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

SUMMARY*

First Amendment Speech / Due Process

The panel reversed in part and affirmed in part the district court's judgment upholding the constitutionality of the City of Seattle's Fair Chance Housing Ordinance, which 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.

Plaintiffs are landlords who filed an action against the City, alleging violations of their federal and state rights of free speech and substantive due process. The district court held that the Ordinance regulates speech, not conduct, and that the speech it regulates is commercial speech. The district court 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."

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel did not decide 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, because it concluded that the Ordinance did not survive the intermediate scrutiny standard of review. The panel held that the Ordinance's inquiry provision impinged upon the First Amendment rights of landlords. 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—were substantial. The panel disagreed with the district court that the Ordinance was narrowly drawn to achieve the City's stated goals. Here, the inquiry provision—a complete ban on any discussion of criminal history between the landlords and prospective tenants—was not in proportion to the interest served by the Ordinance in reducing racial injustice and reducing barriers to housing. The panel therefore concluded that the inquiry provision failed intermediate scrutiny.

The panel rejected the landlords' claim that the adverse action provision of the Ordinance violated their substantive due process rights because the landlords did not have a fundamental right to exclude, and the adverse action provision survived rational basis review. Because the Ordinance contains a severability provision, the panel remanded the case to the district court to determine whether the presumption of severability was rebuttable and for further proceedings.

Judge Wardlaw concurred. While the majority assumes, but does not decide, that the Ordinance regulates commercial speech, she would agree with the district court that the speech it regulates is commercial speech. Applying the

three-factor test in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), she would hold that the Ordinance regulates commercial speech and is subject to an intermediate standard of review, which it fails to survive.

Judge Bennett concurred in the majority opinion, except for Part III.B.i and footnote 16, and concurred in the result. He wrote separately because under *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), he would hold that strict scrutiny applies because the Ordinance, on its face, is a content- and speaker-based restriction on *noncommercial* speech, and the Ordinance fails strict scrutiny.

Judge Gould concurred in part and dissented in part. He concurred in Parts I, II, III(A), III(B)(i), and IV of the majority opinion. He agreed with Judge Wardlaw that Seattle's inquiry provision regulates commercial speech and is subject to intermediate scrutiny. He dissented from the majority's conclusion that the inquiry provision is not narrowly tailored, and from the resulting judgment that the provision is unconstitutional. He would instead hold that the inquiry provision survives intermediate scrutiny and affirm the district court in full.

COUNSEL

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Eric Dunn, National Housing Law Project, Richmond, Virginia, for Amici Curiae National Housing Law Project, Shriver Center on Poverty Law, Tenant Law Center, Formerly Incarcerated & Convicted People and Families Movement, and Just Cities Institute.

Nick Allen and Ashleen O'Brien, Columbia Legal Services, Seattle, Washington; Melissa R. Lee and Robert S. Chang, Ronald A. Peterson Law Clinic, Seattle, Washington; Breanne Schuster, ACLU of Washington Foundation, Seattle, Washington; for Amici Curiae Pioneer Human Services, Tenants Union of Washington, Fred T. Korematsu Center for Law and Equality, and ACLU of Washington.

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 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

[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).

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 Americans comprised 12% of the total population, but 36% of the total prison population.[5]

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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 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).

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 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

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[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).

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 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

[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).

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 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

[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.

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 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

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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).

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.

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

[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.

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 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

[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).

[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

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 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

provision's prohibition on asking for criminal history regulates speech related to unlawful activity."

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

[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

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

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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 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.

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 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]

[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.

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 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

[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.

[23] Portland, Or., City Code § 30.01.086.

[24] Minneapolis, Minn., City Code § 244.2030.

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 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

[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.

(citation omitted)); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (same); *Knick v. Twp. of Scott, Pa.*, 139 S. 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.

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

[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."

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-

[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).

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, 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

[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

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 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

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diligence as to prior convictions that could put any landlord on notice of easily foreseeable violent criminal acts of certain prospective tenants.

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 noncommercial speech, and the Ordinance clearly fails strict scrutiny.

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

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 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

[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.

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

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

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]

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

[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, 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.").

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 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.

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

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.

PRISON POLICY INITIATIVE

Nowhere to Go: Homelessness among formerly incarcerated people

By Lucius Couloute
August 2018

It's hard to imagine building a successful life without a place to call home, but this basic necessity is often out of reach for formerly incarcerated people. Barriers to employment, combined with explicit discrimination, have created a little-discussed housing crisis.

In this report, we provide the first estimate of homelessness among the 5 million formerly incarcerated people living in the United States, finding that formerly incarcerated people are **almost 10 times more likely to be homeless** than the general public. We break down this data by race, gender, age and other demographics; we also show how many formerly incarcerated people are forced to live in places like hotels or motels, just one step from homelessness itself.

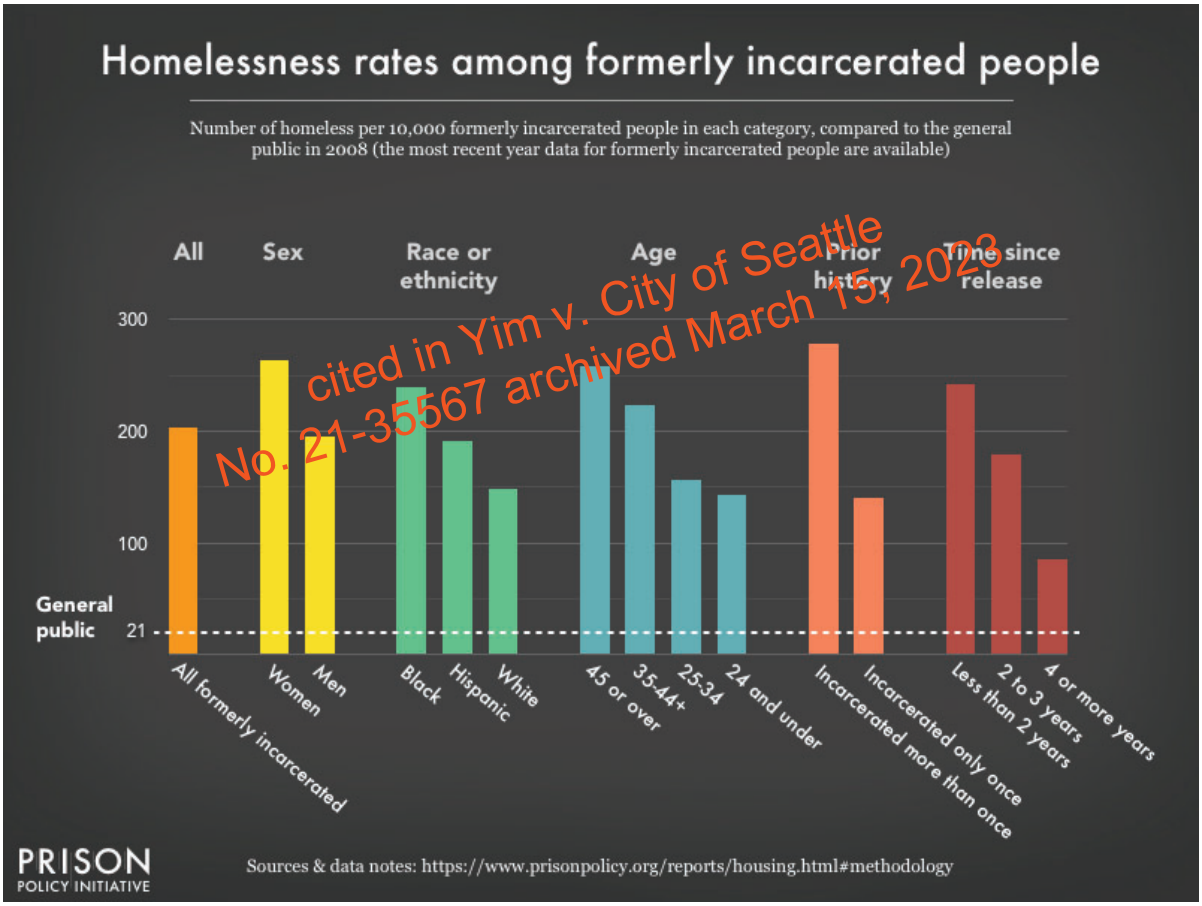

Figure 1. *2% of formerly incarcerated people were homeless in 2008 (the most recent year for which data are available), a rate nearly 10 times higher than among the general public.*

Homelessness among formerly incarcerated people

The transition from prison to the community is rife with challenges. But before formerly incarcerated people can address health problems, find stable jobs, or learn new skills, they need a place to live.

This report provides the first national snapshot of homelessness among formerly incarcerated people, using

data from a little-known Bureau of Justice Statistics survey. Our analysis builds on existing research showing that past incarceration and homelessness are linked. National research suggests that up to 15% of incarcerated people experience homelessness in the year before admission to prison.[1] And city- and state-level studies of homeless shelters find that many formerly incarcerated people rely on shelters, both immediately after their release and over the long term.[2]

We find that rates of homelessness are especially high among specific demographics:

- People who have been incarcerated more than once⤵
- People recently released from prison⤵
- People of color and women⤵

In the following sections, we take a closer look at these populations. We also break down how many formerly incarcerated people are living in marginal housing⤵ - a step away from homelessness.

The revolving door & homelessness

We find that people experiencing cycles of incarceration and release - otherwise known as the "revolving door" of incarceration - are also more likely to be homeless.[3]

People who have been to prison just once experience homelessness at a rate nearly 7 times higher than the general public. But people who have been incarcerated *more than once* have rates *13 times higher* than the general public. In other words, people who have been incarcerated multiple times are twice as likely to be homeless as those who are returning from their first prison term.

Unfortunately, being homeless makes formerly incarcerated people more likely to be arrested and incarcerated again, thanks to policies that criminalize homelessness.[4] As law enforcement agencies aggressively enforce "offenses" such as sleeping in public spaces, panhandling, and public urination - not to mention other low-level offenses that are more visible when committed in public - formerly incarcerated people are unnecessarily funneled back through the "revolving door."

Homelessness among recently-released individuals

Previous research has shown that formerly incarcerated people are most likely to be homeless in the period shortly after their release.[5] Our data supports this research: We find that people who spent two years or less in the community were more than twice as likely to be homeless as those who had been out of prison for four years or longer.

Homelessness among recently released individuals is a fixable problem. States can - and should - develop more efficient interagency systems to help formerly incarcerated people find homes. But longer-term support is also needed: Our analysis found that even people who had spent several years in the community were 4 times more likely to be homeless than the general public.

A closer look: sheltered and unsheltered homelessness by race and gender

Within the broad category of homelessness, there are two distinct populations: people who are **sheltered** (in a homeless shelter) and those who are **unsheltered** (without a fixed residence).

We find - in keeping with previous research on homelessness in the general public - that the sheltered and unsheltered formerly incarcerated populations have significant demographic differences.[6]

For example, we find important differences by gender. Overall, formerly incarcerated women are more likely to be homeless than formerly incarcerated men. But among homeless formerly incarcerated people, men are less likely to be *sheltered* than women, whether for reasons of availability or personal choice.

	Homeless (Rate per 10,000)	**Sheltered** (Rate per 10,000)	**Unsheltered** (Rate per 10,000)
Men	195	90	105
Women	264	156	108
Total	203	98	105

Table 1. *Rates of sheltered and unsheltered homelessness per 10,000 formerly incarcerated people by gender.*

Unsheltered homelessness by race and gender

We find that formerly incarcerated Black men have much higher rates of unsheltered homelessness than white or Hispanic men.

The data also suggests that women of color experience unsheltered homelessness at higher rates than white women. (Though there were too few unsheltered formerly incarcerated Black and Hispanic women in our dataset to analyze,[7] the rate of unsheltered homelessness among white women was substantially lower than the rate for women generally. Therefore, it is clear that formerly incarcerated Black and/or Hispanic women experience unsheltered homelessness at significantly higher rates than white women.)

	Black (Rate per 10,000)	**Hispanic** (Rate per 10,000)	**White** (Rate per 10,000)	**Total** (Rate per 10,000)
Men	124	82	81	105
Women	n/a	n/a	87	108
All	123	90	82	105

Table 2. *Rates of unsheltered homelessness per 10,000 formerly incarcerated people by race and gender. To compare rates of homelessness (sheltered, unsheltered, and all homelessness) and housing insecurity for all groups in our dataset, see Appendix Table 2.*

Sheltered homelessness by race and gender

Black women experienced the highest rate of sheltered homelessness - nearly four times the rate of white men, and twice as high as the rate of Black men. Combined with our breakdowns of race and gender separately (see Figure 1), this analysis shows that Black women face severe barriers to housing after release.

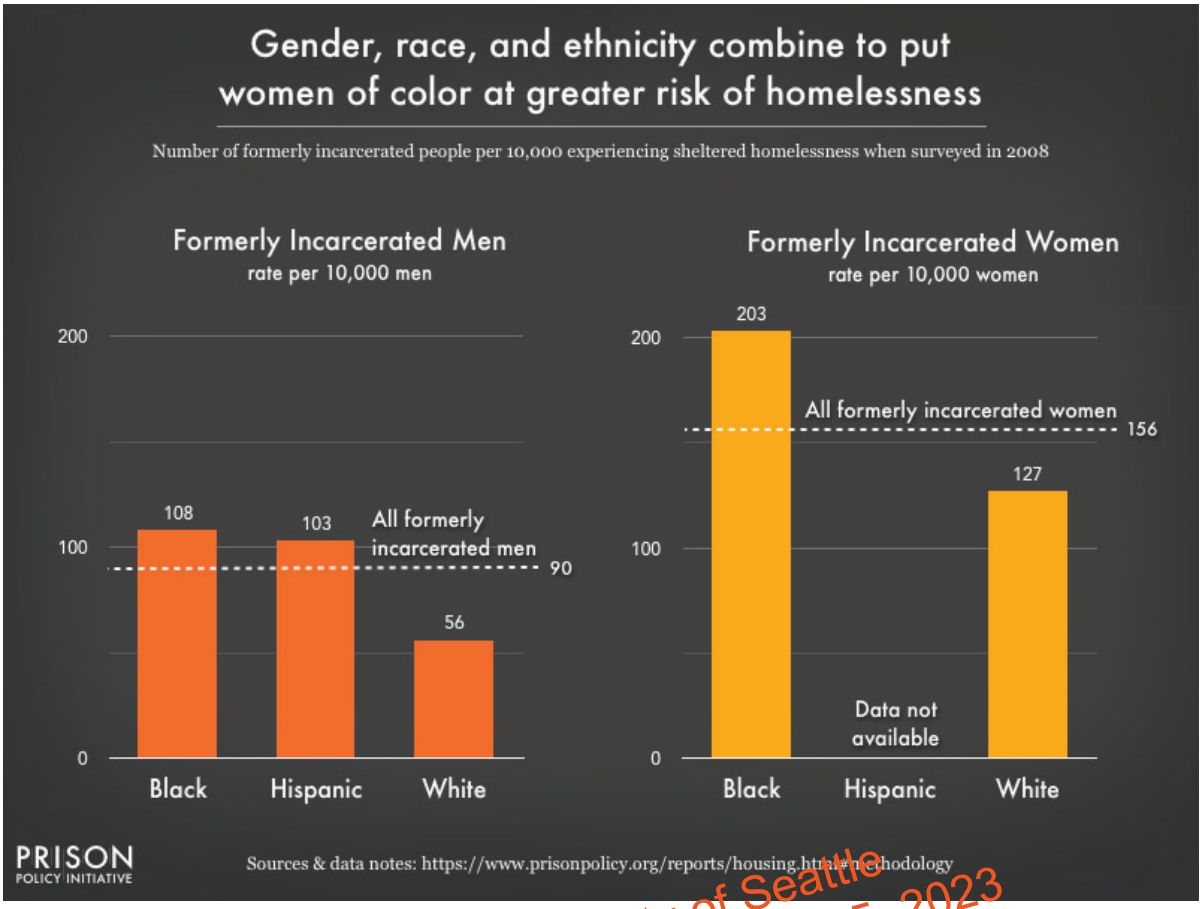

Figure 2. *Rates of sheltered homelessness among formerly incarcerated people differ widely by race and gender, with Black women nearly four times more likely than white men to be living in a homeless shelter.*

The high rates of homelessness among Black women are especially striking in light of our similar finding, last month, that unemployment rates among formerly incarcerated Black women were higher than any other demographic group.[8] Our findings illustrate that Black women, in particular, have been excluded from the social resources necessary to succeed after incarceration.

Almost homeless: Housing insecurity among formerly incarcerated people

Measuring homelessness among formerly incarcerated people is a critical step forward, but it doesn't fully capture the exclusion of formerly incarcerated people from *stable housing* - the kind of housing most people need to thrive and contribute to their communities.

To better measure the scope of the problem, we created a second metric - **housing insecurity** - that includes formerly incarcerated people who are homeless (both sheltered and unsheltered) as well as those living in **marginal housing** like rooming houses, hotels, or motels.[9]

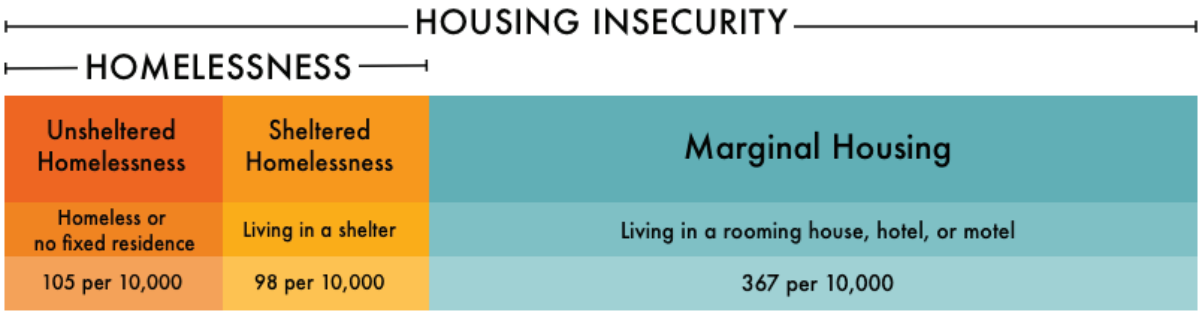

Figure 3. *Housing insecurity includes people who are* ***homeless*** *as well as those living in* ***marginal housing****. 570 out of every 10,000 formerly incarcerated people fall into one of these categories, making housing insecurity nearly three times more common than homelessness alone.*

Housing insecurity provides a more realistic measurement of the number of formerly incarcerated people denied access to permanent housing. While we found that 203 out of every 10,000 formerly incarcerated people were homeless, nearly three times as many - 570 out of every 10,000 - were housing insecure.

We also uncovered notable demographic differences by expanding our view to the housing insecure population: Hispanics, for example, were more likely than people of any other race to live in marginal housing. Men had much higher rates of marginal housing than women, resulting in high rates of housing insecurity. And older formerly incarcerated people experienced the highest rates of housing insecurity.

Ideally, this report would directly compare the prevalence of housing insecurity among formerly incarcerated people to that of the general public. Unfortunately, the equivalent national statistics on housing insecurity do not yet exist. Even without that comparison, however, it's clear that having been to prison is a major risk factor for housing insecurity.

Causes and consequences of housing insecurity after release

Stable housing is the foundation of successful reentry from prison. Unfortunately, as our data show, many formerly incarcerated people struggle to find stable places to live. Discrimination by public housing authorities and private property owners,[10] combined with affordable housing shortages,[11] continues to drive the exclusion of formerly incarcerated people from the housing market.

Part of the problem is that property owners and public housing authorities have the ability to implement their own screening criteria to determine if an applicant merits housing[12] - a process that often relies upon criminal record checks as the primary source of information. In practice, this means local authorities and landlords have wide discretion to punish people with criminal records even after their sentences are over.

The use of credit checks, exorbitant security deposits, and other housing application requirements - such as professional references - can also act as systemic barriers for people who have spent extended periods of time away from the community and out of the labor market.[13]

Excluding formerly incarcerated people from safe and stable housing has devastating side effects: It can reduce access to healthcare services (including addiction and mental health treatment),[14] make it harder to secure a job,[15] and prevent formerly incarcerated people from accessing educational programs.[16] Severe homelessness and housing insecurity destabilizes the entire reentry process.

Fortunately, on-the-ground advocates across the country have made important progress in reducing overall homelessness.[17] But an estimated 550,000 people are still homeless on any given night in the United States,[18] many of them individuals with a history of criminal justice system contact. It's critical that policymakers develop comprehensive responses to this problem, rather than continuing to punish those without homes.

All people - and particularly those carrying the stigma of criminalization - need these solutions. In such a wealthy country, it's time we eliminate homelessness for good.

Conclusion

This report provides the first national estimates of homelessness among formerly incarcerated people, but these estimates likely understate the problem. Because the effects of intermittent homelessness last longer than your last night on the street, the best measures of homeless include those who have *experienced* homelessness in the last year. However, there is not yet a way to calculate this fuller picture of homelessness among formerly incarcerated people. [19]

Nevertheless, our findings make it clear that the 600,000 people released from prisons each year face a housing crisis in urgent need of solutions. State and local reentry organizations must make housing a priority, and provide additional services thereafter - a strategy known as "Housing First." [20] If formerly incarcerated people are legally and financially excluded from safe, stable, and affordable housing, they cannot be expected to successfully reintegrate into their communities.

Recommendations

Excluding formerly incarcerated people from stable housing harms not only individuals, but public safety and the economy at large. State- and city-level policymakers have the power to solve this housing crisis:

1. **States should create clear-cut systems to help recently-released individuals find homes**. Even in states like New York, there is often "no central, coordinating force" set up to ensure that people leaving prison will land somewhere other than a shelter. Improved systems should help incarcerated people understand their housing options before release; find pathways to both short-term and permanent housing; and receive financial supports, such as housing vouchers, from the state.
2. **Ban the box on housing applications**. Cities and states should ensure that public housing authorities and landlords evaluate housing applicants as individuals, rather than explicitly excluding people with criminal records in housing advertisements or applications. A criminal record is not a good proxy for one's suitability as a tenant.
3. **End the criminalization of homelessness**. Cities should end the aggressive enforcement of quality-of-life ordinances. Arresting, fining, and jailing homeless people for acts related to their survival is not only cruel; it also funnels formerly incarcerated people back through the "revolving door" of homelessness and punishment, which reduces their chances of successful reentry at great cost to public safety.
4. **Expand social services for the homeless, focusing on "Housing First."** States like Utah have made permanent housing for the chronically homeless a budget priority. This successful approach acknowledges that stable homes are often necessary before people can address unemployment, illness, substance use disorder, and other problems. "Housing First" reforms, along with expanded social services, would help to disrupt the revolving door of release and reincarceration.

Appendix

To the extent possible, this report uses terms commonly found in the literature on homelessness in the United States. However, given the limitations of the data set we used, the **terms and definitions used in this report** are not always consistent with those used by the U.S. Department of Housing and Urban Development (HUD), which is the data source we use for comparisons with the general public. Appendix Table 1, below,

summarizes the differences between the terms used in this report and terms used by HUD.

Term	Definitions used in this report	Equivalent Department of Housing and Urban Development (HUD) definitions
Homelessness	Includes people who reported their current, usual residence as: • a shelter • homeless or no fixed residence	"Literally homeless" includes any "Individual or family who lacks a fixed, regular and adequate nighttime residence, meaning: • Has a primary nighttime residence that is a public or private place not meant for human habitation; • Is living in a publicly or privately operated shelter designed to provide temporary living arrangements (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state, and local government programs); or • Is exiting an institution where (s)he has resided for 90 days or less and who resided in an emergency shelter or place not meant for human habitation immediately before entering that institution." Note that in 2008 (the reference year we use to compare HUD data to our own) this category included people exiting an institution where they had resided for 30 days or less, not 90 days.
Sheltered Homelessness	Includes people who reported that they currently live in a shelter most of the time. The type of shelter was not specified.	Includes individuals and families "who are staying in emergency shelters, transitional housing programs, or safe havens."
Unsheltered Homelessness	Includes people who reported that they are currently homeless or have no fixed residence most of the time.	Includes people "whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people (for example, the streets, vehicles, or parks.)"
Marginal housing	Includes people who reported currently living in a rooming house, hotel, or motel most of the time. Unlike the HUD definition, this is not exclusive to those whose housing is being paid for by charitable organizations or government programs.	HUD does not use this term, but includes people living in hotels and motels paid for by charitable or government programs in its definition of "literally homeless."
Housing Insecurity	A combined measure that includes people experiencing sheltered and unsheltered homelessness, and people living in marginal housing.	HUD does not use this measure, but includes children living in a hotel or motel due to lack of alternative adequate accommodations in its description of "Additional Forms of Homelessness and Housing Instability," using data from the U.S. Department of Education. Other living situations included in HUD's analysis of additional forms of homelessness and housing instability include: • "People who live with another household and then

Appendix Table 1. *By necessity, our definitions of homelessness and housing insecurity differ slightly from those used by the U.S. Department of Housing and Urban Development.*

		move out; • People who move into a unit with a pre-existing household;… and • Low-income renters who are severely rent burdened, have severe housing problems, and have other indicators of instability such as missed rent payments or no good choice for a destination if evicted.”
Source	National Former Prisoner Survey (2008)	U.S. Department of Housing and Urban Development (HUD) Resources: • For “literally homeless” definition: “Homeless Definition” • For sheltered and unsheltered homelessness definitions: The 2017 Annual Homeless Assessment Report (AHAR) to Congress, Definition of Terms (p. 2-3) • For housing instability definition: The 2016 Annual Homeless Assessment Report to Congress: Part 2, Additional Forms of Homelessness and Housing Instability section (p. 3)

Appendix Table 2, below, summarizes **all of our findings on housing** from the National Former Prisoners Survey. Note that the “general public” rates come from our calculation of HUD homeless counts and Census Bureau population estimates for 2008, and that all data is reported as rates per 10,000 population.

			Sheltered Homeless (per 10,000)	Unsheltered Homeless (per 10,000)	Sheltered & Unsheltered Homeless (per 10,000)	Living in rooming house, hotel, or motel (per 10,000)	Total housing insecure (per 10,000)
General public		All general public	13	8	21	n/a	n/a
Formerly incarcerated		All formerly incarcerated	98	105	203	367	570
	Race or ethnicity	Black	117	123	240	358	598
		Hispanic	101	90	191	396	587
		White	66	82	148	350	498
	Gender	Men	90	105	195	386	581
		Women	156	108	264	226	490
	Race and gender	Black men	108	124	233	369	602
		Hispanic men	103	82	185	409	594
		White men	56	81	137	383	520
		Black women	203	n/a	n/a	247	n/a
		Hispanic women	n/a	n/a	n/a	297	n/a
		White women	127	87	214	158	371
	Age	24 and under	52	91	143	132	274
		25-34	76	80	156	250	406
		35-44	113	111	224	327	551
		45 or older	124	134	258	607	865
	Time in prison	Less than 12-months	127	151	278	368	646
		12-23 months	103	143	246	330	577
		24-35 months	101	89	190	404	594
		36-59 months	98	87	185	291	476
		60-119 months	64	51	115	438	554
		120 months or longer	69	n/a	n/a	409	n/a
	Year released (Years since release)	2007-2008 (less than 2 years)	127	115	242	437	679
		2005-2006 (2-3 years)	64	115	179	292	471
		2004 or before (4 or more years)	37	48	85	185	270
	Prior history	Incarcerated more than once	136	143	279	434	713
		Incarcerated only once	67	74	141	312	453

Appendix Table 2. *Homelessness (sheltered, unsheltered, and combined) and housing insecurity among formerly incarcerated people in 2008, by characteristics. Comparable "point in time" demographic information about people experiencing homelessness and housing insecurity in the general public is not available.*

Figure 4, below, explains **our method of calculating "housing insecurity."** Housing insecurity captures the full extent to which formerly incarcerated people lack stable housing, even if they are not literally homeless. We define this term in more detail below:

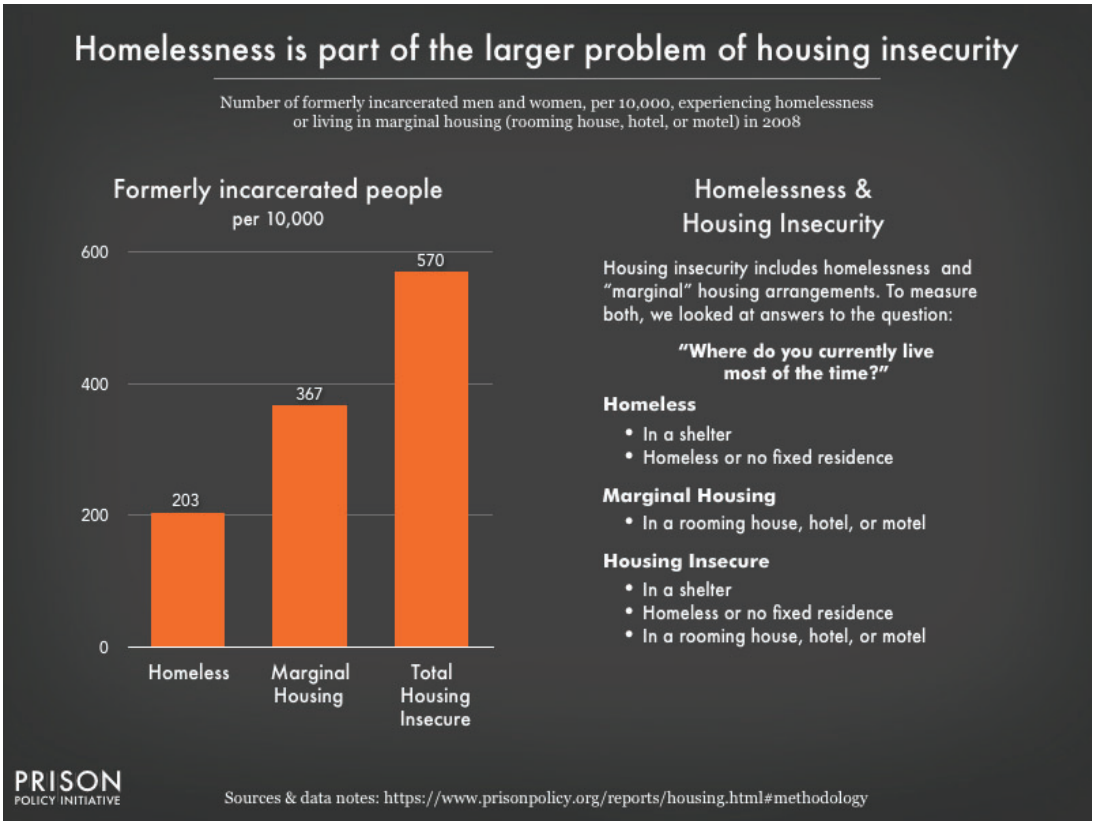

Figure 4. *Our metric of housing insecurity includes people living in rooming houses, hotels, and motels, as well as those experiencing homelessness. Using this measure, it's clear that many more formerly incarcerated people are in precarious housing situations than the rate of homelessness alone suggests.*

Methodology

This report's analyses of homelessness and housing insecurity are primarily based on our analysis of an underutilized government survey, the National Former Prisoner Survey, conducted in 2008. The survey was a product of the Prison Rape Elimination Act, and mainly asks about sexual assault and rape behind bars, but it also contains some very useful data on housing.

Because this survey contains such sensitive and personal data, the raw data was not available publicly online. Instead, it is kept in a secure data enclave in the basement of the University of Michigan Institute for Social Research. Access to the data required the approval of an independent Institutional Review Board, the approval of the Bureau of Justice Statistics, and required us to access the data under close supervision.

The practicalities of having to travel across the country in order to query a computer database limited the amount of time that we could spend with the data, and other rules restricted how much data we could bring with us. Additionally, if the number of respondents falling within any one group was too small, we were not allowed to export the data for that group due to privacy concerns.

Using this survey data, we were able to produce the first national estimates of homelessness among formerly incarcerated Americans. We also uncovered many other questions, which we do not yet have the necessary data to answer on a national level, but which suggest avenues for further research:

- How often do formerly incarcerated people move?
- How often are formerly incarcerated people forced to live with someone they know because of a lack of housing options?
- Are formerly incarcerated people likely to reside in overcrowded living spaces?

- How often are formerly incarcerated people denied housing, compared to the general public?
- How often are formerly incarcerated people in danger of eviction due to the inability to pay rent?

Even so, we believe that the analyses presented in this report begin to illuminate the severe housing-related inequalities experienced by criminalized people.

Data Sources

We used the National Former Prisoner Survey (NFPS) as our main data source for measuring homelessness and housing insecurity among formerly incarcerated people. This survey began in January 2008 and concluded in October 2008, and was derived from the Prison Rape Elimination Act of 2003, which mandated that the Bureau of Justice Statistics investigate sexual victimization among formerly incarcerated people.

The NFPS dataset includes 17,738 adult respondents who were previously incarcerated in state prisons and under parole supervision at the time of the survey. Individual respondents were randomly selected from a random sample of over 250 parole offices across the United States.

It is important to note that because this survey was given to people on parole, it is not a perfect tool to measure homelessness and housing insecurity among all formerly incarcerated people. Some incarcerated people are released without supervision, and their ability to attain stable housing may be different than those on parole. Previous research suggests, however, that parole officers have a minimal (or at best, inconsistent) effect on post-release housing stability. A national survey of state parole agencies in 2006 found that most - 60% - had no housing assistance program. Two regional studies of post-release shelter use, meanwhile, had conflicting findings: In New York, parole increased the likelihood of shelter use, but it appeared to reduce shelter use in Philadelphia.[21] These mixed results are unsurprising: A synthesis of the literature explains that there is "little collaboration among [corrections and social service] systems and little consistency over time. What results is a prisoner reentry system that is disconnected from the housing and homeless assistance services system and from the neighborhoods where released prisoners live." Future research should more closely examine the effect of supervision on homelessness and housing stability.

We drew upon specific NFPS survey questions for this report:

- A2. Are you of Hispanic or Latino origin?
- A3. Which of these categories describes your race?
- C1. Are you male, female, or transgendered?[22]
- F15. Where do you currently live most of the time?
- B2a, B2b. Date of admission.
- B3a, B3b. Date of release.
- B13a. Before your confinement in [AdmDate2] had you ever served time in a state or federal prison? [IF AdmDate2=blank] Before the confinement we just discussed, had you ever served time in a state or federal prison?

To measure homelessness in the general public, we used the Department of Housing and Urban Development's Point-in-Time counts of sheltered and unsheltered homeless people, along with Census Bureau population estimates. This data is from 2008, the most recent year in which comparable data for formerly incarcerated people exists.

There is one minor, but notable, difference between HUD's Point-in-Time counts (which we used to calculate homelessness in the general public) and our NFPS data (which we used to calculate homelessness among formerly incarcerated people). HUD's Point-in-Time counts relied upon special local groups, called Continuums of Care, to record and report the total number of sheltered and unsheltered homeless people during the last 10 days in January 2008. The National Former Prisoner Survey, conversely, asked subjects about their housing status directly.

About the Prison Policy Initiative

The non-profit, non-partisan Prison Policy Initiative was founded in 2001 to expose the broader harm of mass criminalization and spark advocacy campaigns to create a more just society. The organization is known for its visual breakdown of mass incarceration in the U.S., as well as its data-rich analyses of how states vary in their use of punishment. The Prison Policy Initiative's research is designed to reshape debates around mass incarceration by offering the "big picture" view of critical policy issues, such as probation and parole, women's incarceration, and youth confinement.

The Prison Policy Initiative also works to shed light on the economic hardships faced by justice-involved people and their families, often exacerbated by correctional policies and practice. Past reports have shown that people in prison and people held pretrial in jail start out with lower incomes even before arrest, earn very low wages working in prison, and face unparalleled obstacles to finding work after they get out.

About the author

Lucius Couloute is a Policy Analyst with the Prison Policy Initiative and a PhD candidate in Sociology at the University of Massachusetts Amherst, his dissertation examines both the structural and cultural dynamics of reentry systems. Most recently he co-authored *Out of Prison & Out of Work*, which provided the first-ever unemployment rate among formerly incarcerated people.

Acknowledgements

This report benefitted from the expertise and input of many individuals. The author is particularly indebted to Dan Kopf for retrieving this data from the ICPSR Physical Enclave, Amy Sawyer for her valuable insight into the state of homelessness today, Alma Castro for IRB assistance, Allen Beck for his insight into the NFPS, the ICPSR staff for their data retrieval support, Elydah Joyce for the illustrations, Maddy Troilo for background research, my Prison Policy Initiative colleagues, and the Connecticut Coalition to End Homelessness for their helpful guidance on "Housing First" strategies.

This report was supported by a generous grant from the Public Welfare Foundation and by our individual donors, who give us the resources and the flexibility to quickly turn our insights into new movement resources.

Footnotes

1. Numerous studies show that up to 15% of currently incarcerated people experienced homelessness in the year leading up to their incarceration. For more on this line of research see: *Profile of Jail Inmates, 2002* and Education and Correctional Populations and Jail Incarceration, Homelessness, and Mental Health: A National Study. ↩

2. See Brianna Remster's (2017) work on homelessness among formerly incarcerated people in Philadelphia. Half of the formerly incarcerated people in Remster's study did not stay in a shelter until two years after release. ↩

3. According to the Bureau of Justice Statistics, 44% of those who were released from state prisons in 2005 were rearrested within one year; 68% within three years; and 83% in 9 years. High rates of rearrest and subsequent re-incarceration after release comprise what is frequently referred to as the "revolving door". ↩

4. See recent coverage from The Nation and a report from the Million Dollar Hoods Research Project on how the criminalization of homelessness operates today. ↩

5. See Metraux & Culhane (2004) and Remster (2017). ↩

6. See Montgomery et al. (2016) and Nyamathi et al. (2000). ↩

7. Because our data source (the National Former Prisoner Survey) contains restricted information, there were limits on what we could and could not export and analyze. Per ICPSR policy, if any query produced a result that included less than 200 respondents, we were not able to export that data. See the appendix for more detail. ↩

8. Couloute, Lucius and Dan Kopf. 2018. Out of Prison & Out of Work: Unemployment among formerly incarcerated people. *Prison Policy Initiative*. ↩

9. There is no widely accepted definition of housing insecurity. Instead, researchers have created different definitions using available data. As such, some researchers have defined and

measured housing insecurity using residential moves, ability to pay rent, or rates of "doubling up" and living with others. Our measure represents a broad category of people who self-reported that they are either homeless or living in less-permanent spaces such as rooming houses, hotels, and motels. ↩

10. Research suggests that most landlords would not accept tenants with criminal record histories. ↩

11. According to analyses from the National Low Income Housing Coalition, nowhere in the United States can a full time worker earning minimum wage afford a two-bedroom rental home at fair market rent. ↩

12. See Congressional Research Service's report on crime-related restrictions on housing assistance and the U.S. Department of Housing and Urban Development's memo on the use of arrest records in housing decisions. ↩

13. Couloute, Lucius and Dan Kopf. 2018. Out of Prison & Out of Work: Unemployment among formerly incarcerated people. ↩

14. Reid KW, Vittinghoff E, Kushel MB. 2008. Association between the level of housing instability, economic standing and health care access: a meta-regression. ↩

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16. Ferguson, Kristy, Kimberly Bender, Sanna Thompson. 2011. Employment Status and Income Generation Among Homeless Young Adults. ↩

17. Stephen Lurie. 2013. The Astonishing Decline of Homelessness in America. The Atlantic. Release from Prison — A High Risk of Death for Former Inmates.The New England Journal of Medicine. ↩

18. The 2017 Annual Homeless Assessment Report (AHAR) to Congress. ↩

19. For example, numerous studies show that up to 15% of currently incarcerated people *experienced* homelessness in the year leading up to their incarceration. For more on this line of research see: *Profile of Jail Inmates, 2002* and Education and Correctional Populations and Jail Incarceration, Homelessness, and Mental Health: A National Study. ↩

20. See the National Alliance to End Homelessness for more on "Housing First" strategies. ↩

21. See The 2007 National Symposium on Homelessness Research. ↩

22. We could not analyze the trans population because the number of trans-identified people in the survey was too small to use, and doing so posed a risk of respondent identification. ↩

Local News

The Seattle Times

Audit of King County jails finds racial disparities in discipline, says 'double-bunking' leads to violence

April 6, 2021 at 9:30 am | *Updated April 6, 2021 at 1:18 pm*

1 of 2 | A new audit identified racial disparities in housing and discipline for people... (Greg Gilbert / The Seattle Times) More

By Lewis Kamb
Seattle Times staff reporter

Black people jailed in King County generally face harsher discipline and more restrictive confinement than incarcerated people of other races, and fights, assaults and other violent episodes that occur frequently within the county's two adult jails are partly driven by the practice of "double-bunking" — or putting two people in the close confines of a single cell.

These and other key findings are the result of a sweeping audit of the King County Department of Adult and Juvenile Detention's (DAJD) jail operations presented Tuesday to the Metropolitan King County Council's Law and Justice Committee.

The problems identified by the audit — including documented incidents of violence, deaths in custody, racial disparities among the incarcerated and a dearth of psychiatric resources

for an increasing number of people with serious mental illnesses — generally exist because the county's corrections department "lacks a robust risk management system to help keep the people in its care safe," according to the report by the King County Auditor's Office.

The audit details 25 recommendations aimed at establishing a new risk management approach to consistently assess and improve jail safety. The plan should include, among other things, policies that prevent assigning more than one person to the same cell, making more cells suicide-resistant, increasing mental health resources for those incarcerated and reducing racial inequities in discipline and housing, the auditors said.

DAJD Director John Diaz told council members Tuesday that he welcomed the recommendations as a step in furthering goals of safety and racial equity.

"We took every one of those recommendations seriously and there is going to be a written plan," Diaz said. "... I think those were all good questions that needed to be explored deeply."

The county's corrections department will follow up on the recommendations in a timely way, seeking advice from university researchers and nationally recognized experts to address areas of improvement, he said.

But based on corrections officials' initial written response to the audit findings, auditors cited "two overarching concerns": First, that the department agreed with some findings "without indicating that it plans to change current practices, increasing the likelihood that these recommendations may not be implemented," and second, that the department's comments for some recommendations suggest "that the agency does not understand what steps are necessary for implementation."

Inequities persist

Each year, the audit says, more than 30,000 people are booked into the county's two adult jails: the King County Jail in downtown Seattle and the Maleng Regional Justice Center in Kent.

Until the pandemic, the two jails housed about 2,000 people on average per day, though that number dropped to an average of about 1,300 in 2020. A disproportionate number of Black (36%) and Indigenous (3%) people were incarcerated compared to the racial makeup of the county's population, which is about 7% Black and 1% Indigenous, the audit found. Approximately 85% of those incarcerated are awaiting trial and haven't been convicted of a crime.

But local jails in Washington aren't subject to state oversight, which reduces transparency and accountability for identifying and addressing problems within the jails, the audit said.

In King County's two adult jails, the audit found fights, assaults and other violent incidents are common and result in injuries to both incarcerated people and staff.

The audit determined the county's "practice of assigning two people to the same cell (double-bunking) contributes to this danger," noting data showed a big drop in the number of assaults and

fights in 2020 “when, in response to the COVID-19 pandemic, use of two-person cells stopped” at the King County Jail in downtown Seattle.

Overall last year, the population at the King County Jail declined by 47%, with fights and assaults dropping by 63%, the audit found.

Still, even with the big reduction in overall population last year, the audit noted “the jail does not have enough psychiatric housing to provide consistent care to the increasing number of people with serious mental illness in custody.”

That means that people with serious mental illness are increasingly being housed in areas of the jails that are not designed to provide treatment.

“Since the fourth quarter of 2019, on average each day, more than 10 people who need psychiatric housing are not placed in psychiatric housing,” the audit found. “At least one person has died in DAJD custody every year since 2009, and four suicides took place between 2017 and 2020. None of these took place in units with suicide resistant cells.”

Auditors analyzed demographic data of roughly 106,00 county jail bookings between 2017 and 2019 to help identify racial disparities in the jails’ populations. They also looked at disproportionality in assessments used to classify a person’s risk and security levels.

“We found racial disparities in discipline and housing that harm Black people and benefit white people on average,” the audit concluded. “Black people were more likely to be in higher security units, get infractions for breaking the rules and spend more time in restrictive housing as punishment. Effects of these inequities can go beyond the jail and have lasting negative health impacts.”

“The Council’s Law and Justice Committee will be digging in on the report as well and considering any potential next steps,” council spokesperson Daniel DeMay said.

The auditor’s office also plans to follow up on its recommendations this fall, with a goal of publishing a report on the success of implementing recommendations by April 2022, he said.

Lewis Kamb: *206-464-2932 or lkamb@seattletimes.com; on Twitter: @lewiskamb.*

The Seattle Times

See how Seattle's homelessness crisis stacks up across the country and region

Traffic on Interstate 5 whizzes past tents near North Seattle College in April. (Ellen M. Banner / The Seattle Times)

By Seattle Times staff
Published June 27, 2021

Since the coronavirus first emerged in Seattle and King County, visible homelessness — encampments along greenbelts and sidewalks, RVs parked in neighborhoods and industrial zones — has grown and so, too, have frustration, fear and finger pointing over local officials' handling of the crisis on top of a crisis.

Early into the pandemic, city and county officials worked quickly to set up new shelters and to pay for hotel stays to keep people with higher health risks out of crowded shelters. At the same time, federal public health guidance encouraged local governments to let people shelter in place — whether that was in a home or outside — so encampments grew as fewer people rotated through shelters.

PROJECT HOMELESS

The Seattle Times' Project Homeless is funded by BECU, The Bernier McCaw Foundation, Campion Foundation, the Paul G. Allen Family Foundation, Raikes Foundation, Schultz Family Foundation, Seattle Foundation, Starbucks and the University of Washington. The Seattle Times maintains editorial control over Project Homeless content.

Both Seattle and King County have recently received a surge in emergency federal aid, setting off a chain of promises to use the funds to increase emergency and permanent housing.

And, as the 2021 Seattle mayoral candidates hit the campaign trail, homelessness is at the top of many candidates' policy platforms. Whoever wins will have to work with a Regional Homelessness Authority — designed to place money and decision-making power over homelessness in King County under one roof — and its recently hired first executive director, Marc Dones.

But if you cut away from the political chatter, there's a lot to be learned from studying the raw data — like who is most affected by this crisis and why a growing region with some of the world's most successful tech companies is also home to the nation's third highest metro-area homeless population.

SELECT A TOPIC BELOW TO SEE DATA AND CHARTS

The national housing crisis is real, and it's local

NATIONAL RANKINGS	FORMS OF HOMELESSNESS	UNSHELTERED VS. SHELTERED
Thirty people out of 10,000 in the Evergreen state are **homeless.**	23% of homeless people in King County **live in their cars.**	Between **47% and 59%** of homeless people **in their vehicles or outside** in the Puget Sound area.
+	+	+

People have to sleep — but where?

ENCAMPMENT LOCATIONS	TINY HOUSE VILLAGES	RACE & GENDER
Tents in Seattle's urban center have **increased by more than 50%** during the pandemic.	Seattle has nearly **300 tiny homes** for homeless people.	**One quarter** of people experiencing homelessness in King County **are Black.**
+	+	+

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Project Homeless
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Fair Chance Ordinances: An Advocate's Toolkit

NHLP PUBLICATIONS / FEBRUARY 25, 2020

Tags: Fair housing (https://www.nhlp.org/tag/fair-housing/), Reentry (https://www.nhlp.org/tag/reentry/)

(https://www.nhlp.org/wp-content/uploads/021320_NHLP_FairChance_Final.pdf)Organizers and advocates around the country are increasingly pressing local governments to adopt policies aimed at increasing housing access for people with criminal records by reducing the use of those records in the rental housing application process. This toolkit offers a step-by-step guide to developing such a policy. It discusses the key elements of a fair chance ordinance, including implementation and enforcement provisions, and highlights the various legal and practical considerations that need to be addressed during the drafting of a fair chance ordinance. It also provides a chart summarizing existing local fair chance ordinances as of December 2019.

Download Toolkit Here. (https://www.nhlp.org/wp-content/uploads/021320_NHLP_FairChance_Final.pdf)

For more information, please visit NHLP's webpage: Housing Opportunities for People Reentering (https://www.nhlp.org/initiatives/housing-opportunities-for-people-reentering/)

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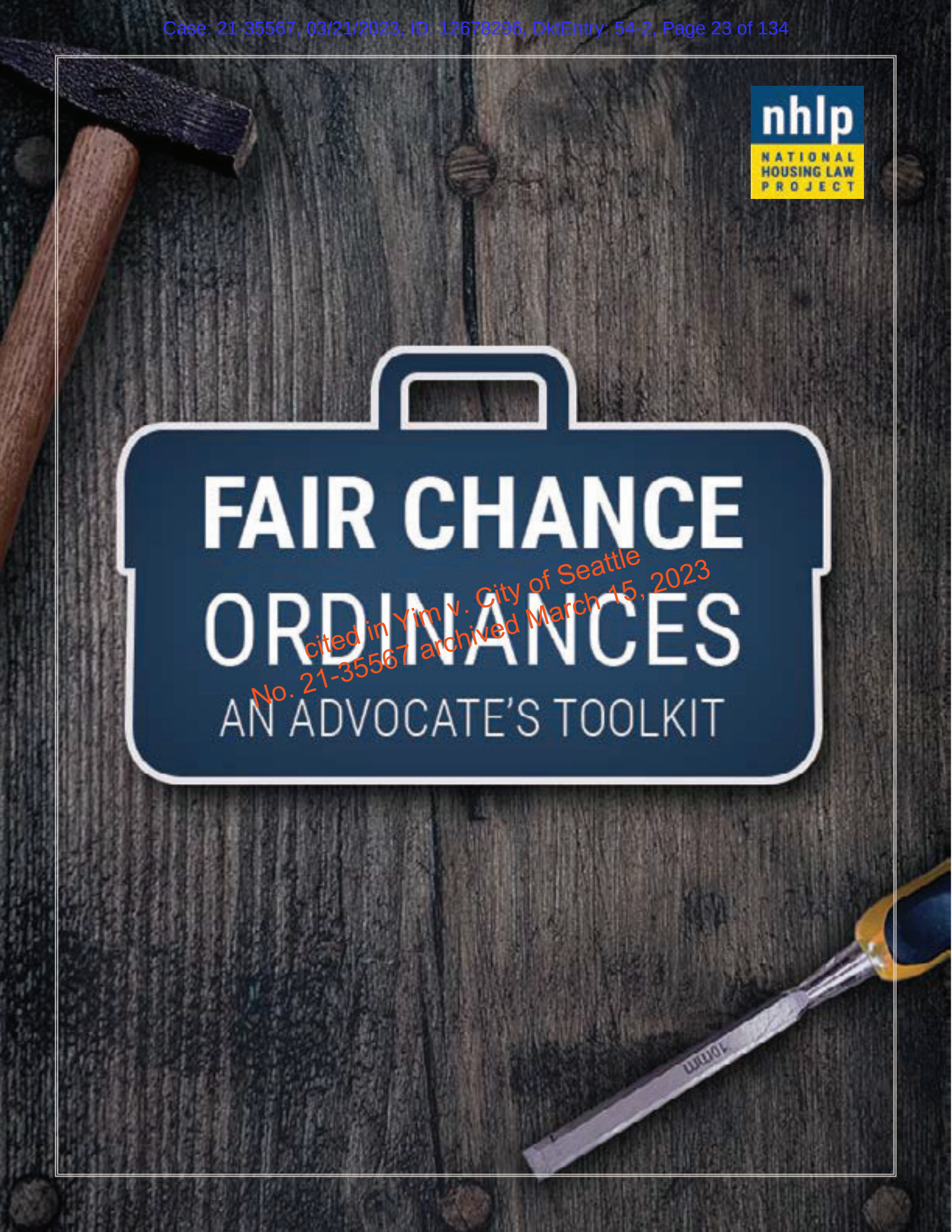

Acknowledgements

The National Housing Law Project (NHLP) is a legal advocacy center focused on increasing, preserving, and improving affordable housing; expanding and enforcing rights of low-income tenants and homeowners; and increasing housing opportunities for underserved communities. Our organization provides technical assistance and policy support on a range of housing issues to legal services and other advocates nationwide.

NHLP is committed to supporting policy solutions that expand housing opportunities for people who have come in contact with the criminal justice system. Working at the intersection of housing and reentry is critical to our mission of advancing racial and social justice.

NHLP is pleased to publish *Fair Chance Ordinances: An Advocate's Toolkit*. Our work in this area has been informed by local, state and national leaders working on issues related to criminal justice reform, affordable housing, homeless services, and reentry. We offer particular gratitude to Marie Claire Tran-Leung of the Shriver Center on Poverty Law, Tamisha Walker of the Safe Return Project, Merf Ehman of Columbia Legal Services, Esther Patt of the Champaign-Urbana Tenant Union, Rachel Rintelman of the Legal Aid Society of the District of Columbia, Amber Harding of the Washington Legal Clinic for the Homeless, Taylor Healy of Bread for the City, and Catherine Cone and Brook Hill of the Washington Lawyers' Committee for Civil Rights and Urban Affairs.

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nhlp NATIONAL HOUSING LAW PROJECT

Table of Contents

1.0 Introduction

What Is a Fair Chance Ordinance?

A fair chance ordinance is a law adopted by a local jurisdiction (usually a city or county) that creates rules that limit the use of criminal records by landlords when they are screening prospective tenants. The purpose of a fair chance ordinance is to reduce barriers that people who have had contact with the criminal justice system frequently face when they are looking for housing. Fair chance ordinances generally include rules limiting what types of criminal history landlords can consider and procedures that landlords have to follow when screening prospective tenants, as well as rules about how these requirements will be enforced. In recent years, several communities around the country have passed fair chance ordinances aimed at expanding access to housing.[1] While these ordinances share certain features, they also vary in many ways, reflecting the particular political and practical choices made in each community.

Fair chance ordinances vary in many ways.

- *Scope: Some ordinances cover all types of rental housing while others only cover publicly-subsidized affordable housing.*
- *Screening restrictions: The fair chance ordinance in Richmond, California, does not allow affordable housing providers to consider criminal records unless they relate to a felony conviction that is less than two years old.[2] An older ordinance in Newark, New Jersey, permits landlords to consider any serious offense conviction for eight years after a person is released from custody.[3] Seattle, Washington, bars most landlords from considering any criminal records except official sex offender registries.[4] Many ordinances require landlords to consider the context of a person's criminal history before making a final decision.*
- *Screening procedures: Some ordinances require landlords to determine whether an applicant is otherwise qualified for a unit before doing any criminal history screening, but others allow landlords to screen for all criteria at the same time.*
- *Enforcement: Most existing fair chance ordinances include administrative complaint procedures. Richmond also allows people to enforce its ordinance by going to court.*

1. A chart summarizing the existing fair chance ordinances as of December 2019 is included in the Appendix.
2. Richmond Municipal Code §§ 7.110 *et seq.*
3. Newark Ordinance 14-0921 (2015) (not codified).
4. Seattle Municipal Code §§ 14.09.005 *et seq.*

Who Is This Toolkit For?

This toolkit is for organizers and advocates who are engaged in fair chance advocacy on a local level who are looking for guidance on the nuts and bolts of developing a fair chance policy. It draws heavily on our experience supporting local fair chance campaigns, particularly in northern California, and on input from advocates who have worked on fair chance campaigns in other states. We have been privileged to work with dedicated organizers and other groups focused on criminal justice reform and reentry, including many people directly impacted by the criminal justice system. All of our work is informed by organizations engaged in the hard work of advocating on behalf of formerly incarcerated people and their families.

This manual provides a framework for advocates and organizers to use as they develop fair chance policies. While we focus on local fair chance ordinances, the materials presented here can also be used to analyze related policies such as the admissions criteria for a particular building or a planning document that sets out policies for a public housing authority's entire portfolio (some of these planning processes are discussed in more detail in Section 6.0 below).

To draft a successful fair chance policy, advocates must be involved in the broader fair chance campaign and partner with organizations in the community that are deeply engaged in issues related to criminal justice reform, especially those that include individuals and families who are directly impacted by mass incarceration. This toolkit touches on fair chance organizing as it relates to crafting a policy, but it does not provide guidance on the organizing and community engagement aspects of a fair chance campaign. For that, we urge you to seek out local partners with grassroots organizing experience.

2.0 Why Fair Chance?

The Scope of the Problem

The United States prison population grew by 500 percent over the last 40 years.[5] Over 600,000 people leave prison each year.[6] In 2014, 1 in 52 adults in the United States was on probation or parole.[7] One in three adults in the U.S. has a criminal record. Estimates of the number of people likely to be excluded from housing due to an arrest or criminal record are staggering.[8]

Due to a long history of intentionally racist policies, especially the "war on drugs," people of color and ethnic minorities represent over 56 percent of the prison population.[9] Law enforcement's focus on urban areas, poor communities, and communities of color have led to significant racial disparities in arrests and incarceration. The federal Bureau of Justice Statistics reports that as of the end of 2017, out of all state and federal inmates with a sentence of more than one year, approximately 33 percent were African American, 23 percent were Latino, and 30 percent were white.[10] In the same year, African Americans accounted for 13.4 percent of the total population, Latinos for 18.3 percent, and non-Hispanic or Latino Whites for 60.4 percent.[11]

Low-income people are also overrepresented among those arrested or incarcerated. One 2015 study found that incarcerated people ages 27-42 had a median income prior to entering jail or prison that was 41 percent less than the median income of non-incarcerated people of a similar age.[12] People experiencing homelessness are 11 times more likely to face incarceration when compared to the general population.[13]

Women are the fastest growing segment of the prison population. Between 1980 and 2014, the number of women imprisoned increased by an astounding 700 percent.[14] This increase coincided with the rapid increase in the number of inmates imprisoned for drug offenses, which rose from 40,900 in 1980 to 469,545 in 2015.[15] In 2015, an estimated 48 percent of federal inmates and 8.7 percent of state inmates were serving sentences for drug offenses. That same year, 25 percent of all women in prison were incarcerated for drug related offenses.[16]

5. The Sentencing Project, *Fact sheet: Trends in U.S. Corrections* (June 2017), *available at*: http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf

6. U.S. Department of Justice, Bureau of Justice Statistics, *Total Sentenced Prisoners Released From State or Federal Jurisdiction Admissions and Releases of Sentences Prisoners Under the Jurisdiction of State or Federal Correctional Authorities* (2015), *available at*: https://www.bjs.gov/content/pub/pdf/p15.pdf

7. U.S. Department of Justice, Bureau of Statistics, *Probation and Parole in the United States* (2014), *available at*: https://www.bjs.gov/content/pub/pdf/ppus14.pdf

8. U.S. Department of Justice, Bureau of Justice Statistics, *Prisoner Series 1980 to 2015*, *available at:* https://www.bjs.gov/index.cfm?ty=pbse&sid=40

9. U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2017*, *available at:* https://www.bjs.gov/content/pub/pdf/p17.pdf

10. *Id.*

11. U.S. Census Bureau, *Quick Facts, Population Estimates,* (2018) *available at*: https://www.census.gov/quickfacts/fact/table/US/PST045218

12. Bernadette Rabuy and Daniel Kopf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned* (Prison Policy Initiative, June 2015) *available at:* https://www.prisonpolicy.org/reports/income.html.

13. National Law Center on Homelessness & Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* (2016) 19, *available at:* https://nlchp.org//wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf

14. U.S. Department of Justice, Bureau of Justice Statistics, *Prisoner Series 1980 to 2015, available at:* https://www.bjs.gov/index.cfm?ty=pbse&sid=40

15. The Sentencing Project, *Fact sheet: Trends in U.S. Corrections* (June 2017), *available at*: http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf

16. U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2015*, *available at:* https://www.bjs.gov/content/pub/pdf/p15.pdf

Lack of Affordable Housing

People released from incarceration face a monumental challenge when trying to find affordable housing. They are competing for housing with over 37 million Americans who live at or below the federal poverty level.[17] Very low-income households (those making 50 percent of area median income or less) already face extremely long odds, with only 62 affordable rental units available for every 100 households.[18] The situation is even worse for extremely low-income households (those making 30 percent of area median income or less) for whom there are only 37.7 affordable rental units available for every 100 households.[19] In 2015 alone, 8.3 million tenants had what HUD termed "worst case needs," meaning that in addition to having very low incomes and lacking housing assistance, they also had severe rent burdens and/or severely inadequate housing.[20]

Stable, affordable housing is an urgent need for people leaving prison and is an essential factor in reducing recidivism.[21] Being homeless makes formerly incarcerated people more likely to be arrested and incarcerated again due to policies that criminalize homelessness such as making it illegal to sleep in public or panhandle.[22] Homelessness has other negative impacts as well, such as reducing access to health care, social services, educational opportunities and jobs.[23]

What a Fair Chance Ordinance Can Do

Access to affordable housing is limited by overly strict admissions policies, many of which specifically target and reduce options for people with criminal records. About 90 percent of landlords screen tenants for any criminal history[24] and many applicants to affordable housing are subject to unreasonable screening standards. For example, public housing authorities (housing authorities) are required to implement "reasonable" lookback periods in their admissions criteria, yet many housing authorities have admissions policies that either lack any lookback periods at all or allow for consideration of criminal history from an unreasonably long time ago.[25] In addition, many housing providers screen for criminal activity that has little to no bearing on an individual's likelihood of success as a tenant.

One way to ensure that applicants with criminal records have meaningful opportunities to secure housing is to pass local ordinances that limit the information landlords can consider when making admissions decisions. For example, an ordinance could prohibit the use of outdated records or non-conviction records. Because such ordinances seek to eliminate the use of outdated or irrelevant criminal history information, they are generally called "fair chance" ordinances.

What a Fair Chance Ordinance Cannot Do

While fair chance policies ***expand access*** to housing, they do little to ***create*** new housing for people with criminal records. Fair chance policies alone cannot affect the supply of affordable housing. In order to have a broad impact on people reentering the community post-incarceration, more resources are needed to build new housing, particularly permanent supportive housing that provides the services that people need when they exit jails or prisons. It is also important to recognize that fair chance policies intend to solve a problem that appears at the back end of an individual's involvement in the criminal justice system. Addressing root causes will require support for campaigns that seek to end mass incarceration, police brutality, unfair sentencing laws, and other racist policies.

17. U.S. Census Bureau, *Income and Poverty in the United States 2015, available at:* https://www.census.gov/library/publications/2016/demo/p60-256.html

18. HUD-*Worst Case Housing Needs 2017: A Report to Congress, available at*: https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf

19. *Id.*

20. *Id.*

21. Urban Institute, *Examining Housing as a Pathway to a Successful Reentry, available at*: http://www.urban.org/sites/default/files/publication/24206/412957-Examining-Housing-as-a-Pathway-to-Successful-Reentry-A-Demonstration-Design-Process.PDF; Faith E. Lutze, Jeffrey W. Rosky, Zachary K. Hamilton, *Homelessness and Reentry-A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders* (2013) *available at*: http://journals.sagepub.com/doi/abs/10.1177/0093854813510164

22. Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People* (Prison Policy Initiative, Aug. 2018), *available at:* https://www.prisonpolicy.org/reports/housing.html

23. *Id.*

24. Collatz, Andrea, "Landlord Survey: Optimism In Renting Your Property," TransUnion Smartmove blog (June 6, 2017).

25. Tran-Leung, Marie Claire, *When Discretion Means Denial: The Use of Criminal Records to Deny Low-Income People Access to Federally Subsidized Housing in Illinois* 12 (2011) *available at*: https://www.nhlp.org/wp-content/uploads/Tran-Leung-When-Discretion-Means-Denial.pdf

3.0 Getting Started

Key issues you will need to address at the outset of developing a fair chance ordinance include:

- Determining whether existing federal or state laws might affect the validity or scope of your planned ordinance;
- Deciding how to frame and communicate about the planned ordinance; and
- Taking an inventory of the rental housing stock in your community.

These issues are discussed in more detail below. Keep in mind that as your ordinance evolves, you may need to revisit some or all of them.

Interaction with Other Laws

When developing an ordinance, you have to be aware of the legal context in which it will function. There may be laws in place at the federal or state level that opponents of a fair chance ordinance may try to use to invalidate or undermine it. There may also be other existing or potential local laws or policies that will interact with a fair chance law and that need to be taken into account to avoid conflicts or uncertainty.

Federal law preemption

Federal law might directly conflict with a particular component of your planned ordinance. For example, certain federal statutes and regulations require public housing agencies (housing authorities) and owners of some federally assisted housing[26] to reject applicants in two specified categories: those with convictions for methamphetamine production on a federally-assisted property and people who appear on a lifetime sex offense registry.[27] As a result, any fair chance ordinance that does not permit screening for these categories must include an exception that allows housing authorities and owners to comply with these federally mandated exclusions.

Under federal law, housing authorities and owners in many federally assisted housing programs also have discretion over whether to accept applicants who have engaged in other types of criminal activity beyond the two exclusion categories, within some limits. If a housing authority or owner has a policy of denying applicants based on other types of criminal history, the policy must be in writing and available to applicants. It is important to determine what criminal history policies are in place in federally assisted programs in your jurisdiction so you can make an informed decision about how your fair chance ordinance will affect those policies. At least one housing authority in a jurisdiction with a broad fair chance ordinance has taken the position that it does not have to comply based on federal law. While this position has not been accepted by any court, it is important to be aware of the possibility that your ordinance might be challenged if you restrict criminal history screening by housing authorities and owners who claim to have conflicting obligations or discretion under federal law.

26. Affected programs include public housing, the Section 8 voucher program, project-based Section 8, Section 202, Section 811, Section 221(d)(3), Section 236, Section 514 and Section 515. Owners of certain Rural Development (RD) housing and of properties financed with low-income housing tax credits (LIHTC) are not required to bar any applicant due to criminal history. For more details about which mandated criminal history exclusions exist in the various federal housing programs, see *An Affordable Home on Reentry*, Ch. 2, (NHLP 2018) [hereinafter *Reentry*] *available at:* https://www.nhlp.org/wp-content/uploads/2018/08/Rentry-Manual-2018-FINALne.pdf

27. There is an additional mandatory three-year waiting period if a member of the household was previously evicted from federally assisted housing for drug-related criminal activity, but there are some exceptions available, such as in the case of rehabilitation or changed circumstances. For more details about this issue, see *Reentry* at 2.2.3.

What is federally-assisted housing?

Federally-assisted housing is affordable housing that is subsidized by the federal government. There are different types of federally-assisted housing, and each program's rules vary with respect to tenant screening.

HUD administers a number of federally-assisted housing programs including:

- *Public housing, which is owned and administered by a local Public Housing Authority (housing authority).*
- *Housing Choice Vouchers (also known as Section 8 vouchers) which are tenant-based subsidies administered by a local housing authority.*
- *HUD "Multifamily" programs that may house specific populations such as people with disabilities or seniors.*
- *HUD administers a number of other programs that make housing affordable to low-income families. For more information see NHLP's HUD Housing Programs: Tenants Rights.*

The Internal Revenue Service (IRS) administers The Low Income Housing Tax Credit (LIHTC) program. LIHTC housing is the largest source of new affordable housing in the country. Tax credits may be used to build or renovate affordable housing. Different rules apply to LIHTC housing than HUD-subsidized housing.

For more information on how to advocate for reasonable screening policies at both HUD and LIHTC affordable housing projects see Section 6.0 *below.*

State law preemption

Certain state laws cover broad subject areas, such as housing discrimination, in ways that might not leave room for some aspects of your planned fair chance ordinance. For example, the California Fair Employment and Housing Act (FEHA) prohibits housing discrimination based on characteristics such as race, color, sex, national origin, disability and sexual orientation.[28] In some cases, opponents of local regulation have claimed (usually unsuccessfully) that FEHA bars local ordinances aimed at preventing other types of housing discrimination.[29]

In many states, the state constitution or court decisions have established "home rule," meaning that local jurisdictions are free to pass laws with respect to municipal affairs and state laws only take precedence over local laws when they relate to "state affairs" as opposed to "municipal affairs."[30] Some states, however, use a different approach, often called "Dillon's rule", which gives state law precedence over local laws except in limited circumstances.[31] A few states, including Arkansas, Tennessee, Wisconsin and North Carolina, explicitly preempt local anti-discrimination laws and prohibit cities from enacting anti-discrimination laws that are more protective than their state laws.[32] In Wisconsin, the state legislature passed such a prohibition targeting longstanding fair chance protections in Dane County and the city of Madison,

28. Cal. Gov't Code § 12921 (West 2019).

29. *See, e.g.,* Apartment Association of Greater Los Angeles v. City of Santa Monica, Los Angeles Sup. Ct., Case No. SC124308 (Order Granting Defendants' and Interveners' Motion for Summary Judgment, Feb. 2, 2017). Note that in this California case, the court concluded that a local source of income anti-discrimination ordinance for voucher families is not preempted by the state fair housing law.

30. California is a "home rule" state with respect to its charter cities. Cal. Const. art. XI, § 7.

31. Vermont, for example, is a "Dillon's rule" state. *See, e.g.*, City of Montpelier v. Barnett, 2012 VT 32, ¶60, 49 A.3d 120, 142 (2012); E.B. & A.C. Whiting Co. v. City of Burlington, 175 A. 35, 42 (Vt. 1934).

32. Nicole DuPuis et al., *City Rights in an Era of Preemption: A State-by-State Analysis*, 10-11 (National League of Cities 2017) *available at:* https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf

effectively undoing the work that had been done at the local level years earlier.[33]

In order to understand how related state laws might affect a local fair chance ordinance in your jurisdiction, you will need to identify the relevant laws in your state and analyze how your state handles potential conflicts between state and local laws.

Interaction with other local laws

It is also important to be aware of other, related local laws that might affect – or be affected by – how your fair chance ordinance is implemented. Examples of this type of related law are source-of-income ordinances that prohibit discrimination against Section 8 voucher holders, ordinances that regulate tenant screening reports, and "first-in-time" ordinances that require a landlord to offer an available rental unit to the first qualified person who applies.[34]

Framing and Messaging

As in all political campaigns, framing and messaging are critical and have a direct impact on the political chances of getting a fair chance ordinance passed. Your campaign's communications strategy will involve decisions and activities that are beyond the scope of this Toolkit, but it is important to integrate that strategy into the development of the ordinance itself.

Aspects of an ordinance that can bolster your communications strategy include:

- The name of the ordinance;
- Where the ordinance is placed in the municipal code; and
- Legislative findings that detail the relevant problems the ordinance is positioned to help address (***e.g.,*** racial discrimination in housing, homelessness, barriers to family reunification, recidivism arising from lack of housing).

Taking an Inventory of the Local Rental Housing Stock

Knowing what types of rental housing are available in your community will make it easier to develop a fair chance ordinance that addresses local needs. If, for example, your community's affordable rental housing options are limited to privately-owned properties subsidized by federal tax credits or available to Section 8 voucher holders, the details of your ordinance might be different than they would be if public housing units were also in the mix. Knowing whether most multifamily rentals are in buildings with only a few units or with more than 8 or 10 units will also help you determine the impact of covering or not covering properties with fewer units in the ordinance.

33. *New Wisconsin landlord laws wipe out hard-fought victories for Madison renters* (Isthmus, November 1, 2013) *available at:* https://isthmus.com/news/news/new-wisconsin-landlord-laws-wipe-out-hard-fought-victories-for-madison-renters/

34. *See* Section VI(a) below for more details about first-in-time ordinances.

Rental housing stock inventory

You can gather information about your community's rental housing stock using these resources:

- *The National Housing Preservation Database, http://preservationdatabase.org/, is searchable by location and lists the type(s) of subsidy or other federal assistance for each property. You need to complete a free registration in order to be able to access the database.*
- *For information about properties subsidized by federal tax credits: www.novoco.com/low_income_housing/resources/maps_data.php.*
- *For information about subsidies for rural properties, searchable by location: https://rdmfhrentals.sc.egov.usda.gov/RDMFHRentals/select_state.jsp.*
- *Local housing authorities should have data about the number of rentals using tenant-based vouchers and the number of public housing units.*
- *City or county websites may include data or lists about the rental housing available in a community.*
- *Non-profit affordable housing providers are likely to have information about the range of rental housing options available in a community.*

4.0 Key Elements of a Fair Chance Ordinance

As you develop and begin to draft a fair chance ordinance, you will need to make decisions about a number of key issues, including: the type(s) of housing the ordinance will cover; the categories of persons the ordinance will protect; the specific limits the ordinance will place on screening for criminal history; the mechanics of tenant screening under the ordinance; notice and disclosure requirements; and enforcement mechanisms.

Which Housing Providers Will the Ordinance Cover?

When deciding the scope of coverage, the basic considerations will be about which types of housing providers and which types of housing to include.

Some cities have chosen to cover only affordable housing providers in their fair chance ordinances. In California, the City of Richmond's ordinance covers all affordable housing, including units rented to Section 8 voucher holders. San Francisco's ordinance is narrower, covering only affordable housing funded by the City or that is part of the City's inclusionary affordable housing program.

When deciding the scope of coverage, the basic considerations will be about which types of housing providers and which types of housing to include.

Deciding which type of housing an ordinance will cover

Advocates in Richmond, CA, led by the Safe Return Project, decided to move forward with an ordinance that covered only affordable rental housing in their city. This decision was the result of strategic political decision-making and compromise. Some specific factors they considered were:

- *Where people were living upon reentry (most people could only afford affordable housing).*
- *The rental housing landscape (most of the affordable housing in Richmond is federally-assisted housing or financed by low income housing tax credits (LIHTC)).*
- *The political feasibility of an ordinance that covered private housing (knowing that the landlord and realtor lobby would come out in full force to oppose the ordinance if it was expanded to private housing).*

For more on the development of Safe Return's policy and the organizers' participatory research and organizing model see Home with a Purpose: A History of the Safe Return Project.[35]

35. The Haas Institute for a Fair and Inclusive Society at the University of California, Berkeley, *Home with a Purpose: A History of the Safe Return Project*, *available at:* http://haasinstitute.berkeley.edu/sites/default/files/safereturncasestudy_publish.pdf

Other jurisdictions have chosen to restrict consideration of criminal history by all providers of rental housing, including private landlords. The fair chance ordinances in Seattle, Portland (OR), Detroit, Minneapolis, Washington, D.C., and Urbana, Champaign and Cook County (IL) cover all types of housing.[36]

If a fair chance ordinance is going to differentiate between affordable housing providers and private landlords, it is important to define "affordable housing provider" very carefully and with reference to the specific characteristics of the rental housing stock in your jurisdiction. For example, in Richmond, the fair chance ordinance defines affordable housing providers in terms of receipt of public funding, including grants, tax credits and other subsidies.[37] In San Francisco, which has an inclusionary affordable housing program and a density bonus program that imposes affordability restrictions on certain units in new, privately owned developments, the ordinance also includes those below-market-rate units as a separate category in the definition since those units are not necessarily covered by a narrower definition that only includes publicly funded housing.

With regard to tenant-based Housing Choice Vouchers (more commonly known as Section 8 vouchers), there are additional considerations to address because voucher families generally go through two rounds of tenant screening. First, the housing authority screens the applicant for voucher eligibility. That screening must include the two categorical bans discussed earlier (people who appear on a lifetime sex offense registry and people convicted of production of methamphetamine on federally-assisted property) and may also include a broader criminal background check. Second, the voucher family will usually be screened by a private landlord.[38] It is important to explicitly state whether a fair chance ordinance applies to housing authorities when they screen for voucher eligibility, to private landlords who rent to voucher families ("voucher landlords") or to both.

If voucher landlords are going to be covered, you will also have to consider how to define a "voucher landlord" for purposes of the local law. Voucher landlords could be included in the definition of "affordable housing provider," but that may leave out landlords who are not currently accepting vouchers but may accept them in the future. This issue is especially complicated in jurisdictions that also prohibit discrimination against Section 8 voucher holders (sometimes called "source-of-income discrimination"), because all private landlords in such jurisdictions are potential Section 8 landlords. Another thing to keep in mind when deciding who will be covered is that including voucher landlords in a fair chance ordinance that covers only affordable housing providers could make some landlords less willing to rent to voucher holders.[39]

If you want your ordinance to cover public housing authorities or other agencies that determine people's eligibility for Section 8 vouchers and other forms of tenant-based rental assistance, you will need to include language that covers those entities and their voucher screening activities. For example, you could include in the definition of a covered adverse action "treating a person as ineligible for a tenant-based rental assistance program, including, but not limited to, the Section 8 tenant-based voucher program (42 U.S.C. section 1437f)."

Due to political and community concerns, jurisdictions with fair chance ordinances that cover all housing providers often include some limited exceptions. For example, a number of fair chance ordinances do not require landlords who own and occupy the housing to comply. Washington D.C. exempts housing providers who own and occupy housing with three or fewer rental units.[40] Champaign and Urbana exclude all owner-occupied units in which the landlord will be sharing a kitchen or bathroom with an unrelated tenant.[41] Seattle's ordinance includes exceptions for owner-occupied single-family homes and for accessory dwelling units (***i.e.,*** "in-law units") if the landlord lives on the premises.[42] In some cases, these exemptions mirror exceptions provided to private landlords in state or federal fair housing laws. In Cook County, fair chance proponents opted not to include such an exception, in part because the Human Rights Ordinance they were amending did not include one, and they did not want to narrow the scope of that broader ordinance.

36. Seattle Municipal Code § 14.09.025(A)(1); Portland City Code § 30.01.86; Chapter 26, Article V, §§ 26-5-1 – 26-5-20 of the 1984 Detroit City Code; Minneapolis Ordinance No. 2019-038, amending Title 12, Chapter 24 of the Minneapolis Municipal Code of Housing; Code of the District of Columbia §§ 42-3541.01(5), 42-3501.03(14); Urbana Code of Ordinances §§ 12-37, 12-64; Champaign Municipal Code §§ 17-3(11), 17-4.5, 17-71, 17-75; Cook County Code of Ordinances §§ 42-38(b)(8), (c)(5).

37. Richmond Municipal Code § 7.110.040(b).

38. In some jurisdictions, however, private landlords may rely on the housing authority's screening process.

39. This will be less of a concern if your jurisdiction also prohibits discrimination against voucher holders.

40. Code of the District of Columbia § 42-3541.03(1).

41. Champaign Municipal Code § 17-75(b); Urbana Code of Ordinances § 12-64(d)(2).

42. Seattle Municipal Code § 14.09.115(C)-(D).

Whether to include all housing providers or only some subset in your ordinance is of course a strategic decision based on local context. Some factors to consider are:

- Where do formerly incarcerated people and people with criminal records in your city live? Where do they want to live?
- What types of affordable and market-rate rental housing are available in your jurisdiction?
- How many people would be protected if only affordable housing or another subset of rental housing is covered?
- What other laws or regulations are applicable to tenant screening in your jurisdiction? For example, are some or all housing providers prohibited from discriminating against Section 8 voucher holders?
- What are the political costs and benefits of covering more types of housing?
- Who are your political allies and opponents, and how will the scope of coverage affect their support for or opposition to a fair chance ordinance?
- How does the scope of coverage intersect with other policy priorities that you and your allies have?
- Broader ordinances that cover more types of housing providers may have a higher chance of being challenged in court.

Will there be an opportunity to broaden the ordinance in the near future (for example, is the strategy to pass an ordinance that applies only to certain types of housing providers and then, building on that success, later amend it to cover more housing providers)?

Who Will Be Protected by the Ordinance?

All fair chance ordinances currently in effect protect people who are applying to begin a tenancy. As noted above, some only cover applicants to affordable housing, while others cover applicants to all (or most) types of housing.

You may also want to consider whether to explicitly cover current tenants with regard to previous criminal history from before they began the tenancy. The concern here is that a housing provider, such as a federally-assisted landlord, might conduct a criminal history screening as part of a periodic recertification[43] during the course of a tenancy and then attempt to evict the tenant on the basis of a previous offense. The Richmond ordinance addresses this issue by including "to fail or ***refuse to continue*** to rent or lease real property to an individual, or fail or refuse to add a household member to an existing lease, or to reduce any tenant subsidy" in the definition of "Adverse Action."[44] Another option would be to address this issue in the definition of an "Applicant."

Prospective applicants should also be considered – ***i.e.,*** people who inquire about or come to look at a rental unit but have not yet formally submitted an application. In order to make sure prospective applicants are also protected, you may want to add language to the ordinance that defines "applicant" to include this group. Washington D.C.'s ordinance includes any person ***"who intends to request to be considered for tenancy*** within a housing accommodation" in its definition of "Applicant."[45]

Some communities have also decided that their ordinances should specifically name for protection people who are seeking to join an existing tenant household. For example, the Richmond ordinance explicitly calls out "individuals applying to be added to a lease"[46] to emphasize the fact that family reunification is a key goal and a critical support for people who are exiting jails and prisons.

What Type of Criminal History Will the Ordinance Prohibit Housing Providers From Considering?

Perhaps the most important element of a fair chance ordinance is the scope of information that a landlord is prohibited from considering. When deciding the exact limits you want to place on criminal history screening, there are a few different approaches you can take. You may opt to ban all criminal history screening, except as required by federal law.[47] Alternatively, you could allow screening only for convictions that occurred during a specified lookback period and/or only for certain types of offenses.

43. Many federally-assisted landlords are required to conduct periodic recertifications of tenants' income and/or eligibility. *See, e.g.,* 24 C.F.R. § 960.257 (public housing) and § 982.516 (vouchers).

44. Richmond Municipal Code § 7.110.040(a) (emphasis added).

45. Code of the District of Columbia § 42-3541.01(1) (emphasis added).

46. Richmond Municipal Code § 7.110.050(b).

47. For more information about federally mandated exclusions in federally assisted programs and properties, *see* Section 3.0 above.

Limiting how far back criminal record screening can go

If you include a lookback period, you will need to specify the length of the lookback period. Lookback periods in existing ordinances range from two years (Richmond, California) to eight years (Newark, New Jersey) to ten years for certain serious offenses (Minneapolis, Minnesota). It is also very important to be careful about how the lookback period will be measured. If your ordinance includes a two-year lookback period, will that two years be counted from the date of the conduct that resulted in the conviction, the date the person was sentenced, the date the person was released from incarceration, or the date the person completed the sentence, which could include completion of any parole or probation and/or payment of any fines or restitution? Using the date of the underlying conduct will result in the earliest access to housing for people reentering, while using the date of conviction or sentencing or the date of release or of completion of all terms of a sentence will delay access.

The start date of a lookback period matters a lot!

Kendra was convicted of a criminal offense that took place in August 2007 and was sentenced in January 2008. Her sentence included a prison term, fines and restitution. She was released from incarceration in September 2015 and was then on parole until September 2018. She cannot afford to pay the remaining fines and restitution imposed as part of her sentence, and it is unclear if she will ever be able to complete that part of her sentence.

In a jurisdiction with a five-year lookback period counted from the date of sentencing, Kendra will have the right to be considered for rental housing without reference to her conviction as soon as she is released since her sentencing occurred over seven years before her release. If the five-year lookback is counted from the date of release, however, she will have to wait until September 2020 before she can benefit from the fair chance protections. If the lookback period is counted from when she completed parole, she will have to wait until September 2023. And if the five years only starts once she completes all terms of her sentence, she may never benefit at all.

All lookback periods are based on the concept that at some point, applicants with aging criminal records should be eligible for housing because the risk that they will re-offend declines over time. HUD's 2016 fair housing guidance on the use of criminal records in housing cites one research study that showed that after a period of time, there is little to no difference in risk of future offending between those with an old criminal record and those without any criminal record.[48] Although the timeframes may differ, the research all supports the proposition that an offender's risk of re-offending declines over time to the point that it is the same as the risk that someone in the general population will commit a crime.[49] For this reason, some housing providers have opted to adopt, shorten and/or customize lookback periods.[50]

Deciding whether or not to apply a lookback period, and how long any lookback period will be is not a simple matter. These decisions have often been made arbitrarily by policy makers with little or no input from local organizers and advocates, but it is crucial for organizers and advocates to work through for themselves whether any lookback period is justified and, if so, what length of lookback would be fair and reasonable and would meet local needs.

48. Dep't Hous. & Urban Dev., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 7 n. 34 (2016) (citing Megan C. Kurlycheck et al., *Scarlet Letters and Recidivism: Does an Old Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483 (2006)).

49. Peter Leasure & Tia Stevens Andersen, *Recognizing Redemption: Old Criminal Records and Employment Outcomes*, 41 N.Y.U. Rev. of L. & Change: The Harbinger 276-78 (2017) (providing a literature review of relevant criminological research).

50. *See, e.g.,* Housing Authority of New Orleans (HANO) Criminal Background Screening Procedures (adopted March 2016) *available at*: http://www.hano.org/home/agency_plans/2016%20CRIMINAL%20BACKGROUND%20PROCEDURES%20-%20FINAL.pdf. HANO got rid of all blanket bans except those that are federally mandated, established lookback periods tailored to the type of offense and required an individualized assessment before any denial. For information about other innovative policies, *see* https://www.vera.org/projects/opening-doors-to-public-housing

Defining "criminal history"

Landlords screen for a wide range of criminal history. It is therefore necessary to consider not only how convictions are handled, but also other types of interactions with the criminal justice system, such as:

- *Arrests;*
- *Convictions that have been sealed, vacated, expunged or otherwise invalidated by later judicial or legislative action;*
- *Cases from the juvenile justice system;*
- *Incidents that occurred while a person was a juvenile (even if later tried as an adult); and*
- *Participation in or completion of a diversion or a deferral of judgment program.*

Note that definitions for various dispositions vary by state so it is important to be as specific as possible about the information you are referencing. You may want to include the specific part of the penal code that applies in the ordinance.

Limiting the type of criminal history that landlords can consider

Ordinances that permit screening for certain types of convictions (with or without a lookback period) usually include a list of specific offenses or set out broad categories of offenses. For example, Washington DC's ordinance permits screening for a lengthy list of criminal offenses that includes, among other things, arson, murder, sexual abuse and various drug offenses, with a seven-year lookback period.[51] Champaign's ordinance permits screening for convictions involving the use of force or violence or the illegal use, possession, distribution, sale or manufacture of drugs, with a five-year lookback period.[52] In contrast, Seattle's ordinance only permits limited sex offender registry screening.[53]

Some fair chance ordinances restrict blanket bans for particular offenses or categories of offenses by prohibiting denials except when an applicant's prior felony conviction is "directly related" to an individual's tenancy. The fair chance ordinance in Cook County, Illinois, for example, allows landlords to rely on a past conviction only if a denial based on the specific conviction "is necessary to protect against a demonstrable risk to personal safety and/or property of others affected by the transaction."[54] Richmond's ordinance defines a "directly related conviction" which is a conviction where the underlying conduct "has a direct and specific negative bearing on the safety of persons or property, given the nature of the housing," ***and*** that either makes the person ineligible for public housing under state or federal law, is for a crime carried out in the applicant's home, or is for a sex crime.[55] Presumably, a conviction during the applicable lookback period for arson at a prior residence or for assault of a neighbor could meet such a test, but a DUI/DWI or prostitution conviction would not.

Studies that examine the impact of different types of criminal history on housing outcomes can provide critical information to organizers and advocates and can also be useful as part of the fair chance campaign. One study published in 2019 found, among other things, that 11 out of 15 offense categories studied – including marijuana possession, serious traffic offenses and prostitution – had no significant effect on housing outcomes.[56]

51. Code of the District of Columbia § 42-3541.02(d).
52. Champaign Municipal Code § 17-75(e). Note that a majority of city council members voted in June 2019 to shorten the lookback period from five years to two years.
53. Seattle Municipal Code § 14.09.020 (exempting sex offender registry information from the screening prohibition).
54. Cook County Code of Ordinances § 42-38(c)(5)(c).
55. Richmond Municipal Code § 7.110.040(h).
56. Cael Warren, *Success in Housing: How Much Does Criminal Background Matter?* 19 (Wilder Research 2019). The study also found that negative effects of criminal history on housing outcomes are significantly reduced in households with two or more adults and/or one or more children. *Id.* at 15.

What Procedures Will Landlords Have to Follow?

In order to make a fair chance ordinance effective, you will need to consider what rules to put in place regarding the landlord's process of screening for criminal history. These rules should address how and where landlords obtain criminal history information, when in the screening process they can consider that information, and what steps they have to take if they intend to deny an application based on criminal history.

Some fair chance ordinances try to get at the various ways landlords gather criminal history information by including a definition of "inquiry" that covers oral and written inquiries, questions on application forms and in interviews, and background check reports obtained from third parties.[57] Seattle's ordinance, which permits landlords to screen for an applicant's status on a sex offender registry, limits the inquiry to information obtained directly from a county, statewide or national sex offender registry and not from a secondhand report by a third party[58] since information in such reports is frequently inaccurate.[59]

Another safeguard to consider is requiring landlords who do screen for criminal history (as permitted by the ordinance) to first determine whether an applicant is "otherwise qualified" – *i.e.,* screen first for all criteria other than criminal history – before asking about or reviewing any criminal history information. That way, a landlord will not be able to use another reason, such as credit or income, as a pretext, and it will be clear that any denial after someone is determined to be "otherwise qualified" is based on the criminal history information. Some ordinances, like the ones in Richmond, California, and Washington D.C., that include an "otherwise qualified" requirement also require landlords to make conditional offers to applicants before doing any criminal history screening.[60]

To the extent that your ordinance will permit some criminal history screening beyond the narrow federal mandates previously discussed, you will still want to ensure that landlords do not just impose blanket bans on people with certain types of convictions

What are mitigating circumstances?

Richmond's fair chance ordinance includes a non-exclusive list of "Evidence Of Rehabilitation or Other Mitigating Factors" that includes: "a person's satisfactory compliance with terms and conditions of parole and/or probation following the Conviction; employer recommendations; educational attainment or vocational or professional training since the Conviction; completion or active participation in rehabilitative treatment; [] letters of recommendation from community organizations, counselors or case managers, teachers, community leaders or parole/probation officers who have observed the Applicant since his or her conviction; and the age of person at the time of the conviction."[61]

Additional mitigating circumstances that could be included in a fair chance ordinance include:

- documentation showing that the applicant's criminal conduct was related to a disability
- documentation showing that the applicant's criminal conduct was related to the applicant's status as a victim of domestic violence or another crime
- the effect the denial of admission would have on the rest of the applicant's family
- the effect the denial of admission would have on the community[62]
- evidence of the family's participation in or willingness to participate in social service or counseling programs
- For a further discussion of mitigating circumstances, rehabilitation and requests for reasonable accommodation, see Chapter 4 of An Affordable Home on Reentry.

57. *See, e.g.*, Richmond Municipal Code § 7.110.050(k).

58. Seattle Municipal Code § 14.09.010 (definition of "Registry Information").

59. *See, e.g.,* https://www.consumer.ftc.gov/blog/2018/10/will-background-check-errors-deny-you-home. Errors in tenant screening reports can arise from mismatches (*i.e.,* reporting information about another person with the same or similar name as the applicant) or misleading information (*e.g.*, failure to provide information about a subsequent reversal of a conviction).

60. Richmond Municipal Code § 7.110.050(c)(2); Code of the District of Columbia § 42-3541.02(b)(1).

61. Richmond Municipal Code § 7.110.040(i).

62. Note that this factor opens the door to the argument that providing housing to an individual with a criminal record substantially increases the potential that the individual will not be a repeat offender and therefore may be a benefit to the community.

without considering the specific facts of the offense and of the applicant's current situation. As discussed in HUD's 2016 guidance on the use of criminal records in tenant screening, blanket bans on housing for people with criminal records or for certain types of offenses will almost always violate federal law because they have a disparate impact on people of color that cannot be justified as necessary to achieve a substantial, legitimate objective.[63] The HUD guidance therefore disapproves most categorical bans in favor of policies that use individualized assessment – rather than stereotypes and biases – to determine whether an applicant is likely to perform well as a tenant.[64]

Most of the existing fair chance ordinances require landlords to conduct some type of individualized assessment before turning down an applicant with a criminal record.[65] Some of the important factors to be considered in such an assessment (also known as "mitigating circumstances") include:

- The nature and severity of the crime.
- How long ago the underlying conviction occurred.
- The degree of participation by the applicant in the criminal conduct.
- Whether the criminal conduct occurred on property rented by the applicant.
- Whether the criminal conduct has a direct and specific negative bearing on the safety of persons or property at the housing in question.
- The age of the applicant at the time of the criminal conduct.
- Evidence of positive performance as a tenant before and/or after the criminal conduct.
- Household composition (***i.e.,*** how many adults and children).
- Supplemental information regarding the applicant's rehabilitation.

What Type of Notices Will the Ordinance Require?

Notice requirements serve many purposes, including informing applicants and tenants of the rights and protections available under a fair chance ordinance, encouraging applicants to complain about unfair denials, deterring landlords from using improper criminal history screening, and creating a record that can be used in the future if there is a dispute about whether a landlord complied with the law. Notice requirements should be designed to meet your specific objectives. Below, we include a few examples of notices and their purposes, but there may be other types of notices that make sense for your ordinance.

For all notices, you may decide to be explicit in the ordinance about what information is required by law. Another approach is to leave the details to an enforcement or oversight body, and have that agency draft the notices as part of the implementation plan. The Washington, D.C., Urbana, Champaign and Newark ordinances direct city staff to prepare model notices that must be used by all property owners.

When making the decision whether to include requirements about the content of the notice in the ordinance itself, there are several factors to consider. First, will leaving the content unaddressed in the ordinance result in inconsistent notices from various housing providers? The result may be confusing for applicants. Second, will you have a chance to review the content of any model notices if drafting is delegated to city staff? Advocates and organizers often have the strongest understanding of the types of information applicants need to know and understand before they apply for housing. If you choose to allow the city or another entity to draft the notice, you should make sure that you and your partners have a key role in the drafting process.

63. Dep't Hous. & Urban Dev., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 2 (2016). For a more detailed discussion of the HUD Guidance and fair housing principles as applied to criminal records screening see also, *Reentry* at 2.3.4.

64. Dep't Hous. & Urban Dev., *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 7 (2016).

65. *E.g.,* Seattle Municipal Code § 14.09.025(A)(3).

Informational Notices

An informational notice informs prospective applicants of their fair chance rights. There are two important considerations regarding informational notices: the content of the notice and how it is posted or distributed by housing providers. The basic elements of an informational notice are:

- A brief description of the fair chance law;
- A clear list of the criminal history that can't be considered;
- If relevant, definitions and examples of "rehabilitation," mitigating circumstances" or other factors housing providers must consider and how and when the applicant can provide this information; and
- How applicants can appeal a decision or report a violation of the law.

A fair chance ordinance might also require that informational notices include a copy of the landlord's tenant screening criteria. Landlords are generally not required to make screening criteria publicly available (except for some HUD housing providers). Requiring landlords to provide their screening criteria in writing can be useful both to inform prospective tenants of the criteria up front and help applicants determine whether a denial was proper. On the other hand, written screening criteria can also cause people to screen themselves out of applying, so it is important to balance those concerns.

How housing providers post and/or distribute informational notices to prospective tenants is also important. You should consider where applicants are most likely to see a notice during the housing search process, such as a realtor or landlord's website or rental office, in common areas of the property, or as an attachment to the application itself. For example, San Francisco's ordinance requires that all advertisements for vacancies include an informational notice that criminal history will only be considered in compliance with the city's fair chance ordinance.[66] Seattle's ordinance requires that an informational notice be included as part of all rental applications.[67]

Notice of Adverse Action

A fair chance ordinance can also address what notice applicants receive in the case of an adverse action. How and when the applicant is informed of an adverse decision will affect whether the applicant has the time and the information needed to properly evaluate and appeal the decision.

In laying out the required elements of an adverse action notice, consider including all of the information the applicant will need to evaluate whether the housing provider's actions violated the fair chance ordinance or other law. The language in the notice will vary depending on what screening criteria the ordinance allows for, but consider requiring the following information:

- The specific criminal history that was the basis of the decision;
- An explanation of the relationship between the criminal history considered and the risk of foreseeable harm to other tenants and/or the property;
- How and what mitigating factors and rehabilitation were considered;
- How to appeal the housing provider's denial;
- The procedures and contact information for reporting a violation of the ordinance, including any deadlines or statutes of limitation.

The Richmond, Seattle, Washington D.C. and Newark ordinances all require that adverse action notices contain the information that formed the basis for a denial.[68] For example, Richmond requires the following information:

- The type of housing sought;
- Why the criminal history that was considered has a specific negative bearing on the landlord's ability to fulfill his or her duty to protect the public and other tenants from foreseeable harm;
- What bearing, if any, the time that has elapsed since the applicant's or household member's last offense has on the housing provider's decision;
- The evidence of rehabilitation and mitigating circumstances considered, and
- How to report a violation of the ordinance. [69]

66. San Francisco Police Code § 4907(a).
67. Seattle Municipal Code § 14.09.020.
68. Richmond Municipal Code § 7.110.050(f); Seattle Municipal Code § 14.09.025; District of Columbia Code § 3(f)(1); Newark Ordinance 14-0921, Sec. V.
69. Richmond Municipal Code § 7.110.050(f).

Generally, requiring detailed information about the denial will make it easier for an applicant to determine whether the fair chance ordinance was violated. However, you don't want the requirements to be so administratively burdensome that they deter property owners from complying or local government from enacting and enforcing the law.

You should also consider addressing when and how the landlord must notify an applicant of an adverse action. The timing should take into account the deadline for filing an appeal and whether landlords will be required to keep units open during any complaint or appeal procedure. The method of notice should be consistent with the standard notification practices in your community (***e.g.,*** email, regular mail). For more information on appeals, see Subsection 4.0(f) below.

Copies of criminal background check reports

You should consider requiring housing providers to provide a copy of the background report used as the basis for the housing decision to all applicants. Access to the report is important for several reasons. First, it allows the applicant to assess whether an adverse action violated the ordinance. Second, it helps the applicant determine whether any mitigating circumstances or evidence of rehabilitation will be useful for an appeal. Third, it gives the applicant an opportunity to dispute inaccurate information in the report with both the housing provider and the supplier of the report. Fourth, it eliminates the (often significant) delay associated with requesting and obtaining a copy of the criminal report from a tenant screening company, thus improving the likelihood of a successful appeal that enables the applicant to obtain the housing in question.

Your ordinance could also specify when the report must be provided to the applicant. Ideally, an applicant should be given access to the report in time to provide mitigating information or evidence of rehabilitation and dispute inaccurate information before an adverse decision is made. For example, San Francisco's ordinance requires housing providers to give applicants all reports they relied on before making a final decision.[70]

70. San Francisco Police Code § 4906(g).

Do consumer protection laws require the landlord to provide a copy of your screening report?

Many landlords obtain and utilize criminal background reports from private consumer reporting agencies when screening applicants. These private companies and the landlords that use the reports are subject to the federal Fair Credit Reporting Act (FCRA)[71] as well as most state consumer protection laws.[72] The FCRA includes a number of rights and protections that are especially germane to applicants denied rental housing, including the right to obtain disclosures of whatever information a consumer reporting agency has on file about an applicant at the time of the request.[73] The disclosure must be made for free if requested within 60 days of an adverse action, such as denial of admission to housing. The FCRA also requires that the housing provider provide the name, address and telephone number of the agency that provided the report and notify the consumer that she may obtain a free copy of the report (from the screening or consumer reporting agency) within 60 days after the denial.

While these protections are important, applicants requesting disclosure of reports under the FCRA generally do not receive copies of the same reports that housing providers rely on to deny applications. Additionally, under the FCRA, an applicant has to submit a disclosure request that includes personal identification information that is satisfactory to the screening company. As a result, FCRA responses are often unreasonably delayed. Unreasonable delays occur in a number of common circumstances such as when errors in the report cause the screening company to question the identity of the consumer, the consumer has an unstable address history or lacks a verifiable address, or if the consumer has a disability that makes obtaining records particularly challenging. You should therefore consider including explicit disclosure obligations in your fair chance ordinance in order to make sure that applicants know their rights and have timely access to the actual information used to deny them housing.

71. 15 U.S.C.A, § 1681 *et seq.* (West 2019).

72. For example, Washington's consumer protection act imposes stricter guidelines than FCRA as to the timeliness of the dispute process and requires credit reporting agencies to (1) contact the source of disputed information within five days, (2) give the consumer notice that a dispute has been closed within five days, and (3) provide a consumer with the results of an investigation within five days. Rev. Code. Wash. § 19.182

73. 15 U.S.C.A. § 1681m (a)(3)& (a)(4) (West 2019).

Notice Accessibility

Advocates and organizers should ensure that notices are accessible to all prospective tenants, including people with disabilities, people with limited English proficiency (LEP individuals), and people with limited literacy skills.

The Fair Housing Act requires most housing providers to grant reasonable accommodations to people with disabilities.[74] A reasonable accommodation is a change in a rule, policy, or practice that affords an individual with a disability the right to use and enjoy housing. The right to a reasonable accommodation extends to the application process.[75] Although required under fair housing laws independent of the fair chance ordinance, you should consider including language in the ordinance about housing providers' obligation to provide reasonable accommodations to applicants with respect to the notice requirements.

Federally-assisted housing providers, managers and landlords are also subject to obligations under Section 504 of the Rehabilitation Act of 1973 (Section 504).[76] Federally-assisted landlords must ensure effective communication with applicants with disabilities, which may include the use of auxiliary aids and devices or interpreters. Consider including explicit language about compliance with Section 504 if the ordinance will cover federally-assisted housing providers, particularly with respect to communicating information in relevant notices.

It is also important to consider how notices will be communicated to non-English speakers. Both the San Francisco and Richmond ordinances contain provisions requiring translation of notices for LEP individuals. Richmond's ordinance requires the city to translate the adverse action notice into any language spoken by more than 5 percent of the city's population.[77]

Federally-assisted housing providers are subject to additional requirements with respect to serving LEP individuals. Federally-assisted owners and landlords must create plans to address how to serve people who are LEP[78] and do an analysis to assess the LEP needs in the area they are serving.[79] They are required to create a language access plan and to provide language access in accordance with that plan.[80] Adverse action notices related to a fair chance ordinance should be part of any such language access plan.

Finally, consider requiring that notices be written in easy-to-understand and accessible language for people with limited literacy skills.

How Will the Ordinance Be Enforced?

There are several issues to consider when deciding how your fair chance ordinance will be enforced. You will need to select enforcement mechanisms and remedies. You will need to determine who will be responsible for enforcement. You should also consider including additional measures to ensure compliance, such as publicity, outreach and education for landlords and prospective tenants, housing testing to assess compliance, and data collection.

There are two primary mechanisms for enforcing a fair chance ordinance. The first is an administrative complaint process managed by the local government. The second is a private right of action that allows individuals to sue landlords in court over violations of the ordinance. While most existing fair chance ordinances include one or the other of these options, they are not mutually exclusive. In Richmond, for example, organizers elected to include an administrative complaint process and a private right of action.[81]

Here are some factors to consider when deciding how your ordinance will be enforced:

74. 42 U.S.C.A. § 3604(f) (West 2019).

75. 42 U.S.C.A. § 3604(f)(1) (West 2019); *See also* Joint Statement of the Dept. of Hous. and Urban Dev. And the Dept. of Justice, Reasonable Accommodation Under the Fair Housing Act at 2 (2002).

76. 29 U.S.C.A. § 794 (West 2019).

77. Richmond Municipal Code § 7.110.060(c).

78. 42 U.S.C.A. § 2000d (West 2019); Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000).

79. Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2,732 (Jan. 22, 2007).

80. *Id.*

81. Richmond Municipal Code § 7.110.070.

- Does the local government have the resources to provide staff time and other support to enforce the ordinance administratively and/or in court?
- Is there another administrative enforcement process already in place that could be used to enforce the ordinance?
- How many complaints and hearings do you anticipate will be brought each year?
- Does your jurisdiction already have other laws in place – such as consumer protection or landlord-tenant laws – that could be used to sue someone who violates the fair chance ordinance?
- What resources are available in the community to assist applicants with bringing cases in court? [82]
- Does the local legal aid organization have capacity to represent tenants in administrative enforcement actions and/or in court?

Depending on available resources in your community, you may also want to explore alternative or additional methods of enforcement involving conciliation or restorative justice models.[83]

Administrative Complaint Process

All of the existing fair chance ordinances utilize some form of an administrative complaint process in which municipal staff review, investigate, and make a determination, often after an administrative hearing. Key elements to consider when designing an administrative complaint process include: (1) important deadlines; (2) how the hearing process will be conducted; (3) to what extent investigative materials will be subject to public disclosure; and (4) what remedies will be available through the administrative process. On one hand, an administrative process usually allows for faster and less expensive resolution than litigation in court. It also gives prospective tenants the ability to enforce the ordinance without necessarily having to find an attorney to represent them. On the other hand, depending on other state and local laws, the remedies available administratively will generally be much more limited than those available from a court.

Deadlines

If you decide to include an administrative complaint process in your ordinance, one of the first considerations will be timing. You will need to set a deadline for submitting complaints and also decide how long the process will take from complaint to resolution.

There are several competing interests to consider when determining these time frames. On the one hand, both parties will usually have an interest in having disputes resolved quickly. This is a particularly important consideration if the ordinance will require the landlord to hold the unit open pending resolution of the complaint, as discussed below. On the other hand, a slower process may be necessary to allow for an adequate investigation both before and after a complaint is submitted. For example, applicants need ample time to gather evidence of rehabilitation. If there is only a short window of time to submit a complaint, wrongfully denied applicants may be discouraged from utilizing the process.

Jurisdictions with existing ordinances have adopted varying deadlines for complaints. San Francisco's deadline is 60 days, and Urbana's is 90 days.[84] In contrast, both Seattle and Washington, D.C. give complainants up to a year to submit a complaint.[85]

Many fair chance ordinances that provide for administrative complaints include review and hearing procedures that can take a year or more to complete, particularly when they utilize existing administrative complaint procedures that the local government already has in place. For example, Seattle's fair chance ordinance utilizes the City's existing employment discrimination administrative complaint process, which includes several levels of investigations and review, and then a final determination.[86] In deciding whether to use an existing complaint process, you will need to understand the rules and timeline of the existing process and decide whether the advantages of not having to create a new set of procedures outweigh any delay or other disadvantages that might result from using a system set up for other purposes. Another element to consider is whether the existing process is appropriate for complaints related to your ordinance. For example, will a hearing officer who decides complaints related to employment discrimination be given

82. Note that if you do include a private right of action with an attorney fees provision, it is more likely that attorneys will be willing to take fair chance cases.
83. For more information about these alternative models, see, e.g., https://irjrd.org/home/restorative-practices/.
84. San Francisco Police Code § 4911; Urbana Code of Ordinances § 12-81(d).
85. Seattle Municipal Code § 14.09.050; District of Columbia Code § 5(a).
86. Seattle Municipal Code §§ 14.09.35 – 14.09.105.

authority to decide a case about a fair chance violation? Will training be available so that people used to reviewing other types of complaints understand applicants' rights under the new ordinance?

Richmond's dual-option administrative complaint deadline

It is possible to create an administrative process that provides both an option for an expedited resolution and a longer time frame for submitting complaints. Richmond's ordinance gives applicants access to an expedited hearing process if they file a complaint within 14 days of receiving notice that they have been denied. The landlord must hold the unit open during that 14-day period and then, if a complaint is filed, until the process is complete. The City must hold an administrative hearing and issue a decision within 30 days of the filing of the complaint. Hearing officers have the authority to order a housing provider to rent to an applicant and to levy monetary penalties.[87]

Complaints can also be filed after the initial 14-day deadline for up to six months after the denial. These complaints are subject to a non-expedited administrative review process. The landlord is not required to hold the unit open while the complaint is under review, but hearing officers can still levy monetary penalties if they determine there has been a violation of the ordinance. Other interested parties, including city staff, also have access to this process if they witness or receive evidence of violations.

Hearing Process

Given what is at stake for both the tenant and the landlord in a hearing on a fair chance complaint, it is important that your ordinance provide for fair and just procedures, often referred to in the law as "due process." Generally, due process requires hearing procedures that include:

- A timely notice detailing the reasons for the action;
- An opportunity to present evidence and arguments and to confront any adverse witnesses;
- The option to be represented by an advocate, if desired;
- An impartial decision maker;
- A decision resting on the applicable legal rules and the evidence presented; and
- A statement of reasons for the decision and of the evidence relied on.[88]

There are several additional features you should consider including to ensure an accessible and fair process:

- Procedures to ensure equal access to the process for people with disabilities and people with limited English proficiency;
- Translation services;
- Procedures allowing the parties to review each other's evidence; and
- A requirement that the hearing be recorded (at no cost to the applicant) and that the parties have prompt access to that recording.

Administrative Remedies

Remedies are the relief or penalties imposed by the administrative complaint process after a violation is found. Some examples of fair chance ordinance remedies include monetary penalties for

87. A copy of Richmond's implementing regulations is included in the Appendix.

88. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

violating the ordinance or affirmative relief such as ordering the housing provider to rent to a wrongfully denied applicant. When considering the remedies for your ordinance, keep in mind what your primary goals are so you can align the remedies with those goals. Some factors to consider are:

Will the ordinance provide a remedy to a wrongfully denied applicant or only provide for a fine paid to the local government?

- What type of relief would be most useful to an applicant? Access to the unit in question? Access to the landlord's next available comparable unit? Money?
- What types of remedies will promote compliance and deter other landlords from violating the ordinance?
- Are the remedies you are considering consistent with applicable state and local laws?

All of the existing fair chance ordinances impose some type of monetary penalties on housing providers who violate the ordinance. However, the amount of the penalties varies significantly from jurisdiction to jurisdiction. For example, Richmond's ordinance imposes no penalty for the first violation of the ordinance.[89] In contrast, Seattle's ordinance penalizes housing providers $11,000 for the first violation.[90]

An important consideration in setting a schedule of penalties is whether it will promote compliance. If the penalty is too low, it may not provide enough of a deterrent. However, if it is too high, it may be an unfair penalty to a landlord with fewer resources or it could be vulnerable to a legal challenge. Washington D.C. has addressed this issue by imposing penalties based on the size of the housing provider's rental inventory.[91] The maximum penalty is $1,000 for housing providers with 10 or fewer units, $2,500 for 11 to 20 units, and $5,000 for 21 or more units.[92]

Another consideration is whether penalties will increase progressively if a provider violates the ordinance more than once. The rationale with this type of system is that higher penalties are appropriate when it is more likely the provider knowingly violated the ordinance. For example, Seattle's ordinance has a penalty of $11,000 for the first violation, $27,500 for a second violation within five years of the first violation, and $55,000 for a third violation within seven years of the first violation.[93]

A couple of cities have also chosen to authorize relief that orders a housing provider to rent the unit in question to the wrongfully denied applicant. It is important to note that in order to ensure that this remedy is available, the ordinance must also require that the landlord hold the unit open until the complaint process has been resolved. Otherwise, the landlord will rent the unit to someone else, especially in competitive rental markets. Richmond, for example, requires housing providers to hold the unit open for 14 days after giving the applicant notice that they intend to deny the application for the unit.[94] If the applicant submits a complaint to the city during the 14-day period, the housing provider must keep the unit open until the administrative process has been resolved.

Another option is to authorize relief that orders a housing provider to rent the next available comparable unit in their inventory to the wrongfully denied applicant. This type of remedy could be subject to legal challenge, however, and is unlikely to address the immediate housing needs of a wrongfully denied applicant, particularly in a rental market with low vacancies and low turnover.

Private Right of Action

Of the existing fair chance ordinances, only one (Richmond) allows applicants for rental housing to sue landlords over violations of the ordinance.[95] However, enforcement through the courts can be the most powerful enforcement tool available to people harmed by violations of a fair chance ordinance, so you should seriously consider including a private right of action in addition to any administrative enforcement system. A lawsuit can allow for relief that is generally not available as part of an administrative complaint process, such as significant monetary damages payable to the wronged applicant and injunctive relief requiring the landlord to take certain actions. On the other hand, litigation can take a long time, and, unless there are legal

89. City of Richmond Rules of Procedure For Considering Arrests and Convictions in Affordable Housing Decisions § IX(A).
90. Seattle Municipal Code § 14.09.100.
91. District of Columbia Code § 6(a).
92. *Id.*
93. Seattle Municipal Code § 14.09.100.
94. City of Richmond Rules of Procedure For Considering Arrests and Convictions in Affordable Housing Decisions § V(H).
95. City of Richmond Rules of Procedure For Considering Arrests and Convictions in Affordable Housing Decisions § V(I).

resources available in the community to represent prospective tenants, a private right of action may not be as helpful as intended. It is important, therefore, to identify legal resources, such as legal aid or other tenant advocates, and, if feasible given budgetary constraints, to build in funding for legal representation of wronged applicants as part of your ordinance. At a minimum, any private right of action should include a provision allowing a prospective tenant who wins to collect attorney fees and costs from the defendant housing provider.

If you decide to allow for your ordinance to be enforced in court, there are a number of factors to consider. First, will the ordinance require applicants to go through an administrative process before filing a lawsuit in court? This type of requirement is often referred to as an exhaustion of administrative remedies. Property owners generally argue that requiring the parties to complete an administrative process will encourage them to resolve their differences in a less costly and quicker way than litigation. On the other hand, requiring a prospective tenant to go through an administrative procedure before suing in court will generally delay relief and deny people their rights just because they miss the short deadline to engage in the administrative process.

You will also have to decide who is authorized to sue in court under the ordinance. You may want to limit access to the court process to wrongfully denied applicants. However, you should also consider allowing other interested parties, such as community groups or municipal staff to enforce the ordinance in court. Allowing additional parties to enforce the ordinance can promote more proactive enforcement, for example, the ordinance could authorize criminal justice agencies to bring lawsuits against landlords who post advertisements in violation of the ordinance.

Your ordinance should also authorize specific remedies for the court to award. Remedies can include monetary penalties, damages that compensate a party for losses due to violations of the ordinance and/or injunctive relief. Giving the court the ability to order injunctive relief allows the court to force a housing provider to comply with the ordinance, which may be the most important result of challenging a violation for the prospective tenant. As noted above, the ordinance should also direct the court to award attorney fees and costs to the prospective tenant if a violation is established.[96] Without an attorney fees clause, people who file a legal complaint will be on the hook for any fees and costs associated with filing the case.

Finally, as with an administrative complaint process, you will need to determine how long after the relevant events (***e.g.,*** wrongful denial based on criminal history or posting of non-compliant ads) a lawsuit can be brought. Richmond's ordinance does not have a set deadline (also called a "statute of limitations"), so rules that apply to similar types of legal claims will apply there. Since general statutes of limitation can be fairly short, though, it is usually better to include an explicit deadline so the parties know where they stand and can avoid costly and time-consuming disputes over what deadline applies.

96. Ideally, the attorney fees provision will only allow for an award of fees and costs to a prevailing plaintiff, as in fair housing and consumer protection laws.

Additional Enforcement Measures

There are other proactive ways to ensure compliance with a fair chance ordinance. Publicity, outreach and education, and requirements aimed at assessing the jurisdiction-wide impacts of an ordinance, such as testing and data collection, are all important enforcement mechanisms.[97]

Publicity about the ordinance can help ensure that applicants are informed of their rights when they apply for rental housing. Local governments, including public health departments for example, can play an important role in publicizing fair chance policies. Cities can post notices of their own, include FAQ's and other informational materials online, disseminate information through service providers in the community, and place ads on public transportation and in other public areas. They can also conduct or sponsor outreach and educational workshops for prospective tenants and for housing providers. These activities should be ongoing and not just limited to the period immediately after an ordinance is enacted.

On-the-ground testing is another way to ensure that housing providers are aware of and complying with your ordinance. Housing testing involves sending testers out to apply for housing and seeing what questions a housing provider asks regarding criminal history and whether an applicant with, for example, a felony conviction that pre-dates the ordinance's lookback period, is denied. Testing often involves sending out a pair of testers with matched characteristics except for the issue being tested (such as criminal history) and tracking differences in how they are treated. You can team up with a local fair housing testing organization that typically engages in fair housing testing and other anti-discrimination work.[98]

It is also important for the local government to collect data about the number of complaints submitted and/or lawsuits filed, the outcomes of those complaints and lawsuits, and any testing results. The data should be compiled and reported to the council or legislative body at regular intervals. This type of data may be useful as evidence in administrative or court proceedings, if, for example, it shows that a landlord has a pattern of violating the ordinance.

Data Collection

Data collection can act as a key enforcement tool because it provides meaningful information to decision-makers and people in power. Data such as trends in screening criteria, denials, and the number and types of complaints filed by applicants, may provide insight into the housing barriers faced by people impacted in your community and could show the need for enhanced enforcement.

First, consider a requirement that housing providers submit a copy of their admissions criteria and the number and characteristics of housing application denials to the local enforcement body. In addition, the city should track and make public all complaints made under the fair chance ordinance (without disclosing confidential or private information). A fair chance law could direct the city to compile a monthly or annual report on the data it receives and/or distribute the report to a municipal governing board such as a City Council or Board of Supervisors. Both the Richmond[99] and San Francisco[100] ordinances include data capture requirements.

97. Center on Budget and Policy Priorities, *Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results* (2018) *available at:* https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results . This report about Section 8 anti-discrimination ordinances, which are similar in many ways to fair chance ordinances, asked stakeholders to identify the best methods of enforcement. Respondents in many cases cited to alternatives to administrative complaints or lawsuits as the best enforcement mechanisms.

98. For more information on fair housing testing related to racial discrimination and criminal records screening policies in housing see Equal Rights Center, *Unlocking Discrimination* (2016) *available at:* https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf

99. Richmond Municipal Code §§ 7.110.070(e) and (g).

100. San Francisco Police Code §§ 4911(b) and 4912.

5.0 Implementation

It is essential to include an implementation plan in your local fair chance ordinance. Elements could include: designation of a specific department or agency responsible for administering the ordinance; a specific timeline for implementation; directions to the assigned department or agency to promulgate regulations under the ordinance; and a plan for educating community members about the ordinance.

Identifying the Responsible Department and Specific Tasks

When drafting your ordinance -- ideally in collaboration with municipal staff -- you should identify the appropriate department that will be tasked with administration of the ordinance. This will also allow the specified department to think about staffing or other needs ahead of time. Ideally, the ordinance will provide the department with the resources and authority necessary for effective implementation. Otherwise, you may risk delays in implementation until resources are appropriately allocated.

You may also want to include specific tasks that must be completed after the ordinance is enacted. For example, Richmond's ordinance directs the City Manager to identify hearing officers and staffing for the administrative process, develop notices and other documents, conduct outreach to housing providers, identify a funding source, create a budget, and set out a schedule of penalties.[101]

Timeline

Consider including an implementation timeline in your ordinance. You may want to have a deadline for an initial report to a local governing body as an accountability mechanism. You could also consider giving affected individuals and interested parties an explicit right to enforce implementation of the ordinance so advocates and organizers will have leverage to resist bureaucratic inaction.

Regulations

Many fair chance ordinances direct a city department or agency to create fair chance regulations. The ordinance could include a provision that gives community groups, legal aid advocates, and other interested parties the right to participate in the drafting process. Some topics that you could address in regulations are:

- The mechanics of complaint submission, including whether there will be an official form, what information must be included in a complaint, and how complaints can be received (***e.g.,*** in person, by phone, online).
- How complaints will be processed, including timelines for each step (if not laid out in the ordinance) such as investigations, scheduling of hearings, and hearing decisions.
- When application fees are paid.[102]
- The required contents of the hearing officer's decisions.
- Policies for accommodating people with disabilities and people with limited English proficiency.
- How parties will be informed of developments during the administrative process.
- Referrals to legal assistance.
- Procedures for collection of data and compilation of reports.
- Procedures for testing to ensure compliance.
- Information on penalties and other remedies.

101. Richmond Municipal Code § 7.110.070(c).

102. See Cook County Just Housing Amendment Interpretive Rules § 730.100. Before accepting an application fee, a housing provider must disclose to the applicant information about their tenant selection criteria and key information related to the fair chance ordinance.

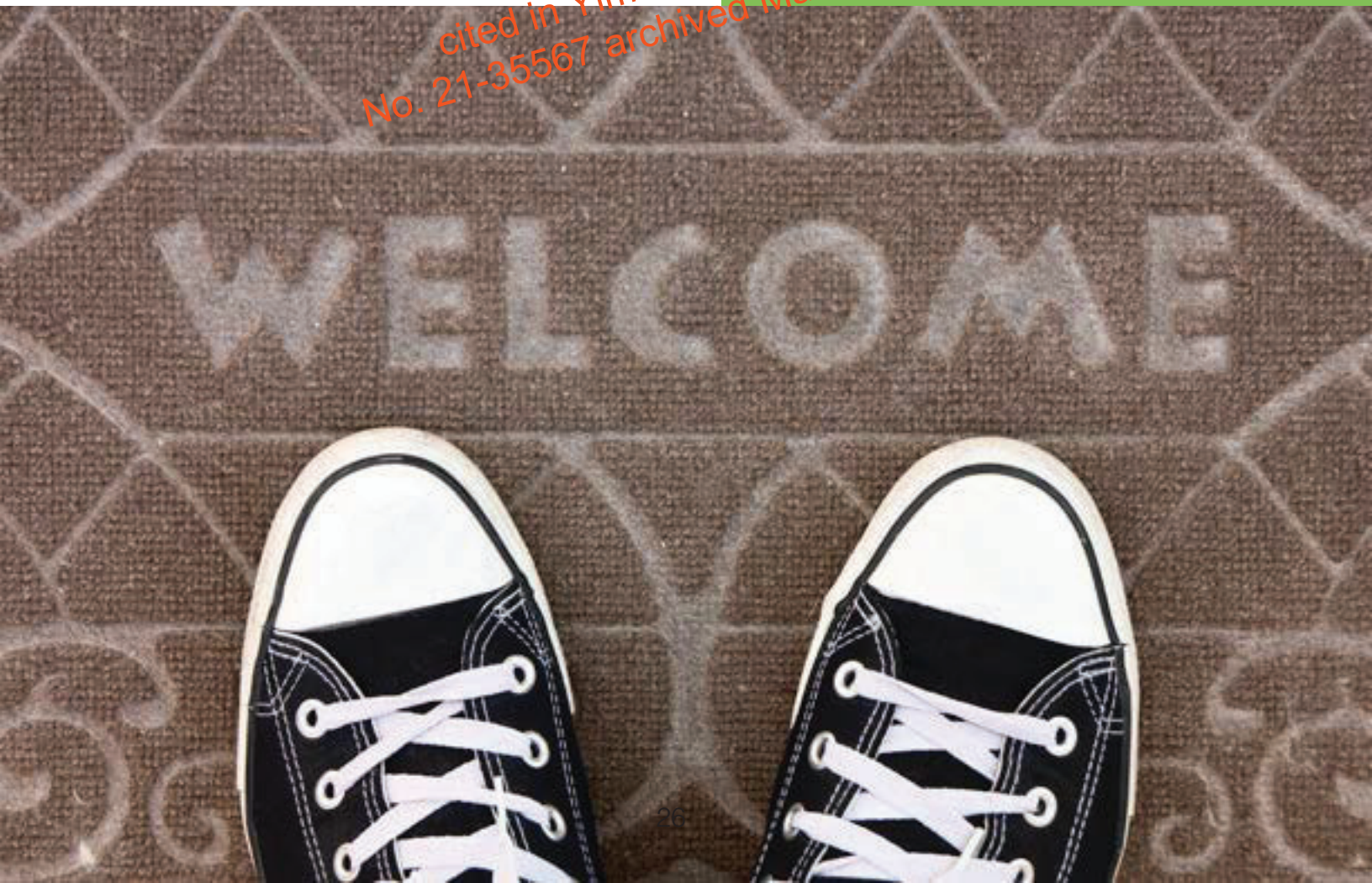
Several jurisdictions have enacted fair chance regulations under their fair ordinances. We have included examples in the Appendix.

Outreach

Subsection 4.0(e) above discusses notice to prospective applicants as an important element of a fair chance policy. You should also consider including a plan for public outreach and education, for both tenants and landlords. How will landlords be informed of their responsibilities under the law? Will landlords be required, for example, to attend a training on the new ordinance? It may also be useful to direct the municipality to draft model materials (required language for rental listings, for example) and make them available online.

An ordinance is only as strong as its implementation!

When Richmond, California, passed their fair chance ordinance in 2016, they had several champions in local government who helped move the policy through the City Council. Directly following the bill's passing, several of those same champions changed jobs or retired. This created implementation challenges because the people in power no longer prioritized the fair chance policy. Fair chance partners in Richmond had to stay at the table and continue to advocate for fair chance so that families in Richmond could benefit from the ordinance's protections. It was not until after immense pressure from local organizers and a lawsuit against a housing provider for clearly violating the ordinance that the City began to fully implement its fair chance policy.



6.0 Related Policies

Other Local Ordinances

Advocates and organizers across the country have thought creatively about ways to increase housing opportunities for people exiting jails and prisons and have come up with a range of policies to address this challenge. Like most fair chance ordinances, these policies are new. There is, therefore, little data available on the outcomes of such initiatives. In the coming years, we hope to know more about what works in different local communities. The following policies aim to achieve some of the same goals as a fair chance ordinance: increasing housing access for people directly impacted by the criminal justice system, reducing prejudice or implicit bias against people with criminal records, and removing barriers to affordable housing.

Seattle's "first-in-time" ordinance

In 2016, Seattle passed a "first-in-time" ordinance to combat implicit bias in housing application decisions and level the playing field for people with criminal records. [103] The ordinance requires landlords to consider housing applications on a first-come, first-served basis so that the landlord cannot discriminate arbitrarily or based on characteristics of the applicant that they are not legally permitted to consider. Citing research that shows how implicit bias can undermine a prospective tenant, the City Council voted to approve the first ordinance of its kind.

The first-in-time ordinance requires landlords to keep accurate records of the date and time completed applications are received. The landlord must then offer the unit to the first qualified applicant. The landlord has no discretion to move onto the next qualified applicant unless the earlier qualified applicant turns down the rental. Other important aspects of the ordinance include: (1) a requirement that residential landlords provide notice of tenant screening criteria to all applicants, and (2) civil penalties for failure to comply with the law, including rent refunds or credits, attorney fees and costs, and other penalties.

In 2017, the Pacific Legal Foundation (PLF), a conservative non-profit organization, sued the City of Seattle on behalf of several landlords, alleging that the first-in-time ordinance was unconstitutional under Washington state law.[104] The trial court agreed with the plaintiff landlords and found that the ordinance violated the takings, due process, and free speech clauses of Washington's state constitution. However, in November 2019, the Washington Supreme Court reversed that decision and ruled Seattle's first-in-time ordinance does not violate the state's constitution.[105]

The case is important for several reasons. First, the Seattle ordinance is the first of its kind in the nation, so this decision will likely set a precedent for similar laws.[106] Second, the legal claims in the "First-in-Time" case are similar to those that can be used to challenge other ordinances, particularly local laws that try to achieve the same goals. In fact, opponents of Seattle's fair chance ordinance (also represented by PLF) presented similar claims in a separate case challenging that ordinance.[107] Third, the decision will influence the willingness of other local

103. Seattle Municipal Code § 14.08.050.

104. Yim v. City of Seattle ("Yim I"), Case No. 17-2-05595-6 SEA (King County Super. Ct.).

105. Yim v. City of Seattle, Case No. 95813-1 (Wash., Nov. 14, 2019).

106. Keep in mind, however, that because the case was brought in state court under Washington law, the legal analysis may be unique to that state, leaving room for opponents in other states to challenge such ordinances using similar theories.

107. Yim v. City of Seattle ("Yim II"), Case No. Civil Action No. 2:18-cv-00736-JCC (W.D. Wash.). Unlike Yim I, Yim II is pending in federal (rather than state) court. However, the federal court requested guidance from the Washington Supreme Court on the state constitutional issues, and the Washington Supreme Court issued a decision in November 2019 that will likely result in a victory for the City of Seattle regarding its fair chance ordinance. *See* Certification in Yim v. City of Seattle, Case No. 96817-9 (Wash., Nov. 14, 2019).

jurisdictions to enact ordinances that limit what a landlord can consider in the tenant screening process.

Portable screening reports and other policies that limit the use of application fees

Some jurisdictions have explored policies that eliminate application fees, which can act as a huge barrier to affordable housing.[108] Application fees can be especially problematic for people with criminal records who are routinely charged such fees even if they do not meet a landlord's threshold eligibility requirements. In addition, application fees disproportionately steer low-income people away from housing opportunities.

Policies that require landlords to use portable screening reports aim to reduce the impact of discriminatory application fees and also put control of the information contained in a screening report back in the hands of the applicant. This is especially important given the prevalence of errors in background reports generated by private screening companies, including inaccurate criminal history information or duplicative entries.[109]

A portable screening report ordinance requires landlords to accept a verified and secure third-party-generated tenant screening report provided by tenants applying for rental housing. Prospective tenants can use a reusable screening report as many times as needed within a thirty-day period for a single fee paid to third-party companies that provide the service. Applicants pay the screening company directly to generate the report, and landlords access the report using an online portal. Applicants have the opportunity to view their reports prior to submitting applications, so they have an opportunity to correct errors and also prepare evidence of mitigating circumstances of any criminal history that is accurately captured in the report.

Advocates in Washington state were the first to push forward a portable screening report bill, the Fair Tenant Screening Act.[110] The final bill requires landlords to provide prospective applicants with detailed information about their screening criteria and practices, including whether they accept portable screening reports, and prohibits landlords from charging additional application fees if they have accepted a portable screening report. The Washington law falls short, however, of requiring that all landlords accept portable screening reports.

Other policies that advocates can pursue to reduce or eliminate the disproportionate impact of application fees on people of color, particularly low-income families and people with a criminal record include:

- Banning the use of housing application fees.
- Requiring that landlords refund application fees to rejected applicants.
- Capping application fees at a reasonable amount.

Administrative Plans

Local ordinances can broadly limit how landlords screen prospective applicants, but there are other types of policies that impact access to affordable housing. For example, local administrative plans that apply to particular housing programs are an important way to expand housing opportunities for people reentering, especially those who wish to reunify with family. Because most local plans require public participation in their development, it is relatively easy for advocates, organizers, and tenants to have an impact on the screening criteria. This section will focus on the major types of plans that govern the housing choice voucher (Section 8), public housing, and Low Income Housing Tax Credit programs in your community. These are the Administrative Plan (Admin Plan), the Admissions and Continued Occupancy Plan (ACOP), and the Qualified Allocation Plan (QAP), respectively.

Each of these plans serves a unique purpose, so advocacy strategies will differ. In general, though, the emphasis of your advocacy in this context should be on reasonable admissions policies for all housing programs and/or a set-aside of units or an admission priority for individuals with criminal records and their families. For additional information on how to use these plans to advocate for more inclusive tenant screening policies, *see* NHLP's guide, *An Affordable Home on Reentry.*[111]

108. Owners of HUD-assisted properties are prohibited from charging application fees 24 C.F.R. 5.903(d)(4) and 5.905(b)(5).

109. National Consumer Law Center, *Broken Records: How Errors by Criminal Background Checking Companies Continue to Harm Consumers Seeking Jobs and Housing* (2019) *available at:* https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf?eType=EmailBlastContent&eId=8eb6cbd4-fa57-49eb-a26e-386cb1fe6599

110. Washington SHB 1257 (March 5, 2015); RCW 59.18.257.

111. *Available at:* https://www.nhlp.org/wp-content/uploads/2018/08/Rentry-Manual-2018-FINALne.pdf

Admin Plans and ACOPs

Housing authorities administer both public housing and Section 8 programs and are responsible for developing and implementing plans that govern the day-to-day operations of those programs. HUD requires that certain policies be included in a housing authority's Section 8 Admin Plan and its public housing ACOP, including details of the housing authority's admissions criteria. Most Admin Plans and ACOPs can be found on the housing authority's website.

Section 8 vouchers and public housing are subject to federal laws that regulate the eligibility of individuals who have been released from incarceration or have engaged in prior criminal activity. Pursuant to federal statutes and regulations, housing authorities must reject applicants in three specific categories for these programs:

- People with convictions for methamphetamine production on federally assisted property;[112]
- Lifetime registered sex offenders under any state registry;[113] and
- Those with evictions during the previous three years for drug-related criminal activity, absent evidence of rehabilitation.[114]

Housing authorities are only limited by the federal requirements above. Housing authorities have discretion over whether or not to reject an applicant based on any other type of criminal history. HUD encourages housing authorities to exercise this discretion in favor of "allowing ex-offenders to rejoin their families in the Public Housing or Housing Choice Voucher programs, when appropriate."[115] Even Congress has placed limits on housing authority discretion by limiting the grounds on which housing authorities may opt to reject an applicant to: drug related criminal activity, violent criminal activity, or other criminal activity that would threaten the health or safety of other residents or housing authority staff.[116] In addition, housing authorities policies must include "reasonable" lookback periods that only consider criminal history going back a limited period of time prior to admission. Nonetheless, housing authorities

112. 42 U.S.C. § 1437n(f)(1); 24 C.F.R. § 960.204(a)(3) (public housing); 24 C.F.R. § 982.553(a)(1)(ii)(c) (vouchers).

113. 42 U.S.C. § 13663(a); 24 C.F.R.§ 960.204(a)(4) (public housing); 24 C.F.R. § 982.553(a)(2)(i) (vouchers).

114. 42 U.S.C. § 13661(a); 24 C.F.R. § 960.204(a)(1) (public housing); 24 C.F.R. § 982.553(a)(1)(i) (vouchers).

115. Letter from Shaun Donovan, HUD Secretary, to PHA Executive Directors at 1-2 (June 17, 2011).

116. 42 U.S.C.A § 1437a(b)(9) (West 2019).

across the country have exercised their discretion to adopt overly restrictive screening policies that create unnecessary barriers to people with a criminal history.[117]

HUD issued guidance in 2015 and 2016 explaining that overly restrictive criminal records screening policies can have fair housing implications,[118] and why arrest records alone should never be the sole basis of an adverse housing decision.[119] For example, in its fair housing guidance, HUD states that blanket bans on certain criminal history (for example, "no felonies") is probably illegal under fair housing law.[120] You should review the housing authority's local plans with the following questions in mind:

- Does the policy include any blanket bans, such as "no felonies"?
- Does the policy include restrictions on criminal history that do not affect the health and safety of other residents or housing authority staff?
- Does the policy include a reasonable lookback period?
- Is there an opportunity for applicants to present mitigating circumstances of the criminal activity?
- Does the plan allow the use of arrests as the sole basis for a decision?

Advocates in a number of jurisdictions have had success influencing public housing and voucher program admission policies as they relate to people reentering. For example, advocates in New Orleans worked with formerly incarcerated individuals, representatives of law enforcement, the Housing Authority of New Orleans (HANO) and others for several years to improve HANO's admissions policy. The result is an innovative approach to tenant screening that rules out certain criminal activity as a factor in admissions decisions, clearly defines lookback periods, and includes a hearing process that allows an applicant to submit mitigating circumstances surrounding the conviction and rehabilitation. Engaging in the housing authority plan process with regard to admissions screening criteria can be a critical part of your fair chance campaign. In addition, you may need to advocate for changes to these plans to make your fair chance policy effective.

Qualified Allocation Plan

The Low Income Housing Tax Credit (LIHTC) program is the largest source of new affordable housing in the United States. There are about two million tax credit units today, and the number continues to grow by an estimated 100,000 annually. The program is administered by the Internal Revenue Service (IRS), a bureau of the Department of the Treasury.

The IRS distributes tax credits to each state for construction or rehabilitation of housing. Each state then allocates the tax credits to sponsors of LIHTC housing in accordance with a state-adopted Qualified Allocation Plan (QAP). The QAP sets forth the state's LIHTC allocation plan and project selection criteria.[121] The IRS requires that state LIHTC agencies update their QAP plans annually and that they do so after a hearing that has been reasonably noticed to the public.[122] A copy of each state's QAP is available online.[123]

The tax credit program itself does not have any requirements with respect to screening for criminal history, nor does it require LIHTC properties to have screening policies in writing or accessible to prospective tenants. Aside from fair housing and civil rights laws then, tenant screening is fully within the discretion of private LIHTC landlords. Unfortunately, this means that many tax credit properties adopt overly restrictive screening criteria.

You can take advantage of the QAP planning and public hearing process to advocate for inclusive screening policies for all LIHTC-financed developments in your state. Policies could address a prohibition on the use of arrests as the basis for a denial or a requirement that LIHTC owners and managers conduct an

117. Marie Claire Tran-Leung, *When Discretion Means Denial; The Use of Criminal Records to Deny Low-Income People Access to Federally Subsidized Housing in Illinois* (2011).

118. Dept. Hous. and Urb. Dev., *Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (2016).

119. Guidance for Public Housing Agencies (PHAs) and Owners of Federally Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, PIH 2015-19 (Nov. 2, 2015).

120. Dept. Hous. and Urb. Dev., *Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 6 (2016).

121. 26 U.S.C.A. § 42(m)(1)(A)(I) (West 2019).

122. *Id.*

123. Copies of the 2017 QAPs are available at https://www.novoco.com/resource-centers/affordable-housing-tax-credits/application-allocation/qaps-and-applications/2017-qaps-and-applications. QAPs for other years are available at the same site.

individualized assessment of applicants with criminal records.

For example, the Georgia Housing Finance Agency, in its QAP, requires all LIHTC properties to have a clearly defined screening policy that "establishes criteria for renting to prospective tenants that is not a violation of the Fair Housing Act" and that contains "reasonable and non-discriminatory policies around applicant income, employment requirements, and background checks."[124] Georgia's policy further requires that all screening policies (at a minimum) incorporate the following:

- Arrest records are not a valid reason to deny an applicant housing;
- Applicants with a criminal conviction may be denied housing only if the reason for their conviction clearly demonstrates that the safety of residents and/or property is at risk; and
- Blanket terms in screening criteria, that say "Any criminal convictions will be denied" are considered discriminatory and in violation of the Fair Housing Act.[125]

QAP advocacy can have a broad impact on people seeking to live in LIHTC housing in your state as well as on the effectiveness of a local fair chance ordinance that is intended to apply to LIHTC properties. You can inquire with your state allocation agency about when the QAP process begins so you know when to submit public comment on admissions and criminal history.

124. Georgia Department of Community Affairs, Qualified Allocation Plan, Section 21(L) (2018).

125. *Id.*

7.0 Conclusion

Developing a fair chance ordinance that effectively expands housing access for people with criminal records and serves the needs of your local community will require input from a wide range of community members and organizations and careful attention to the details. We hope that this toolkit will help you achieve your goals in this important work.

NHLP staff are available to provide technical assistance to organizers and advocates drafting fair chance ordinances. Please email nhlp@nhlp.org for assistance.

8.0 Appendices

8.1 NHLP Existing Fair Chance Ordinances Chart

Jurisdiction, title and citation	Summary of ordinance
San Francisco, CA Fair Chance Ordinance Ordinance No. 17-14 (2014) S.F. Police Code, Article 49 Note: San Francisco adopted procedural rules (included in the Toolkit Appendix).	Applies to all housing funded in whole or in part by the City and below-market-rate units. Prohibits criminal history screening except for felony convictions in the past 7 years and pending unresolved arrests, except if required by federal law. No criminal history screening until applicant is determined to be otherwise qualified for the unit. Denials based on criminal history require written notices and an individualized assessment. Includes an administrative complaint procedure administered by the City's Human Rights Commission. Private right of action only after a person alleging a violation has exhausted administrative remedies.
Newark, NJ Ordinance 14-0921 (2015) Not codified at the direction of the City.	Applies to all housing. Limits criminal history screening to: serious offense convictions for 8 years following release from post-conviction custody or from the date of sentencing (if no incarceration); specified minor offense convictions or municipal ordinance violations for 5 years following release from post-conviction custody or from the date of sentencing (if no incarceration); pending criminal charges; convictions for certain specified offenses 9e.g, murder, arson, sex offenses), regardless of when they occurred. Denials based on criminal history require an individualized assessment and a notice of adverse action. No enforcement mechanism provided.

Jurisdiction, title and citation	Summary of ordinance
Champaign, IL City of Champaign Code of Ordinances Ch. 17 Article I, §§ 17.3 (11) - 17.4.5 and Article V §§ 17.71, 17.75. Note: In June 2019, the Champaign City Council started re-examining the scope of the permissible criminal history screening.	Amended existing anti-discrimination statute to prohibit discrimination based on criminal history except specific crimes enumerated in the ordinance, such as: forcible felony, felony drug conviction or conviction for the sale, manufacture or distribution of illegal drugs, unless applicant has not re-offended for 5 years following release from incarceration. Further exception for preferences by religious organizations. Includes an administrative complaint procedure administered by the Human Rights Commission. Parties may seek review of a decision by the Commission in court.
Urbana, IL Urbana Code of Ordinances, Ch. 12, Article III, §§ 12-37, 12-64.	Applies to all housing except owner-occupied where owner anticipates sharing living space with prospective tenant. Amended existing anti-discrimination statute to prohibit discrimination based on criminal history. Exception for preferences for elderly or disabled tenants. Includes an administrative complaint procedure administered by the Human Rights Commission. Parties may seek review of a decision by the Commission in court.

Jurisdiction, title and citation	Summary of ordinance
Richmond, CA Fair Chance Access to Affordable Housing, Ord. No. 20-16 N.S. (2016) Richmond Municipal Code Article VII, Ch. 7.110 Note: Richmond adopted detailed implementing rules in 2019 (included in the Toolkit Appendix).	Applies to affordable housing providers (including private landlords renting to Section 8 voucher-holders) Prohibits housing providers from screening for any criminal history except "directly-related" convictions no more than two years old; or as required in certain federally assisted programs. No criminal history screening until applicant is determined to be otherwise qualified for the unit and is offered a conditional lease. Denials based on criminal history require an individualized assessment and a written notice. Includes an administrative appeal process. If an applicant files an administrative appeal within 14 days of a denial, the owner must hold the unit open until the appeal process is completed. Includes a private right of action.

Jurisdiction, title and citation	Summary of ordinance
Seattle, WA Fair Chance Housing Ordinance 125393 (2017) Seattle Municipal Code Ch. 14.09	Applies to all housing types except single-family owner-occupied and in-law units where owner lives on the same premises. Prohibits as an unfair practice consideration of arrest records, criminal history, or conviction records when deciding whether to rent to a prospective tenant, except if required by federal law. Permits landlords to check official sex offender registries subject to certain restrictions. Requires a written notice and an individualized assessment before any denial based on sex offender status. Includes an administrative complaint procedure administered by the Seattle Office for Civil Rights. Note: This ordinance was challenged in a case pending in federal court, Yim v. City of Seattle, Case No. 2:18-cv-00736-JCC (W.D. Wash.). In November 2019, the Washington Supreme Court issued a ruling in a related matter, Certification in Yim v. City of Seattle, Case No. 96817-9 (Wash., Nov. 14, 2019), that indicates that the City of Seattle will likely win the case and the fair chance ordinance will stand.
Washington D.C. Fair Criminal Record Screening for Housing Act of 2016 D.C. ACT 21-677 (2017) D.C. Law 21-259 District of Columbia Code Ch. 35B, §§ 42-3541.01-.10	Applies to all housing types except owner-occupied properties with 1-3 units. Prohibits criminal history screening except for felony convictions or pending charges for specified offenses in the past 7 years except if required by federal law. No criminal history screening until applicant is determined to be otherwise qualified for the unit and receives a conditional offer. Denials based on criminal history require an individualized assessment. Includes an administrative complaint procedure administered by the Office of Human Rights.

Jurisdiction, title and citation	Summary of ordinance
Cook County, IL Just Housing Amendment Cook County Code of Ordinances, Ch. 42, Article II, § 42-38 (2019). Note: Cook County has adopted interpretive rules for this ordinance (included in the Toolkit Appendix).	Applies to all housing (subject to possible limitation in implementing regulations). Amended existing anti-discrimination statute to prohibit discrimination based on criminal history. Exceptions for persons subject to current sex offender registration requirement or a current child sex offender residency restriction; and convictions that present a "demonstrable risk" to personal safety and/or property. No criminal history screening until applicant is determined to be otherwise qualified for the unit and receives a conditional offer. Denials based on criminal history require an individualized assessment and a written notice. Provides for an administrative complaint procedure.
Detroit, MI Fair Chance Access to Rental Housing Chapter 26, Article V, §§ 26-5-1 – 26-5-20 of the 1984 Detroit City Code (2019).	Applies to rental properties with 5 or more units. Housing providers may only take adverse action against an applicant based on a "directly-related conviction" that has a "direct and specific negative bearing on the safety of persons or real property". Includes a non-exclusive (and very broad) list of offenses that qualify as "directly-related" convictions, such as any violent or drug-related felony, any felony committed in the past 10 years or any imprisonment for a felony in the past 5 years. No criminal history screening until applicant is determined to be otherwise qualified for the unit and receives a conditional lease. Denials based on criminal history require an individualized assessment and a written notice. Provides for an administrative complaint procedure administered by the Detroit Department of Civil Rights, Inclusion and Opportunity.

Jurisdiction, title and citation	Summary of ordinance
Portland, OR Fair Access in Renting Ordinance No. 189580 (2019) Portland City Code § 30.01.86 Note: Includes a "first-in-time" requirement in addition to optional restriction on criminal history screening.	Applies to all housing except certain specified affordable housing, units shared with owner, duplexes where owner occupies one unit and accessory dwelling units where owner lives on the same parcel. Requires housing providers to either use specified "Low-Barrier Screening Criteria" (or less prohibitive criteria) that restrict screening for certain specified types of criminal history (including felonies with sentencing in past 7 years or misdemeanors with sentencing in the past 3 years) or use their own more prohibitive screening criteria but conduct an individualized assessment and provide a written denial notice. Includes a private right of action.
Minneapolis, MN Applicant Screening Criteria for Prospective Tenants Ordinance (2019) Minneapolis Code, Title 12, Ch. 244, § 244.2030	Applies to all housing, though exceptions will likely be developed through regulations. Effective date is 6/1/2020, but for owners of properties with ≤ 15 units, it is delayed 6 months to 12/1/2020. Requires housing providers to either use specified "Inclusive Screening Criteria" (or less prohibitive criteria) that restrict screening for certain specified types of criminal history (including felonies with sentencing in past 7 or 10 years (depending on the type of offense) or misdemeanors with sentencing in the past 3 years) or use their own more prohibitive screening criteria but conduct an individualized assessment and provide a written denial notice. Includes a private right of action.

8.2 NHLP Fair Chance Checklist

Fair Chance Ordinance Checklist

- ☐ **Where is the ordinance housed (e.g., municipal code, police code, health & safety code)?**
- ☐ **What types of housing (e.g., affordable housing, private housing, both) does the ordinance apply to? Are there exceptions?**
- ☐ **What records and information relating to criminal history are landlords allowed to consider?**
- ☐ **What screening procedures do landlords have to follow?**
- ☐ **What is the administrative complaint/appeal process?**
- ☐ **What is the statute of limitations (deadline) for filing an administrative complaint/appeal?**
- ☐ **Is there a private right of action? If so, what is the statute of limitations (deadline) for filing a case in court?**
- ☐ **What are the penalties for noncompliance?**
- ☐ **When and how will the ordinance be implemented?**
- ☐ **What are the requirements about informational notices to applicants?**
- ☐ **What are the reporting requirements (data or otherwise)?**
- ☐ **How does the ordinance deal with possible federal or state preemption issues?**

8.3 City of San Francisco Procedures for Considering Arrests and Convictions in Employment and Housing Decisions

Rules of Procedure

San Francisco Police Code
Article 49
Procedures for Considering Arrests and Convictions
in Employment and Housing Decisions

CITY AND COUNTY OF SAN FRANCISCO
HUMAN RIGHTS COMMISSION

Table of Contents

I. Introduction

After public hearings and considerations of testimony and documentary evidence, the Board of Supervisors found that the health, safety, and well-being of San Francisco's communities depend on increasing access to employment and housing opportunities for people with arrest or conviction records. In response, the Board of Supervisors unanimously voted to pass the "Fair Chance Ordinance" in February of 2014.

The Fair Chance Ordinance provides people with prior arrest and conviction records the opportunity to be considered for employment and housing on an individual basis, thereby affording them with a fair chance to acquire employment and housing, to effectively reintegrate into the community, and to provide for their families and themselves.

The Commission is also aware of the disproportionate arrest and incarceration of African Americans, Latinos, and Native Americans and the lifelong post-conviction stigma that follows individuals and compromises their human rights and ability to reintegrate into society. By reducing barriers, the Fair Chance Ordinance promotes public safety and reintegration. In addition, the Ordinance redresses some of the human rights concerns implicated by the over-incarceration of these communities.

The Fair Chance Ordinance was codified as San Francisco Police Code Article 49: Procedures for Considering Arrests and Convictions and Related Information in Employment and Housing Decisions ("Article" or "Article 49").

II. Preemption and Scope of Authority

Article 49 instructs the Human Rights Commission (HRC), in consultation with the Mayor's Office of Housing and Community Development (MOHCD), to establish rules and regulations that implement the housing provisions of the Article.

Article 49 authorizes the HRC, in consultation with the MOHCD, to take appropriate steps to enforce the Article and coordinate enforcement, including the investigation of any possible violations of the Article.

In developing these rules, the HRC is guided by its understanding of the importance of fulfilling the goals of this Article and has given weight to considerations of equity and practicality. The rules seek to provide clear direction to affordable housing providers and housing applicants and residents regarding the requirements of this Article.

Nothing in these rules shall be interpreted or applied so as to create any requirements, power or duty in conflict with federal or state law or with a requirement of any government agency, including any agency of City government, implementing federal or state law. The HRC is not authorized to enforce any provision of Article 49 upon determination that its application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

III. DEFINITIONS

The definitions are derived directly from Article 49 of the San Francisco Police Code.

Adverse Housing Action in the context of housing shall mean to evict from, fail or refuse to rent or lease real property to an individual, or fail or refuse to continue to rent or lease real property to an individual, or fail or refuse to add a household member to an existing lease, or to reduce any tenant subsidy. The "Adverse Action" must relate to real property in the City.

Affordable Housing shall mean any residential building in the City that has received funding from the City, connected in whole or in part to restricting rents, the funding being provided either directly or indirectly through funding to another entity that owns, master leases, or develops the building. Affordable Housing also includes "affordable units" in the City as the term is defined in Article 4 of the Planning Code. Projects that are financed using City-issued tax exempt bonds, but that receive no other funding from the City or are not otherwise restricted by the City shall not constitute Affordable Housing.

Arrest shall mean a record from any jurisdiction that does not result in a conviction and includes information indicating that a person has been questioned apprehended taken into custody or detained, or held for investigation by a law enforcement, police, or prosecutorial agency and/or charged with, indicated, or tried and acquitted for any felony, misdemeanor or other criminal offense. "Arrest" is a term that is separate and distinct from, and that does not include, "Unresolved Arrest."

Background Check Report shall mean any criminal history report, including but not limited to those produced by the California Department of Justice, the Federal Bureau of Investigation, other law enforcement or police agencies, or courts, or by any consumer reporting agency or business, employment screening agency or business, or tenant screening agency or business.

Conviction shall mean a record from any jurisdiction that includes information indicating that a person has been convicted of a felony or misdemeanor; provided that the conviction is one for which the person has been placed on probation, fined, imprisoned, or paroled. The definition of a conviction shall not include items listed in Section V.A. of these Rules.

Conviction History shall mean information regarding one or more Convictions or Unresolved Arrests, transmitted orally or in writing or by another means, and obtained from any source, including but not limited to the individual to whom the information pertains and a Background Check Report.

Directly-Related Conviction in the housing context shall mean that the conduct for which a person was convicted or that is the subject of an Unresolved Arrest has a direct and specific negative bearing on the safety of persons or property, given the nature of the housing. In determining whether the conviction or Unresolved Arrest is directly related to the housing, the Housing Provider shall consider whether the housing offers the opportunity for the same or a similar offense to occur and whether circumstances leading to the conduct for which the person was convicted will recur in the housing, and whether supportive services that might reduce the likelihood of a recurrence of such conduct are available on-site.

Evidence of Rehabilitation or Other Mitigating Factors may include but is not limited to:

- A person's satisfactory compliance with all terms and conditions of parole and/or probation (however, inability to pay fines, fees, and restitution due to indigence shall not be considered noncompliance with terms and conditions of parole and/or probation);
- Employer recommendations, especially concerning a person's post-conviction employment, educational attainment, vocation, or vocational or professional training since the conviction, including training received while incarcerated;
- Completion of or active participation in rehabilitative treatment (e.g., alcohol or drug treatment);
- Letters of recommendation from community organizations, counselors or case managers, teachers, community leaders, or parole/probation officers who have observed the person since his or her conviction;
- Age of the person at the time of the conviction.
- Examples of other mitigating factors that are offered voluntarily by the person may include but are not limited to explanation of the precedent coercive conditions, intimate physical or emotional abuse, or untreated substance abuse or mental illness that contributed to the conviction.

Fair Chance Ordinance or Fair Chance Act – The name commonly used to refer to Article 49 of the San Francisco Police Code: Procedures for Considering Arrests and Convictions and Related Information in Employment and Housing Decisions.

Housing provider shall mean any entity that owns, master leases, or develops Affordable Housing in San Francisco. "Housing Provider" also includes owners and developers of below-market-rate housing in the City or "affordable units."

Inquire shall mean any direct or indirect conduct intended to gather information from or about an applicant, candidate, potential applicant or candidate, using any mode of communication, including but not limited to application forms, interviews, and background check reports.

Person shall mean any individual, person, firm, corporation, business or other organization or group of persons however organized.

Unresolved Arrest shall mean an arrest that is undergoing an active pending criminal investigation or trial that has not yet been resolved. An arrest has been resolved if the arrestee was released and no accusatory pleading was filed charging him or her with an offense, or if the charges have been dismissed or discharged by the district attorney or the court.

IV. Procedures for the Advertisements, Applications, and Interviews

Nothing in the Ordinance affects additional appeals procedures or rights afforded to tenants and housing applicants elsewhere. In addition, nothing in the Ordinance mandates a conviction inquiry or background check. Affordable housing providers who do not inquire about an applicant's prior unresolved arrests or conviction record or who do not perform background checks on applicants are in compliance with this Article. Affordable housing providers who choose to inquire about an applicant's unresolved arrests or conviction history or who perform background checks must comply with the following procedures.

A. Advertisements and Solicitations

1. No Blanket Exclusions

Housing providers may not produce or disseminate any advertisement related to affordable housing that expresses, directly or indirectly, that any person with an arrest or conviction record will not be considered for the rental or lease of real property or may not apply for the rental or lease of real property, except as required by local, state, or federal law.

2. Applicants with Prior Arrest and Conviction Records will be Considered

Housing providers are required to state in all solicitations or advertisements for the rental or lease of affordable housing placed by the housing provider, or on behalf of the housing provider, that the housing provider will consider for tenancy qualified applicants with arrest or conviction record in a manner consistent with the requirements of this Article.

B. HRC Notice and Posting Requirements

The HRC is responsible for publishing and making available to affordable housing providers a notice suitable for posting that informs applicants of their rights under this Article. The HRC shall make this notice available to housing providers in English, Spanish, Chinese, and Tagalog and all other languages spoken by more than 5% of the San Francisco population.

1. Website

Housing providers must prominently post on their website the HRC notice in all of the languages referenced above.

2. Frequently Visited Locations

Housing providers must prominently post the HRC notice in all the languages referenced above at any location under their control that is frequently visited by applicants or potential applicants for the rental or lease of affordable housing in San Francisco.

3. Languages Access

In addition to making the notice available in English, Spanish, Chinese, and Tagalog, the HRC shall update the notice on December 1 of any year in which there is a change in the languages spoken by more than 5% of the San Francisco population.

C. Interviews and Applications: No Inquiry Prior to Determination of Qualification

Housing providers may not at any time ask an applicant in person, on an application or by any other means to disclose any details about his or her or a household member's conviction history, until the housing provider has first determined that:

1) The applicant is legally eligible to rent the housing unit, and
2) The applicant is qualified to rent the housing unit under the housing provider's criteria for assessing rental history and credit history, if such assessments are used by the housing provider.

D. Obtain but not Review

For the sake of efficiency, a housing provider may obtain a conviction history report at the same time as the housing provider obtains the rental history report and credit history report for an applicant. However, a housing provider may not in any way look at or review the conviction history report until *after* determining that based on the rental history and credit history the applicant is qualified to rent the housing unit. Housing providers must employ practices and safeguards to ensure that conviction history information is not inadvertently viewed prior to a determination of qualification for a housing unit. It is a violation of this Ordinance if the records are viewed prior to a determination of qualification.

E. Notice Requirement

2. Notice to Applicant Prior to Conducting Criminal Background Inquiry

In addition to posting the notice prominently on the website and in frequently visited locations, housing providers must individually provide each housing applicant a copy of the HRC issued notice referenced above in IV.B prior to any conviction history inquiry.

3. Language Access

If a housing applicant speaks Spanish, Chinese, Tagalog or any other language spoken by more than 5% of the San Francisco population, the housing provider must provide the applicant with the HRC notice in his or her respective language.

V. Procedures for Decision Making

A. Prohibited Inquiries and Considerations

Housing providers may not at any time or by any means inquire about, require disclosure of, or if such information is received, base an adverse action in whole or in part on any of the following:

1. An arrest not leading to a conviction, unless it is an "unresolved arrest" as defined in Section III above;
2. Participation in or completion of a diversion or a deferral of judgment program;
3. A conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative;
4. A conviction or any other determination or adjudication in the juvenile justice system or information regarding a matter considered in or processed through the juvenile justice system;
5. A conviction that is more than 7 years old, the date of conviction being the date of sentencing;
6. Information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

Inquiring about or basing any adverse decision on any of the above 6 categories is a violation of Article 49. To ensure that none of this prohibited information is considered, affordable housing providers should explicitly exclude the above-information from any inquiry into conviction history. For example, if a criminal history questionnaire is required of an applicant, it should state that the above-information should not be disclosed. In addition, commercial background check companies should be informed that the above-information should not be included in any report.

Any affordable housing provider who decides to conduct a commercial background check should be aware that these reports can be inaccurate or incomplete. Upon receiving notice that information contained in the report falls into one of the prohibited 6 categories, the affordable housing provider should not consider or rely upon that criminal history information to take an adverse action.

B. Consideration Limited to Directly-Related Convictions and Unresolved Arrests

Affordable housing providers may only consider directly-related convictions within the past 7 years or directly-related unresolved arrests for a housing decision. A directly-related conviction or unresolved arrest means the following: The conduct for which a person was convicted or that is the subject of an unresolved arrest has a **direct and specific negative** bearing on the safety of persons or property, given the nature of the housing.

In determining whether the conviction or unresolved arrest is directly related to the housing, the housing provider shall consider:

- Whether the housing offers the opportunity for the same or a similar offense to occur;
- Whether circumstances leading to the conduct for which the person was convicted will recur in the housing;
- Whether supportive services that might reduce the likelihood of a recurrence of such conduct are available on-site.

In addition to considering whether a conviction or an unresolved arrest is directly-related as defined above, the housing provider shall also consider the time that has elapsed since the conviction or unresolved arrest.

If a housing provider determines that a conviction or an unresolved arrest is not directly-related or that reasonable times has elapsed, no further action is required. If however, the housing provider intends to take adverse action based on a directly-related conviction within the past 7 years or a directly-related unresolved arrest, the housing provider must comply with the rules below.

C. Written Notice and Copy of Report Prior to Prospective Adverse Action

If a housing provider intends to take an adverse action based on directly-related conviction with the past 7 years or a directly-related unresolved arrest, the housing provider must take the following steps:

1. Notify the applicant in writing of the prospective adverse action;
2. Give the applicant a copy of any conviction history or unresolved arrest;
3. Specifically indicate the item or items forming the basis for the prospective adverse action;
4. Provide the applicant with a copy of language-appropriate HRC notice described in Section IV.B which explains the applicant's right under this Article, including his or her right to respond, the manner in which he or she may respond, and the evidence he or she may submit; and
5. Provide the applicant with the opportunity to respond and delay any adverse action in order to reconsider in light of evidence submitted by the applicant.

Examples of housing related adverse actions include, but are not limited to, eviction, failing or refusing to rent or lease property to an individual, failing or refusing to add a household member to an existing lease, or reducing any tenant subsidy.

D. Opportunity to Respond

Within 14 days of the date of the written notice described above in Section V.C., the applicant, or any person on behalf of the applicant, may give the housing provider notice orally or in writing of evidence of any of the following:

1. Inaccuracies of the item or items of conviction history; examples of inaccuracies include but are not limited to:
    a. Mismatching of the subject of the report with another person;
    b. Revealing restricted information:
    c. Omitting information of how an arrest was resolved;
    d. Repeating the same information giving the appearance of multiple offenses;
    e. Mischaracterizing the seriousness of the offense;
2. Evidence of rehabilitation; examples of evidence of rehabilitation include but are not limited to:
    a. A person's satisfactory compliance with all terms and conditions of parole and/or probation (however, inability to pay fines, fees, and restitution due to indigence shall not be considered noncompliance with terms and conditions of parole and/or probation);
    b. Employer recommendations, especially concerning a person's post-conviction employment, educational attainment or vocation or vocational or professional training since the conviction, including training received while incarcerated;
    c. Completion of or active participation in rehabilitative treatment (e.g., alcohol or drug treatment);
    d. Letters of recommendation from community organizations, counselors or case managers, teachers, community leaders, or parole/probation officers who have observed the person since his or her conviction;
    e. Age of the person at the time of the conviction.
3. Evidence of other mitigating circumstances; examples of mitigating factors that are offered voluntarily by the person may include but are not limited to:
    a. Explanation of the precedent coercive conditions;
    b. Intimate physical or emotional abuse;
    c. Untreated substance abuse or mental illness that contributed to the conviction.

E. Conduct an Individualized Assessment

A housing provider may not deny an applicant based on his or her prior conviction history without first conducting an individualized assessment. In conducting an individualized assessment, the housing provider must consider only directly-related convictions and directly-related unresolved arrests and the time that has elapsed since the conviction or unresolved arrest. In addition to considering the time that has elapsed, the housing provider shall also review and consider any evidence of inaccuracy or evidence of rehabilitation or other mitigating factors provided by the applicant on the applicant's behalf.

The HRC shall not find a violation based on a housing provider's decision that an individual applicant's conviction history or unresolved arrest is directly-related, but may otherwise find a violation of this Article. For example, a violation may be found if the housing provider failed to take the steps to conduct an individualized assessment, including determining whether a conviction or unresolved arrest is directly-related, considering the time elapsed, or reviewing and considering evidence presented by the applicant.

F. Delay Adverse Action to Reconsider

A housing provider must delay any adverse action for a reasonable period after receipt of information and, during that time, shall reconsider the prospective adverse action in light of the information.

G. Written Notification of Adverse Action

Upon taking any adverse action based on an unresolved arrest or conviction history of an applicant, the housing provider shall notify the applicant within a reasonable time and in writing of the final adverse action.

VI. Retaliation

Housing providers or any other person may not interfere with, restrain, or deny the exercise of or the attempt to exercise any right protected under this Article. This includes interrupting, terminating or failing or refusing to initiate or conduct a transaction involving the rental or lease of residential real property, including falsely representing that a residential unit is not available for rental or lease. This also includes taking adverse action against a person or family member in retaliation for exercising rights protected under the Article. These protections apply to any person who mistakenly, but in good faith, alleges violation of this Article. Examples of what may constitute adverse action are defined above in these Rules.

A. Protected Exercise of Right under this Article

The following activities include, but are not limited to, the protected exercise of right under this Article:

1. The right to file a complaint;
2. The right to inform any person about a housing provider's alleged violation of the Article;
3. The right to cooperate with the HRC or other persons in the investigation or prosecution of any alleged violations of the Article;
4. The right to oppose any policy, practice or act that is unlawful under this Article;
5. The right to inform any person of his or her rights under this Article

B. 90-Day Presumption

Taking adverse action against a person within 90 days of the exercise of one or more of the rights described above shall create a rebuttable presumption that such adverse action was taken in retaliation for the exercise of these rights.

VII. Filing a Complaint with the HRC

A. Who May Report

An applicant or any other person may report to the HRC any suspected violation of this Article.

B. HRC-Initiated Investigations

The HRC may, in its sole discretion, investigate possible violations of this Article on its own initiative.

C. Elements of a Complaint

A complaint may be made in writing, or if made orally, shall be put in writing by HRC staff. The complaint shall contain the following:

1. The complete name and contact information of the person making the complaint, unless the person making the complaint wishes to remain anonymous;
2. A plain and concise statement of facts, which provide the basis of the complaint, including the specific date(s), action(s), practice(s) or incident(s) alleged to violate this Article;
    a. The signature of the person making the complaint verifying under penalty of perjury that the response is true and complete to the best of the signatory's knowledge and belief. In cases in which the complainant wishes to remain anonymous or in HRC initiated complaints, the complaint shall be verified by an HRC staff;
3. Possible violations of the Article include, but are not limited to, the following examples:
    a. An advertisement for affordable housing that does not state that the provider will consider qualified applicants with criminal histories;
    b. An advertisement for affordable housing that expresses directly or indirectly that a person with an arrest or conviction record will not be considered;
    c. An application for affordable housing that contains an inquiry about prior arrest or conviction record;
    d. A housing provider who inquires about an applicant's conviction background prior to determining eligibility for housing;
    e. A housing provider who reviews an applicant's conviction report prior to determining eligibility for housing;
    f. A housing provider who inquires about an applicant's conviction background prior to providing applicant the HRC notice informing them of their rights under this Article;
    g. A housing provider who does not post the HRC notice on its website;
    h. A housing provider who does not post HRC notice in locations frequented by tenants or housing applicants;

i. A housing provider who does not provide the HRC notice in the languages mandated by the ordinance;
j. A housing provider who inquires about or considers one of the six off-limits categories, enumerated in section V.A. of these Rules and Section 4906 of Article 49;
k. A housing provider who does not give an applicant a copy of the conviction history report or an unresolved arrest prior to taking a prospective adverse action;
l. A housing provider who does not specify which conviction or unresolved arrest is the basis for the adverse action;
m. A housing provider who does not give an applicant notice of their right to provide evidence of inaccuracies and evidence of rehabilitation or mitigating circumstances;
n. A housing provider who does not offer the applicant 14 days to provide evidence of inaccuracies and evidence of rehabilitation or mitigating circumstances;
o. A housing provider who fails to conduct an individualized assessment. The HRC may not find a violation based on a housing provider's decision that an applicant's conviction within the past 7 years or unresolved arrest is directly-related, but may find a violation of this Article if the housing provider failed to take the steps to conduct the individualized assessment, which requires determining whether a conviction or unresolved arrest is directly-related, considering the time elapsed, and reviewing and considering evidence presented by the applicant;
p. A housing provider who does not delay the adverse action until they have reconsidered the decision in light of evidence provided by the applicant;
q. A housing provider who does not provide notice of a final adverse action to the applicant;
r. A housing provider who retaliates against someone for exercising his or her rights under this ordinance;
s. A housing provider who fails to maintain and retain records as required by this Article.

D. Timeliness of a Complaint

A suspected violation of this Article may be reported within 60 days of the date that the suspected violation occurred, or that the complainant became aware that the action violating this ordinance occurred, whichever date occurred more recently.

E. Amending a Complaint

The complaint may be amended any time prior to resolution. HRC shall serve all amended complaints on the housing provider with instructions concerning which

allegations of the amended complaint, if any, the housing provider shall answer, and when the verified response is due. If the amendment occurs before the housing provider has answered, the housing provider shall be served with and shall respond to the amended complaint. The housing provider's time for filing a response shall start upon service of the amended complaint.

F. Withdrawing a Complaint

A complainant may withdraw a complaint any time prior to resolution. HRC shall notify the housing provider in writing within 5 days after the complaint has been withdrawn. A complaint may be withdrawn without prejudice, but nothing in these Rules shall require the HRC to accept a new complaint alleging substantially identical conduct if the complainant has engaged in repeated or unwarranted withdrawal and resubmission of complaints. After a withdrawal, the HRC may, in its sole discretion, initiate an investigation of a possible violation of this article as authorized above in section VII.B.

G. Confidentiality

The HRC shall encourage reporting of violations by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the resident, applicant or other person reporting the violation, unless such a person authorizes the HRC to disclose his or her name and identifying information as necessary to enforce this Article or for other appropriate purposes.

VIII. HRC Notice of Alleged Violation

The HRC shall serve the housing provider with notice that a complaint of an alleged violation has been filed against them and that they are required to respond.
In addition to including the elements of a complaint listed above in VII.C., the notice shall:

- Clearly state the date by which the response is due;
- Inform the housing provider of their right to respond to the alleged violation and describe the information the housing provider is required to include in the response;
- State that failure to respond to the complaint may result in a default decision;
- Offer the housing provider technical assistance;
- Inform the housing provider that retaliation against the complainant or suspected complainant is prohibited by this Article;
- Describe HRC's enforcement powers and administrative penalties;
- Inform the housing provider of his or her right to appeal the HRC Director's determination.

IX. Housing Provider Response

A. Who May File

The housing provider or an authorized representative shall file a verified response to the complaint or amended complaint in writing.

B. Content

A response shall contain the following:

1. The full name and title, where applicable of the housing provider;
2. The name, address, and telephone number of the housing provider's representative, if any;
3. A specific admission or denial of each allegation contained in the complaint. If the housing provider does not have knowledge or information sufficient to form a belief as to the truth of a particular allegation, the housing provider shall so state and such statement shall operate as a denial of the allegations;
4. A statement of any matter constituting an explanation or affirmative defense; and
5. The signature of the housing provider or authorized representative, verifying under penalty of perjury that the response is true and complete to the best of the signatory's knowledge and belief;

C. Timeliness

The response shall be filed within 10 business days of service of the complaint.

D. Amendment of Response

The housing provider, at the discretion of the Commission staff, may amend its response.

E. Failure to Respond to a Complaint

Any party who fails to file a response to a complaint or amended complaint may be held to be in default.

F. Response Shared with Complainant

The HRC shall serve a copy of the response or amended response to the complainant after redacting any confidential information.

X. Enforcement

G. Warning, Notice to Correct, and Technical Assistance

1. First Violation and Violations Prior to August 13, 2015

For a first violation, or for any violation prior to August 13, 2015, the HRC Director must issue a warning and notice to correct and offer the housing provider technical assistance on how to comply with the requirements of this Article.

H. Administrative Penalty

1. Second Violation

For a second violation, the HRC Director may impose an administrative penalty of no more than $50.00 that the housing provider must pay for each applicant whose rights were violated or continue to be violated.

2. Subsequent Violations

For subsequent violations, the HRC Director may increase the penalty to no more than $100.00.

3. Multiple Applicants Impacted by Same Violation

If multiple applicants are impacted by the same procedural violation at the same time (e.g. all applicants for a certain housing unit are asked for their conviction history on the initial application) the violation shall be treated as a single violation rather than multiple violations.

4. Allocation of Penalties

The penalties are payable to the City for each applicant whose rights were, or continue to be, violated. Such funds shall be allocated to the HRC and used to offset the costs of implementing and enforcing this Article.

I. Mediation

Mediation refers to a process whereby the HRC staff acts as a neutral third-party to encourage and facilitate the resolution of a dispute between two or more parties. It is a voluntary, informal, and non-adversarial process with the objective of helping the disputed parties reach a mutual agreement. In mediation, decision-making authority rests with the parties. The role of the HRC as mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving, and exploring resolution alternatives.

Mediation may be initiated at any time after allegations of a violation are presented to the HRC. Either party may make a request to the HRC for mediation. Upon receipt of a request for mediation, or on its own initiative where the HRC determines that

mediation might be productive, the HRC shall ascertain if all parties agree to attempt resolution through mediation. If all parties to the dispute or all parties concerned with a specific issue in the dispute agree to mediation, the HRC shall appoint a staff member to act as a neutral mediator and attempt to resolve the dispute through mediation.

J. Investigations

The HRC, in consultation with the Mayor's Office of Housing and Community Development, is authorized to take appropriate steps to enforce this Article and coordinate enforcement, including the investigation of any possible violations of this Article.

1. Length of Time of Investigation

Staff shall endeavor to complete the investigation within 30 days of the date of receipt of the housing provider's response. If the scope of the investigation and the availability of witnesses require a longer investigation, the HRC shall notify the parties. Any party may request to mediate upon the agreement of all parties.

2. Investigation Plan

Staff shall create a written investigation plan specifying the names of any witnesses to be interviewed, documents to request, and/or sites to be visited.

3. Witness Interviews

Staff shall create a mutually convenient schedule for interviewing witnesses. Interviews are informal in nature. HRC staff may also obtain information from witnesses by written interrogatories or other means of contact.

4. Document Review

HRC staff may require any person or company to produce relevant documents.

5. Subpoena Power

The HRC may subpoena any person or company to provide testimony or documents relevant to the case who fails or refuses to voluntarily cooperate with the investigation.

6. Consultation with MOHCD

HRC staff shall consult with the MOHCD at the outset of the investigation, prior to the conclusion of the investigation, and at any other stage during the investigation the HRC regards as necessary.

7. Conclusion of Investigation

HRC staff shall submit the conclusion of the investigation to the Director for action.

K. Determination

1. Director's Action

After reviewing the complete investigation file, the Director of the HRC shall do one of the following:

a. Issue a determination that a violation has occurred. The determination shall consist of written findings, and where authorized by law, order any appropriate relief; or
b. Return the file to the staff member with instructions for further investigation and analysis; or
c. Decide that a determination of a violation is not in order and direct the staff member to administratively close the complaint.

2. Notification

The HRC shall serve copies of the Director's determination to all parties within 10 days of the Director's action.

XI. Appeal

Parties will have the right to appeal as provided in Article 49 of the Police Code. An appeal process will be set forth in a future version of the Rules.

If there is no appeal of the Director's determination of a violation, then that determination shall constitute a failure to exhaust administrative remedies, which shall serve as a complete defense to any petition or claim brought by the housing provider against the City regarding the Director's determination of a violation.

XII. Severability

These rules shall be construed so as not to conflict with applicable local, state, or federal laws, rules or regulations. In the event that a court or an agency of competent jurisdiction holds that a local, state or federal law, rule or regulation invalidates any clause, sentence, paragraph or section of these rules or the application thereof to any person or circumstances, it is the intent of the Commission that the court or agency sever such clause, sentence, paragraph or section so that the remainder of these rules shall remain in effect.

8.4 City of Richmond Rules of Procedure For Considering Arrests and Convictions in Affordable Housing Decisions

City of Richmond Rules of Procedure For Considering Arrests and Convictions in Affordable Housing Decisions

I. Introduction

After a public hearing, the City Council of the City of Richmond (hereinafter referred to as the "City Council") found that the health, safety, and well-being of Richmond citizens depend on increasing access housing opportunities for people with arrest or conviction records. In response, the City Council Member voted 6-1 to pass the "Fair Chance Access to Affordable Housing Ordinance "in December of 2016.

The Fair Chance Access to Affordable Housing Ordinance (hereinafter referred to as the "Fair Chance Ordinance") provides people with prior arrest and conviction records the opportunity to be considered for housing on an individual basis, thereby affording them with a fair chance to acquire housing, to effectively reintegrate into the community, and to provide for their families and themselves.

In considering the Fair Chance Ordinance, the City Council was made aware of the disproportionate arrest and incarceration of African Americans, Latinos, and Native Americans and the lifelong post-conviction stigma that follows individuals and compromises their ability to reintegrate into society. By reducing barriers, the Fair Chance Ordinance promotes public safety and reintegration.

The Fair Chance Ordinance was codified as Richmond Municipal Code Chapter 7.110.

II. Preemption and Scope of Authority

Richmond Municipal Code Section 7.110.070 (c) requires the City Manager of the City of Richmond (hereinafter referred to as the "City Manager") to establish rules and regulations that implement the provisions of Chapter 7.110.

In developing these rules, the City Manager is guided by an understanding of the importance of fulfilling the goals of the Fair Chance Ordinance and has given weight to considerations of equity and practicality. These rules seek to provide clear direction to affordable housing providers and housing applicants and residents regarding the requirements of the Fair Chance Ordinance.

Nothing in these rules shall be interpreted or applied so as to create any requirements, power or duty in conflict with federal or state law or with a requirement of any government agency, including any agency of City government, implementing federal or state law. The City of Richmond (herein referred to as the "City") is not authorized to enforce any provision of Fair Chance Ordinance upon determination that its application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

III. DEFINITIONS

The following definitions are derived directly from the definitions set forth in the Fair Chance Ordinance (Section 7.110.040 of the Richmond Municipal Code).

Adverse Action in the context of housing shall mean to evict from, fail or refuse to rent or lease real property to an individual, or fail or refuse to continue to rent or lease real property to an individual, or fail or refuse to add a household member to an existing lease, or to reduce any tenant subsidy. The "Adverse Action" must relate to real property in the City of Richmond.

Affordable Housing shall mean any residential building in the City, State, or Federal funding, tax credits, or other subsidies connected in whole or in part to developing, rehabilitating, restricting rents, subsidizing ownership, or otherwise providing housing for extremely low income, very low income, and moderate income households.

Appeal shall mean an applicant's challenge to a housing provider's adverse action filed with the city of Richmond, within fourteen days of receipt of the notice of adverse action.

Applicant shall refer to the person or persons applying for affordable housing located in the City of Richmond.

Arrest shall mean a record from any jurisdiction that does not result in a conviction and

includes information indicating that a person has been questioned, apprehended, taken into custody or detained, or held for investigation, by a law enforcement, police, or prosecutorial agency and/or charged with, indicted, or tried and acquitted for any felony, misdemeanor or other criminal offense.

Background Check Report shall mean any criminal history report, including but not limited to those produced by the California Department of Justice, the Federal Bureau of Investigation, other law enforcement or police agencies, or courts, or by any reporting agency or tenant screening agency.

City Manager shall mean the City Manager of the City of Richmond or said City Manager's designee.

Complaint shall mean a complaint filed with the City of Richmond alleging a violation of the ordinance. This includes challenges to adverse actions where the applicant has not filed an appeal within 14 days of the adverse action.

Conviction shall mean a record from any jurisdiction that includes information indicating that a person has been convicted of a felony or misdemeanor; provided that the conviction is one for which the person has been placed on probation, fined, imprisoned, or paroled.

Conviction History shall mean information regarding one or more Convictions, transmitted orally or in writing or by another means, and obtained from any source, including but not limited to the individual to whom the information pertains and a Background Check Report.

Directly-Related Conviction in the housing context shall mean that the conduct for which a person was convicted that has a direct and specific negative bearing on the safety of persons or property, given the nature of the housing, and includes one or more of the following: (1) any conviction where state or federal law prohibits the applicant from being eligible for the public housing; (2) any conviction for a crime carried out in the applicant's home or on the premises where the applicant lived; or (3) any conviction that leads to the applicant becoming a lifetime registered sex offender.

Evidence of Rehabilitation or Other Mitigating Factors may include but is not limited to: (1) a person's satisfactory compliance with all terms and conditions of parole and/or probation (however, inability to pay fines, fees, and restitution due to indigence shall not be considered noncompliance with terms and conditions of parole and/or probation); (2) employer recommendations, especially concerning a person's post-conviction employment, educational attainment, vocation, or vocational or professional training since the conviction, including training received while incarcerated; (3) completion of or active participation in rehabilitative treatment (e.g., alcohol or drug treatment); (4) letters of recommendation from community organizations, counselors or case managers, teachers, community leaders, or

parole/probation officers who have observed the person since his or her conviction; (5) age of the person at the time of the conviction. Successful completion of parole, mandatory supervision, or post release community supervision shall create a presumption of rehabilitation.

Housing provider shall mean any entity that owns, master leases, or develops Affordable Housing in the City. "Housing Provider" also includes any agent, such as a property management company, that makes tenancy decisions on behalf of the above described entities.

Inquire shall mean any direct or indirect conduct intended to gather information from or about an applicant, candidate, potential applicant or candidate, or employee using any mode of communication, including but not limited to application forms, interviews, and background check report.

Person shall mean any individual, person, firm, corporation, business or other organization or group of persons however organized.

IV. Procedures for the Advertisements, Applications, and Interviews

Nothing in the Fair Chance Ordinance affects additional appeals procedures or rights afforded to tenants and housing applicants elsewhere. In addition, nothing in the Fair Chance Ordinance mandates a conviction inquiry or background check. Affordable housing providers who do not inquire about an applicant's conviction record or who do not perform background checks on applicants are in compliance with this Article. Affordable housing providers who choose to inquire about an applicant's conviction history or who perform background checks must comply with the following procedures.

A. Advertisements and Solicitations

1. No Blanket Exclusions

Housing providers may not produce or disseminate any advertisement related to affordable housing that expresses, directly or indirectly, that any person with an arrest or conviction record will not be considered for the rental or lease of real property or may not apply for the rental or lease of real property, except as required by local, state, or federal law.

2. Applicants with Prior Arrest and Conviction Records will be Considered

Housing providers are required to state in all solicitations or advertisements for the rental or lease of affordable housing placed by the housing provider, or on behalf of the housing provider, that the housing provider will consider for tenancy qualified applicants with arrest or

conviction records in a manner consistent with the requirements of this Fair Chance Ordinance.

B. City Manager Notice and Posting Requirements

The City Manager is responsible for publishing and making available to affordable housing providers a notice suitable for posting that informs applicants of their rights under the Fair Chance Ordinance. The City Manager shall make this notice ("the notice")available to housing providers in English, Spanish, and all other languages spoken by more than five percent (5%) of the City of Richmond population.

1. Website

Housing providers must prominently post on their website the notice in all of the languages referenced above.

2. Frequently Visited Locations

Housing providers must prominently post the notice in all of the languages referenced above at any location under their control that is frequently visited by applicants or potential applicants for the rental or lease of affordable housing in the City of Richmond. This includes, but is not limited to a housing provider's lobby and rental office, the Richmond Housing Authority and the Housing Authority of the County of Contra Costa.

3. Language Access

In addition to making the notice available in English and Spanish, the City Manager shall update the notice on December 1 of any year in which there is a change in the languages spoken by more than five percent (5%) of the City of Richmond population.

C. Notice Requirement

1. Notice to Applicant Prior to Conducting Criminal Background Inquiry

In addition to posting the notice referenced in section IV. B.) prominently on their websites and in frequently visited locations, housing providers must individually provide each housing applicant a copy of the City Manager issued

notice prior to any inquiry regarding an applicant or household member's criminal history and a copy of the housing provider's admissions policy.

2. Language Access

If a housing applicant speaks Spanish or any other language spoken by more than five percent (5%) of the population of the City of Richmond, the housing provider must provide the applicant with the City Manager notice in his or her respective language.

V. Procedures for Decision Making

A. No Inquiry Prior to Determination of Qualification

The housing provider shall not require applicants, and individuals applying to be added to an existing lease, to disclose, and shall not inquire into, conviction history until the housing provider has first:

1. Determined that the applicant is qualified to rent the housing unit under all of the housing provider's criteria for assessing applicants except for criteria related to potential past criminal convictions; and
2. Provided to the applicant a conditional lease agreement that commits the unit to the applicant as long as the applicant passes the conviction history review.

B. Obtain but not Review

For the sake of efficiency, a housing provider may obtain a conviction history report at the same time the housing provider obtains the rental history report and credit history report for an applicant. However, a housing provider may not in any way look at or review the conviction history report until *after* determining that based on the rental history and credit history the applicant is qualified to rent the housing unit. Housing providers must employ practices and safeguards to ensure that conviction history information is not inadvertently viewed prior to a determination of qualification for a housing unit. It is a violation of the Fair Chance Ordinance if the records are viewed prior to a determination of qualification.

C. Consent to Obtain Criminal History

If and when the housing provider requests written consent from the applicant to obtain a background check record of conviction history, the housing provider must also request

consent to share the conviction history record with the applicant and with the City of Richmond (for the purposes of an appeal only), and must offer the applicant an opportunity to provide evidence of rehabilitation, inaccuracies, or other mitigating factors related to convictions within the previous two years.

D. Prohibited Inquiries and Considerations

1. Housing providers may not at any time or by any means inquire about, require disclosure of, or if such information is received, base an adverse action in whole or in part on any of the following:

   (a) an arrest not leading to a conviction,

   (b) participation in or completion of a diversion or a deferral of judgment program;

   (c) a conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative, by way of example but not limitation, under California Penal Code Section 1203.1 or California Penal Code Section 1203.4.

   (d) a conviction or any other determination or adjudication in the juvenile justice system or information regarding a matter considered in or processed through the juvenile justice system;

   (e) a conviction that is more than 2 years old, the date of conviction being the date of sentencing; or

   (f) information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

   Inquiring about or basing any adverse decision on any of the above 6 categories is a violation of the Fair Chance Ordinance. To ensure that none of this prohibited information is considered, affordable housing providers should explicitly exclude the above- information from any inquiry into conviction history. For example, if a criminal history questionnaire is required of an applicant, it should state that the above information should not be disclosed. In addition, commercial background check companies should be informed that the above information should not be included in any report.

   Any affordable housing provider who decides to conduct a commercial background check should be aware that these reports can be inaccurate or incomplete. Upon receiving notice that information contained in the report falls into one of the prohibited 6 categories, the affordable housing provider should not consider or rely upon that criminal history information to take an adverse

action.

E. Consideration Limited to Directly-Related Convictions

1. Affordable housing providers may only consider directly-related convictions within the past 2 years for a housing decision.

2. In determining whether a criminal conviction is directly related, a housing provider should consider the nature and severity of the crime and the amount of time that has passed since the criminal conduct occurred as provided in criminal history information, and additional relevant information as provided in criminal history information.

3. If a housing provider determines that a conviction is not directly-related or that reasonable time has elapsed, no further action is required. If however, the housing provider intends to take adverse action based on a directly-related conviction within the past 2 years, the housing provider must comply with the rules set forth below.

F. Conduct an Individualized Assessment

1. In reviewing conviction history and making a decision related to affordable housing based on conviction history, a housing provider shall conduct an individualized assessment, considering only convictions that warrant denial based on state and federal law, and considering the time that has elapsed since the conviction, whether it is a directly-related conviction, and any evidence of inaccuracy or evidence of rehabilitation or other mitigating factors.

2. Inaccuracies of the item or items of conviction history. Examples of inaccuracies include but are not limited to:

   (a) Mismatching of the subject of the report with another person;

   (b) Revealing restricted information;

   (c) Omitting information of how an arrest was resolved;

   (d) Repeating the same information giving the appearance of multiple offenses; or

   (e) Mischaracterizing the seriousness of the offense;

3. Evidence of other mitigating circumstances. Examples of mitigating factors that are offered voluntarily by the person may include but are not limited to:

   (a) Explanation of the precedent coercive conditions;

(b) Intimate physical or emotional abuse; or

(c) Untreated substance abuse or a mental health disability that contributed to the conviction.

G. Written Notice and Copy of Report Prior to Prospective Adverse Action

1. If a housing provider intends to take an adverse action based on a directly-related conviction with the past 2 years, the housing provider must take the following steps:

2. Notify the applicant of the prospective adverse action, providing in written form the following:

(a) The type of housing sought;

(b) A copy of the background check;

(c) For each item of criminal history relied upon, why the housing provider believes it has a direct and specific negative bearing on the landlord's ability to fulfill his or her duty to protect the public and other tenants from foreseeable harm;

(d) What bearing, if any, the time that has elapsed since the applicant's or household member's last offense has on the housing provider's decision;

(e) What evidence the housing provider has received from the applicant or household member that shows rehabilitation or mitigation;

(f) The name and telephone number of the city staff member who the applicant may contact if he or she believes the housing provider has violated this Chapter.

H. Opportunity to Respond

Within fourteen (14) calendar days of receiving the notice and background check report, the applicant can file an appeal with the city of Richmond to challenge the adverse action. During this 14 day period, the housing provider shall hold the unit open. If the applicant does not file an appeal within 14 days, the housing provider can carry out the adverse action.

I. Delay Adverse Action

The housing provider shall delay any adverse action and shall hold the unit open during the time of the appeals process.

VI. Appeal Process

A. Filing of Appeal

1. An applicant can file an appeal of an adverse action no more than fourteen days after receipt of the notice of such action. The appeal must be filed with the City of Richmond.

2. An appeal may be made in writing, or if made orally, shall be put in writing by a City Manager staff person. Appellants are encouraged to utilize the City of Richmond Fair Chance Appeal/Complaint form. City staff shall take the appropriate steps necessary to ensure full access to the appeal process for persons with disabilities and people with limited English proficiency. City staff will also provide the appellant with the contract information for Bay Area Legal Aid and the website address: lawhelpca.org. The appeal shall contain the following information:

   (a) The complete name and contact information of the person filing the appeal.

   (b) A plain and concise statement of facts, which provide the basis of the appeal, including:

      (i) The specific date(s), action(s), practice(s) or incident(s) alleged to violate the Fair Chance Ordinance;
      (ii) The signature of the person making the appeal verifying under penalty of perjury that the response is true and complete to the best of the signatory's knowledge and belief.

B. Notice of Appeal

City staff shall notify the housing provider that an appeal has been filed and that they must hold the unit until the appeal process has been completed. This notification should be done as soon as possible but no more than three days after receipt of the complaint.

C. Setting Appeal Hearing

The appeal hearing shall occur no later than seven days from receipt of the appeal. Notice of the appeal hearing shall be sent to the parties by first class mail as soon as possible, but no later than three days prior to the hearing.

D. Hearing Officer

The appeal shall be heard by a hearing officer appointed by the City Manager to hear administrative appeals. The hearing officer may be a City employee, but in that event, the hearing officer shall not have had any responsibility for the investigation, prosecution or enforcement of the Fair Chance Ordinance and shall not have had any personal involvement in the appeal to be heard within the past twelve months.

E. Delay for Good Cause

The hearing officer may delay the hearing no longer than [illegible] seven days for good cause including: giving either party time in which to retain counsel, as an accommodation for a person with disabilities, or an unavoidable conflict which seriously affects the health, safety or welfare of the party.

F. Hearing

Both parties shall have the right to have an advocate of their choosing to represent them at the hearing and may present any relevant witnesses and evidence. Evidence will be considered without regard to the admissibility under the Rules of Evidence applicable to a judicial proceeding. Both parties shall be allowed to examine the other party's evidence and to rebut and cross-examine witnesses. Both parties shall also have the opportunity to request a translator and to request any reasonable accommodation needed to participate in the hearing process. The hearing shall be audio recorded. The audio recording shall be made available to the complainant and housing provider at no cost.

G. Contents of Hearing Officer's Decision

The hearing officer shall issue a written decision containing findings of fact and a determination of the issues presented. The hearing officer may affirm, modify or reverse the notice of adverse action. If it is shown by a preponderance of all the evidence that the housing provider has violated the Fair Chance Ordinance, the hearing office shall also specify the appropriate penalties and relief that shall be imposed.

H. Timing and Service of Hearing Officer's Decision

The hearing officer shall issue a decision, no later than three days from the date of the hearing. Upon issuance of the hearing officer's decision, the City shall serve a copy on the parties by first class mail to the address provided by the appellant in the written notice of appeal.

I. Finality of Hearing Officer's Decision

The decision of the hearing officer on an appeal shall constitute the final administrative decision of the City and shall not be appealable to the City Council or any committee or commission of the City.

J. Failure to Obey Order

If, after any order of a hearing officer made pursuant to this Rule has become final, the person to whom such order was directed shall fail, neglect or refuse to obey such order, the City is authorized and directed to take whatever legal action is deemed necessary to remedy the failure to obey the order.

K. Failure to File Appeal

An applicant is not required to exhaust administrative remedies in order to bring a civil action against the housing provider for failure to comply with the Fair Chance ordinance.

VII. Filing a Complaint with the City of Richmond

A. Who May Report

An applicant or any other person may report to the City Manager any suspected violation of this Fair Chance Ordinance.

B. City Manager-Initiated Investigations and Complaints

The City Manager may, in the City Manager's sole discretion, investigate possible violations of the Fair Chance Ordinance on the City Manager's own initiative and shall

adjudicate them pursuant to the complaint process. City manager initiated complaints shall not be subject to the time limitation laid out in section (V)(C).

C. Timing of Complaint

A suspected violation of the Fair Chance Ordinance may be reported within one hundred and twenty days (120 days of the date that the suspected violation occurred, or that the complainant became aware that the action violating this ordinance occurred.)

D. Elements of a Complaint

A complaint may be made in writing, or if made orally, shall be put in writing by a City Manager staff person. Applicants are encouraged to utilize the City of Richmond Fair Chance Complaint form. City staff shall take the appropriate steps necessary to ensure full access to the complaint process for persons with disabilities and people with limited English proficiency. City staff will also provide the appellant with the contract information for Bay Area Legal Aid and the website address: lawhelpca.org. The complaint shall contain the following:

1. The complete name and contact information of the person making the complaint, unless the person making the complaint wishes to remain anonymous;
2. A plain and concise statement of facts, which provide the basis of the complaint, including
3. The specific date(s), action(s), practice(s) or incident(s) alleged to violate the Fair Chance Ordinance;
4. The signature of the person making the complaint verifying under penalty of perjury that the response is true and complete to the best of the signatory's knowledge and belief.
   In cases in which the complainant wishes to remain anonymous or in City Manager initiated complaints, a verification of the complaint by a City Manager staff person;
5. Possible violations of the Fair Chance Ordinance include, but are not limited to the following examples:

(a) An advertisement for affordable housing that does not state that the provider will consider qualified applicants with criminal histories;

(b) An advertisement for affordable housing that expresses directly or indirectly that a person with an arrest or conviction record will not be considered;

(c) An application for affordable housing that contains an inquiry about a prior arrest or conviction record;

(d) A housing provider who inquires about an applicant's conviction background prior to determining eligibility for housing;

(e) A housing provider who reviews an applicant's conviction report prior to determining eligibility for housing;

(f) A housing provider who inquires about an applicant's conviction background prior to providing applicant the City Manager notice informing them of their rights under the Fair Chance Ordinance;

(g) A housing provider who does not post the City Manager notice on its website;

(h) A housing provider who does not post the City Manager notice in locations frequented by tenants or housing applicants;

(i) A housing provider who does not provide the City Manager notice in the languages mandated by these rules;

(j) A housing provider who inquires about or considers one of the six off- limits categories, enumerated in Section V.A. of these Rules;

(k) A housing provider who does not give an applicant a copy of the conviction history report prior to taking a prospective adverse action;

(l) A housing provider who does not specify which conviction is the basis for the adverse action;

(m) A housing provider who does not give an applicant notice of their right to provide evidence of inaccuracies and evidence of rehabilitation or mitigating circumstances;

(n) A housing provider who does not offer the applicant 14 days to provide evidence of inaccuracies and evidence of rehabilitation or mitigating circumstances

(o) A housing provider who fails to conduct an individualized assessment.

(p) The City may not find a violation based on a housing provider's decision that an applicant's conviction within the past 2 years is directly-related, but may find a violation of the Fair Chance Ordinance if the housing provider failed to take the steps to conduct the individualized assessment, which requires determining whether a conviction is directly-related, considering the time elapsed, and reviewing and considering evidence presented by the applicant;

(q) A housing provider who does not delay the adverse action until they have reconsidered the decision in light of evidence provided by the applicant;

(r) A housing provider who does not provide notice of a final adverse action to the applicant;

(s) A housing provider who retaliates against someone for exercising his or her rights under this ordinance;

(t) A housing provider who fails to maintain and retain records as required by the Fair Chance Ordinance.

E. Setting of Complaint Hearing

The appeal hearing shall occur no later than thirty days from the date of the complaint. Notice of the complaint hearing shall be sent to the parties by first class mail as soon as possible, but no later than seven days prior to the hearing.

F. Hearing Officer

The complaint hearing shall be heard by a hearing officer appointed by the City Manager to hear administrative appeals. The hearing officer may be a City employee, but in that event, the hearing officer shall not have had any responsibility for the investigation, prosecution or enforcement of the Fair Chance Ordinance and shall not have had any personal involvement in the complaint to be heard within the past twelve months.

G. Delay for Good Cause

The hearing officer may delay the hearing no longer than (7) seven days for good cause including: giving either party time in which to retain counsel, as an accommodation for a person with disabilities, or an unavoidable conflict which seriously affects the health, safety or welfare of the party.

H. Hearing

Both parties shall have the right to have an advocate of their choosing to represent them

at the hearing and may present any relevant witnesses and evidence. Evidence will be considered without regard to the admissibility under the Rules of Evidence applicable to a judicial proceeding. Both parties shall be allowed to examine the other party's evidence and to rebut and cross-examine witnesses. Both parties shall also have the opportunity to request a translator and to request any reasonable accommodation needed to participate in the hearing process. The hearing shall be audio recorded. The audio recording shall be made available to the complainant and housing provider at no cost.

I. Contents of Hearing Officer's Decision

The hearing officer shall issue a written decision containing findings of fact and a determination of the issues presented. If it is shown by a preponderance of all the evidence that the housing provider has violated the Fair Chance Ordinance, the hearing office shall also specify the appropriate penalties and relief that shall be imposed.

J. Timing and Service of Hearing Officer's Decision

The hearing officer shall issue a decision, no later than fifteen days from the date of the hearing. Upon issuance of the hearing officer's decision, the City shall serve a copy on the parties by first class mail within five days.

K. Finality of Hearing Officer's Decision

The decision of the hearing officer on complaint shall constitute the final administrative decision of the City and shall not be appealable to the City Council or any committee or commission of the City.

L. Failure to Obey Order

If, after any order of a hearing officer made pursuant to this Rule has become final, the person to whom such order was directed shall fail, neglect or refuse to obey such order, the City is authorized and directed to take whatever legal action is deemed necessary to remedy the failure to obey the order.

M. Failure to File a Complaint

An applicant is not required to exhaust administrative remedies in order to bring a civil action against the housing provider for failure to comply with the Fair Chance Ordinance.

N. Confidentiality

The City Manager shall encourage reporting of violations by keeping confidential, to the maximum extent permitted by applicable laws, the name and other identifying information of the applicant or other person reporting the violation, unless such a person authorizes the City Manager to disclose his or her name and identifying information as

necessary to enforce the Fair Chance Ordinance or for other appropriate purposes.

VIII. Retaliation

A. Rehabilitation Prohibited

Neither housing providers nor any other person may interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under the Fair Chance Ordinance. This includes interrupting, terminating or failing or refusing to initiate or conduct a transaction involving the rental or lease of residential real property, including falsely representing that a residential unit is not available for rental or lease. This also includes taking adverse action against a person or family member in retaliation for exercising rights protected under the Fair Chance Ordinance. These protections apply to any person who mistakenly, but in good faith, alleges violation of the Fair Chance Ordinance. Examples of what may constitute adverse action are defined above.

B. Protected Exercise of Right under this Article

The following activities include, but are not limited to, the protected exercise of rights under the Fair Chance Ordinance: (1) the right to file a complaint; (2) the right to inform any person about a housing provider's alleged violation of the Article; (3) the right to cooperate with the City Manager or other persons in the investigation or prosecution of any alleged violations of the Fair Chance Ordinance; (4) the right to oppose any policy, practice or act that is unlawful under the Fair Chance Ordinance; and (5) the right to inform any person of his or her rights under the Fair Chance Ordinance.

C. 90-Day Presumption

Taking adverse action against a person within 90 days of the exercise of one or more of the rights described above shall create a rebuttable presumption that such adverse action was taken in retaliation for the exercise of the rights set forth above.

IX. Enforcement

Warning, Notice to Correct, and Technical Assistance

A. First Violation

For a first violation, the City Manager must issue a warning and notice to correct and offer the housing provider technical assistance on how to comply with the requirements of these Rules.

B. Second Violation

For a second violation, the City Manager may impose an administrative penalty of no more than $250.00 that the housing provider must pay for each applicant whose rights were violated or continue to be violated.

C. Third Violation

For a third violation, the City Manager may impose an administrative penalty of no more than $500.00 that the housing provider must pay for each applicant whose rights were violated or continue to be violated.

Subsequent Violations

For subsequent violations, the City Manager may increase the penalty up to $1000.00.

D. Multiple Applicants Impacted by Same Violation

If multiple applicants are impacted by the same procedural violation at the same time (e.g. all applicants for a certain housing unit are asked for their conviction history on the initial application) the violation shall be treated as a single violation rather than multiple violations.

E. Allocation of Penalties

The penalties are payable to the City for each applicant whose rights were, or continue to be, violated.

X. Civil Action

A. Any person, including the City of Richmond, may enforce the provisions of this ordinance by means of a civil action.

B. Injunction. Any person or entity that commits an act, proposes to commit an act, or engages in any pattern and practice which violates this ordinance may be enjoined by any court of competent jurisdiction. An action for injunction under this subsection may be brought by any aggrieved person, by the City Attorney, or by any person or entity who will fairly and adequately represents the interest of the protected class.

C. Damages. Any person or entity who violates or aids or incites another person to violate the provisions of this ordinance is liable for the general and special damages suffered by any aggrieved party or for statutory damages pursuant to section (include cite), whichever is greater, and shall be liable for such attorneys' fees and costs as may be determined by the court in addition thereto.

D. Nonexclusive Remedies and Penalties. The remedies provided in this Chapter are not exclusive, and nothing in this Chapter shall preclude any person from seeking any other remedies, penalties or procedures provided by law.

E. A complaint to City of Richmond for a violation of this ordinance is not a prerequisite to the filing of a civil action or to seeking injunctive relief pursuant to this section. The pendency of a complaint will not bar any civil action, but a final judgment in any civil action involving the same parties and claims shall bar any further proceedings by the City of Richmond.

F. If either party retains a private attorney to pursue litigation pursuant to this provision, the party shall provide notice to the City and the Appeal Hearing Officer within ten (10) calendar days of filing court action against the housing provider, and inform the City and the Appeal Hearing Officer of the outcome of the court action within ten (10) calendar days of any final judgment.

XI. Severability

These rules shall be construed so as not to conflict with applicable local, state, or federal laws, rules or regulations. In the event that a court or an agency of competent jurisdiction holds that a local, state or federal law, rule or regulation invalidates any clause, sentence, paragraph or section of these rules or the application thereof to any person or circumstances, it is the intent of the Commission that the court or agency sever such clause, sentence, paragraph or section so that the remainder of these rules shall remain in effect.

8.5 Cook County Just Housing Amendment Interpretive Rules

PART 700 JUST HOUSING AMENDMENT INTERPRETIVE RULES

Section 700.100 **Prohibition of Discrimination**

Article II of the Cook County Human Rights Ordinance ("Ordinance") prohibits unlawful discrimination, as defined in §42-31, against a person because of any of the following: race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge, source of income, gender identity or housing status.

Additionally, any written or unwritten housing policy or practice that discriminates against applicants based on their criminal history, as defined in § 42-38(a) of the Ordinance, is a violation of the Ordinance. Any written or unwritten housing policy or practice which discriminates against applicants based on their convictions, as defined in § 42-38(a) of the Ordinance, prior to the completion of an individualized assessment violates the Ordinance.

Nothing in this section shall be interpreted as prohibiting a housing provider from denying housing to an applicant based on their criminal conviction history when required by federal or state law.

SUBPART 710 **AUTHORITY AND APPLICABILITY**

Section 710.100 **Authority**

These rules are adopted in accordance with the authority vested in the Cook County Commission on Human Rights ("Commission"), pursuant to § 42-34(e)(5) and §42-38(c)(5)(c) of the Ordinance, to adopt rules and regulations necessary to implement the Commission's powers.

Section 710.110 **Applicability**

These rules shall go into effect on the effective date of the Just Housing Amendment (No. 19-2394) to the Ordinance and shall only apply to claims that arise out of actions that occur on or after the effective date of the amendments.

SUBPART 720 **DEFINITIONS**

Section 720.100 **Business Day**

"Business Day" means any day except any Saturday, Sunday, or any day which is a federal or State of Illinois legal holiday.

Section 720.110 **Criminal Background Check**

"Criminal background check," as referenced in § 42-38(e)(2)(a), includes any report containing information about an individual's criminal background, including but not limited to those produced by federal, state, and local law enforcement agencies, federal and state courts or consumer reporting agencies.

Section 720.120 **Demonstrable Risk**

"Demonstrable risk," as referenced in § 42-38(c)(5)(c), refers to the likelihood of harm to other residents' personal safety and/or likelihood of serious damage to property. When the applicant is a person with a disability, "demonstrable risk" must be based on (a) objective evidence and (b) a conclusion that any purported risk cannot be reduced or eliminated by a reasonable accommodation.

Section 720.130 **Individualized Assessment**

"Individualized Assessment," as referenced in § 42-38(a) means a process by which a person considers all factors relevant to an individual's conviction history from the previous three (3) years. An individualized assessment is not required for convictions that are more than three (3) years old. Factors that may be considered in performing the Individualized Assessment include, but are not limited to:

(1) The nature and severity of the criminal offense and how recently it occurred;

(2) The nature of the sentencing;

(3) The number of the applicant's criminal convictions;

(4) The length of time that has passed since the applicant's most recent conviction;

(5) The age of the individual at the time the criminal offense occurred;

(6) Evidence of rehabilitation;

(7) The individual history as a tenant before and/or after the conviction;

(8) Whether the criminal conviction(s) was related to or a product of the applicant's disability; and

(9) If the applicant is a person with a disability, whether any reasonable accommodation could be provided to ameliorate any purported demonstrable risk.

Section 720.140 **Relevance**

"Relevance," as referenced in § 42-38(e)(2), refers to the degree to which an individual's conviction history makes it likely that the applicant poses a demonstrable risk to the personal safety and/or property of others.

Section 720.150 **Tenant Selection Criteria**

"Tenant selection criteria," as referenced in § 42-38(e)(2)(a), means the criteria, standards and/or policies used to evaluate whether an applicant qualifies for admission to occupancy or continued residency. The criteria, standards and/or policies concerning the applicant's conviction history from the previous three (3) years shall apply only after a housing applicant has been pre-qualified. The criteria must explain how applicants' criminal conviction history from the previous three (3) years will be evaluated to determine whether their conviction history poses a demonstrable risk to personal safety or property.

SUBPART 730 **TWO STEP TENANT SCREENING PROCESS**

Section 730.100 **Notice of Tenant Selection Criteria and Screening Process**

Before accepting an application fee, a housing provider must disclose to the applicant the following information:

(A) The tenant selection criteria, which describes how an applicant will be evaluated to determine whether to rent or lease to the applicant;

(B) The applicant's right to provide evidence demonstrating inaccuracies within the applicant's conviction history, or evidence of rehabilitation and other mitigating factors as described in §740.100(B) below; and

(C) A copy of Part 700 of the Commission's procedural rules or a link to the Commission's website, with the address and phone number of the Commission.

Section 730.110 **Step One: Pre-Qualification**

No person shall inquire about, consider or require disclosure of criminal conviction history before the prequalification process is complete, and the housing provider has determined the applicant has satisfied all other application criteria for housing or continued occupancy.

Section 730.120 **Notice of Pre-Qualification**

Once a housing provider determines an applicant has satisfied the pre-qualification standards for housing, the housing provider shall notify the applicant that the first step of the screening procedure has been satisfied and that a criminal background check will be performed or solicited.

Section 730.130 **Step Two: Criminal Background Check**

After a housing provider sends the notice of pre-qualification required by Section 730.120, a housing provider may conduct a criminal background check on the prequalified applicant. However, the housing provider may not consider any information related to the criminal convictions that are more than three (3) years old or any covered criminal history as defined in Section 42-38(a) of the Ordinance.

SUBPART 740 **CONVICTION DISPUTE PROCEDURES**

Section 740.100 **Notice**

Within five days of obtaining a background check on an applicant, the housing provider must deliver a copy of the background check to the applicant. The housing provider must complete delivery in one of the following ways: (1) in person, (2) by certified mail, or (3) by electronic communication (e.g., text, email).

Section 740.110 **Opportunity to Dispute the Accuracy and Relevance of Convictions**

Once a housing provider complies with the requirements of Section 740.100, the applicant shall have an additional five (5) business days to produce evidence that disputes the accuracy or relevance of information related to any criminal convictions from the last three (3) years.

Section 740.120 **Dispute Procedures and Other Applicants**

Nothing in these rules shall prevent a housing provider from approving another pre-qualified individual's housing application during the pendency of the criminal conviction dispute process.

SUBPART 750 **REVIEW PROCESS**

750.100 **General**

After giving an applicant the opportunity to dispute the accuracy and/or relevance of a conviction, a housing provider shall conduct an individualized assessment, in accordance with Sections 720.120 through 720.140. of these rules, to determine whether the individual poses a demonstrable risk. If the applicant poses a demonstrable risk, the housing provider may deny the individual housing.

Section 750.110 **Exceptions**

A housing provider must perform an individualized assessment prior to denying an individual housing based on criminal conviction history, except in the following circumstances:

(A) A current sex offender registration requirement pursuant to the Sex Offender Registration Act (or similar law in another jurisdiction); and/or

(B) A current child sex offender residency restriction.

Section 750.120 **Prohibited Factors**

Any person conducting an individualized assessment, as defined in Section 720.130 of these rules, is prohibited from basing any adverse housing decision, in whole or in part, upon a conviction that occurred more than (3) years from the date of the housing application.

SUBPART 760 **NOTICE OF FINAL DECISION**

Section 760.100 **Decision Deadline**

A housing provider must either approve or deny an individual's housing application within three (3) business days of receipt of information from the applicant disputing or rebutting the information contained in the criminal background check.

Section 760.110 **Written Notice of Denial**

(A) Any denial of admission or continued occupancy based on a conviction must be in writing and must provide the applicant an explanation of why denial based on criminal conviction is necessary to protect against a demonstrable risk of harm to personal safety and/or property.

(B) The written denial must also contain a statement informing the housing applicant of their right to file a complaint with the Commission.

Section 760.120 **Confidentiality**

The housing provider must limit the use and distribution of information obtained in performing the applicant's criminal background check. The housing provider must keep any information gathered confidential and in keeping with the requirements of the Ordinance.

SUBPART 770 **EVALUATION**

Section 770.100 **Evaluation and Report**

The Commission on Human Rights shall conduct an evaluation of the rules implementing the Just Housing Amendment to the Cook County Human Rights Ordinance to determine whether the rules should be amended to better effectuate the Amendment's purpose. The evaluation shall include an analysis of whether applicants who receive a positive individualized assessment from housing providers are ultimately admitted into the unit that they applied for. This analysis will inform the Commission on Human Rights on whether it needs to modify the rules to re-instate a requirement that housing providers hold the unit open during the individualized assessment process. In addition, the evaluation should include data about complaints brought under the Just Housing Amendment. The evaluation shall be completed and made publicly available by March 31, 2021.

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2016/2017 Civil Rights, Utilities, Economic Development & Arts Committee

Civil Rights, Utilities, Economic Development, and Arts Committee 8/8/17

8/8/2017 | 2:32:45

Agenda: Public Comment; Appointments to the Seattle Women's Commission; CB 119015: relating to housing regulations; CB 119051: relating to water services; CB 119050: relating to rates and charges for water services; Res 31760: adopting a 2018-2023 Strategic Business Plan Update for Seattle Public Utilities; CB 119036: contract with Cedar Grove Composting; CB 119052: relating to Seattle Public Utilities.

TV ID: 2501729

Advance to a specific part

Public Comment - 02:11

Appointments to the Seattle Women's Commission - 40:18

CB 119015: relating to housing regulations - 45:19

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Civil Rights, Utilities, Economic Development, and Arts Committee 12/12/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x86095)

12/12/2017

Agenda: Public Comment; Appt 00856: Appointments; Appt 00880: Reappointments; Appt 00855: Appointments; 8. University District Small Business Impact Study; CB 119165: relating to Seattle Public Utilities; CB 119140: authorizing Seattle Public Utilities to enter into agreements with the Port of Seattle and BP West Coast Products LLC; CB 119167: relating to Seattle Public Utilities; CB 119166: relating to Seattle Public Utilities; Seattle Public Utilities 2017 Audit Entrance Report; CB 119169: relating to the Department of Parks and Recreation.

(/mayor-and-council/city-

council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x85484)

Civil Rights, Utilities, Economic Development, and Arts Committee 11/28/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x85484)

11/28/2017

Agenda: Cultural Spotlight; Public Comment; Appointments to Seattle Human Rights Commission; Appointments to Seattle Women's Commission; CB 119141: relating to historic preservation - Campbell Building; CB 119140: Seattle Public Utilities easements (held); CB 119142: relating to Seattle Public Utilities; CB 119144: relating to City employment; CB 119145: relating to employment in Seattle.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x84552)

Civil Rights, Utilities, Economic Development, and Arts Committee Special Meeting 10/31/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x84552)

10/31/2017

Agenda: Lunch and Learn Special Meeting on Prisoner and Community Corrections and Re-entry Work Group preliminary report back.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x82171)

Civil Rights, Utilities, Economic Development, and Arts Committee Special Meeting 9/12/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee

/?videoid=x82171)
9/12/2017
Agenda: Word's Worth, Public Comment, Res 31760: Strategic Business Plan Update for Seattle Public Utilities, CB 119050: relating to rates and charges for water services, CB 119051: relating to water services, CB 119075: relating to wastewater and drainage services, Seattle Office for Civil Rights issue areas that would benefit from independence, Appointments and Reappointments, CB 119037: related to appropriations for the Office of Arts & Culture, Res 31766: creating an Arts & Cultural District in the Uptown neighborhood of Seattle.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x79673)
Civil Rights, Utilities, Economic Development, and Arts Committee 8/8/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x79673)
8/8/2017
Agenda: Public Comment; Appointments to the Seattle Women's Commission; CB 119015: relating to housing regulations; CB 119051: relating to water services; CB 119050: relating to rates and charges for water services; Res 31760: adopting a 2018-2023 Strategic Business Plan Update for Seattle Public Utilities; CB 119036: contract with Cedar Grove Composting; CB 119052: relating to Seattle Public Utilities.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x79283)
Civil Rights, Utilities, Economic Development, and Arts Committee 7/25/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x79283)

7/25/2017

Agenda: Cultural Spotlight, Public Comment; Appointments to the Seattle Commission for People with Disabilities, Seattle Human Rights Commission and Seattle LGBTQ Commission; CB 119015: Fair Chance Housing; Res 31760: Seattle Public Utilities Strategic Business Plan Update; CB 119035: King Street Station third-floor tenant improvements.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x78912)

Civil Rights, Utilities, Economic Development & Arts - Special Meeting - Public Hearing 7/13/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x78912)

7/13/2017

Agenda: CB 119015: relating to housing regulation, Overview of Legislation and Data Presentation, Public Hearing.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x78724)

Civil Rights, Utilities, Economic Development & Arts Committee 7/11/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x78724)

7/11/2017

Agenda: Word's Worth, Public Comment, Appointments, CB 118939: related to City public works, Res 31760: relating to Seattle Public Utilities.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x78464)

Civil Rights, Utilities, Economic Development & Arts Committee 6/27/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x78464)

6/27/2017

Agenda: Cultural Spotlight, Public Comment, Seattle Public Utilities Solid Waste Services Draft Request for Proposals, Seattle Public Utilities Capital Projects Report, The CAP Report: 30 Ideas for the Creation, Activation and Preservation of Cultural Spaces.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x77786)

Civil Rights, Utilities, Economic Development & Arts Committee 6/13/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x77786)

6/13/2017

Agenda: Public Comment, CB 118984: relating to Seattle Office for Civil Rights, Mayor's Youth Employment Initiative.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x76441)

Civil Rights, Utilities, Economic Development & Arts Committee 5/23/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x76441)

5/23/2017

Agenda: Cultural Spotlight, Public Comment, Appointment and Reappointment to the Seattle Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) Commission, 2017 workplans of Seattle Office for Civil Rights commissions, CB 118984: relating to the Seattle Office for Civil Rights, Report on 2016 Audits of Seattle Public Utilities, Fair Chance Housing.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x75991)

Civil Rights, Utilities, Economic Development & Arts Committee 5/9/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x75991)

5/9/2017

Agenda: Word's Worth, Public Comment, Appointments to the Seattle Music Commission, the Special Events Committee, and the Seattle Commission for People with Disabilities.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x75288)

Civil Rights, Utilities, Economic Development & Arts Committee (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x75288)

4/25/2017

Agenda: Cultural Spotlight - Delridge Neighborhoods Development Association, Public Comment, Appointments and reappointments to the Labor Standards Advisory Commission, Josephine: The Private Network for Home Cooked Meals, Seattle Public Utilities 2018-2023 Strategic Business Plan Status Update.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x71999)

Civil Rights, Utilities, Economic Development & Arts Committee (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x71999)

4/11/2017

Agenda: Word's Worth, Public Comment, CB 118944: relating to Seattle Public Utilities and funding assistance, CB 118947: relating to the drainage and wastewater system of The City, New Customer Information System Implementation Audit.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x71555)

Civil Rights, Utilities, Economic Development & Arts Committee 3/31/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x71555)

3/31/2017

Agenda: Public Comment, Office of Film and Music 2017 Workplan and 2016 Race and Social Justice Initiative Report, Seattle Music Commission 2017 Workplan, Seattle Public Utilities Customer Review Panel Update on Strategic Business Plan, CB 118935: relating to Seattle Public Utilities recycling requirements, CB 118939: related to City public works and priority hire.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x71219)

Civil Rights, Utilities, Economic Development & Arts Committee 3/14/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x71219)

3/14/2017

Agenda: Word's Worth, Public Comment, Appointment to the Seattle Arts Commission, Office of Arts and Culture 2016 RSJI Report, CB 118932: Seattle Public Utilities' contract with Waste Management, Secure Scheduling draft rules, Appointment to the Labor Standards Advisory Commission.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x70912)

Civil Rights, Utilities, Economic Development & Arts Lunch and Learn - Special Meeting 3/1/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x70912)

3/1/2017

Agenda: Trump-Proof Seattle: A Lunch and Learn Forum on Tax Justice, Public Comment.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x70877)

Civil Rights, Utilities, Economic Development & Arts Committee 2/28/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x70877)

2/28/2017

Agenda: Public Comment, Priority Hire Annual Report, Community Service in the Arts: 5th Avenue Theatre and Seattle Symphony.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x70651)

Civil Rights, Utilities, Economic Development & Arts Committee 2/14/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x70651)

2/14/2017

Agenda: Word's Worth, Public Comment, Appt 00565: Appointment of Tara Cookson as member, Seattle Women's Commission, CB 118903: relating to Seattle Public Utilities, Seattle Public Utilities 2016 Race and Social Justice Initiative Report, Office of Economic Development 2016 Race and Social Justice Initiative Report, The Scarecrow Project.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x70317)

Civil Rights, Utilities, Economic Development & Arts Committee 1/24/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x70317)

1/24/2017

Agenda: Public Comment, Reappointments to the Museum Development Authority, Appointment to the Human Rights Commission, CB 118895: relating to Seattle Public Utilities.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x69980)

Civil Rights, Utilities, Economic Development & Arts Committee 1/10/17 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x69980)

1/10/2017

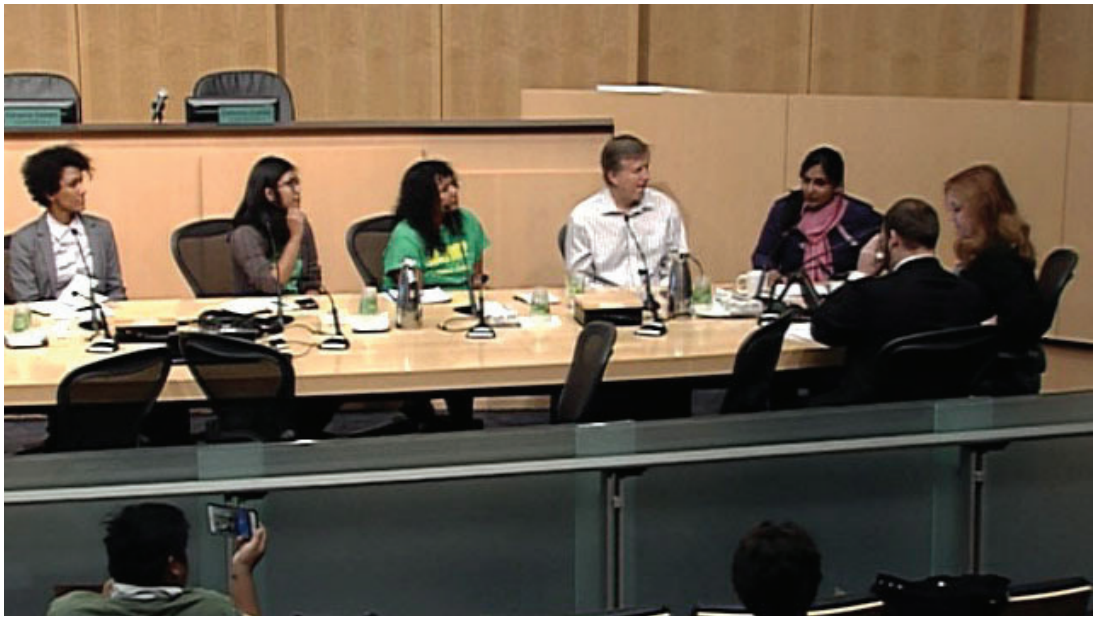
Agenda: Word's Worth, Public Comment, Appointments to the Seattle Human Rights Commission, Appointments to the Seattle Music Commission, CB 118870: City's Tolt Water Transmission Pipeline right-of-way, Cultural Space Inventory and Stability Index, Arts Commission/Music Commission recommendations on cultural spaces.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x69647)

Civil Rights, Utilities, Economic Development & Arts Committee 12/13/16 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x69647)

12/13/2016

Agenda: Public Comment, Appointments to the Seattle Music Commission, Appointments to the Seattle Human Rights Commission, Appointments to the Seattle Commission for People with Disabilities, Appointment to the Seattle Women's Commission, CB 11887: Seattle Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) Commission name, Appointment of Dylan Orr as Director of the Office of Labor Standards, CB 11886: Taylor Creek, CB 118878: Tolt Pipeline Trail permit, Seattle Public Utilities 2016 Audit Entrance Plan.



(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x68122)

Civil Rights, Utilities, Economic Development & Arts Committee 9/23/16 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x68122)

9/23/2016

Agenda: Public Comment, Res 31712: advance green careers for people of color and other marginalized or under-represented groups, Appointment to the Seattle Human Rights Commission, CB 118771: related to appropriations for the Office of Arts & Culture, CB 118806: Sewer facility easements, CB 118760: Ship Canal Water Quality Project, CB 118805: charge for certain recyclable paper bags, Hugo House briefing

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x67959)

Civil Rights, Utilities, Economic Development & Arts Committee 9/16/16 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x67959)

9/16/2016

Agenda: Public Comment, Appointment and Oath of Office of Mami Hara as Director of Seattle Public Utilities, CB 118773: North Fork Tolt River Watershed, CB 118774: Port of Seattle Drainage System, CB 118775: loan from the Washington State Public Works Board.

(/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x67908)

Civil Rights, Utilities, Economic Development & Arts Committee 9/13/16 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x67908)

9/13/2016

Agenda: Word's Worth, Public Comment, CB 118765: Relating to secure scheduling requirements

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2 (/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?pageNum=2&itemsPer=25&displayType=Thumbnail_Excerpt)

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