflecting the CRUEDA Committee's recommendations), for version 4 (an earlier version). SR 0549–0550. The proposed substitute showed the proposed amendments to version 4, labeled "D4-revised" in the bill's header. SR 0551–

0581. The City Council unanimously passed the motion and version 5. *See* SR 0550. A summary and fiscal note accompanied the final legislation. SR 0582–0584.

33. On August 23, 2017, Mayor Murray signed the bill, which became Ordinance 125393. SR 0585–0616. The Ordinance took effect 30 days later (on September 22, 2017), but to provide time for rule-making and to adjust business practices, the Ordinance's operative provisions did not take effect until February 19, 2018, 150 days after the Ordinance. *See* SR 0616.

2018 University of Washington study

34. In June 2018, the University of Washington completed a City-commissioned "Seattle Rental Housing Study," including a final report and appendices. SR 0617–1141.

Agreed to September 12, 2018.

By: s/Ethan W. Blevins,
WSBA #48219

Pacific Legal Foundation

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By: s/Sara O'Connor-Kriss,
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Seattle City Attorney's Office

Attorneys for Defendant City of Seattle

Filed May 21, 2018

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Chong and Marilyn Yim, Kelly Lyles, Eileen, LLC and Rental Housing Association of Washington, Plaintiffs, vs. The City of Seattle, a Washington Municipal Corporation, Defendant.	No. NOTICE OF REMOVAL FROM KING COUNTY SUPERIOR COURT (NO. 18-2-11073-4SEA)

TO: THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, AT SEATTLE:

Defendant City of Seattle hereby gives notice that it is removing this case to the United States District Court for the Western District of Washington on the grounds set forth below.

I. SUMMARY OF STATE COURT PROCEEDINGS

1. Plaintiffs filed this action in King County Superior Court on May 1, 2018. **The Complaint is attached hereto as Exhibit 1**. Defendant was served with the Complaint on May 1, 2018.

2. Defendant is filing, concurrently with this Notice of Removal, a Verification of State Court Records that complies with Local Rules W.D. Wash. LCR 101(c). It summarizes all state court proceedings as of today.

3. After filing this Notice of Removal, Defendant will give notice to the King County Superior Court of the removal of this action.

II. GROUNDS FOR REMOVAL

4. Plaintiffs assert only claims arising under the United States Constitution and the Washington Constitution. Ex. 1 (Complaint at ¶¶ 49–62). Specifically, they assert a claim arising under the First Amendment of the United States Constitution and its Washington analogue, *id.* ¶ 50, and a claim arising under the Fourteenth Amendment of the United States Constitution and its Washington analogue, *id.* ¶¶ 53–54.

5. This Court has original jurisdiction over Plaintiffs' claims invoking the United States Constitution. 28 U.S.C. § 1331 (giving federal district courts original jurisdiction of "all civil actions arising under the Constitution, laws, or treaties of the United States"). This Court has supplemental jurisdiction over Plaintiffs' claims invoking the Washington Constitution, because they are "so related to" the claims invoking the United States Constitution "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

6. Accordingly, this action is subject to removal to "the district Court of the United States for the district and division embracing the place where [the] action is pending." 28 U.S.C. § 1441(a). Pursuant to Local Rules W.D. Wash. LCR 3(e)(1), Defendant is removing this case to the Western District of Washington, Seattle Division, because it is removing this case from King County Superior Court.

7. For all of the reasons stated above, Defendant hereby gives notice that the civil action in King County Superior Court, State of Washington has been removed from that Court to the United States District Court for the Western District of Washington at Seattle.

DATED this 21st day of May, 2018.

PETER S. HOLMES
Seattle City Attorney

By: s/ Josh Johnson
*****

By: s/ Sara O'Connor-Kriss
*****

By: s/ Roger D. Wynne
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Attorneys for Defendant
City of Seattle