

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CHONG and MARILYN YIM, KELLY LYLES,
EILEEN, LLC, and RENTAL HOUSING
ASSOCIATION OF WASHINGTON

Plaintiffs,

v.

THE CITY OF SEATTLE, a Washington
municipal corporation,

Defendant.

Case No. 2:18-cv-00736-JCC

**JOINT MOTION OF CONSUMER
DATA INDUSTRY ASSOCIATION
AND NATIONAL ASSOCIATION OF
PROFESSIONAL BACKGROUND
SCREENERS FOR LEAVE TO FILE
BRIEF OF *AMICI CURIAE* IN
SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT**

NOTE ON MOTION CALENDAR:
December 7, 2018

The Consumer Data Industry Association, and the National Association of Professional Background Screeners, hereby submit this Joint Motion for Leave to File Brief of *Amici Curiae* in Support of Plaintiffs’ Motion for Summary Judgment (“Motion”).

I. MOTION FOR PERMISSION TO FILE BRIEF OF *AMICI CURIAE*

A. Identity of Moving Parties

The Consumer Data Industry Association (“CDIA”) is a trade association representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and

1 manage risk. Through data and analytics, CDIA members empower economic opportunity,
2 helping ensure fair and safe transactions for consumers, facilitating competition, and expanding
3 consumers' access to financial and other products suited to their unique needs.

4 The National Association of Professional Background Screeners ("NAPBS") is an
5 international trade association of over 900 member companies that provide employment and tenant
6 background screening and related services to virtually every industry around the globe. The tenant
7 screening reports prepared by NAPBS's background screening members (which do not include
8 any of the parties to this action) are used by landlords and property managers every day to ensure
9 that residential communities are safe for all who work, reside, or visit there. NAPBS members
10 range from large background screening companies to individually-owned businesses, each of
11 which must comply with applicable law, including when they obtain, handle, or use public record
12 data.

13 **B. Statement of Relief Sought**

14 CDIA and NAPBS request permission to file a brief as *amici curae* in support of Plaintiffs'
15 pending motion for summary judgment (Dkt. No. 23). As a "friend of the court," it is the role of
16 an amicus curiae to submit briefing designed to assist the court in cases of general public interest,
17 supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape
18 consideration. *Cnty. Ass'n for Restoration of Env't (CARE) v. DeRuyter Bros. Dairy*, 54 F.Supp.2d
19 974, 975 (E.D. Wash. 1999) (citing *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d
20 203, 204 (9th Cir. 1982)); *see also* authorities cited in this Court's Order (Dkt. No. 37) granting
21 motions for leave to file *amicus curiae* briefs submitted by the National Housing Law Project and
22 Sargent Shriver National Center on Poverty Law (Dkt. No. 26), and the Fred T. Korematsu Center
23 for Law and Equality (Dkt. No. 28). An amicus brief may be allowed when the amicus has unique
24 information or perspective that can assist the court (beyond what the parties and their counsel are
25 able to provide). *Id.*

1 **C. Issues to Which the *Amici Curiae* Brief Will Be Directed**

2 In this case, Plaintiffs challenge the legality of the Fair Chance Housing Ordinance, Seattle
3 Municipal Code section 14.09, because it violates the Due Process and Free Speech provisions of
4 the Washington State Constitution and the United States Constitution, and seek to permanently
5 enjoin Defendant, the City of Seattle, from its enforcement. (Complaint, ¶ 49-62, Dkt. No. 1-1).
6 CDIA and NAPBS seek leave to file their joint Brief of *Amici Curiae*, a copy of which is attached
7 to this Motion as Exhibit A, to support Plaintiffs' position and provide the Court with background
8 and analysis on (1) the critical role that tenant screening serves in the rental housing market, (2)
9 the federal laws that require appropriate screening of tenants, and (3) why the Ordinance, as
10 interpreted and applied by the City of Seattle to the members of CDIA and NAPBS, is preempted
11 by two different provisions of federal law—the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et*
12 *seq.*, and Executive Order 12334 and related regulations that prohibit persons from entering into
13 transactions with certain foreign nationals.

14 **D. Consent of Parties Requested**

15 CDIA and NAPBS have requested and obtained the consent of the Plaintiffs herein to their
16 participation as *amici*. CDIA and NAPBS have also requested the consent of Defendant, but as of
17 the filing of this Motion have not yet received any consent or objection from the City of Seattle.

18 **II. CONCLUSION**

19 For the foregoing reasons, the Consumer Data Industry Association and the National
20 Association for Professional Background Screeners respectfully request that the Court grant their
21 joint Motion and permit them to file the attached Brief of *Amici Curiae*.

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November 21, 2018

s/ Douglas E. Smith
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CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Ste. 3200, Seattle, WA 98101. On November 21, 2018, I

<input checked="" type="checkbox"/>	ELECTRONICALLY FILED the foregoing document(s) with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:
<input type="checkbox"/>	U.S. MAIL by placing a true copy for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Seattle, Washington addressed as set forth below.
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Brian T. Hodges, WSBA #31976 Ethan W. Blevins, WSBA #48219 Pacific Legal Foundation 10940 NE 33 rd Place Bellevue, WA 98004 T: 425.576.0484 F: 425.576.9565 bth@pacificlegal.org eblevins@pacificlegal.org	Roger Douglas Wynne, WSBA #23399 Sara O'Connor-Kriss, WSBA #41569 Seattle City Attorney's Office 701 Fifth Ave. Suite 2050 Seattle, WA 98104-7097 T: 206.233.2177 Roger.wynne@seattle.gov Sara.oconnor-kriss@seattle.gov Jessica L. Goldman, WSBA #21856 Summit Law Group 315 5th Ave. S., Ste. 1000 Seattle, WA 98104 T: 206.676.7000 F: 206.676.7001 jessicag@summitlaw.com
<i>Attorneys for Plaintiffs</i>	<i>Attorneys for Defendant</i>

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed on November 21, 2018 at Seattle, Washington.

s/ Liana Natividad

 Liana Natividad
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EXHIBIT A

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHONG and MARILYN YIM, KELLY
LYLES, EILEEN, LLC, and RENTAL
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**BRIEF OF AMICI CURIAE
CONSUMER DATA INDUSTRY
ASSOCIATION AND NATIONAL
ASSOCIATION OF PROFESSIONAL
BACKGROUND SCREENERS IN
SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT**

NOTE ON MOTION CALENDAR:
December 7, 2018

In accordance with the Court’s October 1, 2018 Minute Order (Dkt. No. 25), the Consumer Data Industry Association, together with the National Association of Professional Background Screeners (collectively, “*amici*”), respectfully submit this brief in support of Plaintiffs’ Motion for Summary Judgment (Dkt. No. 23).

I. Statement of Interest and Summary of the Brief

The Consumer Data Industry Association (“CDIA”) is a trade association representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and

1 manage risk. Through data and analytics, CDIA members empower economic opportunity,
2 thereby helping to ensure fair and safe transactions for consumers, and facilitating competition and
3 expanding consumers' access to financial and other products suited to their unique needs.

4 The National Association of Professional Background Screeners ("NAPBS") is an
5 international trade association of over 900 member companies that provide employment and tenant
6 background screening and related services to virtually every industry around the globe. The tenant
7 screening reports prepared by NAPBS's background screening members are used by landlords and
8 property managers every day to ensure that residential communities are safe for all who work,
9 reside, or visit there. NAPBS members range from large background screening companies to
10 individually-owned businesses, each of which must comply with applicable law, including when
11 they obtain, handle, or use public record data.

12 The tenant screening reports that *amici* members provide are consumer reports governed
13 by the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* ("FCRA"). Such reports help property
14 owners assess and mitigate against financial risk, as well as provide an objective mechanism by
15 which property managers can prioritize the safety of their employees, residents and guests. As
16 demonstrated by Plaintiffs in their Motion for Summary Judgment (Dkt. No. 23), Seattle Municipal
17 Code section 14.09, referred to as the Fair Chance Housing Ordinance (the "Ordinance"), restricts
18 the lawful use of tenant screening reports that include criminal record information, and operates
19 as an unconstitutional restriction of commercial speech in violation of the First Amendment and
20 the Constitution of the State of Washington.

21 Further, the Ordinance, as interpreted by the Seattle Office of Civil Rights ("SOCR"),
22 which has the authority to enforce the Ordinance, seeks to restrict consumer reporting agencies
23 ("CRAs") from providing landlords with criminal record information, and to prohibit rental
24 housing providers from receiving information required for compliance with Executive Order
25 12334 and the regulations promulgated by the U.S. Department of the Treasury and enforced by
26 the federal Office of Foreign Asset Control ("OFAC"). Any application of the Ordinance to restrict

1 the provision of criminal records in consumer reports, or to restrict the provision and use of OFAC
2 information, is preempted by federal law.

3 **II. Background on the Ordinance and SOCR's Interpretation that the Ordinance**
4 **Applies to Consumer Reporting Agencies and OFAC Alerts.**

5 As written, the Ordinance limits a landlord's use of and inquiry into a prospective tenant's
6 criminal history in several ways. Specifically, the Ordinance:

- 7 1. Restricts a landlord's use of a prospective tenant's criminal history. Seattle Mun. Code §
8 14.09.025. Under the Ordinance:
- 9 a. Landlords may not advertise or have a policy that they exclude all individuals with
10 criminal arrest records. Seattle Mun. Code 14.09.025(A)(1).
 - 11 b. Landlords may not inquire about or take adverse action against a prospective tenant
12 or member of their household based on any criminal record. Seattle Mun. Code
13 14.09.025(A)(2).
 - 14 c. Landlords may not carry out an adverse action based on registry information absent
15 a legitimate business justification for doing so. Seattle Mun. Code
16 14.09.025(A)(3).
 - 17 i. If a landlord takes an adverse action based on a legitimate business
18 justification, it must give written notice to the prospective applicant and
19 specify the registry information its decision was based on. Seattle Mun.
20 Code 14.09.025(B).
 - 21 d. Landlords may not carry out an adverse action based on registry information
22 regarding any prospective juvenile occupant. Seattle Mun. Code 14.09.025(A)(4).
 - 23 e. Landlords may not carry out an adverse action based on registry information if the
24 conviction occurred when the prospective tenant was a juvenile. Seattle Mun. Code
25 14.09.025(A)(5).
- 26

- 1 2. Requires that when a consumer report is used by a landlord as part of the screening of
2 prospective tenants, the landlord must provide the identity and contact information of the
3 screening agency to the prospective tenant and give notice of the tenant’s right to obtain a
4 free copy of the report in the event of an adverse action. Seattle Mun. Code 14.09.025(C).
- 5 3. Further requires landlords to give notice of whether the landlord screens for conviction
6 records and what criteria will apply. Seattle Mun. Code § 14.09.020.
- 7 4. Prohibits any person from taking adverse action against any other person because of the
8 person’s exercise of their rights under the Ordinance. Seattle Mun. Code. § 14.09.030
- 9 5. Prohibits any person from reporting the undocumented immigration status of a person who
10 is exercising their rights under the Ordinance. Seattle Mun. Code § 14.09.030

11 Although the Ordinance expressly states that it “*shall not be interpreted or applied to*
12 *diminish or conflict with any requirements of state or federal law, including but not limited to . . .*
13 *the Federal Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.,*” Seattle Mun. Code. § 14.09.115(A)
14 (emphasis added), the Seattle Office for Civil Rights (“SOCR”)—which is charged with the
15 enforcement of the Ordinance—has interpreted this provision in a manner that brings it into direct
16 conflict with the FCRA and other federal law.¹ Specifically, the SOCR has interpreted the
17 Ordinance as applying to consumer reporting agencies that provide reports for tenant screening
18 purposes:

19 Unless there is an exclusion, neither landlords **nor any person** may
20 run criminal background checks. Examples of “any person”
21 include, but are not limited to: property managers, owners,
22 **screening companies**, etc.

23 *See* Seattle Office for Civil Rights, “Fair Chance Housing Ordinance, SMC 14.09 Frequently
24 Asked Questions”² (hereinafter “Seattle SOCR FAQs”), p. 3 (emphasis added).

25 ¹ The SOCR has the authority to enforce the Ordinance. City of Seattle, Ordinance 125393, Council Bill 119015
([https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/Fair%20Chance%20Housing%20F](https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/Fair%20Chance%20Housing%20FAQ_amendments_FINAL_08-23-18.pdf)
26 [AQ_amendments_FINAL_08-23-18.pdf](https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/Fair%20Chance%20Housing%20FAQ_amendments_FINAL_08-23-18.pdf)).

² The Seattle SOCR FAQs may be accessed at [https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-](https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing)
[chance-housing](https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing)

1 Similarly, the Seattle SOCR FAQs also state that “[a]ny attempt of a landlord **or any**
2 **person** to gather information about arrest records, conviction records, or criminal history from any
3 other source [other than a sex offender registry] will be a violation of SMC 14.09, unless an
4 exclusion applies.” Seattle SOCR FAQs, p. 8. The Seattle SOCR FAQs further interpret the
5 Ordinance as prohibiting landlords “or any person” from checking the accuracy of registry
6 information by conducting a criminal background check. *Id.* at 7.

7 In addition to the interpretations set forth in its formal FAQs, the SOCR, in discussions
8 with various members of the *amici*, has taken the position that the criminal record restrictions in
9 the Ordinance prohibit a CRA from providing, or a landlord from receiving, information from
10 OFAC regarding persons on the Specially Designated Nationals and Blocked Person List (known
11 as the “OFAC list”). Specifically, SOCR takes the position that alerts from the OFAC list are
12 “criminal records” and/or that the alerts indicate that an applicant is on a watch list but has not
13 officially been charged with a crime.

14 III. Argument

15 As set forth more fully below, CDIA and NAPBS support Plaintiffs’ Motion for Summary
16 Judgement because the Ordinance operates as an unconstitutional restriction of commercial
17 speech, in violation of the First Amendment and the Constitution of the State of Washington. In
18 addition, any interpretation of the Ordinance as restricting the contents of consumer reports
19 prepared by CRAs is preempted by the FCRA. Finally, any interpretation of the Ordinance as
20 prohibiting rental housing providers from receiving information for OFAC compliance is
21 preempted by Executive Order 13224 and the U.S. Department of the Treasury’s regulations
22 thereunder.

23 A. Tenant Background Screening is Critically Important to Public Safety.

24 As a threshold matter, it is important to understand the critical role the tenant screening
25 industry plays in our communities. Consumer reporting agencies provide consumer reports to
26 assist owners, landlords, and managers of residential properties (including nursing homes and

1 apartment communities) in evaluating prospective tenants and assessing the risks associated with
2 those applicants. Property managers have a financial responsibility to evaluate the applicant's
3 ability to satisfy their leasing obligations, but also to assure the safety and wellbeing of their
4 employees, residents, and guests.

5 Tenant screening reports may include: (1) financial information, including a credit score,
6 credit report, income verification and rent payment history; (2) eviction information, consisting of
7 unlawful detainer filings and judgments; and (3) criminal background information regarding the
8 commission of crimes against a person (such as assault, rape, homicide, etc.) and the commission
9 of property crimes (including burglary, vandalism, larceny). Each piece of information provides
10 the landlord with predictors regarding the risk associated with an applicant, such as an applicant's
11 ability to pay their potential lease obligations when due, and insight into any past criminal history,
12 to allow the property manager to evaluate the applicant using these objective factors, as opposed
13 to subjective, uncontrolled, criteria.

14 *Amici* conduct residential screening pursuant to the terms of the FCRA.³ Their clients—
15 property owners and management companies—typically receive three different kinds of race-
16 neutral information about prospective tenants: (1) financial information, including a credit score,
17 credit report, income verification and rent payment history; (2) eviction information, consisting of
18 unlawful detainer records; and (3) criminal background information consisting of damage to
19 persons (including sex offender information) and property. Each of these categories provides the
20 landlord with reliable predictors regarding the tenant's ability to pay and general suitability for a
21 particular property. *Cf.* Bd. of Governors of the Fed. Reserve Sys., *Report to the Congress on*
22 *Credit Scoring and Its Effects on the Availability and Affordability of Credit* S1-S2 (2007) (noting
23 that credit scores act as predictors of default and not as proxies for race). For example, individuals
24

25 ³ In general terms, the FCRA regulates consumer information and sets the terms under which such information
26 (including public record information) can be used. *See* 15 U.S.C. § 1681a(d), (f) (defining consumer report and
consumer reporting agency, respectively); *see generally* ABA Section of Antitrust Law, *Consumer Law Developments*
117-19 (2009) (summarizing function and scope of FCRA).

1 who have not skipped or been late in rent payments have a roughly six percent rate of default;
2 prospects with a rental debt default at a rate of nearly one in four.⁴ Owners looking to maintain
3 viable properties properly seek to avoid these costs, and *amici*'s services help them do so.

4 In addition to reducing housing costs, residential screening also advances public safety.
5 *See, e.g., HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (affirming the ability of public housing
6 authorities to have no-fault evictions to protect health and safety interests); *see also* Preventing
7 Crime in Federally Assisted Housing—Denying Admission and Terminating Tenancy for
8 Criminal Activity or Alcohol Abuse, 24 C.F.R. § 5.850 *et seq.* (2013) (defining times when public
9 housing authorities may or must terminate tenants involved in particular types of criminal activity);
10 *cf. NASA v. Nelson*, 131 S. Ct. 746, 758 (2011) (acknowledging the legitimate needs of the
11 government as employer to screen employees for drug use and other elements of their background).
12 The responsible use of tenant screening advances all of these interests—economic stability,
13 protection from identity theft, and general public safety. Indeed, some evidence exists that the use
14 of background screening may actually *reduce* the incidence of racial discrimination by shattering
15 subconscious stereotypes.⁵

16 The federal government has recognized the clear benefits of tenant screening, requiring
17 that criminal history reports be used in the tenant screening process for public housing. Congress
18 has enumerated four discrete categories of applicants with criminal histories that public housing
19 authorities must reject: (1) persons subject to a lifetime registration requirement under state sex
20 offender laws; (2) persons convicted of methamphetamine production on public housing property;
21 (3) persons evicted from public housing for drug-related criminal activity in the three years prior
22 to the application, unless the evicted individual completed an approved rehabilitation program;
23 and (4) persons currently engaged in illegal drug use. 42 U.S.C. § 1437n(f); 42 U.S.C. § 13661;

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25 ⁴ *See* Experian, *Risk versus Reward: Identifying the Highest Quality Resident Using Rental Payment History* 4 (2013),
<http://www.experian.com/assets/rentbureau/white-papers/experian-rentbureau-rental-history-analysis.pdf>.

26 ⁵ *See* Harry J. Holzer *et al.*, *Perceived Criminality, Criminal Background Checks and the Racial Hiring Practices of Employers*, 49 J. Law & Econ. 451, 452 (2006).

1 42 U.S.C. § 13663; 24 C.F.R. § 960.204.

2 Beyond these mandatory bans, public housing authorities have discretion to develop more
3 stringent screening policies and to accept or deny prospective renters with records of other crimes.
4 Federal guidelines instruct that public housing authorities may reject applicants who have engaged
5 in any of the following activities within a reasonable time before submitting their application:
6 drug-related criminal activity; violent criminal activity; and other criminal activity that would
7 adversely affect the health, safety, or right to peaceful enjoyment of the premises by other
8 residents, the owner, or public housing-agency employees. 42 U.S.C. § 13661(c).

9 Sadly, tragic consequences may result when a property owner fails to perform criminal
10 background checks on prospective tenants. For example, in Nebraska in 2016, a tenant's minor
11 child was kidnapped and raped by another resident who had been allowed to move into a rental
12 community without first undergoing a background check. *Cure v. Pedcor Mgmt. Corp.*, 265
13 F.Supp.3d 984, 988–89 (D. Neb. 2016) (trial court refused to grant defendant's motion to dismiss,
14 finding instead that the plaintiff had alleged sufficient facts to argue that had the landlord
15 conducted a background check, it would have been discovered that the perpetrator had multiple
16 convictions for assault and public indecency). A property management company serves as a first
17 line of defense against violent crimes occurring on an owner's property, and the tenant screening
18 process permits the property owner to fulfill that critical responsibility.

19 As set forth more fully in Plaintiff's Motion for Summary Judgment, through its restrictions
20 on the use or inquiry of criminal record information, the Ordinance operates as an impermissible
21 restriction on speech in contravention of the First Amendment and the Washington State
22 Constitution. *See* Plaintiff's Motion for Summary Judgment (Dkt. No. 23), at pp. 5-17. Given the
23 important role that criminal history information plays in protecting the safety of the public and
24 tenants, CDIA and NAPBS support Plaintiffs' Motion for Summary Judgment.

1 **B. The FCRA Expressly Preempts Any Interpretation of the Ordinance that Attempts**
 2 **to Regulate the Content of Consumer Reports.**

3 The preemption doctrine arises out of the Supremacy Clause of the United States
 4 Constitution, which provides that “[t]his Constitution, and the Laws of the United States which
 5 shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the
 6 Authority of the United States, shall be the supreme Law of the Land; and the Judges in every
 7 State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary
 8 notwithstanding.” Federal statutes may preempt state laws either expressly or impliedly through
 9 a statute’s structure and purpose. *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008); *Retail Clerks Int’l*
 10 *Ass’n v. Schermerhorn*, 375 U.S. 96, 103 (1963).

11 The FCRA provides for multiple forms of preemption of state law under 15 U.S.C. § 1681t.
 12 First, FCRA § 1681t(a) preempts any state law that is “*inconsistent with any provision*” of the
 13 FCRA. This “conflict preemption” rule codifies the longstanding approach to conflict preemption
 14 taken by the courts, in which state law is preempted when there is outright or actual conflict
 15 between federal and state law, or where compliance with both federal and state law is physically
 16 impossible. *See Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986).⁶

17 Second, FCRA § 1681t(b)(1) expressly provides for even broader preemption in specific
 18 circumstances, namely, that no requirement or prohibition may be imposed by any state *with*
 19 *respect to any subject matter* specified in the enumerated subsections of FCRA § 1681t(b)(1). This
 20 is referred to as the FCRA’s “Subject Matter Preemption.” Relevant here, the FCRA mandates
 21 that:

22 No requirement or prohibition may be imposed under the laws of any State

23 (1) with respect to any subject matter regulated under . . .

24 (E) section 1681c of this title, relating to information contained in consumer

25 ⁶ Conflict preemption is relevant to the SOCR’s application of the Ordinance to the OFAC list, as discussed more
 26 fully below.

1 reports, except that this subparagraph shall not apply to any State law in effect on
2 September 30, 1996[.]
3 15 U.S.C. § 1681t(b)(1)(E) (emphasis added).

4 FCRA § 1681c expressly *permits* a consumer reporting agency to include in a consumer
5 report the very categories of criminal history information prohibited under the Ordinance—
6 namely, arrest records, convictions, and “other adverse information.” In crafting this FCRA
7 provision, Congress balanced the clear need users would have for this type of information against
8 its impacts on consumers and created an “obsolescence” rule that permits CRAs to permanently
9 report certain adverse information about consumers, but to only report other adverse information
10 on consumers for a shorter duration. In particular, while arrest records may only be reported for
11 the longer of seven years from date of entry, or until the governing statute of limitations has
12 expired, criminal conviction information may be reported by a consumer reporting agency
13 indefinitely. 15 U.S.C. §§ 1681c(a)(2), (5).

14 The subject matter preemption provided in FCRA § 1681t(b)(1) is broad and explicit, and
15 has been held to preempt state laws that attempt to regulate that which the FCRA expressly
16 regulates. In particular, a federal district court found a similar restriction under Colorado law
17 prohibiting the disclosure of criminal records older than seven years to be expressly preempted by
18 the FCRA. *Simon v. Directv, Inc.*, No. 09CV00852PABKLM, 2010 WL 1452853, at *3-4 (D.
19 Colo. Mar. 19, 2010), *report and recommendation adopted*, No. 09CV00852PABKLM, 2010 WL
20 1452854 (D. Colo. Apr. 12, 2010). In *Simon*, the court held that because “records of convictions
21 of crime which antedate the report by more than seven years” may be disclosed under FCRA §
22 1681c(a)(5), the Colorado law limiting such records to seven years was preempted because
23 Colorado’s prohibition and FCRA § 1681c(a)(5) “concern[ed] the same subject matter,” namely,
24 “the type of information that can be legally disclosed in consumer reports.” *Id.* at *4.

25 Subject matter preemption has also been applied to prohibit the prosecution of various
26 claims under state law, where the subject matter of the claim is regulated by the FCRA. For

1 example, the Second Circuit Court of Appeals invalidated a claim under New York tort law where
2 the plaintiff sought damages from a CRA related to the sale of lists of consumers who may be
3 interested in receiving certain offers of credit. *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d
4 103 (2d Cir. 2009). The Second Circuit held that the FCRA preempted the state tort claims under
5 FCRA § 1681t(b)(1)(A) because the specific information at issue is consumer report information
6 compiled and sold by CRAs. FCRA § 1681t(b)(1)(A) preempts all requirements or prohibitions
7 imposed “with respect to any subject matter regulated under subsection (c) or (e) of FCRA §
8 1681b, relating to the prescreening of consumer reports.”⁷ *Id.* at. 106. The Second Circuit found
9 that the allegations all “relate[d] to the prescreening of consumer reports,” and therefore the claim
10 was preempted by the FCRA. *Id.* at 106-7; *see also Consumer Data Industry Ass’n v. Swanson*,
11 2007 WL 2219389 at *4 (D. Minn. 2007) (analyzing preemptive effect of § 1681t(b)(1)(A) on
12 state law regulating the sale of mortgage-trigger lists).

13 Courts have explained that subject matter preemption under the FCRA is fatal to a
14 preempted claim’s survival. If a state law claim touches on the subject matter of one of the
15 enumerated FCRA provisions to any degree, it is preempted. In such cases, the subject matter
16 preemption provision is recognized as being an “absolute immunity provision.” *Sigler v. RBC*
17 *Bank*, 712 F. Supp. 2d 1265, 1269 (M.D. Ala. 2010) (holding that a state’s laws related to identity
18 theft were preempted by § 1681t(b)(1)(F)); *see also Barberan v. Nationpoint*, 706 F. Supp. 2d 408,
19 427-29 (S.D.N.Y. 2010) (holding that the plaintiffs’ wrongful foreclosure claim was within the
20 subject matter regulated by § 1681s-2, and therefore preempted); *Cosmas v. American Exp.*
21 *Centurion Bank*, 757 F. Supp. 2d 489, 499–500 (D.N.J. 2010) (same).

22 The SOCR’s interpretation that the Ordinance prohibits a CRA from including criminal
23 record information in a consumer report is in direct conflict with the provisions of the FCRA.
24 FCRA § 1681c governs the required, prohibited, and permissible content in consumer reports and

25
26 ⁷ Pre-screening refers to the method by which lenders obtain lists of consumers to whom they will extend firm offers
of credit who have not yet applied.

1 under the express subject matter preemption rules, the Ordinance must yield. Accordingly, the
2 Court should hold the Ordinance, as applied by the SOCR, preempted by the FCRA, and enjoin its
3 enforcement accordingly.

4 **C. Executive Order 13224 and Related Federal Regulations Preempt Any Interpretation**
of the Ordinance as Restricting the Issuance and Use of OFAC Alerts.

5 Under the principles of federal preemption set forth above, SOCR's interpretation that the
6 Ordinance prohibits a CRA from inquiring, or a landlord from obtaining, OFAC alerts, is also
7 preempted. A federal agency acting within the scope of its congressionally delegated authority
8 may preempt state regulation. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368.

9 By way of background, on September 23, 2001, President Bush issued Executive Order
10 13224 (the "Executive Order") in response to the attacks on September 11, 2001. Executive Order
11 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001); *see also* Proclamation No. 1463, 66 Fed. Reg. 48199
12 (Sept. 14, 2001) (declaring national emergency). The Executive Order was issued pursuant to the
13 authorities of the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.*, the
14 National Emergencies Act, 50 U.S.C. 1601 *et seq.*, section 5 of the United Nations Participation
15 Act of 1945, as amended 22 U.S.C. 287c, and 3 U.S.C. § 301. The Order blocks all property and
16 interests in the United States of foreign persons listed, of persons determined by the Secretary of
17 the Treasury to act for or on behalf of those persons listed, and of persons determined by the
18 Secretary "to assist in, sponsor, or provide financial, material, technological support for, or
19 financial or other services to or in support of, such acts of terrorism or those persons listed" or "to
20 be otherwise associated" with those persons. *See Humanitarian Law Project v. U.S. Treasury*
21 *Dept.*, 578 F.3d 1133 (9th Cir. 2009) (holding *inter alia* that the provision of executive order
22 authorizing the Secretary to designate terrorist organizations was not unconstitutionally vague).

23 Pursuant to the Order and by regulation, the U.S. Department of the Treasury and the Office
24 of Foreign Assets Control prohibit persons from entering into transactions with persons on the
25 Specially Designated Nationals and Blocked Persons list maintained by OFAC (the OFAC list).
26

1 See 31 C.F.R. §§ 594.201, 594.204, 594.701.⁸ To avoid running afoul of the law, the OFAC list
2 “should be consulted before engaging in transactions that may be prohibited by the economic
3 sanctions programs in chapter V.” 31 CFR Appendix A to Chapter V. The OFAC list is updated
4 “frequently and at irregular intervals to incorporate changes reflected in notices of blocking,
5 designation, identification, and delisting actions, all of which are published in the Federal
6 Register.” *Id.*

7 All U.S. persons are responsible for ensuring that they do not engage in business dealings
8 with an individual on the OFAC list. Business dealings include real estate transactions, such as
9 leases. Therefore, to comply with OFAC’s regulations, landlords must consult the OFAC list
10 (either by reviewing the OFAC list directly, or requesting that another entity conduct a search on
11 their behalf) prior to consummating a leasing transaction.

12 To access information about the OFAC list, any member of the public may contact OFAC’s
13 Sanctions Compliance & Evaluation Division, by phone, facsimile, or via its website
14 ([https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-
15 Assets-Control.aspx](https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx)). Many consumer reporting agencies offer a service to obtain and convey this
16 information to landlords, but other types of service providers conduct searches upon request as
17 well. In conducting the search, one compares the information provided by an applicant, such as
18 their name and, potentially, a date of birth, to the name and other identifying information on the
19 OFAC list. If there is a potential match, the reviewer returns an alert to the person requesting the
20 search. The alert is a notification to the person requesting the search that the person should verify
21 that the applicant is not the person identified on the OFAC list prior to consummating any
22 transaction.

23 SOCR’s interpretation that under the Ordinance “criminal records” include whether a

24 ⁸ Penalties for transacting business with a person on the OFAC list are severe. A civil penalty not to exceed \$250,000
25 or twice the amount of the forbidden transaction may be imposed on “any person who violates, attempts to violate,
26 conspires to violate, or causes a violation of” the regulation. 31 C.F.R. Chapter V, Part 594 § 594.701. Willful
violations are punishable by a penalty of up to \$1,000,000 and imprisonment for not more than 20 years, or both. *Id.*

1 person is included on the OFAC list runs directly contrary to the requirements of federal law. If a
2 landlord is prevented from “inquiring” about whether a prospective tenant is on the OFAC list, the
3 landlord will be unable to comply with the federal law prohibition against doing business with
4 individuals on the OFAC list, and may face severe fines and criminal penalties.

5 Under the principles of conflict preemption, even if Congress has not expressly displaced
6 state regulation in a specific area, state law is nullified to the extent that it actually conflicts with
7 federal law. *Fidelity Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982).
8 Such a conflict arises when “compliance with both federal and state regulations is a physical
9 impossibility” or when state law “stands as an obstacle to the accomplishment and execution of
10 the full purposes and objectives of Congress.” *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67
11 (1941)); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 526, (1977); *Bethlehem Steel Co. v.*
12 *New York Labor Relations Bd.*, 330 U.S. 767, 773 (1947). The relative importance to the state of
13 its own law is not material when there is a conflict with a valid federal law, for the Framers of the
14 United States Constitution provided that the federal law must prevail. *Fidelity Fed. Savings &*
15 *Loan Ass’n*, 458 U.S. at 153.

16 With respect to federal regulations, when the federal government acts within the authority
17 it possesses under the Constitution, it is empowered to preempt state laws to the extent it is believed
18 that such action is necessary to achieve its purposes. *City of New York v. F.C.C.*, 486 U.S. 57, 63
19 (1988). The Supremacy Clause of the Constitution gives force to federal action of this kind by
20 stating that “the Laws of the United States which shall be made in Pursuance” of the Constitution
21 “shall be the supreme Law of the Land.” *Id.* U.S. Const., Art. VI, cl. 2. The United States Supreme
22 Court has explained that the phrase “Laws of the United States” encompasses “both federal statutes
23 themselves and federal regulations that are properly adopted in accordance with statutory
24 authorization.” *Id.*

25 The Supreme Court has further explained that when state law is claimed to be preempted
26 by federal regulation, a narrow focus on Congress' intent to supersede state law is misdirected, for

1 a preemptive regulation's force does not depend on express congressional authorization to displace
2 state law. *City of New York*, 486 U.S. at 64 (quoting *Fidelity Fed. Savings & Loan Assn. v. de la*
3 *Cuesta*, 458 U.S. 141 (1982)) (internal quotations omitted). Instead, “the correct focus is on the
4 federal agency that seeks to displace state law and on the proper bounds of its lawful authority to
5 undertake such action.” *Id.* The statutorily authorized regulation of an agency will preempt any
6 state or local law that conflicts with the regulation or frustrates its purposes. *Id.*

7 Here, SOCR’s interpretation of the Ordinance to prohibit the request and provision of
8 OFAC alerts runs directly contrary to the requirement of federal law. If a landlord is prevented
9 from inquiring about whether a prospective tenant is on the OFAC list, the landlord will be unable
10 to comply with the federal law prohibition against doing business with individuals on the OFAC
11 list (and as a result may face severe fines and criminal penalties). The Ordinance is expressly
12 preempted because it conflicts with federal mandates. It stands as an obstacle to the
13 accomplishment and execution of the regulations implementing Executive Order 13224, and
14 makes it physically impossible for property owners and landlords to comply with the federal
15 prohibition against doing business with persons on the OFAC list. The City of Seattle cannot
16 override this federal requirement through its Ordinance.

17 **IV. Conclusion**

18 For the foregoing reasons, this Court should find that (1) the Ordinance constitutes an
19 unconstitutional restriction on commercial speech; (2) any interpretation of the Ordinance as
20 restricting the contents of consumer reports is preempted by the FCRA; and (3) any interpretation
21 of the Ordinance as prohibiting rental housing providers from receiving information for OFAC
22 compliance is preempted by Executive Order 13224 and the U.S. Department of the Treasury’s
23 regulations thereunder. The Court should further enjoin enforcement of the Ordinance by SOCR
24 or any other person, entity or agency in any manner that would be inconsistent with this Court’s
25 rulings above.

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Respectfully submitted,

November 21, 2018

s/ Douglas E. Smith

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CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Ste. 3200, Seattle, WA 98101. On November 21, 2018, I

<input checked="" type="checkbox"/>	ELECTRONICALLY FILED the foregoing document(s) with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:
<input type="checkbox"/>	U.S. MAIL by placing a true copy for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Seattle, Washington addressed as set forth below.
<input type="checkbox"/>	OVERNIGHT DELIVERY by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.
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<i>Attorneys for Plaintiffs</i>	<i>Attorneys for Defendant</i>

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed on November 21, 2018 at Seattle, Washington.

s/ Liana Natividad

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The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHONG and MARILYN YIM, KELLY
LYLES, EILEEN, LLC, and RENTAL
HOUSING ASSOCIATION OF
WASHINGTON,

Plaintiffs,

v.

THE CITY OF SEATTLE, a Washington
municipal corporation,

Defendant

Case No. 2:18-cv-00736-JCC

**[PROPOSED] ORDER GRANTING
JOINT MOTION OF CONSUMER
DATA INDUSTRY ASSOCIATION
AND NATIONAL ASSOCIATION OF
PROFESSIONAL BACKGROUND
SCREENERS FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE IN
SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY
JUDGMENT**

The Court, having reviewed the Joint Motion of Consumer Data Industry Association and National Association of Professional Background Screeners for Leave to File Brief of *Amici Curiae* in Support of Plaintiffs’ Motion for Summary Judgment (“Motion”), and Plaintiffs’ and Defendant’s response thereto (if any), finds that good cause exists for the filing of the proposed Brief of *Amici Curiae* attached as Exhibit A to the Motion. CDIA/NAPBS's Motion is therefore GRANTED, and the Brief of *Amici Curiae* submitted by CDIA/NAPBS shall be deemed filed as of the date of this Order.

1 DATED: December ___, 2018
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3 THE HONORABLE JOHN C. COUGHENOUR
4 UNITED STATES DISTRICT COURT JUDGE
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Presented by:

s/ Douglas E. Smith

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The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHONG and MARILYN YIM, KELLY
LYLES, EILEEN, LLC, and RENTAL
HOUSING ASSOCIATION OF
WASHINGTON,

Plaintiffs,

v.

THE CITY OF SEATTLE, a Washington
municipal corporation,

Defendant.

Case No. 2:18-cv-00736-JCC

**CONSUMER DATA INDUSTRY
ASSOCIATION AND NATIONAL
ASSOCIATION OF PROFESSIONAL
BACKGROUND SCREENER'S
NOTICE OF APPEARANCE**

Clerk's Action Required

- TO: Clerk of the U.S. District Court, Western District of Washington at Seattle
- AND TO: Plaintiffs, Chong and Marilyn Yim, Kelly Lyles, Eileen, LLC and Rental Housing Association of Washington, and their counsel of record
- AND TO: Defendant, The City of Seattle, and its counsel of record

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that *amici curiae* Consumer Data Industry Association and National Association of Professional Background Screeners, without waiving any defenses or objections, hereby enter their appearance in the above-entitled action by and through the undersigned attorneys and request that notice of all further proceedings in said action, except original process, be served upon the undersigned attorneys at the address below.

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November 21, 2018

s/ Douglas E. Smith

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Professional Background Screeners

CERTIFICATE OF SERVICE

I am a resident of the State of Washington, over the age of eighteen years, and not a party to the within action. My business address is One Union Square, 600 University Street, Ste. 3200, Seattle, WA 98101. I hereby certify that on November 21, 2018, I electronically filed the foregoing **CONSUMER DATA INDUSTRY ASSOCIATION AND NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS’ NOTICE OF APPEARANCE** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to The Honorable John C. Coughenour and to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed on November 21, 2018, at Seattle, Washington.

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