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# Appendix A

**BRIEF OF THE NATIONAL CONSUMER REPORTING  
ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF  
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN  
OPPOSITION OF DEFENDANT'S CROSS-MOTION FOR  
SUMMARY JUDGMENT -1**  
(2:18-cv-00736-JCC)

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THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

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

Plaintiffs,

vs.

THE CITY OF SEATTLE, a Washington  
Municipal corporation,

Defendant.

NO. 2:18-cv-00736-JCC

**BRIEF OF THE NATIONAL  
CONSUMER REPORTING  
ASSOCIATION AS AMICUS CURIAE  
IN SUPPORT OF PLAINTIFFS'  
MOTION FOR SUMMARY JUDGMENT  
AND IN OPPOSITION OF  
DEFENDANT'S CROSS-MOTION FOR  
SUMMARY JUDGMENT**

**NOTE DATE: DECEMBER 14, 2018**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. INTRODUCTION**

3 Amicus curiae, the National Consumer Reporting Association (“NCRA”), appreciates the  
4 Court’s permission to submit an amicus brief in this lawsuit.

5 At issue in the case at bar is an Ordinance<sup>1</sup> enacted by the City of Seattle (“the City”).  
6 The goal behind said Ordinance is to soften the perceived disparate impact that discriminatory  
7 policing and prosecution practices – including the City’s own policing and prosecution practices  
8 – have had on minority segments of the community with regard to obtaining housing.<sup>2</sup> The  
9 ordinance attempts to accomplish this goal by depriving large segments of society access to, and  
10 information contained in, public criminal court records.<sup>3</sup>

11 The concept behind the subject ordinance is to place the financial burden of correcting a  
12 societal wrong squarely on the shoulders of property owners. It is the City’s intent to force  
13 property owners to assume blindly all of the risks involved in renting private residential property  
14 to people convicted of crimes by taking everyone’s right to utilize, learn of, or even inquire about  
15 public criminal court records to evaluate a consumer’s creditworthiness and credit capacity<sup>4</sup> – let  
16

17  
18 <sup>1</sup> SMC 14.09 et seq. (“the Ordinance”)

19 <sup>2</sup> See Dkt. # 33 page 7

20 <sup>3</sup> See Dkt. # 33 page 7

21 <sup>4</sup> *Moran v. Screening Pros, LLC*, No. 2:12-cv-05808-SVW-AGR, 2012 U.S. Dist. LEXIS  
22 158598, at \*21-22 (C.D. Cal. Sep. 28, 2012). (“[C]ommon sense dictates that a consumer's  
23 criminal record can provide insight into their creditworthiness and credit capacity. For example,  
24 records of incarceration may reasonably be expected to negatively impact one's ability to obtain  
25 long-term employment, which in turn affects one's capacity to pay debts or bills.

26 Similarly, records of repeat offenses could suggest that a consumer is likely to return to  
jail and thus would be an unreliable debtor or tenant. Records of stolen property crimes, such as  
the embezzlement conviction in this case, reasonably undermine a creditor or landlord's  
confidence that the consumer has a stable source of income, and that even if he did, he would be  
inclined to pay his debts or rent.”)

1 alone to determine any potential safety risks that a particular ex-convict may pose to other  
2 persons and/or property.

3 Plaintiffs have made a facial challenge to the subject Ordinance, as any attempt to  
4 prohibit a person's access to information that is contained in public court records open to the  
5 perusal of everyone is, and always will be, an unconstitutional violation of the First  
6 Amendment.<sup>5 6</sup> The City has likewise filed a Cross-Motion for Summary Judgment incorrectly  
7 claiming that the Ordinance enjoys less First Amendment protection because it involves  
8 commercial speech.<sup>7</sup>

9 Missing from these motions, however, is any argument or analysis regarding the simple  
10 fact that the Ordinance, as written, is poorly drafted and glaringly lacks any specific information  
11 regarding the core conduct that is supposed to be prohibited, and as such is unconstitutionally  
12 vague. Further missing from said motions is the fact that, when the Ordinance is interpreted in a  
13 manner to correct the issues of its missing information, the Ordinance becomes  
14 unconstitutionally overbroad by prohibiting "any person" from inquiring about anyone's criminal  
15 record at any time for any reason and in any context – not just with regard to the screening of a  
16 prospective tenant.

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17 <sup>5</sup> The First Amendment to the United States Constitution which is applicable to the states  
18 through the Fourteenth Amendment due process clause guarantees "Congress shall make no law  
19 . . . abridging the freedom of speech . . . ." (*McIntyre v. Ohio Elections Comm'n* 514 U.S. 334,  
20 336, fn. 1 (1995)). Paternalistic statutes that intrude upon the First Amendment Right to Free  
21 Speech are highly disfavored. The United States Supreme Court has held: "The First Amendment  
22 is an Absolute, 1961 S. Ct. Rev. 245, 263. **The First Amendment rejects the "highly  
23 paternalistic" approach of statutes [ ] which restrict what the people may hear.** *Virginia  
24 State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976);  
25 see *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 (1977); *Whitney v. California*, 274  
26 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630  
(1919) (Holmes, J., dissenting). *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 792 (1978); also see  
*San Francisco County Democratic Cent. Committee v. March Fong Eu*, 826 F.2d 814, 835  
(1987, 9<sup>th</sup> Cir.).

<sup>6</sup> See Dkt. # 23.

<sup>7</sup> See Dkt. # 33



1 Finally, because the Ordinance on its face expressly states that it is designed to intrude  
2 into areas that affect the issuance and use of consumer reports, it is likewise noteworthy that  
3 none of the Parties in this matter have brought to this Court's attention that certain material  
4 aspects of the Ordinance are federally preempted under the Federal Fair Credit Reporting Act  
5 ("FCRA").<sup>8</sup>

6 As such, NCRA hereby writes to offer the Court guidance on the consumer reporting  
7 industry's interpretation and issues with the subject Ordinance so that this Court may better  
8 understand its intrusive reach into areas protected by the Constitution and federal law.

## 9 **2. CORPORATE DISCLOSURE STATEMENT**

10 Amicus Curiae, NCRA, hereby makes the following disclosures: (1) NCRA is a nonprofit  
11 trade association which has no parent corporation; and (2) no publicly held company owns 10%  
12 or more of its stock.

## 13 **3. STATEMENT OF THE INTERESTS OF AMICUS CURIAE**

14 NCRA is a national trade organization of consumer reporting agencies regulated by the  
15 FCRA and associated professionals that provide products and services to credit grantors,  
16 employers, landlords and all types of general businesses.

17 Founded in 1992, NCRA's membership now includes a large percentage of this Nation's  
18 mortgage credit reporting entities, employment background screeners, tenant-screening agencies,  
19 and consumer data repositories.

20 NCRA creates and disseminates educational, operational, and advocacy services for its  
21 members, and for the benefit of end users of consumer data. In doing so, NCRA advocates for  
22 fair governmental treatment of consumers, consumer reporting agencies and property owners in  
23 multi-family housing businesses nationwide, including advocating for the interests of the rental  
24 housing business community at large in legal cases of national concern.

---

25 <sup>8</sup> 15 USC § 1681 et. seq.

1 Because of the manner in which the subject Ordinance at issue was drafted, NCRA’s  
2 members and their end users are directly impacted by the issues presented in this case. As such,  
3 NCRA offers this amicus brief to address how the Ordinance, both as currently drafted and as to  
4 how it will be interpreted under the rules of statutory construction, fails to give proper notice as  
5 to what certain conduct is actually prohibited; is impermissibly overbroad; and contains  
6 provisions that are preempted under the FCRA.

7 NCRA adopts, by reference, the constitutional arguments advanced by Plaintiffs in  
8 support of their Motion for Summary Judgment, and in their Reply in support thereof. Rather  
9 than repeat those arguments, NCRA writes separately to assist the Court by providing an  
10 industry view of the actual language used in the subject Ordinance and its practical effect on the  
11 consumer reporting industry and its end users if it should be allowed to stand.

#### 12 4. ARGUMENT

##### 13 A. THE ORDINANCE AS DRAFTED.

14 Seattle Municipal Code (“SMC”) Chapter 14.09 went into effect on February 19, 2018.<sup>9</sup>

15 The applicability of the Ordinance is set forth under SMC 14.09.015, which states: “A  
16 person is covered by this Chapter 14.09 when the physical location of the housing is within the  
17 geographic boundaries of the City.”<sup>10</sup> No definition exists for the term “the housing.”

18 Presumably, it was supposed to mean a residential unit at which a prospective tenant has  
19 applied. However, the ordinance does not make that distinction on its face, which is  
20 subsequently important to note with regard to the Ordinance’s total lack of context.

21 Next, SMC 14.09.025 is titled “Prohibited Use of Criminal History.” SMC 14.09.025  
22 states in its entirety:

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

24  
25 <sup>9</sup> SF ¶ 33. Dkt # 24 at 10.

26 <sup>10</sup> SMC 14.09.015 (emphasis added).

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

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

10          3. Carry out an adverse action based on registry information of a prospective  
11          adult occupant, an adult tenant, or an adult member of their household, unless  
12          the landlord has a legitimate business reason for taking such action.

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

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

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

23          C. If a consumer report is used **by a landlord** as part of the screening process, **the**  
24          **landlord** must provide the name and address of the consumer reporting agency and  
25          the prospective occupant's or tenant's rights to obtain a free copy of the consumer  
26

1 report in the event of a denial or other adverse action, and to dispute the accuracy of  
2 information appearing in the consumer report.”<sup>11</sup>

3 SMC 14.09.010 defines the term “person” as follows:

4 “‘Person’ means one or more individuals, partnerships, organizations, trade or  
5 professional associations, corporations, legal representatives, trustees, trustees in  
6 bankruptcy, or receivers. It includes any owner, lessee, proprietor, manager, agent, or  
7 employee, whether one or more natural persons, and any political or civil subdivision or  
8 agency or instrumentality of the City.”<sup>12</sup>

9 SMC 14.09.010 also defines the term “Criminal history” as follows:

10 “‘Criminal history’ means records or other information received from a criminal  
11 background check or contained in records collected by criminal justice agencies,  
12 including courts, consisting of identifiable descriptions and notations of arrests, arrest  
13 records, detentions, indictments, informations, or other formal criminal charges, any  
14 disposition arising therefrom, including conviction records, waiving trial rights, deferred  
15 sentences, stipulated order of continuance, dispositional continuance, or any other initial  
16 resolution which may or may not later result in dismissal or reduction of charges  
17 depending on subsequent events. The term includes acquittals by reason of insanity,  
18 dismissals based on lack of competency, sentences, correctional supervision, and release,  
19 any issued certificates of restoration of opportunities and any information contained in  
20 records maintained by or obtained from criminal justice agencies, including courts, which  
21 provide individual's record of involvement in the criminal justice system as an alleged or  
22 convicted individual. The term does not include status registry information.”<sup>13</sup>

23  
24 <sup>11</sup> SMC 14.09.025 (emphasis added).

25 <sup>12</sup> SMC 14.09.010.

26 <sup>13</sup> SMC 14.09.010 (emphasis added).

1           **B.       THE ORDINANCE IS UNCONSTITUTIONALLY VAGUE AND**  
2           **OVERBROAD.**

3                   **1) The Ordinance, As Written, is Void for Vagueness.**

4           It is a well-settled rule that “a statute which either forbids or requires the doing of an act  
5 in terms so vague that [people] of common intelligence must necessarily guess at its meaning  
6 and differ as to its application, violates the first essential of due process of law.”<sup>14</sup>

7           The question of whether a statute is void for vagueness most frequently arises in criminal  
8 prosecutions. In such cases the underlying principle is said to be that no man shall be held  
9 criminally responsible for conduct which he could not reasonably understand to be  
10 proscribed.<sup>15</sup> But the Supreme Court has also applied this principle in civil proceedings, and in  
11 so doing has expressly ruled that a criminal penalty need not be involved.<sup>16</sup>

12           This notion stems from the due process requirement that the government afford  
13 reasonable notice of the kinds of conduct that will result in deprivations of liberty and property,  
14 which otherwise reflects a sense of basic fairness as well as concern for the intrinsic dignity of  
15 human beings.<sup>17</sup> Furthermore, the rule is instrumental to the constitutional concept of "ordered  
16 liberty." By demanding that government articulate its aims with a reasonable degree of clarity,  
17 the Due Process Clause ensures that state power will be exercised only on behalf of policies  
18 reflecting a conscious choice among competing social values; reduces the danger of caprice and  
19 discrimination in the administration of the laws; and permits meaningful judicial review of state  
20 actions.<sup>18</sup>

21  
22 <sup>14</sup> *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

23 <sup>15</sup> *United States v. Harriss*, 347 U.S. 612, 617 (1954).

24 <sup>16</sup> See *A. B. Small Company v. American Sugar Refining Company*, 267 U.S. 233, 239 (1925),  
see also *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983).

25 <sup>17</sup> *Whisenhunt v. Spradlin*, 464 U.S. 965, 969-70 (1983) (Dissent)

26 <sup>18</sup> See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972); *Giaccio v.*  
*Pennsylvania*, 382 U.S. 399, 402-404 (1966); *Raley v. Ohio*, 360 U.S. 423, 437-439 (1959).

1 The concern with arbitrary encroachments on freedom which underlies the notice  
2 requirement naturally has special force when the liberty interests at stake are fundamental. For  
3 this reason, the Supreme Court has demanded greater precision in laws which render conduct  
4 criminal or which may abridge First Amendment rights.<sup>19</sup>

5  
6 **a. The Subject Ordinance Involves A Substantial Amount Of  
Constitutionally Protected Activity.**

7 In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to  
8 determine whether the enactment reaches a substantial amount of constitutionally protected  
9 conduct.<sup>20</sup>

10 As incorporated herein, both parties have argued that the Ordinance prohibits “any  
11 person” from inquiring about public criminal court records.<sup>21</sup> Plaintiffs and the City both argue  
12 that such an intended restriction involves First Amendment protections, albeit the City argues  
13 incorrectly that the First Amendment analysis is subject to lesser scrutiny. Regardless, the First  
14 Amendment is still invoked by both sides in this case. Thus, the first part of the analysis is met  
15 because the Ordinance touches upon a substantial amount of protected conduct.

16  
17 **b. SMC 14.09.025.A.2 Fails To Identify All Of The Conduct It  
Intends To Prohibit.**

18 SMC 14.09.025.A.2 reads in relevant part:

19 It is an unfair practice for any person to:

- 20
- 21 • **Require disclosure,**
  - 22 • **inquire about,**

23 <sup>19</sup> See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 358, and n. 8 (1983); *Parker v. Levy*, 417 U.S.  
24 733, 756 (1974); *Smith v. Goguen*, 415 U.S. 566, 573, n. 10 (1974); *Winters v. New York*, 333  
25 U.S. 507, 515 (1948).

<sup>20</sup> *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494-95, (1982).

<sup>21</sup> See Dkts. #23, #33

- or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in Section 14.09.115.<sup>22</sup>

SMC 14.09.025.A.2 is drafted so poorly, that the language and grammatical makeup of this ordinance fails to expressly state exactly what “any person” is not allowed to require disclosure of, or is not allowed to inquire about. The use of the terms “require disclosure” and “inquire about” are dependent terms in dire need of an “object” or “article” to identify exactly what it is that should not be disclosed or inquired about. Rather, the only qualifier or “object” of the sentence in the ordinance – “a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history” – is written in such a way as to only apply to the “adverse action” segment as being the description of the people for, and the basis of items upon, which adverse action may not be taken. We know this limitation to be the case since there is no comma after the term “or take an adverse action against.”

Specifically, with regard to statutory construction of Washington State Statutes and ordinances, the Washington Supreme Court has stated:

“[W]e employ traditional rules of grammar in discerning the plain language of the statute. *Chevelle*, 166 Wn.2d at 839. One such grammar rule is the last antecedent rule, which states that qualifying or modifying words and phrases refer to the last antecedent. *Spokane*, 158 Wn.2d at 673; *Berrocal v. Fernandez*, 155 Wn.2d 585, 600, 121 P.3d 82 (2005) (C. JOHNSON, J., dissenting). Related to this rule is the corollary principle that “the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one.””

---

<sup>22</sup> SMC 14.09.025.A.2 (emphasis and illustrations added).



1 *Spokane*, 158 Wn.2d at 673 (emphasis and internal quotation marks omitted) (quoting  
2 *Berrocal*, 155 Wn.2d at 593).”<sup>23</sup>

3 Here, no such comma exists. Thus, as currently written, SMC 14.09.025.A.2 reads as  
4 follows:

- 5 • It is an unfair practice for any person to Require disclosure [from /of] \_\_[?].
- 6 • It is an unfair practice for any person to inquire about \_\_[?]\_\_ .
- 7 • It is an unfair practice for any person to take an adverse action against **a**  
8 **prospective occupant, a tenant, or a member of their household, based on**  
9 **any arrest record, conviction record, or criminal history.**

10 In this illustration, it can be more easily seen that the term “a prospective occupant, a  
11 tenant, or a member of their household, based on any arrest record, conviction record, or  
12 criminal history record” is not grammatically connected under any recognized sentence  
13 structure with the terms “require disclosure” or “inquire about.” It is, under the rules of  
14 construction a qualifier describing what an adverse action cannot be “based on” because there  
15 is no comma between “adverse action against” and “a prospective occupant...”.

16 As such, the Ordinance, as written, lacks an object or article identifying exactly whom  
17 or what “any person” may not require disclosure from or about, and upon whom or what “any  
18 person” may not inquire about.

19 Therefore, SMC 14.09.025.A.2 is void for vagueness.

20 **2) Even If The Court Were To Imply The Missing Terms In Its**  
21 **Interpretation Of The Ordinance, The Ordinance Would Still Be**  
22 **Unconstitutionally Overbroad.**

23 Assuming this Court gleans from the other portions of the ordinance that the City  
24 meant to prohibit disclosure from, or inquiry about, “a prospective occupant, a tenant, or a

25 \_\_\_\_\_  
26 <sup>23</sup> *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487, 490-91 (2010) (emphasis added).



1 member of their household, based on any arrest record, conviction record, or criminal history  
2 record,” the Ordinance still remains impermissibly overbroad.

3 In analyzing the overbreadth of a statute or ordinance, the Washington Supreme Court  
4 has stated:

5 “[O]ur article I, section 5 analysis of overbreadth follows the analysis under the First  
6 Amendment.” *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 804, 231 P.3d  
7 166 (2010). A law is overbroad if it “sweeps within its prohibitions” a substantial  
8 amount of constitutionally protected conduct. *City of Tacoma v. Luvene*, 118 Wn.2d  
9 826, 839, 827 P.2d 1374 (1992). “A statute or ordinance will be overturned only if the  
10 court is unable to place a sufficiently limiting construction on a standardless sweep of  
11 legislation.” *Id.* at 840.”<sup>24</sup>

12 Here, SMC 14.09.025.A.2 is overly broad on its face and otherwise attempts to limit  
13 anyone and everyone’s ability to inquire about any public criminal court records associated  
14 with an unspecified number of people, for an unspecified period of time, and in an  
15 unspecified context.

16 **a. SMC 14.09.025.A.2 is not limited to landlords, but otherwise  
17 applies to everyone and every entity without limitation.**

18 As stated above, the term “any person” is not limited to landlords or a landlord’s agent or  
19 someone involved with the leasing of residential real property. Rather, the term “any person”  
20 has been defined to include any person or entity or agency regardless of their association with the  
21 leasing of real property<sup>25</sup>. What is more, SMC 14.09.025 actually uses the term “landlord” in its  
22 other provisions, thus demonstrating that the City meant the term “any person” to apply to all  
23 persons and entities that are otherwise not landlords or otherwise directly associated with the  
24 leasing of rental property. The term “any person,” therefore, was expressly written to include

25 <sup>24</sup> *State v. Immelt*, 173 Wn.2d 1, 6-7, 267 P.3d 305, 307 (2011)

26 <sup>25</sup> See SMC 14.09.010.

1 consumer reporting agencies (“CRAs”), police officers, prosecutors, judges, journalists,  
2 corrections officers, and all manner of persons or entities that are not actively leasing out  
3 residential housing.

4 In fact, the City has stated that the overly broad application of this ordinance to  
5 everyone and every entity was intended. To be certain, the City published its Fair Chance  
6 Housing Ordinance, SMC 14.09 Frequently Asked Questions (“FAQ”) on the City’s  
7 website.<sup>26</sup> Therein on page 8, the City stated: “The ordinance describes prohibited uses of  
8 criminal history that applies to ‘any person,’ **not just landlords.**”<sup>27</sup>

9 Thus, the Ordinance was intentionally written by the City to apply to more than just  
10 those persons or entities associated with the processing of a rental application. This, when  
11 coupled with SMC 14.09.025.A.2’s lack of context (see below), automatically makes the  
12 Ordinance unconstitutionally overbroad and reach constitutionally protected conduct far  
13 beyond the Ordinance’s stated purpose.

14  
15 **b. SMC 14.09.025.A.2 is not limited to a particular context.**

16 The next problem with the Ordinance is, without being limited in context, the Ordinance  
17 appears on its face to apply to everyone everywhere for any reason and at any time so long as  
18 some unspecified housing for some unspecified person or household member is located in the  
19 City of Seattle. Thus, SMC 14.09.025.A.2’s attempted prohibition with regard to obtaining  
20 access to public criminal court records applies to everyone, including people and entities that  
21 have no direct nexus to the person being inquired upon, and long after a prospective tenant  
22 would have been accepted or rejected. This lack of context in the Ordinance automatically  
23 sweeps into its prohibitions substantial amounts of constitutionally protected speech.

24  
25 <sup>26</sup> See <https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing>

26 <sup>27</sup> See FAQ Page 8 through <https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing>

1 By way of example, and not limitation, without limiting the context, time frame,  
2 purpose, type of person subject to the Ordinance, and nexus to the prohibition on inquiring  
3 about anyone’s prospective tenant’s criminal history (or member of that person’s household),  
4 the ban on being able to inquire about criminal histories from any source – including the  
5 public court records – would apply to: journalists covering a criminal case; police officers  
6 obtaining a rap sheet on an arrestee; prosecutors requiring allocution by a criminal defendant  
7 before taking a plea; judges that are simply asking their court clerks for a particular criminal  
8 court file; and hundreds of other examples that involve conversations about public criminal  
9 court records.

10 In addition, because SMC 14.09.025.A.2 is not limited in context or time to just a  
11 prospective tenant’s application process, SMC 14.09.025.A.2 is currently written to operate as  
12 a prohibition on legally authorized discovery in any lawsuits that occur involving a tenant  
13 where a prior criminal history would be relevant, as SMC 14.09.025.A.2 prohibits “any  
14 person” from inquiring into such matters or otherwise compelling a tenant (or any member of  
15 the tenant’s household) from disclosing such information. This in turn would act as an  
16 impermissible infringement of “any person’s” First Amendment constitutional right to fairly  
17 petition the government for redress of grievances.<sup>28</sup>

18 As currently written, the only caveat for SMC 14.09.025.A.2 to apply to “any person”  
19 is that the person being inquired upon be a member of the “household” of an occupant of  
20 housing in the City of Seattle. SMC 14.09.025.A.2 does not say that the occupant or tenant or  
21 applicant needs to occupy or apply for any particular property owned or managed by any

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22  
23 <sup>28</sup> See *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) ("The  
24 First Amendment right to petition the government for a redress of grievances . . . is 'generally  
25 subject to the same constitutional analysis' as the right to free speech." (quoting *Wayte v.*  
*United States*, 470 U.S. 598, 610 n.11 (1985); *Smith v. Bates Tech. Coll.*, 139 Wn.2d 793, 814  
(2000))

1 particular landlord. In fact SMC 14.09.025.A.2 is so overbroad that it does not require that  
2 there be any nexus whatsoever between the person or entity that wishes to do a criminal court  
3 record inquiry and the person being inquired upon.

4 All of the examples above involve free speech solely related to obtaining information  
5 associated with public government records and the inner workings of government. SMC  
6 14.09.025.A.2 seeks to prevent “any person” from being able to start the conversation about  
7 criminal court records by asking anyone, anywhere, at anytime about them.

8 NCRA fully expects the City to respond to this brief by belittling these examples,  
9 calling them absurd, and then stating that it has no intent to enforce the subject Ordinance in  
10 such a manner. However, the fact that the City claims that it has no intent at this very  
11 moment to enforce the subject Ordinance to apply in such a manner is of no consequence.  
12 The fact that the subject Ordinance, as written, has the capability to be utilized in such an  
13 obtrusive manner is all that need be ascertained to declare the Ordinance unconstitutionally  
14 overbroad.

15 Furthermore, NCRA is not asking for this Court to read SMC 14.09.025.A.2 in a  
16 manner to achieve an absurd result. Rather, NCRA is asking this Court to read the  
17 unambiguous language of SMC 14.09.025.A.2 and the definition of “any person” and  
18 determine that the lack of care with which the City drafted the Ordinance irrefutably makes  
19 the ordinance unconstitutionally overbroad because it has more than the capability to  
20 otherwise prohibit a substantial amount of protected activity that has nothing to do with its  
21 stated purpose.

22  
23 **c. SMC 14.09.025.A.2 Cannot be Saved By Way of Limited  
Construction.**

24 As stated above, SMC 14.09.025.A.2, is missing certain qualifiers as to the disclosure  
25 and inquiry prohibitions therein. Assuming this Court presumes to reconstruct SMC

1 14.09.025.A.2 by interpreting away the grammatical errors in its drafting so that all of its  
2 parts are given some meaning, SMC 14.09.025.A.2 still, as written: lacks context; lacks a  
3 time limit as to when the ordinance should apply; lacks a limit as to whom the ordinance  
4 applies against; lacks a limit as to whom the ordinance is to protect with regard to its  
5 disclosure and inquiry prohibitions; and lacks a nexus between “any person” and the person  
6 being inquired upon.

7 This is not an issue of limiting the interpretation of SMC 14.09.025.A.2 to only apply  
8 as to one situation or to only apply within a certain context. Rather, this Court would need to  
9 redraft SMC 14.09.025.A.2 in its entirety, including the definition of “any person,” in order to  
10 insert a series of missing concepts needed to correct all of its problems. However, redrafting  
11 statutes and ordinances to insert missing concepts is not this Court’s job, and as such it should  
12 avoid doing so.<sup>29</sup>

13 Furthermore, as stated in Plaintiffs moving papers, the City enacted SMC  
14 14.09.025.A.2 with the express intent of depriving “any person” the right to ask the  
15 government (e.g. the Clerk of the Superior Court) for access to certain public criminal court  
16 records that contain information that is supposed to be open to everyone. As such, SMC  
17 14.09.025.A.2 violates the First Amendment on its face.

18 Therefore, SMC 14.09.025.A.2 is overly broad and it cannot be saved by a limiting  
19 instruction due to all of its missing concepts and excessive violations of the First Amendment.

20  
21 **C. THE ORDINANCE CONTAINS PROVISIONS THAT ARE EXPRESSLY  
22 FEDERALLY PREEMPTED.**

23 SMC 14.09.115.A states that Chapter 14.09 shall not be interpreted or applied to diminish  
24 or conflict with any requirements of state or federal law, including the FCRA. Despite this

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25 <sup>29</sup> See *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947  
(9th Cir. 2011).

1 statement, SMC 14.09.025.A.2 was written to contain provisions that do conflict with the FCRA  
2 and that are expressly federally preempted.

3 **1) SMC 14.09.025.B, Which Requires a Landlord to Give Notice of an**  
4 **Adverse Action, Is Expressly Federally Preempted.**

5 In 1996, Congress amended 15 USC § 1681t(b) to expressly prohibit any State or local  
6 laws from imposing certain requirements and prohibitions effecting consumer reports, their  
7 issuers, and their users.<sup>30</sup>

8 15 USC § 1681t(b)(1)(C) states: “No requirement or prohibition may be imposed under  
9 the laws of any State – with respect to any subject matter regulated under –subsections (a) and  
10 (b) of section 615 [15 USCS § 1681m], relating to the duties of a person who takes any adverse  
11 action with respect to a consumer.”<sup>31</sup>

12 In 2017, the City enacted SMC 14.09.025.B adding additional requirements upon  
13 landlords who take adverse action against a consumer.<sup>32</sup> As such SMC 14.09.025.B is expressly  
14 preempted.

15 **2) SMC 14.09.025.A.2’s Prohibition On Inquiring About Criminal Record**  
16 **Information Is Federally Preempted as Applied to CRAs.**

17 As stated above, SMC 14.09.025.A.2 is meant to apply to “any person.” CRAs fall into  
18 the definition of “person.”<sup>33</sup> Because as currently written SMC 14.09.025.A.2 fails to contain  
19 any context or nexus or time limitations, SMC 14.09.025.A.2 appears to apply to CRAs and  
20 otherwise interferes with the operations of a CRA.

21 **a. Express Preemption.**

22 15 USC § 1681t(b)(1)(E) states: “No requirement or prohibition may be imposed under  
23

24 <sup>30</sup> See *Simon v. DIRECTV, Inc.*, 2010 U.S. Dist. LEXIS 35940, \*8-9 (D. Colo. Mar. 19, 2010).

25 <sup>31</sup> 15 USC § 1681t(b)(1)(C)

26 <sup>32</sup> See SMC 14.09.025.B

<sup>33</sup> See SMC 14.09.010.

1 the laws of any State – with respect to any subject matter regulated under – section 605 [15  
2 USCS § 1681c], relating to information contained in consumer reports, except that this  
3 subparagraph shall not apply to any State law in effect on the date of enactment of the Consumer  
4 Credit Reporting Reform Act of 1996 [enacted Sept. 30, 1996].”<sup>34</sup>

5 15 USC § 1681c regulates the content and information that is, and is not, to  
6 be contained in a consumer report – including criminal record information. Consumer reporting  
7 agencies obtain such criminal record information to put into a consumer report by requesting  
8 such criminal record information from the Courts.

9 SMC 14.09.025.A.2 acts as an end-around to the FCRA because it effects the contents of  
10 a consumer report issued on tenants by prohibiting CRAs from inquiring about such public  
11 criminal court records so that it may put such information into a consumer report. As such, SMC  
12 14.09.025.A.2 is a *de facto* ban on the inclusion of such criminal court record information in a  
13 consumer report.

14 However 15 USC § 1681t(b)(1)(E) was written in such a way to cover such occurrence as  
15 it expressly preempts “any subject matter... *relating* to information contained in a consumer  
16 report.”<sup>35</sup> By prohibiting CRAs from having access to information that is allowed to be in a  
17 consumer report, SMC 14.09.025.A.2 is then made to relate to the subject matter of 15 USC §  
18 1681c, and is therefore preempted by 15 USC § 1681t(b)(1)(E).

19 Therefore, SMC 14.09.025.A.2 is expressly preempted.

20  
21 **b. Conflict Preemption**

22 15 USC § 1681t(a) expressly preempts state and local laws “to the extent that those laws  
23 are inconsistent with any provision of [the FCRA]”.<sup>36</sup>

24 <sup>34</sup> 15 USC § 1681t(b)(1)(E)

25 <sup>35</sup> 15 USC § 1681t(b)(1)(E)

26 <sup>36</sup> 15 USC § 1681t(a)



1 15 USC § 1681e(b) requires CRAs to “follow reasonable procedures to assure maximum  
2 possible accuracy of the information concerning the individual about whom the report relates.”<sup>37</sup>  
3 Further, 15 USC § 1681c expressly allows for the inclusion of criminal record information in  
4 consumer reports. Additionally, 15 USC § 1681i expressly requires CRAs to investigate  
5 consumer data when there is a dispute as to its completeness or accuracy.

6 However, SMC 14.09.025.A.2’s ban on inquiring about criminal histories interferes with  
7 a CRA’s: duty of assuring maximum possible accuracy under 15 USC § 1681e(b); right to  
8 include public criminal records in a consumer report under 15 USC § 1681c; and duties of  
9 investigation under 15 USC § 1681i.

10 Thus, SMC 14.09.025.A.2 conflicts with the FCRA as applied to CRAs and their duties  
11 under the FCRA to inquire about certain information to include in reports, to assure that they are  
12 accurate and complete, and to resolve any disputes regarding the accuracy or completeness of  
13 such information. Therefore, SMC 14.09.025.A.2 is federally preempted, because it requires a  
14 CRA to violate, or otherwise fail to comply with, its duties under the FCRA.

## 15 5. CONCLUSION

16 As stated herein, the Ordinance does not only violate the First Amendment as argued by  
17 Plaintiffs, but it is also void for vagueness, unconstitutionally overbroad, incapable of being  
18 fixed by limited construction or interpretation, and its primary key terms are federally  
19 preempted. Therefore, NCRA supports a decision that otherwise invalidates and strikes out all of  
20 the offending portions of the Ordinance.

21  
22  
23 DATED this \_23rd\_ day of November 2018.

24 JACOBSON, RUSSELL, SALTZ, NASSIM & CARROLL, BIDDLE, & BILANKO, PLLC  
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26 <sup>37</sup> 15 USC § 1681e(b)



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7  
8 **CERTIFICATE OF SERVICE**

9 The undersigned declares under penalty of perjury under the laws of the State of  
10 Washington that on this day a true and accurate copy of the document to which this declaration is  
11 affixed was filed with the above-entitled Court through CM/ECF.

12 DATED this 23<sup>rd</sup> day of November 2018.

13  
14 /s/ Stephanie M. Hosey  
15 Stephanie M. Hosey, Paralegal