No. 23-329

IN THE

Supreme Court of the United States

CHONG and MARILYN YIM, et al.,

Petitioners,

v.

THE CITY OF SEATTLE,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether landlords have a fundamental substantive due process right under the Fourteenth Amendment to deny tenancy to someone based on their criminal history, thus subjecting Seattle's Fair Chance Housing Ordinance to strict scrutiny.

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STATEMENT OF THE CASE

1. The decision below accurately summarized the problem confronting Seattle:

> 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, and one in five people who leave prison become homeless shortly thereafter.
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> . . .
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> These consequences [of this "prison to homelessness pipeline"] 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.
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> . . .
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> Seattle is no exception. . . . 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. 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 2014 fair housing test conducted by the Seattle Office of Civil Rights found evidence of [landlords masking discriminatory intent with a "policy" of declining to rent to tenants with a criminal history], 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.

Pet. App. 3a–6a (footnotes omitted).

To address these issues, the City enacted its Fair Chance Housing Ordinance in 2017. Supp. App. 1–33 (adding a new Seattle Mun. Code ("SMC") ch. 14.09).[1] The Ordinance bans landlords from inquiring about, or taking an adverse action (such as denying tenancy or evicting) based on, a tenant's or prospective tenant's arrest or conviction record. Supp. App. 14 (SMC § 14.09.025.A.2). The Ordinance exempts landlords who share a single-family home with, or rent an accessory dwelling unit to, a tenant. Supp. App. 30 (SMC § 14.09.115.C–.D). It also allows a landlord, under certain conditions, to take an adverse action

[1] The Petitioner's Appendix reproduces only select portions of the Ordinance. Pet. App. 127a. The Supplemental Appendix provides the complete text.

based on someone's sex-offender status. Supp. App. 14 (SMC § 14.09.025.A.3–A.5).

Contrary to Petitioners' assertion, *see* Pet. at 7, the Ordinance does not exempt the City and other public-housing providers. The ordinance exempts only "adverse action taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy . . . ." Supp. App. 29 (SMC § 14.09.115.B). The City is not such a landlord—it should not be confused with the Seattle Housing Authority, which is an independent municipal corporation. *See Seattle Housing Auth. v. City of Seattle*, 416 P.3d 1280, 1281 (Wash. Ct. App. 2018).

2. Petitioners are a state-wide landlord association and three landlords. Pet. App. 133a–139a. Petitioners embellish the stipulated record. *See* Pet. App. 132a-142a (record). No tenant of the three landlords "occup[ies] their home[] and shar[es] intimate spaces" with them. Pet. at 2. Indeed, two of those landlords live off-site from their rental properties. Pet. App. 134a–135a. Found nowhere in the record are such details as: a "common storage and laundry area in the basement" of Petitioner Eileen, LLC's rental building; "common areas including the kitchen and laundry room" in the property that Petitioner Kelly Lyles rents; or "a common porch, mailbox, and utility room" in Petitioners Yims' triplex. *Cf.* Pet. at 2–3. None of Petitioners' existing tenants who might have to share space with a new tenant is a party to this action. *Cf. id*. at 3.

Petitioners sued in state court in 2018. Pet. App. 142a. They claimed that, under federal and Washington law, the inquiry provision facially violates landlords' free speech rights, and the adverse-action

provision facially violates landlords' substantive due process rights. Pet. App. 59a–60a. Petitioners pressed no as-applied claim.

The City removed this action to federal court, where the parties filed cross-motions for summary judgment. Pet. App. 58a, 143a. Given uncertainty in Washington's substantive due process law, the district court certified questions to the Washington Supreme Court, which answered that Washington "substantive due process claims are subject to the same standards as federal substantive due process claims." Pet. App. 97a. The district court then granted summary judgment to the City. Pet. App. 61a–95a.

3. Petitioners appealed to the Ninth Circuit, abandoning their state claims and seeking relief only under federal law.[2] The court of appeals reversed on whether the inquiry provision violated landlords' First Amendment rights, Pet. App. 11a–25a, 28a–57a, but unanimously affirmed the dismissal of Petitioners' substantive due process claim against the adverse-action provision. Pet. App. 25a–27a. Because the court of appeals rejected Petitioners' contention that the right to exclude is fundamental for substantive due process purposes, it applied the rational basis analysis, rather than strict scrutiny, to the Ordinance and held that it satisfied that test. *Id.*

4. Petitioners seek review of the court of appeals' substantive due process holding.

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[2] The decision below is unclear about the constitutional foundation of Petitioners' claims on appeal. *See* Pet. App. 11a n.12, 25a n.26 (noting that the analysis of any Washington claim would be identical to the federal analysis). Petitioners ground their claim only in federal law before this Court. Pet. at 2.

REASONS FOR DENYING THE WRIT

This Court has twice denied requests to consider whether property rights are fundamental for substantive due process purposes.[3] This Court should deny this Petition as well. This Court has repeatedly and recently warned against creating new fundamental substantive due process rights. Petitioners identify no circuit split—no lower court has found a fundamental substantive due process right for a landlord to choose their tenants, nor even for property owners to exclude others from their property more generally. The decision below is consistent with this Court's precedent. Even if there were a certworthy issue here, this Court should let the Petitioners' arguments percolate among lower courts before considering expanding substantive due process law so radically. This case is also a poor vehicle for the question presented because Petitioners' focus on three landlords is inconsistent with their facial challenge.

I. No circuit split exists; lower courts are in accord.

1. Although the Due Process Clause speaks only of "process," U.S. Const. amend. XIV, this Court long-ago held that the clause also protects certain unexpressed substantive rights. Specifically, the Due

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[3] *Olympic Stewardship Found. v. State of Wash. Env'l and Land Use Hearings Office*, No. 17-1517, Cert. Pet. at i (May 4, 2018) ("[w]hether property rights are fundamental rights"), *cert. denied*, 139 S. Ct. 81 (2018); *Kentner v. City of Sanibel*, No. 14-404, Cert. Pet. at i (Oct. 3, 2014) ("[w]hether traditional property rights are among those fundamental rights and liberties subject to the substantive protections of due process"), *cert. denied*, 574 U.S. 1075 (2015).

Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests" by subjecting such interference to strict scrutiny, under which the infringement survives only if it is "narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Where a state or local law implicates no fundamental substantive due process right or interest, this Court applies the long-standing rational basis analysis. *See, e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–54 (1938).

This Court "exercise[s] the utmost care" when asked to extend "fundamental" status to a claimed liberty or property interest for substantive due process purposes. *Glucksberg*, 521 U.S. at 720. This is because doing so largely "place[s] the matter outside the arena of public debate and legislative action" and threatens to subtly transform the Due Process Clause into a vehicle for expressing "the policy preferences of the Members of this Court." *Id. Accord Chavez v. Martinez*, 538 U.S. 760, 775 (2003) ("Many times . . . we have expressed our reluctance to expand the doctrine of substantive due process."). The universe of fundamental interests is small, including such rights as to marry, direct the education and upbringing of one's children, marital privacy, and bodily integrity. *Glucksberg*, 521 U.S. at 720. This Court is so careful with the "fundamental" label that it has not created a new fundamental substantive due process right for decades and recently stripped "fundamental" status from the right to terminate a pregnancy. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2248–56 (2022).

In broad strokes, Petitioners ask this Court to determine "whether a property owner's right to exclude is fundamental and protected by the Due Process Clause." Pet. at 15. But this Court has repeatedly made clear that, when contemplating the creation of a new fundamental substantive due process right subject to strict scrutiny, one must define the supposed right with specificity. *E.g.*, *Chavez*, 538 U.S. at 776 ("vague generalities . . . will not suffice"); *Reno v. Flores*, 507 U.S. 292, 302 (1993) (the "analysis must begin with a careful description of the asserted right"); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) ("It is important . . . to determine how petitioner describes the constitutional right at stake"). The specific question here is whether landlords have a fundamental substantive due process right to deny tenancy to someone based on their criminal history.[4]

2. No lower court has recognized any such right. And even if it were proper to abstract the right Petitioners seek to a higher level of generality, lower courts have consistently held that property owners have no fundamental substantive due process right to exclude. *E.g.*, Pet. App. 25a–25a (decision below; "the Supreme Court has never recognized the right to exclude as a 'fundamental' right in the context of the

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[4] *Amici* ask this Court to resolve this case through a Privileges and Immunities Clause theory. Br. *Amicus Curiae* Buckeye Inst.; Br. *Amici Curiae* Nat'l Apt. Ass'n, et al. at 13-18. But the Petition does not mention that theory and neither party addressed it here or below, so it is off-limits. *See* Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 60 n.2 (1981) ("We decline to consider this argument since it was not raised by either of the parties here or below.").

Due Process Clause"); *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1385 (8th Cir. 2022) ("The landlords, however, do not cite any authority that the right to exclude is a fundamental right for the purposes of substantive due process.")[5]; *West Virginia Coalition Against Domestic Violence, Inc. v. Morrisey*, No. 2:19-cv-00434, 2023 WL 5659040, at *17 (S.D.W.V. Aug. 31, 2023) ("Courts have not found a property owner's right to exclude to be 'fundamental' in the context of a substantive due process challenge."); *Duffner v. City of St. Peters*, No. 4:16-CV-01971-JAR, 2018 WL 1519378, at *4 (E.D. Mo. 2018), *aff'd on other grounds*, 930 F.3d 973 (8th Cir. 2019). Other courts apply the rational basis analysis to due process claims premised on the right to exclude, consistent with that right's nonfundamental status. *E.g.*, *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1210 (10th Cir. 2009); *Sheffield v. Bush*, 604 F.Supp.3d 586 (S.D. Tex. 2022).

Circuit courts also reject the even more generalized contention that property rights are fundamental for substantive due process purposes. *E.g.*, *Slidewaters LLC v. Washington State Dept. of Labor & Indust.*, 4 F.4th 747, 758 (9th Cir. 2021); *PBT Real Estate, LLC v. Town of Palm Beach*, 988 F.3d 1274, 1283–84 (11th Cir. 2021). *Accord A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356, 369, 372–73 (4th Cir.2008) (applying the rational basis analysis consistent with property rights' nonfundamental status).

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[5] Petitioners mischaracterize the decision below and *301, 712, 2103 & 3151 LLC* as "noting lack of guidance from this Court." Pet. at 25. The decisions noted no such thing.

3. The only courts that Petitioners claim found a more generalized fundamental substantive due process right to exclude are the Eighth Circuit and Illinois Supreme Court. Pet. at 26. Those courts found no such thing. Again, the Eight Circuit has rejected the notion that landlords enjoy such a right. *See 301, 712, 2103 & 3151 LLC*, 27 F.4th at 1385. The passage Petitioners invoke from *Heights Apts., LLC v. Walz*, 30 F.4th 720, 728 (8th Cir. 2022), is from a discussion of a Contract Clause claim—the decision later rejected a substantive due process claim after reiterating that this Court is "'reluctant to expand the concept of substantive due process . . . .'" *Id.* at 728–29, 735–36 (quoting *Collins*, 503 U.S. at 125).[6] And the Illinois Supreme Court decision Petitioners invoke addressed no due process claim and mentioned "fundamental" only when summarizing a party's averments. *Tovey v. Levy*, 401 Ill. 393, 82 N.E.2d 441, 443–45 (1948).

4. None of the remaining case law Petitioners cite holds that landlords have a fundamental substantive due process right to deny tenancy to someone—much less that a law restricting such denials based on criminal history violates the Fourteenth Amendment. None betrays confusion even over whether the more generalized right to exclude, or property rights as such, are fundamental for substantive due process purposes. *Cf.* Pet. at 25–28.

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[6] The unpublished district court decision Petitioners cite from within the Eighth Circuit did not resolve the question of whether the right to exclude is fundamental because the defendant city there did not address it. *Lamplighter Vill. Apartments LLP v. City of St. Paul*, No. CV 21-413, 2021 WL 1526797, at *4 (D. Minn. Apr. 19, 2021).

Decisions addressing whether a plaintiff presents a right subject to any due process protection are irrelevant here because the court of appeals ruled that the right to exclude is subject to due process protection, albeit under the rational basis analysis Petitioners disfavor. *See* Pet. App. 25a–27a. *Cf. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 672–73 (1999); *Newman v. Sathyavaglswaran,* 287 F.3d 786, 790-97 (9th Cir. 2002); *Local 342, Long Island Pub. Serv. Employees v. Town Bd. of Huntington*, 31 F.3d 1191, 1196–97 (2d Cir. 1994); *Falcon Ridge Dev., LLC v. City of Rio Rancho*, No. CIV 99-1365, 2001 WL 37125278, at *3–*6 (D.N.M. Mar. 20, 2001).

Equally irrelevant are decisions that never utter "fundamental" or do so out of context. *Cf. Golf Village North, LLC v. City of Powell*, 14 F.4th 611 (6th Cir. 2021); *Garcia-Rubiera v. Calderon*, 570 F.3d 443 (1st Cir. 2009); *Newman,* 287 F.3d at 790; *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 253 F.3d 576 (11th Cir. 2001); *Hanley v. City of Houston*, No. 98-20706, 1999 WL 236068 (5th Cir. 1999); *Bickerstaff Clay Prod. Co. v. Harris Cnty. Bd. of Comm'rs,* 89 F.3d 1481 (11th Cir. 1996); *Gamble v. Eau Claire Cnty.,* 5 F.3d 285 (7th Cir. 1993); *Woodstone Ltd. P'ship v. City of St. Paul*, No. 22-CV-1589, 2023 WL 3586077 (D. Minn. May 22, 2023).

Decisions resolving no substantive due process claim gain Petitioners nothing. *Cf. Golf Village*, 14 F.4th at 613 (procedural due process)[7]; *Garcia-*

[7] Attempting to infuse procedural due process case law with relevance, Petitioners cite *Moore v. Harper*, 143 S. Ct. 2065, 2086

Rubiera v. Calderon, 570 F.3d 443, 454 (1st Cir. 2009) (same); *A.A. Profiles*, 253 F.3d at 581 (taking). The same is true for a decision resolving a challenge to a non-legislative state action, which is subject to standards that differ from a challenge to a legislative action, such as the City's Ordinance. *Cf. Nicholas v. Pennsylvania State Univ.,* 227 F.3d 133, 142 (3d Cir. 2000).

II. The court of appeals' decision is consistent with this Court's holdings.

1. Like other courts, the court of appeals correctly refused to go where no court has gone: it declined Petitioners' invitation to hold that landlords have a fundamental substantive due process right to deny tenancy to someone based on their criminal history. Consistent with this Court's admonition, the universe of fundamental substantive due process rights after the court of appeals' decision remains appropriately limited. *See Glucksberg*, 521 U.S. at 720–21; *Chavez*, 538 U.S. at 775.

2. Petitioner's historical analysis yields no example of a court invalidating a law limiting a

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(2023), and *Richardson v. Township of Brady*, 218 F.3d 508, 518 (6th Cir. 2000) (Ryan, J., concurring), for the proposition that "[i]t doesn't matter whether the due process claims in these cases are procedural or substantive." Pet. at 26–27. *Moore* did not address the difference between procedural and substantive due process claims—only whether a law can be cast as procedural or substantive for purposes of the Elections Clause. *Moore*, 143 S. Ct. at 2086. And undercutting Petitioners' proposition, the *Richardson* concurrence noted that the Sixth Circuit "recognize[s] a distinction between the kind of property interest afforded substantive due process protection and that afforded procedural due process protection." *Richardson*, 218 F.3d at 518.

landlord's ability to discriminate on the basis of criminal history, and no legislative history surrounding the Fourteenth Amendment suggesting that it was intended to protect that ability. *Cf.* Pet. at 18–24. Their invocation of old innkeeper law misses the mark. *Cf. id.* at 19–22. As Petitioners concede, and the case law they cite attests, that law is premised on the innkeeper opening his home as a public place. *See id.* at 21 & n.14; *Markham v. Brown*, 8 N.H. 523, 528 (1837). If a litigant claimed a right of, say, a modern-day bed and breakfast operator to deny entry to their combined home and business, old innkeeper law might be apt. But the analogy fails here because the Ordinance exempts those who share their single-family home with a tenant, no Petitioner shares their home with their tenant, and Petitioners mount a facial challenge in which their historical analogies must stretch to reach even the most remote corporate absentee landlord. *See infra* Part IV (discussing the facial nature of this case).

3. Unable to gain a foothold under the Fourteenth Amendment, Petitioners invoke this Court's takings jurisprudence. Pet. at 16–17, 19. But case law based on the Takings Clause gains them nothing. This Court recognizes that takings and substantive due process law are distinct. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (plurality opinion) ("The first problem with using substantive due process to do the work of the Takings Clause is that we have held it cannot be done."); *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 542–45 (2005) (extirpating substantive due process concepts from takings law). For takings claims, this Court applies a per se test when the government authorizes a third-party stranger to

invade another's property, stripping the owner not of a fundamental right, but of a "fundamental element of the property right" protected by the Takings Clause. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072–73 (2021). This Court's takings jurisprudence also clarifies that landlords—who by definition invite strangers onto their property—generally cannot wield that per se test against limitations on their right to choose or evict tenants. *Yee v. City of Escondido*, 503 U.S. 519, 526–31 (1992); *F.C.C. v. Florida Power Corp.,* 480 U.S. 245, 250–53 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 440 (1982). So if takings law holds any lesson for substantive due process law, it is that a landlord's right to exclude tenants they disfavor is not even a fundamental element of their property right.

Petitioners cite another takings case, *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). Pet. at 27. But *Knick* never mentioned "fundamental" or a right to exclude and discussed due process law only to distinguish it from takings law. *Knick*, 139 S. Ct. at 2174 ("the analogy from the due process context to the takings context is strained").

Also unavailing is the sentence Petitioners lift from this Court's emergency docket order in *Alabama Ass'n of Realtors, v. Department of Health & Human Services*, Order on App. to Vacate Stay, 141 S. Ct. 2485 (2021) (per curiam). *Cf.* Pet. at 5, 17. That order, which addressed no due process claim, arose from landlords' challenge to a pandemic-related eviction moratorium. *Ala. Realtors*, 141 S. Ct. at 2487–88. In assessing the equities to determine whether to grant a stay, this Court concluded its list of harms that landlords would suffer with the sentence Petitioners invoke: "And

preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude." *Id.* at 2489 (citing takings case law). Again, recognizing the right to exclude as a fundamental element of property ownership under the Takings Clause does nothing to prove that property ownership—or any of its elements—is a fundamental substantive due process right.

III. Petitioners present no issue warranting intervention by this Court.

Whether the right to exclude or property rights generally—let alone landlords' right to discriminate on the basis of criminal history—are fundamental for substantive due process purposes is not an issue warranting this Court's intervention.

1. Not only has this Court twice denied requests to consider whether property rights are fundamental for substantive due process purposes, *see supra* at 5 n.3, but this Court has also turned away other petitions for certiorari premised on arguments that property rights are fundamental for substantive due process purposes. *E.g.*, *Vision-Park Props., LLC v. Seaside Eng'g & Surveying, LLC*, No. 14-1450, 2015 WL 3623144, at *34 (June 10, 2015) ("Vision's ownership interest . . . is a property right that is properly considered 'fundamental'"), *cert. denied*, 577 U.S. 823 (2015); *Kittery Retail Ventures, LLC v. Town of Kittery*, No. 04-943, 2005 WL 79245 at *15 (Jan. 7, 2005) (invoking "[t]his Court's [alleged] history of treating the ability to use real property as a fundamental right"), *cert. denied*, 544 U.S. 906 (2005).

2. Although Petitioners warn against "property rights [being] excluded from the substantive protections of the Due Process Clause," Pet. at 24, the right to exclude remains constitutionally protected. Even though the right is nonfundamental for substantive due process purposes, laws like Seattle's remain subject to the rational basis analysis. Petitioners' antipathy toward that analysis—calling it "exceptionally lax"—gives this Court no reason to alter it. Pet. at 29. And again, the right to exclude is protected by a per se test under the Takings Clause. *Cedar Point*, 141 S. Ct. at 2072–73.

3. Even if there were a certworthy issue here, this Court should let Petitioners' arguments percolate among lower courts before considering expanding substantive due process law so radically. Petitioners rely principally on the analysis in *Dobbs*, issued last year. *E.g.*, Pet. at 5, 15, 18, 30–31. But lower courts have had no real opportunity to assess whether *Dobbs*—which stripped "fundamental" status from a liberty interest—offers any lesson for whether to extend "fundamental" status to any property right. *See Dobbs*, 142 S. Ct. at 2248–56. Petitioners failed to bring *Dobbs* to the court of appeals' attention[8] and the Petition cites no decision discussing *Dobbs*.

Percolation will also allow lower courts to assess whether Petitioners' expansive assertion of fundamental rights contains any limiting principle. If what Petitioners call the "right to exclude" is fundamental for substantive due process purposes,

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[8] This Court issued *Dobbs* nine months before the court of appeals issued its opinion here. *Compare Dobbs*, 142 S. Ct. at 2228 *with* Pet. App. 1a.

courts must apply strict scrutiny and may uphold the law only if it is "narrowly tailored to serve a compelling state interest"—a reality Petitioners elide. *Compare Glucksberg*, 521 U.S. at 720–21, *with* Pet. at 29 (nodding only to "heightened scrutiny").

This sets Petitioners' argument atop a slippery slope. Petitioners make no effort to limit the right to exclude, casting it in sweeping terms of landlords' "right to choose who they allow to reside on and share their property." Pet. at 11. Under this theory, a landlord could subject any law limiting their right to choose—based on religion, sex, or any other status—to strict scrutiny. And Petitioners assert that the bundle of fundamental property rights extends beyond the right to exclude or choose—they say it extends to property rights generally. *E.g.*, Pet. at at 24 ("property is a fundamental right"), 25 (addressing "the basic question of whether property rights qualify as 'fundamental' under the Fourteenth Amendment"), 28 (complaining that lower courts "refuse to give property rights" "fundamental" status). If this is so, lower courts should be allowed to consider—before this Court intervenes—whether there is any handhold along the resulting slippery slope.

And percolation would allow state courts to grapple with underlying state law questions that Petitioners and their *amici* try to insert into this dispute. They contend that landlords face a tort law duty to conduct criminal background checks. *E.g.*, Pet. at 9, 34 n.12; Br. *Amicus Curiae* Goldwater Inst. at 11–15.

But in Washington a residential landlord might have a duty to protect their tenant against only the foreseeable criminal acts of others. *See, e.g.*, *Griffin v.*

West RS, Inc., 984 P.2d 1070, 1077 (Wash. Ct. App. 1999), *rev'd on other grounds*, 18 P.3d 558 (Wash. 2001). The mere fact that someone was once arrested or convicted of a crime does not make it foreseeable that they will harm others in the future.[9] The dictum Petitioners cite in *City of Bremerton v. Widell,* 51 P.3d 733, 738–39 (Wash. 2002), is not to the contrary. Pet. at 9. Even if it were true that a criminal background check could gauge foreseeable harm to others, Washington imposes no duty to conduct any such check.

A survey of state law across the country confirms that a landlord "need not protect tenants from harm by investigating the backgrounds of other prospective tenants . . . ." 49 AM. JUR. 2D *Landlord and Tenant* § 434 (2021). What's more, a local law banning housing discrimination based on criminal history would relieve landlords of any duty based on foreseeability.

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[9] Petitioners overlook research: critiquing recidivism statistics as a policy-making tool, *e.g.*, Rhodes, et al., *Following Incarceration, Most Released Offenders Never Return to Prison*, 62 CRIME & DELINQ. 1003, 1004–05 (2016); noting that the offense rate for the formerly incarcerated approximates that of the general population within a matter of years after release, *e.g.*, Kurlychek, et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006); addressing how stable housing reduces recidivism, *e.g.*, Ehman, et al., *Tenant Screening in an Era of Mass Incarceration: A Criminal Record Is No Crystal Ball*, N.Y.U. J. LEGIS. & PUB. POL'Y *QUORUM*, 1, 20 (2015); and demonstrating a downward trend in recidivism rates, *e.g.*, Gelb, et al., *The Changing State of Recidivism: Fewer People Going Back to Prison* (Pew, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/01/the-changing-state-of-recidivism-fewer-people-going-back-to-prison (last visited Nov. 20, 2023).

But if ambiguity remains over the intersection of state tort law and relatively new local laws banning housing discrimination based on criminal history, this Court should allow lower courts to wrestle with that question.

IV. This case is a poor vehicle for considering the question presented.

Even if this Court were inclined to consider creating a landlord's fundamental substantive due process right to discriminate on the basis of criminal history—or a more general property owner's fundamental substantive due process right to exclude—this case would be a poor vehicle.

The facial nature of this challenge—which the Petition omits—disconnects it from the factual premise of Petitioners' argument. The Petition opens by casting this as a case about "the right to protect one's home" brought by three landlords who allegedly share their homes with tenants. Pet. at 2–4. They later claim the "right to secure one's family and property against outside threats," invoking "values that are at their zenith in the home." *Id.* at 19, 21. *Accord id.* at 11 (claiming that the Ordinance "deprives owners of their right to choose who they allow to reside on and share their property").

The problem is that the Ordinance exempts anyone who shares a single-family home with a tenant, and two of the individual Petitioners live off-site from their rental properties, while the third does not share their dwelling unit with a tenant. If this Court wants to resolve a case about alleged threats to one's home, it should wait for an as-applied challenge from someone sharing their home under a fair-chance

housing ordinance lacking a shared-home exemption. This is not that case. Because Petitioners in this facial challenge must show that there is no circumstance under which the Ordinance can be constitutionally applied—even to corporate landlords who have little personal interaction with their rental properties—their invocations of home and family are largely irrelevant. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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December 15, 2023.

SUPPLEMENTAL APPENDIX

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CITY OF SEATTLE

ORDINANCE 125393

AN ORDINANCE relating to housing regulations; adding a new Chapter 14.09 (Fair Chance Housing) to the Seattle Municipal Code to regulate the use of criminal history in rental housing; authorizing the Seattle Office for Civil Rights to enforce the regulations set out in this new chapter; and amending Section 3.14.931 of the Seattle Municipal Code to expand the Seattle Human Rights Commission's duties.

WHEREAS, the U.S. Department of Justice has estimated one in every three adults in the United States has either an arrest or conviction record[1]; and

WHEREAS, the Center for American Progress reports that nearly half of all children in the U.S. have one parent with a criminal record[2]; and

WHEREAS, over the past two decades, there has been a rise in the use of criminal background checks to screen prospective tenants for housing; and

WHEREAS, a study by the Vera Institute of Justice has shown that people with stable housing are

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[1] Bureau of Justice Statistics, U.S. Department of Justice, "Survey of State Criminal History Information Systems," 2012,available at https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf

[2] Vallas, Boteacg, West, Odum. "Removing Barriers to Opportunity for Parents with Criminal Records and Their Children: A Two Generation Approach," Center for American Progress. December 2015.

more likely to successfully reintegrate into society and are less likely to reoffend;[3] and

WHEREAS, individuals and parents who have served their time must be able to secure housing if they are to re-enter into society to successfully rebuild their lives and care for their families; and

WHEREAS, African Americans are 3.4 percent of Washington's population but account for nearly 18.4 percent of Washington's prison population;[4] Latinos are 11.2 percent of Washington's population but account for 13.2 percent of Washington's prison population;[5] and Native Americans are 1.3 percent of the state population but account for 4.7 percent of Washington's prison population;[6] and

WHEREAS, racial inequities in the criminal justice system are compounded by racial bias in the rental applicant selection process, as demonstrated by fair housing testing conducted by the Seattle Office for Civil Rights in 2013 that found evidence of different treatment based on race in 64 percent of tests, including some cases where African American applicants were told more often than their white

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[3] Vera Institute of Justice, "Piloting a Tool for Reentry: A Promising Approach to Engaging Family Members," 2011, available at http://archive.vera.org/sites/default/files/resources/downloads/Piloting-a-Tool-for-Reentry-Updated.pdf

[4] http://www.ofm.wa.gov/pop/census2010/default.asp#demo; http://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf

[5] http://www.ofm.wa.gov/pop/census2010/default.asp#demo; http://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf

[6] http://www.ofm.wa.gov/pop/census2010/default.asp#demo; http://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf

counterparts that they would have to undergo a criminal background check as part of the screening process; and

WHEREAS, there is no sociological research establishing a relationship between a criminal record and an unsuccessful tenancy;[7] and

WHEREAS, an Urban Institute study stated, "men who found [stable] housing within the first month after release were less likely to return to prison during the first year out";[8] and

WHEREAS, a study performed in Cleveland found that "obtaining stable housing within the first month after release inhibited re-incarceration";[9] and

WHEREAS, studies show that, after four to seven years where no re-offense has occurred, a person with a prior conviction is no more likely to commit a crime than someone who has never had a conviction;[10] and

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[7] Ehman and Reosti, "Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball", *N.Y.U. Journal of Legislation and Public Policy Quorum*, March 2015.

[8] *The Importance of Stable Housing for Formerly Incarcerated Individuals,* Housing Law Bulletin, Volume 40, http://nhlp.org/files/Importance%20of%20Stable%20Housing%20for%20Formerly%20Incarcerated_0.pdf

[9] *Id.*

[10] Kurlychek, et al. "Scarlet Letters & Recidivism: Does an Old Criminal Record Predict Future Criminal Behavior?" (2006), http://www.albany.edu/bushway_research/publications/Kurlychek_et_al_2006.pdf. and "'Redemption' in an Era of Widespread Criminal Background Checks," *NIJ Journal*, Issue 263 (June 2009), at page 10 - preliminary study with group of first-time

WHEREAS, research shows higher recidivism occurs within the first two years of release and is mitigated when individuals have access to safe and affordable housing and employment;[11] and

WHEREAS, a 2015 study reported that juveniles on the sex offender registry had considerable difficulty in accessing stable housing because of their registration status, which contributed to negative mental health outcomes;[12] and

WHEREAS, more than 90 percent of arrests of juveniles for sex offenses represent a one-time event that does not recur,[13] and studies have repeatedly shown low recidivism rates ranging from three percent to four percent;[14] and

WHEREAS, documents and research relating to the information cited in the recitals is located in Clerk File 320351; and

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1980 arrestees in New York - the findings depend on the nature of the 2009), at page 10 - preliminary study with group of first-time 1980 arrestees in New York- the findings depend on the nature of the prior offense and the age of the individual.

[11] Ehman and Reosti, "Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball", *N.Y.U. Journal of Legislation and Public Policy Quorum*, March 2015.

[12] Harris, Andrew J. et al. (2015). "Collateral Consequences of Juvenile Sex Offender Registration and Notification," http://journals.sagepub.com/doi/abs/10.1177/1079063215574004

[13] Zimring, F.E. (2004). An American travesty: Legal responses to adolescent sexual offending, p. 66. University of Chicago.

[14] Ibid, Appendix C.

WHEREAS, The City of Seattle has developed a Race and Social Justice Initiative (RSJI) to eliminate institutional racism and create a community where equity in opportunity exists for everyone; and

WHEREAS, the City's Office for Civil Rights (OCR) works to advance civil rights and end barriers to equity; and

WHEREAS, in 2010, residents of Sojourner Place Transitional Housing, Village of Hope, and other community groups called on the City to address barriers to housing faced by people with prior records; and

WHEREAS, in response, OCR and the Seattle Human Rights Commission held two public forums in 2010 and 2011, bringing together over 300 people including community members with arrest and conviction records, landlords, and employers to share their concerns; and

WHEREAS, in 2013, the City Council passed the Seattle Jobs Assistance Ordinance, now titled the Fair Chance Employment Ordinance, to address barriers in employment; and

WHEREAS, since 2013, the Office of Housing has worked with nonprofit housing providers to share best practices in tenant screening to address racial inequities; and

WHEREAS, in September 2014 the Council adopted Resolution 31546, in which the Mayor and Council jointly convened the Seattle Housing Affordability and Livability Agenda (HALA) Advisory Committee to evaluate potential strategies to make Seattle more affordable, equitable, and inclusive; and

in particular, to promote the development and preservation of affordable housing for residents of the City; and

WHEREAS, in July 2015, HALA published its Final Advisory Committee Recommendations and the Mayor published *Housing Seattle: A Roadmap to an Affordable and Livable City,* which outlines a multi-pronged approach of bold and innovative solutions to address Seattle's housing affordability crisis; and

WHEREAS, in October 2015, the Mayor proposed and Council adopted Resolution 31622, declaring the City's intent to expeditiously consider strategies recommended by the Housing Affordability Livability Agenda (HALA) Advisory Committee; and

WHEREAS, the Mayor's Housing and Affordability and Livability Agenda recommended that the City address barriers to housing faced by people with criminal records, and the Mayor responded by creating a Fair Chance Housing Committee; and

WHEREAS, the Fair Chance Housing Committee provided input to OCR on a legislative proposal to address these barriers; and

WHEREAS, in 2016, the Department of Housing and Urban Development (HUD) issued guidance on the application of the Fair Housing Act to the use of arrest and conviction records in rental housing, stating that a housing provider may be in violation of fair housing laws if their policy or practice does not serve a substantial, legitimate, nondiscriminatory interest, due to the potential for criminal record

screening to have a disparate impact on African American and other communities of color; and

WHEREAS, except for landlords operating federally assisted housing programs, conducting a criminal background check to screen tenants is a discretionary choice for landlords that they have no legal duty under City or state law to fulfill; and

WHEREAS, in 2016, the Seattle City Council passed Resolution 31669, affirming HUD's guidance and the work of the Mayor's Fair Chance Housing Committee; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. The Council expresses the following concerning implementation of Seattle Municipal Code Chapter 14.09:

A. The implementation of Seattle Municipal Code Chapter 14.09 will consist of:

1. Seattle Office for Civil Rights will conduct regular fair housing testing to ensure compliance, decrease racial bias, and evaluate the impacts of Chapter 14.09; and

2. Seattle Office for Civil Rights will launch a Fair Housing Home Program for landlords. The program's goal will be to reduce racial bias and biases against other protected classes in tenant selection. Completion of the training program will result in a certification of a Fair Housing Home program. For pre-finding settlement and conciliation agreements under Chapter 14.09, landlords will be required to participate in the Fair Housing Home program; and

3. The City of Seattle will work at the state level to reduce the impact of criminal convictions; and

4. The City of Seattle will explore additional mechanisms to reduce the greatest barriers to housing for individuals with criminal conviction records through the Re-Entry Taskforce, convened by the Seattle Office for Civil Rights.

Section 2. A new Chapter 14.09 is added to the Seattle Municipal Code as follows:

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

"Accessory dwelling unit" has the meaning defined in Section 23.84A.032's definition of "Residential use."

"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.

"Aggrieved party" means a prospective occupant, tenant, or other person who suffers tangible or intangible harm due to a person's violation of this Chapter 14.09.

"Arrest record" means information indicating that a person has been apprehended, detained, taken into custody, held for investigation, or restrained by a law enforcement department or military authority due to an accusation or suspicion that the person committed a crime. Arrest records include pending criminal charges, where the accusation has not yet resulted in a final judgment, acquittal, conviction, plea, dismissal, or withdrawal.

"Charging party" means any person who files a charge alleging a violation under this Chapter 14.09, including the Director.

"City" means The City of Seattle.

"Commission" means the Seattle Human Rights Commission.

"Consumer report" has the meaning defined in RCW 19.182.010 and means a written, oral, or other communication of information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for purposes authorized under RCW 19.182.020.

"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.

"Department" means the Seattle Office for Civil Rights and any division therein.

"Detached accessory dwelling unit" has the meaning defined in Section 23.84A.032's definition of "Residential use."

"Director" means the Director of the Seattle Office for Civil Rights or the Director's designee.

"Dwelling unit" has the meaning as defined in Section 22.204.050.D.

"Fair chance housing" means practices to reduce barriers to housing for persons with criminal records.

"Juvenile" means a person under 18 years old.

A "legitimate business reason" shall exist when the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. To

determine such an interest, a landlord must demonstrate, through reliable evidence, a nexus between the policy or practice and resident safety and/or protecting property, in light of the following factors:

A. The nature and severity of the conviction;

B. The number and types of convictions;

C. The time that has elapsed since the date of conviction;

D. Age of the individual at the time of conviction;

E. Evidence of good tenant history before and/or after the conviction occurred; and

F. Any supplemental information related to the individual's rehabilitation, good conduct, and additional facts or explanations provided by the individual, if the individual chooses to do so. For the purposes of this definition, review of conviction information is limited to those convictions included in registry information.

"Person" means one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. It includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons, and any political or civil subdivision or agency or instrumentality of the City.

"Prospective occupant" means any person who seeks to lease, sublease, or rent real property.

"Registry information" means information solely obtained from a county, statewide, or national sex

offender registry, including but not limited to, the registrant's physical description, address, and conviction description and dates.

"Respondent" means any person who is alleged or found to have committed a violation of this Chapter 14.09.

"Single family dwelling" has the meaning as defined in Section 22.204.200.A.

"Supplemental information" means any information produced by the prospective occupant or the tenant, or produced on their behalf, with respect to their rehabilitation or good conduct, including but not limited to:

A. Written or oral statement from the prospective occupant or the tenant;

B. Written or oral statement from a current or previous employer;

C. Written or oral statement from a current or previous landlord;

D. Written or oral statement from a member of the judiciary or law enforcement, parole or probation officer, or person who provides similar services;

E. Written or oral statement from a member of the clergy, counselor, therapist, social worker, community or volunteer organization, or person or institution who provides similar services;

F. Certificate of rehabilitation;

G. Certificate of completion or enrollment in an educational or vocational training program, including apprenticeship programs; or

H. Certificate of completion or enrollment in a drug or alcohol treatment program; or certificate of completion or enrollment in a rehabilitation program.

"Tenant" means a person occupying or holding possession of a building or premises pursuant to a rental agreement.

14.09.015 Applicability

A person is covered by this Chapter 14.09 when the physical location of the housing is within the geographic boundaries of the City.

14.09.020 Notice to prospective occupants and tenants

The written notice shall include 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, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in section 14.09.110. If a landlord screens prospective occupants pursuant to section 14.09.025.A.3, the landlord shall provide written notice of screening criteria on all applications for rental properties. Pursuant to section 14.09.025.A.3, applicants may provide any supplemental information related to an individual's rehabilitation, good conduct, and facts or explanations regarding their registry information. The Department shall adopt a rule or rules to enforce this Section 14.09.020.

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 14.09.110.

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.

B. If a landlord takes an adverse action based on a legitimate business reason, the landlord shall provide written notice by email, mail, or in person of the adverse action to the prospective occupant or the tenant and state the specific registry information that was the basis for the adverse action.

C. If a consumer report is used by a landlord as part of the screening process, the landlord must provide the name and address of the consumer reporting agency and the prospective occupant's or tenant's rights to obtain a free copy of the consumer report in the event of a denial or other adverse action, and to dispute the accuracy of information appearing in the consumer report.

14.09.030 Retaliation prohibited

A. No person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter 14.09.

B. No person shall take any adverse action against any person because the person has exercised in good faith the rights protected under this Chapter 14.09. Such rights include but are not limited to the right to fair chance housing and regulation of the use of criminal history in housing by this Chapter 14.09; the right to make inquiries about the rights protected under this Chapter 14.09; the right to inform others about their rights under this Chapter 14.09; the right to inform the person's legal counsel or any other person about an alleged violation of this Chapter 14.09; the right to file an oral or written complaint with the Department for an alleged violation of this Chapter 14.09; the right to cooperate with the Department in its investigations of this Chapter 14.09; the right to testify in a proceeding under or related to this Chapter 14.09; the right to refuse to participate in an activity that would result in a violation of City, state, or federal law; and the right to oppose any policy, practice, or act that is unlawful under this Chapter 14.09.

C. No person shall communicate to a person exercising rights protected in this Section 14.09.030, directly or indirectly, the willingness to inform a government employee that the person is not lawfully in the United States, or to report, or to make an implied or express assertion of a willingness to report, suspected citizenship or immigration status of a prospective occupant, a tenant or a member of their household to a federal, state, or local agency because the prospective occupant or tenant has exercised a right under this Chapter 14.09.

D. It shall be a rebuttable presumption of retaliation if a landlord or any other person takes an adverse action against a person within 90 days of the person's exercise of rights protected in this Section 14.09.030. The landlord may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

E. Proof of retaliation under this Section 14.09.030 shall be sufficient upon a showing that a landlord or any other person has taken an adverse action against a person and the person's exercise of rights protected in this Section 14.09.030 was a motivating factor in the adverse action, unless the landlord can prove that the action would have been taken in the absence of such protected activity.

F. The protections afforded under this Section 14.09.030 shall apply to any person who mistakenly but in good faith alleges violations of this Chapter 14.09.

G. A complaint or other communication by any person triggers the protections of this Section 14.09.030 regardless of whether the complaint or

communication is in writing or makes explicit reference to this Chapter 14.09.

14.09.035 Enforcement power and duties

A. The Department shall have the power to investigate violations of this Chapter 14.09, as defined herein, and shall have such powers and duties in the performance of these functions as are defined in this Chapter 14.09 and otherwise necessary and proper in the performance of the same and provided for by law.

B. The Department shall be authorized to coordinate implementation and enforcement of this Chapter 14.09 and shall promulgate appropriate guidelines or rules for such purposes.

C. The Director is authorized and directed to promulgate appropriate guidelines and rules consistent with this Chapter 14.09 and the Administrative Code. Any guidelines or rules promulgated by the Director shall have the force and effect of law and may be relied on by landlords, prospective occupants, tenants, and other parties to determine their rights and responsibilities under this Chapter 14.09.

D. The Director shall maintain data on the number of complaints filed pursuant to this Chapter 14.09, demographic information on the complainants, the number of investigations it conducts and the disposition of every complaint and investigation. The Director shall submit this data to the Mayor and City Council every six months for the two years following the effective date of the ordinance introduced as Council Bill 119015.

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.

14.09.045 Charge—Filing

A. An aggrieved person may file a charge with the Director alleging a violation. The charge shall be in writing and signed under oath or affirmation before the Director, one of the Department's employees, or any other person authorized to administer oaths. The charge shall describe the alleged violation and should include a statement of the dates, places, and circumstances, and the persons responsible for such acts and practices. Upon the filing of a charge alleging a violation, the Director shall cause to be served upon the charging party a written notice acknowledging the filing, and notifying the charging party of the time limits and choice of forums provided in this Chapter 14.09.

B. A charge shall not be rejected as insufficient because of failure to include all required information if the Department determines that the charge substantially satisfies the informational requirements necessary for processing.

C. A charge alleging a violation or pattern of violations under this Chapter 14.09 may also be filed by the Director whenever the Director has reason to believe that any person has been engaged or is engaging in a violation under this Chapter 14.09.

14.09.050 Time for filing charges

Charges filed under this Chapter 14.09 must be filed with the Department within one year after the alleged violation has occurred or terminated.

14.09.055 Charge—Amendments

A. The charging party or the Department may amend a charge:

1. To cure technical defects or omissions;

2. To clarify allegations made in the charge;

3. To add allegations related to or arising out of the subject matter set forth or attempted to be set forth in the charge;

4. To add as a charging party a person who is, during the course of the investigation, identified as an aggrieved person; or

5. To add or substitute as a respondent a person who was not originally named as a respondent, but who is, during the course of the investigation, identified as a respondent. For jurisdictional purposes, such amendments shall relate back to the date the original charge was first filed.

B. The charging party may amend a charge to include allegations of retaliation which arose after the filing of the original charge. Such amendment must be filed within one year after the occurrence of the retaliation, and prior to the Department's issuance of findings of fact and determination with respect to the original charge. Such amendments may be made at any time during the investigation of the original charge so long as the Department will have adequate time to investigate the additional allegations and the

parties will have adequate time to present the Department with evidence concerning the additional allegations before the issuance of findings of fact and a determination.

C. When a charge is amended to add or substitute a respondent, the Director shall serve upon the new respondent within 20 days:

1. The amended charge;

2. The notice required under subsection 14.09.060.A; and

3. A statement of the basis for the Director's belief that the new respondent is properly named as a respondent. For jurisdictional purposes, amendment of a charge to add or substitute a respondent shall relate back to the date the original charge was first filed.

14.09.060 Notice of charge and investigation

A. The Director shall promptly, and in any event within 20 days of filing of the charge, cause to be served on or mailed, by certified mail, return receipt requested, to the respondent, a copy of the charge along with a notice advising the respondent of respondent's procedural rights and obligations under this Chapter 14.09. The Director shall promptly make an investigation of the charge.

B. The investigation shall be directed to ascertain the facts concerning the violation alleged in the charge, and shall be conducted in an objective and impartial manner.

C. During the period beginning with the filing of the charge and ending with the issuance of the

findings of fact, the Department shall, to the extent feasible, engage in settlement discussions with respect to the charge. A pre-finding settlement agreement arising out of the settlement discussions shall be an agreement between the charging party and the respondent and shall be subject to approval by the Director. Each pre-finding settlement agreement is a public record. Failure to comply with the pre-finding settlement agreement may be enforced under Section 14.09.100.

D. During the investigation, the Director shall consider any statement of position or evidence with respect to the allegations of the charge which the charging party or the respondent wishes to submit, including the respondent's answer to the charge. The Director shall have authority to sign and issue subpoenas requiring the attendance and testimony of witnesses, the production of evidence including but not limited to books, records, correspondence, or documents in the possession or under the control of the person subpoenaed, and access to evidence for the purpose of examination and copying, and conduct discovery procedures which may include the taking of interrogatories and oral depositions.

E. The Director may require a fact-finding conference or participation in another process with the respondent and any of respondent's agents and witnesses and the charging party during the investigation in order to define the issues, determine which elements are undisputed, resolve those issues which can be resolved, and afford an opportunity to discuss or negotiate settlement. Parties may have their legal counsel present if desired.

14.09.065 Procedure for investigations

A. A respondent may file with the Department an answer to the charge no later than ten days after receiving notice of the charge.

B. The Director shall commence investigation of the charge within 30 days after the filing of the charge. The investigation shall be completed within 100 days after the filing of the charge, unless it is impracticable to do so. If the Director is unable to complete the investigation within 100 days after the filing of the charge, the Director shall notify the charging party and the respondent of the reasons therefor. The Director shall make final administrative disposition of a charge within one year of the date of filing of the charge, unless it is impracticable to do so. If the Director is unable to make a final administrative disposition within one year of the filing of the charge, the Director shall notify the charging party and the respondent of the reasons therefor.

C. If the Director determines that it is necessary to carry out the purposes of this Chapter 14.09, the Director may, in writing, request the City Attorney to seek prompt judicial action for temporary or preliminary relief to enjoin any violation pending final disposition of a charge.

14.09.070 Findings of fact and determination of reasonable cause or no reasonable cause

A. The results of the investigation shall be reduced to written findings of fact and a determination shall be made by the Director that there is or is not reasonable cause for believing that a violation has been, is being or is about to be committed, which

determination shall also be in writing and issued with the written findings of fact. The findings and determination are "issued" when signed by the Director and mailed to the parties.

B. Once issued to the parties, the Director's findings of fact, determination, and order may not be amended or withdrawn except upon the agreement of the parties or in response to an order by the Commission after an appeal taken pursuant to Section 14.09.075; provided, that the Director may correct clerical mistakes or errors arising from oversight or omission upon a motion from a party or upon the Director's own motion.

14.09.075 Determination of no reasonable cause—Appeal from and dismissal

If a determination is made that there is no reasonable cause for believing a violation under this Chapter 14.09 has been, is being, or is about to be committed, the charging party may appeal such determination to the Commission within 30 days of the date the determination is signed by the Director by filing a written statement of appeal with the Commission. The Commission shall promptly deliver a copy of the statement to the Department and respondent and shall promptly consider and act upon such appeal by either affirming the Director's determination or, if the Commission believes the Director should investigate further, remanding it to the Director with a request for specific further investigation. In the event no appeal is taken, or such appeal results in affirmance, or if the Commission has not decided the appeal within 90 days from the date the appeal statement is filed, the determination of the

Director shall be final and the charge deemed dismissed and the same shall be entered on the records of the Department.

14.09.080 Determination of reasonable cause—Conciliation

A. If the Director determines that reasonable cause exists to believe that a violation has occurred, is occurring, or is about to occur, the Director shall endeavor to eliminate the violation through efforts to reach conciliation. Conditions of conciliation may include, but are not limited to, the elimination of the violation, rent refunds or credits, reinstatement to tenancy, affirmative recruiting or advertising measures, payment of actual damages, and reasonable attorney's fees and costs, or such other remedies that will carry out the purposes of this Chapter 14.09. The Director may also require payment of a civil penalty as set forth in Section 14.09.100.

B. Any post-finding conciliation agreement shall be an agreement between the charging party and the respondent and shall be subject to the approval of the Director. The Director shall enter an order setting forth the terms of the agreement, which may include a requirement that the parties report to the Director on the matter of compliance. Copies of such order shall be delivered to all affected parties and shall be subject to public disclosure.

C. If conciliation fails and no agreement can be reached, the Director shall issue a written finding to that effect and furnish a copy of the finding to the charging party and to the respondent. Upon issuance of the finding, except a case in which a City department is a respondent, the Director shall

promptly cause to be delivered the entire investigatory file, including the charge and any and all findings made, to the City Attorney for further proceedings and hearing under this Chapter 14.09, pursuant to Section 14.09.085.

14.09.085 Complaint and hearing

A. Following submission of the investigatory file from the Director, the City Attorney shall, except as set forth in subsection 14.09.085.B, prepare a complaint against such respondent relating to the charge and facts discovered during the Department's investigation. The City Attorney shall file the complaint with the Hearing Examiner in the name of the Department and represent the interests of the Department at all subsequent proceedings.

B. If the City Attorney determines that there is no legal basis for a complaint to be filed or proceedings to continue, a statement of the reasons therefor shall be filed with the Department. The Director shall then dismiss the charge. Any party aggrieved by the dismissal may appeal to the Commission.

C. The City Attorney shall serve a copy of the complaint on respondent and furnish a copy of the complaint to the charging party and to the Department.

D. Within 20 days of the service of such complaint upon it, the respondent shall file its answer with the Hearing Examiner and serve a copy of the same on the City Attorney.

E. Upon the filing of the complaint, the Hearing Examiner shall promptly establish a hearing date and give notice thereof to the Commission, City Attorney,

and respondent, and shall thereafter hold a public hearing on the complaint which shall commence no earlier than 90 days nor later than 120 days from the filing of the complaint, unless otherwise ordered by the Hearing Examiner.

F. After the complaint is filed with the Hearing Examiner, it may be amended only with the permission of the Hearing Examiner, which permission shall be granted when justice will be served and all parties are allowed time to prepare their case with respect to additional or expanded charges.

G. The hearing shall be conducted by the Hearing Examiner, a deputy hearing examiner, or a hearing examiner pro tempore appointed by the Hearing Examiner from a list approved by the Commission, sitting alone or with representatives of the Commission if any are designated. Such hearings shall be conducted in accordance with written rules and procedures consistent with this Chapter 14.09 and the Administrative Code, Chapter 3.02.

H. The Commission, within 30 days after receiving notice of the date of hearing from the Hearing Examiner, at its discretion, may appoint two Commissioners, who have not otherwise been involved in the charge, investigation, fact finding, or other resolution and proceeding on the merits of the case, who have not formed an opinion on the merits of the case, and who otherwise have no pecuniary, private, or personal interest or bias in the matter, to hear the case with the Hearing Examiner. Each Commissioner shall have an equal vote with the Hearing Examiner. The Hearing Examiner shall be the chairperson of the

panel and make all evidentiary rulings. The Hearing Examiner shall resolve any question of previous involvement, interest, or bias of an appointed Commissioner in conformance with the law on the subject. Any reference in this Chapter 14.09 to a decision, order, or other action of the Hearing Examiner shall include, when applicable, the decision, order, or other action of a panel constituted under this subsection.

14.09.090 Decision and order

A. Within 30 days after conclusion of the hearing, the Hearing Examiner shall prepare a written decision and order, file it as a public record with the City Clerk, and provide a copy to each party of record and to the Department.

B. Such decision shall contain a brief summary of the evidence considered and shall contain findings of fact, conclusions of law upon which the decision is based, and an order detailing the relief deemed appropriate, together with a brief statement of the reasons supporting the decision.

C. In the event the Hearing Examiner or a majority of the panel composed of the Hearing Examiner and Commissioners determines that a respondent has committed a violation under this Chapter 14.09, the Hearing Examiner may order the respondent to take such affirmative action or provide for such relief as is deemed necessary to correct the violation, effectuate the purpose of this Chapter 14.09, and secure compliance therewith, including but not limited to rent refund or credit, reinstatement to tenancy, affirmative recruiting and advertising measures, or payment of reasonable attorney's fees

and costs, or to take such other action as in the judgment of the Hearing Examiner will carry out the purposes of this Chapter 14.09. An order may include the requirement for a report on the matter of compliance.

D. The Department in the performance of its functions may enlist the aid of all departments of City government, and all said departments are directed to fully cooperate with the Department.

14.09.095 Appeal from Hearing Examiner order

A. The respondent may obtain judicial review of the decision of the Hearing Examiner by applying for a Writ of Review in King County Superior Court within 14 days from the date of the decision in accordance with the procedure set for in chapter 7.16 RCW, other applicable law, and court rules.

B. The decision of the Hearing Examiner shall be final and conclusive unless review is sought in compliance with this Section 14.09.095.

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.

14.09.105 Enforcement of Department and Hearing Examiner orders and agreements

A. In the event a City respondent fails to comply with any final order of the Director or of the Hearing Examiner, a copy of the order shall be transmitted to the Mayor, who shall take appropriate action to secure compliance with the final order.

B. In the event a respondent fails to comply with any final order issued by the Hearing Examiner not directed to the City or to any City department, the

Director shall refer the matter to the City Attorney, for the filing of a civil action to enforce such order.

C. Whenever the Director has reasonable cause to believe that a respondent has breached a settlement or conciliation agreement, the Director shall refer the matter to the City Attorney for filing of a civil action to enforce such agreement.

14.09.110 Evaluation

The Department shall ask the Office of the City Auditor to conduct an evaluation of the Fair Chance Housing Ordinance to determine if the program should be maintained, amended, or repealed. The evaluation should include an analysis of the impact on discrimination based on race and the impact on the ability of persons with criminal records to obtain housing. The highest quality evaluation will be performed based on available resources and data. The Office of the City Auditor, at its discretion, may retain an independent, outside party to conduct the evaluation. The evaluation shall be submitted to City Council by the end of 2019.

14.09.115 Exclusions and other legal requirements

A. 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.

B. 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 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.

C. This Chapter 14.09 shall not apply to the renting, subrenting, leasing, or subleasing of a single family dwelling unit in which the owner or subleasing tenant or subrenting tenant occupy part of the single family dwelling unit.

D. This Chapter 14.09 shall not apply to the renting, subrenting, leasing, or subleasing of an accessory dwelling unit or detached accessory dwelling unit wherein the owner or person entitled to possession thereof maintains a permanent residence, home, or abode on the same lot.

E. This Chapter 14.09 shall not be construed to discourage or prohibit landlords from adopting screening policies that are more generous to prospective occupants and tenants than the requirements of this Chapter 14.09.

F. This Chapter 14.09 shall not be construed to create a private civil right of action.

14.09.120 Severability

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.

Section 3. Section 3.14.931 of the Seattle Municipal Code, last amended by Ordinance 125231, is amended as follows:

3.14.931 Seattle Human Rights Commission—Duties

The Seattle Human Rights Commission shall act in an advisory capacity to the Mayor, City Council, Office for Civil Rights, and other City departments in respect to matters affecting human rights, and in furtherance thereof shall have the following specific responsibilities:

A. To consult with and make recommendations to the Director of the Office for Civil Rights and other City departments and officials with regard to the development of programs for the promotion of equality, justice, and understanding among all citizens of the City;

B. To consult with and make recommendations to the Director of the Office for Civil Rights with regard to problems arising in the City which may result in discrimination because of race, religion, creed, color, national origin, sex, marital status, parental status, sexual orientation, gender identity, political ideology, age, ancestry, honorably discharged veteran or military status, genetic information, the

presence of any ((~~sensory, mental, or physical~~)) disability, alternative source of income, ((~~the possession or use of~~)) participation in a Section 8 ((~~rent certificate~~)) or other subsidy program, right of a mother to breastfeed her child, or the use of a ((~~trained guide or~~)) service ((~~dog~~)) animal by a ((~~handicapped~~)) disabled person, and to make such investigations and hold such hearings as may be necessary to identify such problems;

C. As appropriate, recommend policies to all departments and offices of the City in matters affecting civil rights and equal opportunity, and recommend legislation for the implementation of such policies;

D. Encourage understanding between all protected classes and the larger Seattle community, through long range projects;

E. Hear appeals and hearings as set forth in Chapters 14.04, 14.06, ((~~and~~)) 14.08, and 14.09 of the Seattle Municipal Code;

F. Report on a semi-annual basis to the Mayor and the City Council. The reports shall include an annual or semi-annual work plan, a briefing of the Commission's public involvement process for soliciting community and citizen input in framing their annual work plans, and updates on the work plans; and

G. Meet on a quarterly basis through a designated representative with the Seattle Women's Commission, the Seattle LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) Commission, and the Seattle Commission for People with Disabilities to ensure coordination and joint project development.

Section 4. Sections 1, 2, and 3 of this ordinance shall take effect and be in force 150 days after the effective date of this ordinance, to ensure there is adequate time for rule-making and any adjustments in business practices needed.

Section 5. This ordinance shall take effect and be in force 30 days after its approval by the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it shall take effect as provided by Seattle Municipal Code Section 1.04.020.

Passed by the City Council the 14th day of August, 2017, and signed by me in open session in authentication of its passage this 14th day of August, 2017.

_s/Bruce Harrell_____

President of the City Council

Approved by me this 23rd day of August, 2017.

_s/Edward B. Murray_____

Edward B. Murray, Mayor

Filed by me this 23rd day of August, 2017.

_s/Monica Martinez Simmons_____

Monica Martinez Simmons, City Clerk

(Seal)