THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

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

I. INTRODUCTION

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

[1] During the COVID-19 pandemic, the City amended the Ordinance to also prohibit landlords from taking adverse action based on evictions occurring during or shortly after the state of emergency caused by the pandemic. *See* S.M.C. § 14.09.026. As a result, the City also renamed the Ordinance the "Fair Chance Housing and Eviction Records Ordinance." *See* S.M.C. §

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

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

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

II. PROCEDURAL BACKGROUND

The parties stipulated that "discovery and a trial are unnecessary" and that the Court should resolve this matter based on the parties' cross motions for summary judgment, which are based on a stipulated record. (Dkt. Nos. 9 at 2, 24, 33-1–33-13.) The parties further stipulated

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14.09.005. Because only the criminal history provisions are relevant here, and because the parties use the previous name, the Court refers to the Ordinance as the "Fair Chance Housing Ordinance."

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

that if the Court determines that there is a genuine issue of material fact, it should resolve the disputed factual issue based on the record before it, without holding a trial. (Dkt. No. 9 at 2–3.)

III. LEGAL STANDARD

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

IV. DISCUSSION

A. Substantive Due Process

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

"To establish a substantive due process claim, a plaintiff must, as a threshold matter,

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

show a government deprivation of life, liberty, or property." *Nunez v. City of L.A.*, 147 F.3d 867, 871 (9th Cir. 1998). Plaintiffs allege that the City has deprived them of their "right to rent their property to whom they choose, at a price they choose, subject to reasonable anti-discrimination measures."[4] (Dkt. No. 1-1 at 3.) The source of this property right is not clear. Plaintiffs originally cited Washington law, (*id*), but after the Washington Supreme Court answered the Court's certified questions Plaintiffs cited two different U.S. Supreme Court opinions: one that is nearly one-hundred years old, (*see* Dkt. No. 70 at 4 n.1 (citing *Terrace v. Thompson*, 263 U.S. 197, 215 (1923)), and another that was decided well after they filed their complaint, (*see* Dkt. No. 84 (citing *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)). But the Supreme Court has made clear that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). Because the City does not dispute that such a property right exists or that the Ordinance deprives Plaintiffs of that right, the Court assumes without deciding that the Ordinance deprives Plaintiffs of a property right.[5]

The parties disagree about the next step of the analysis. Plaintiffs argue that because a property right is involved, the Court must examine whether the Ordinance "substantially advances" a legitimate public purpose, (Dkt. Nos. 23 at 24, 48 at 30–32), meaning the Court must determine whether the Ordinance "is *effective* in achieving some legitimate public purpose," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005). The City argues that the Court's analysis should be more deferential, and that it must determine "only whether the government could have harbored a rational [and legitimate] reason for adopting the law." (Dkt. No. 69 at 3.) According to the City, its *actual* purpose in enacting the Ordinance and the

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

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

Ordinance's actual effectiveness in achieving that purpose are not relevant to the due process analysis. (*Id.* at 9.) The City is correct.

Nearly a century ago, the Supreme Court held that a municipal ordinance does not violate a property owner's substantive due process rights unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The Court has repeatedly reaffirmed this rule. *See, e.g.*, *Nebbia v. People of N.Y.*, 291 U.S. 502, 537 (1934) ("If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ."); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124–25 (1978) (upholding statute that bore "a reasonable relation to the State's legitimate purpose" and declining to analyze "the ultimate economic efficacy of the statute"). Most recently, in *Lingle*, the Court confirmed that it has "long eschewed [the] heightened scrutiny" that the substantially advances test requires "when addressing substantive due process challenges to government regulation." 544 U.S. at 545. Instead, courts must defer "to legislative judgments about the need for, and likely effectiveness of, regulatory actions." *Id.* It is no surprise then that the Ninth Circuit has continued to apply the rational basis test to property-based substantive due process claims after *Lingle*. *See, e.g.*, *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) ("The irreducible minimum of a substantive due process claim challenging land use regulation is failure to advance *any* governmental purpose.") (emphasis added).

To determine whether the Ordinance violates Plaintiffs' substantive due process rights, the Court must determine whether the Ordinance could advance any legitimate government purpose. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) ("In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes, but instead look to whether 'the governmental body *could* have had no legitimate reason for its decision.'") (quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d

680, 690 (9th Cir. 1993)). The Court need not stray into the hypothetical, however, because the City's *actual* reasons for enacting the statute are legitimate, and, as discussed in detail below, the Ordinance directly advances those legitimate purposes. *See infra* Section B(3)(c). Therefore, with respect to the substantive due process claims, the Court DENIES Plaintiffs' motion for summary judgment and GRANTS the City's motion for summary judgment.

B. Free Speech

Plaintiffs' central claims are their free speech claims. The parties assume that the scope of the free speech clause in Washington's constitution is coextensive with the First Amendment in this context and the Court will assume the same. (*See* Dkt. Nos. 23 at 9 n.2, 33 at 13 n.38.) Before turning to the merits of Plaintiffs' claims, the Court must first define the scope of their challenge.

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

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

(2008). To succeed on their overbreadth challenge, Plaintiffs must show that "a substantial number of [the Ordinance's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange*, 552 U.S. at 449 n.6).

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

Although Plaintiffs purport to challenge the inquiry provision in its entirety, the Court concludes that Plaintiffs lack Article III standing to challenge the inquiry provision with respect to inquiries about current tenants.[7] To establish Article III standing to challenge the tenants provision, Plaintiffs must demonstrate that they have suffered an injury in fact that is fairly traceable to that provision and that is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also California v. Texas*, 141 S. Ct. 2104, 2119–20 (2021) (holding that a plaintiff lacks standing to challenge a statutory provision if he or she cannot demonstrate that that particular provision caused his or her injuries).

In the First Amendment context, a plaintiff can establish an injury in fact by showing that a statute chilled his or her speech. *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870

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

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

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

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

speech claims aimed at the tenants provision, and the Court's analysis of Plaintiffs' free speech claims will focus exclusively on the prospective occupants provision.

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

The City argues that the inquiry provision does not implicate the First Amendment because it regulates conduct, not speech. (*See* Dkt. Nos. 33 at 14–16, 50 at 5–6.) The Court disagrees. The inquiry provision directly regulates speech: it prohibits "any person" from "inquir[ing] about . . . a prospective occupant, a tenant, or a member of their household['s] . . . arrest record, conviction record, or criminal history." S.M.C. § 14.09.025(A)(2). Therefore, it implicates the First Amendment because it regulates what people can *ask*, not just what they can do. To the extent there is any doubt about the effect of the Ordinance, its disclaimer provision dispels it by requiring landlords to state on their rental applications "that the landlord is prohibited from . . . *asking about* . . . any arrest record, conviction record, or criminal history . . . ." S.M.C. § 14.09.020 (emphasis added).

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

2. At its Core, the Inquiry Provision Regulates Commercial Speech.

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

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

Plaintiffs are correct that "the core notion of commercial speech" is "speech which does no more than propose a commercial transaction." *Bolger,* 463 U.S. at 66 (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). But when evaluating whether a statute governs commercial speech, courts look to the context in which the speech appears, not just to the speech in isolation. *See, e.g., Bolger*, 463 U.S. at 67–68 (explaining that speech about public issues "in the context of commercial transactions" is entitled to less First Amendment protection than the same speech in other contexts). Thus, the Supreme Court has held that a rule governing the use of CPA and CFP designations in accountant advertising regulated commercial speech even though the terms "CFA" and "CFP," in isolation, do not propose a commercial transaction. *See Ibanez v. Fla. Dep't of Bus. and Pro. Regul.*, 512 U.S. 136, 142 (1994). Similarly, the Ninth Circuit has held that statutes regulating companies' use of words like "biodegradable" and "recyclable" in their advertising and physicians' use of the term "board certified" governed commercial speech, even though the words "biodegradable," "recyclable," and "board certified" do not propose commercial transactions. *See Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1106 (9th Cir. 2004) (board certified); *Assoc. of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 728–29 (9th Cir. 1994) (biodegradable, recyclable); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995) (assuming that "information on beer labels constitutes commercial speech"). These cases demonstrate that when determining whether speech proposes a commercial transaction, the Court must look to the context in which the speech appears, not just to the speech in isolation.

Further, "speech that does not propose a commercial transaction on its face can still be commercial speech." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021). For example, in *Bolger* itself the Supreme Court held that "an eight-page pamphlet discussing at length the problem of venereal disease and the use and advantages of condoms in aiding the prevention of venereal disease" was commercial speech even though it did not expressly propose a transaction and the only commercial element was a statement at the bottom of the last page explaining that "the pamphlet [was] contributed as a public service by Youngs, the distributor of Trojan-brand prophylactics." 463 U.S. at 62 n.4, 68. In *Ariix*, the Ninth Circuit held that a book that purported to "describe[] the science of nutritional supplements and provide[] [objective] ratings for various nutritional supplement products" was commercial speech because it was actually "a sophisticated marketing sham" that promoted a particular manufacturer's products but did not expressly propose a commercial transaction. 985 F.3d at 1115, 1118. And in *Jordan v. Jewel Food Stores, Inc.*, the Seventh Circuit held that advertisements that promote "brand awareness or loyalty" are commercial speech even if they do not expressly propose a transaction. 743 F.3d 509, 518 (7th Cir. 2014).

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

With these principles in mind, the Court turns to the core of the statute here.[9] A

[9] The Supreme Court has also recognized a second, broader category of commercial speech: speech "related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). This second definition has

prospective occupant is "any person who seeks to lease, sublease, or rent real property." S.M.C. § 14.09.010. Most instances in which a landlord asks someone seeking to rent property about his or her criminal history are commercial speech. For example, the record suggests that some landlords included questions about criminal history on their rental applications before the Ordinance was enacted.[10] Rental applications fall squarely within the core notion of commercial speech: they are documents that propose a commercial transaction between a landlord and a prospective occupant. Therefore, when the City regulates what landlords can ask in their rental applications, it regulates commercial speech. Landlords also engage in commercial speech when they ask prospective occupants about their criminal history while showing them the property or discussing its features and the terms of the rental. In those circumstances, the purpose of the speech is to advertise a particular product—property rental—and the landlord's motivation for speaking is primarily economic. Thus, many core applications of the statute constitute commercial speech. *See, e.g., Campbell v. Robb*, 162 F. App'x 460, 469 (6th Cir. 2006) (holding that "a statement made by a landlord to a prospective tenant describing the conditions of rental" falls within the core definition of commercial speech); *S.F. Apartment Ass'n v. City and Cnty. of S.F.*, 881 F.3d 1169, 1176 (9th Cir. 2018) (holding that "a discussion between a landlord and a tenant about the possibility of entering into a buyout agreement is commercial speech"); *see also Greater Phila. Chamber of Com. v. City of Phila.*, 949 F.3d 116, 137 (3d Cir. 2020) (holding that City ordinance prohibiting employers from asking applicants about their salary history regulates

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been criticized from the start, *see id.* at 579–80 (Stevens, J. concurring in the judgment) (arguing that this definition of commercial speech is "too broad"), but the Supreme Court has not expressly overruled this portion of *Central Hudson* so lower courts must continue to apply it. *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011). Nevertheless, because most, if not all, of the speech the inquiry provision regulates falls within the first definition, the Court need not examine this broader definition.

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

commercial speech).

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

The RHA's website advertises various "Screening Products" landlords can purchase, including a "Background Screening" package for "$25 per applicant" and a "Seattle Premium" screening package for "$45 per applicant."[11] *See* Rental Housing Association of WA, *Screening Products*, RHAWA.org (July 6, 2021, 8:10 AM), https://www.rhawa.org/tenant-screening##. A landlord wishing to purchase a background report may do so by logging onto the RHA's online system and entering an "applicant's name, date of birth, and social security number" and submitting "the rental applicant's application" and "the applicant's consent to be screened." (Dkt. No. 24 at 6–7.) In addition, the landlord must pay for the report.[12] After a landlord purchases a report, the RHA obtains a background report from a company called Innovative Software Solutions and provides a copy to the landlord without any "alter[ation] or re-format[ting] by the RHA." (*Id.*) Landlords may also request the report by e-mail or by fax. (*Id.* at 6.) In short, landlords pay the RHA to serve as a middleman between them and Innovative

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

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

Software Solutions.

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

3. The Core of the Statute is Constitutional.

When evaluating the permissibility of government restrictions on commercial speech, the Court must evaluate four factors. First, the Court must determine whether the speech concerns unlawful activity or is misleading. *Central Hudson*, 447 U.S. at 566. If so, it is not entitled to First Amendment protection and the government may ban it "without further justification." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). If not, the government may regulate the speech if it satisfies the following three-part test: "First, the government must assert a substantial interest in support of the regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.'" *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 624 (1995) (quoting *Central Hudson*, 447 U.S. at 564–65).

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

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

b. The City's Interests in Reducing Barriers to Housing for People with Criminal Records

and Combatting Racial Discrimination in Housing are Substantial.

When determining whether the government's interest in regulating commercial speech is substantial, the Court may consider only "the interests the [government] itself asserts." *Edenfield*, 507 U.S. at 768. In other words, the Court may not supply hypothetical interests that the government could have but did not offer. *Id.* Further, the Court need not accept the interests the government offers "if it appears that the stated interests are not the actual interests served by the restriction." *Id.*

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

Plaintiffs appear to argue that the Court should not consider the City's professed interest in combatting racial discrimination because that interest did not actually motivate the City in enacting the Ordinance. (*See* Dkt. No. 48 at 8–9 (arguing that "[r]acial discrimination is not the issue here").) However, the Ordinance's recitals identify "racial inequities in the criminal justice system [that] are compounded by racial bias in the rental applicant selection process" as one of the reasons the City enacted the Ordinance. (Dkt. 33-12 at 57.) Further, the record shows that the City was concerned with racial discrimination when it was considering the legislation. In May 2017, the Director of Seattle's Office for Civil Rights sent a letter to the City Council's Civil Rights Committee that identified "Racial equity" as "Goal 2" of the proposed legislation. (Dkt. No. 33-6 at 19.) Two months later, the Office for Civil Rights moved "Racial equity" to "Goal 1." (Dkt. No. 33-7 at 7.) Plaintiffs do not cite any evidence suggesting that the City's professed

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

interest in combatting racial discrimination is just a *post hoc* litigating position. Therefore, there is no genuine dispute that one of the reasons the City enacted the Ordinance was to combat racial discrimination.[14]

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

> This Chapter 14.09 shall not apply to an adverse action taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy, including but not limited to when any member of the household is subject to a lifetime sex offender registration requirement under a state sex offender registration program and/or convicted of manufacture or production of methamphetamine on the premises of federally assisted housing.

S.M.C. § 14.09.115(B). Although the City likely intended it to do so, this provision does not actually exempt federally funded public housing providers from the inquiry provision, which is the only provision Plaintiffs challenge on free speech grounds. It states only that the Chapter does not apply "to an adverse action taken by" a public housing provider; it never says that the Chapter does not apply to an inquiry by the provider. The provision that appears to exempt federally funded public housing providers from the inquiry provision is the first exemption, which provides that the Ordinance "shall not be interpreted or applied to diminish or conflict with any requirements of state or federal law." S.M.C. § 14.09.115(A). Regardless, both provisions support the City's explanation that it sought to avoid enacting an Ordinance that could be preempted by federal law; they do not show that the City intended to burden private landlords

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

while advantaging publicly funded housing. (*See* Dkt. No. 50 at 10.)

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

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

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

The Supreme Court has held that "the validity of restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct . . . or

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

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

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

Before turning to the record, the Court makes two observations. First, the City is not required to show that landlords reject potential tenants "solely" because of their criminal records. If a prospective occupant's criminal record is one of several factors that contributes to a

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

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

Second, the City considered anecdotal evidence from members of the public. On May 23, 2017, the City heard from a social worker assisting individuals in a law enforcement diversion program who testified that "a majority" of the "over 400" people in the program are "unable to access the rental market because of their criminal histories." *Civil Rights, Utilities, Economic*

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

Development & Arts Committee 5/23/17, SEATTLE CHANNEL (May 23, 2017), http://www.seattlechannel.org/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x76441 (28:00–30:04). She reported that "on a daily basis" she has "conversations with landlords who say, 'We don't accept individuals here with any drug conviction. We don't accept individuals here with any theft conviction.'" *Id.* at 28:23–28:34. A housing case manager with Catholic Community Services whose "job boils down to calling private landlords and asking if they're willing to rent to someone with [certain] conviction[s]," *id.* at 24:01–24:18, reported that although Catholic Community Services "offers a guaranteed payment of up to a certain dollar amount for landlords during a certain period of time . . . it is still extremely difficult for [the organization] to house the people [it] work[s] with, with criminal backgrounds," *Civil Rights, Utilities, Economic Development & Arts Committee 7/13/17*, SEATTLE CHANNEL (May 23, 2017), http://www.seattlechannel.org/mayor-and-council/city-council/2016/2017-civil-rights-utilities-economic-development-and-arts-committee/?videoid=x78912 (1:50:18–1:50:53). The City also heard from individuals who testified that they had been denied housing based on their criminal histories. (*See* Dkt. No. 34 at 5.)

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

Plaintiffs argue the City could not have reasonably concluded that any landlords had refused to rent to people based on their criminal history because the evidence it considered shows only "correlation, not causation" and did not "control for . . . other variables," such as limited credit history, that might be causing individuals with criminal records to struggle to

secure housing. (Dkt. No. 48 at 22.) This argument is not persuasive.

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

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

Plaintiffs complain that the evidence the City considered is not reliable because the public comments were "unsworn" and the Helfgott study is "dated" and has "a small sample size." (Dkt. No. 48 at 19, 21.) But the Supreme Court has not limited the kind of evidence a legislature may consider. In fact, it has expressly rejected some of the arguments Plaintiffs make now. For instance, in *Florida Bar*, the Court held, over the dissent's objection, that the government was entitled to rely on a report that summarized survey results with "few indications of the sample size . . . and no copies of the actual surveys employed." 515 U.S. at 628. And in

Alameda Books, the Court held that the government was entitled to rely on a survey that was several years old. 535 U.S. at 430. At bottom, the Court's role is to determine whether *the legislature* could have reasonably concluded from the evidence before it that prohibiting landlords from asking about criminal history would materially advance its interest in reducing barriers to housing for people with criminal histories. Based on the evidence above, the City's conclusion was reasonable.

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

Plaintiffs do not argue that the Ordinance fails to directly advance the City's interest in combatting racial discrimination and the record shows that it does. In 2014, Seattle's Office for Civil Rights conducted fair housing testing by having "paired testers posing as prospective renters . . . measure the differences in the services they received from leasing agents, as well as information about vacancies, rental rates, and other conditions." Press Release, Seattle Office for Civil Rights, City Files Charges Against 13 Property Owners for Alleged Violations of Rental Housing Discrimination (June 9, 2015), https://www.seattle.gov/Documents/Departments/CivilRights/socr-pr-060915.pdf. "The matched pairs of testers had similar rental profiles in every respect except for their race or disability." *Id.* Even so, "African American and Latino testers were told about criminal background and credit history checks more frequently than the white testers." *Id.* In 2017, as the City Council was developing the Ordinance, the Director of Seattle's Office for Civil Rights shared this information with the Council, noting that, "[i]n some cases, African Americans were told they would have to undergo a criminal record check when similarly situated white counterparts were not." (Dkt. Nos. 33-6 at 19, 33-7 at 8.) The City could reasonably conclude from this evidence that some landlords were using criminal history as a pretext for racial discrimination and that prohibiting landlords from considering criminal history would reduce racial discrimination.

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

To justify the inquiry provision, the City must establish a "reasonable fit" between that provision and the City's objectives. *Fox*, 492 U.S. at 480. To satisfy this standard, the government must show that the fit between the ends it seeks and the means it used "is not necessarily perfect, but reasonable; that [the government's approach] represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). One "relevant consideration in determining whether the 'fit' between ends and means is reasonable" is whether "there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). At the same time, the reasonable fit inquiry does not "require elimination of all less restrictive alternatives." *Fox*, 492 U.S. at 478; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (holding that a speech restriction does not fail intermediate scrutiny "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative"). Because the government "need[s] leeway," *id.* at 481, to exercise its "ample scope of regulatory authority," *id.* at 477, regarding commercial speech, the Supreme Court has held that commercial speech restrictions that go "only marginally beyond what would adequately have served the governmental interest," *id.* at 479, do not violate the First Amendment. A commercial speech restriction fails the reasonable fit inquiry only if it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 478 (quoting *Ward*, 491 U.S. at 799). In other words, "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. The Supreme Court has "been loath to second-guess the Government's judgment to that effect." *Fox*, 492 U.S. at 478.

With these principles in mind, the Court concludes that the Ordinance is a reasonable means of achieving the City's objectives and does not burden substantially more speech than is necessary to achieve them. The Ordinance burdens a limited amount of speech—inquiries about

prospective occupants' criminal history—and most, if not all, of the speech that the City has regulated serves to advance its goals. Plaintiffs argue that the City could have pursued a host of purportedly less-speech-restrictive measures to achieve its objective in reducing barriers to housing for people with criminal records, but most of Plaintiffs' proposals would not achieve the City's objectives and none of them show that the City's choice to enact the Ordinance was an unreasonable means of pursuing them.

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

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

landlords willing to rent to individuals with a criminal history" suffers from the same defect. (*Id.* at 19.)

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

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

If the Court were to accept Plaintiffs' logic, it would mean that commercial speech restrictions would rarely survive constitutional challenge because plaintiffs could always argue the government should have applied a restriction to fewer people. If, for example, the City had enacted Plaintiffs' proposal to prohibit landlords from asking about only crimes that were more than two years old, another plaintiff could argue that it should have been three years, or three-and-a-half, or four, and so on. The Supreme Court has not analyzed commercial speech

restrictions this way. For instance, in *Florida Bar*, the Court determined that the Florida Bar's regulation prohibiting personal injury lawyers from "sending targeted direct-mail solicitations to victims and their relatives" within 30 days of "an accident or disaster" was "reasonably well tailored," without requiring the bar to explain why it did not adopt a 28 or 29-day ban that would have burdened less speech. 515 U.S. at 620, 633. At bottom, the reasonable fit test "allow[s] room for legislative judgments" and the legislature's judgment here was that prohibiting landlords from considering *all* crimes was the best way to achieve the City's interests. *Edge Broad.*, 509 U.S. at 434.

A. The Ordinance is Not Substantially Overbroad.

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

Prohibiting the government from enforcing a statute that is constitutional in its core applications but arguably unconstitutional in others is "strong medicine" that courts use "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). To prevail on their overbreadth challenge, Plaintiffs "must demonstrate from the text of [the Ordinance] and from actual fact that a substantial number of instances exist in which the

[Ordinance] cannot be applied constitutionally." *N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 14 (1988). When a statute is overbroad but not substantially overbroad, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615–16. Thus, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984).

Plaintiffs argue that the statute is substantially overbroad because it prohibits landlords from asking individuals other than prospective occupants about their criminal history, and these conversations are not commercial speech because they are not proposals to engage in commercial transactions. (Dkt. No. 48 at 28.) The City does not dispute that the statute covers these inquiries, so the Court accepts Plaintiffs' interpretation. Even so, the Court need not analyze whether these hypothetical applications of the Ordinance would be constitutional because even assuming they are not, Plaintiffs have not shown "from actual fact that a substantial number of [those] instances exist." *N.Y. State Club Ass'n*, 487 U.S. at 14; *see also Wash. State Grange*, 552 U.S. at 449–50 ("In determining whether a law is facially invalid, [courts] must be careful not to . . . speculate about 'hypothetical' or 'imaginary' cases."). Plaintiffs do not claim to have ever contacted a former landlord or court for criminal history information, nor do they provide any evidence that other landlords have. Therefore, Plaintiffs have not shown on this record that *any* landlord has done so, much less a substantial number of landlords. *See id.*

Plaintiffs also argue that the statute extends well beyond the housing context because it prohibits "any person" from asking about a prospective occupant's criminal history. Thus, Plaintiffs argue, the statute prohibits journalists, firearm dealers, and employers from investigating the criminal history of anyone who happens to be a renter. (Dkt. No. 48 at 29.) The Court agrees that the inquiry provision, which applies to "any person," could be interpreted to cover these inquiries. But, because the Court is construing a City ordinance, it may defer to the

City's plausible interpretation of the Ordinance, including any limiting construction the City has adopted. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563 (2011); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.5 (1982) ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."); S.M.C. § 14.09.085 (providing that the City Attorney's Office—the City's counsel in this litigation—shall enforce the Ordinance). The City argues that the Ordinance applies only in the context of housing transactions because it is entitled the "Fair Chance Housing Ordinance." (Dkt. No. 50 at 7.) Although the title of the Ordinance is a thin reed on which to rest a limiting construction, and the precise boundaries of the Ordinance under the City's interpretation are not clear, the City's interpretation is not implausible. *See* S.M.C. § 1.04.030 ("the names and headings of titles, chapters, subchapters, parts, . . . and sections of the Seattle Municipal Code [are] part of the law"). Therefore, the Court accepts the City's limiting construction that the statute does not apply to journalists or firearm dealers or employers running background checks.

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

V. CONCLUSION

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

DATED this 6th day of July 2021.

John C. Coughenour
UNITED STATES DISTRICT JUDGE