No. 21-35567

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CITY OF SEATTLE,

Defendant-Appellee.

BRIEF OF AMICUS CURIAE CONSUMER DATA INDUSTRY ASSOCIATION AND THE PROFESSIONAL BACKGROUND SCREENING ASSOCIATION IN SUPPORT OF APPELLANTS' REQUEST FOR REVERSAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (NO. 2:18-CV-00736-JCC)

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CORPORATE DISCLOSURE STATEMENT

The Consumer Data Industry Association is an industry trade association that has no parent corporation and no publicly held corporation owns 10% or more of CDIA's stock.[1]

The Professional Background Screening Association is an industry trade association that has no parent corporation and no publicly held corporation owns 10% or more of PBSA's stock.[2]

[1] Fed. R. App. P. 26.1(a), 29(a)(4)(A).
[2] Fed. R. App. P. 26.1(a), 29(a)(4)(A).

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The Consumer Data Industry Association, together with the Professional Background Screening Association (collectively, "*amici*"), respectfully submit this brief in support of Appellants' Opening Brief.[3]

STATEMENT OF INTEREST

The Consumer Data Industry Association ("CDIA") is a trade association representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, and background check and residential screening companies. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, thereby helping to ensure fair and safe transactions for consumers and facilitating competition, expanding consumers' access to financial and other products suited to their unique needs.

The Professional Background Screening Association ("PBSA") is an international trade association of over 900 member companies that provide

[3] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), amici represent that the parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici represent that no party or party's counsel has authored this brief, in whole or in part, or contributed money intended to fund the preparation or submission of this brief. Further, no person other than *amici* and their non-party members contributed money that was intended to fund the preparation or submission of this brief.

employment and tenant background screening and related services to virtually every industry around the globe. The tenant screening reports prepared by PBSA's background screening members are used by housing providers and property managers every day to ensure that residential communities are safe for all who work, reside, or visit there. PBSA members range from large background screening companies to individually-owned businesses, each of which must comply with applicable law, including when they obtain, handle, or use public record data.

The tenant screening reports that *amici* members provide are consumer reports governed by the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* ("FCRA"). The information at issue in this case includes public criminal history information that property managers rely on to prioritize the safety of their employees, residents, and guests. Seattle Mun. Code § 14.09, passed by the City of Seattle ("City" or "Appellee"), (the "Ordinance"), improperly restricts the lawful use of tenant screening reports that include criminal record information for most housing providers in Seattle. Moreover, the Seattle Office of Civil Rights, the entity with enforcement authority over the Ordinance, interprets the Ordinance as prohibiting consumer reporting agencies from preparing a criminal background check on consumers.

Amici are therefore uniquely qualified to assist this Court and have authority to file this brief under Federal Rule of Appellate Procedure Rule 29(a)(2) because all parties have consented to its filing.

ARGUMENT

Tenant screening providers serve an important public interest by offering what tenants demand and the law often requires: safe places to live. Tenant screening reports assist housing providers in fulfilling their duty to provide safe housing for their tenants and their guests, as well as safe workplaces for their employees. The District Court erred in finding that inquiries into a consumer's prior criminal record are purely commercial speech subject to mere rational basis judicial scrutiny, and in finding that the City had satisfied its burden to justify the Ordinance's infringement upon Appellants' Constitutional rights. As such, this Court should reverse the decision of the District Court below and find the Ordinance unconstitutional.

I. Tenant Screening Plays an Important Role in Managing Risk and Ensuring Public Safety.

Public record data, including criminal court records, are crucial to the smooth functioning of the U.S. and state economies, and for public safety, including in this case, the safety of the renters in apartment buildings and other common rental properties. Consumer reporting agencies, including the nationwide credit bureaus, regional and specialized credit bureaus, as well as background check and residential

screening companies, use public record data every day to help consumers achieve their financial and personal goals, and to help businesses, governments, property managers, and volunteer organizations avoid fraud and manage risk.

Amici members provide residential screening reports pursuant to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*[4] Their housing provider clients typically receive three different kinds of race-neutral information about prospective tenants: (1) financial information, including a credit score, credit report, income verification and rent payment history;[5] (2) eviction information, consisting of unlawful detainer records; and (3) criminal background information reporting on cases that involve harm to persons and property. Each of these categories provides the housing provider with reliable predictors regarding the tenant's suitability for a particular property. For example, individuals who have not skipped or been late in rent payments have a roughly six percent rate of default; prospects with a rental debt default at a rate of nearly one in four.[6] Owners looking to maintain viable properties

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

[5] Bd. of Governors of the Fed. Reserve Sys., *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit* S1-S2 (2007) (noting that credit scores act as predictors of default and not as proxies for race).

[6] *See* Experian, *Risk versus Reward: Identifying the Highest Quality Resident Using Rental Payment History* 4 (2013),

properly seek to avoid these costs, and the services provided by *amici's* members help them do so.

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

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http://www.experian.com/assets/rentbureau/white-papers/experian-rentbureau-rental-history-analysis.pdf.

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

The federal government has long since recognized the clear benefits of tenant screening, requiring that criminal history reports be used in the tenant screening process for public housing. In fact, Congress declared that "the Federal Government has a duty to provide public and other federally assisted housing that is decent, safe, and free from illegal drugs…" 42 U.S.C. §11901(1). The HUD Program Requirements for housing providers states:

> (a) Screening applicants. You are authorized to screen applicants for the programs covered by this part. The provisions of this subpart implement statutory directives that either require or permit you to take action to deny admission to applicants under certain circumstances in accordance with established standards, as described in this subpart.

24 C.F.R. §5.851. Congress enumerated four discrete categories of applicants with criminal histories that public housing authorities must reject: (1) persons subject to a lifetime registration requirement under state sex offender laws; (2) persons convicted of methamphetamine production on public housing property; (3) persons evicted from public housing for drug-related criminal activity in the three years prior to the application, unless the evicted individual completed an approved rehabilitation program; and (4) persons currently engaged in illegal drug use. 42 U.S.C. § 1437n(f); 42 U.S.C. § 13661; 42 U.S.C. § 13663; 24 C.F.R. § 960.204.

Beyond these mandatory bans, public housing authorities have discretion to develop more stringent screening policies and to accept or deny prospective renters with records of other crimes. Federal guidelines instruct that public housing

authorities may reject applicants who have engaged in any of the following activities within a reasonable time before submitting their application: drug-related criminal activity, violent criminal activity, and other criminal activity that would adversely affect the **health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing-agency employees**. 42 U.S.C. § 13661(c) (emphasis added). As Congress explained in its findings, "the increase in drug-related and violent crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures." 42 U.S.C. §11901(4).

Private housing providers have also been held to owe a duty of care to their residents to protect them from harm that is reasonably foreseeable, and the failure to effectively screen incoming applicants can be a basis for legal liability. *See, e.g., Peterson v. Kings Gate Partners-Omaha I, L.P.*, 290 Neb. 658 (2015); *Griffin v. W. RS, Inc.*, 97 Wash. App. 557, 570, 984 P.2d 1070 (1999), *rev'd on other grounds by* 143 Wash.2d 81, 13 P.3d 558 (2001); *see also Hutchins v. 1001 Fourth Avenue Associates,* 116 Wash.2d 217, 224, 802 P.2d 1360 (1991). Because housing providers may even be subject to criminal liability for certain offenses committed by their tenants, *see State v. Sigman*, 118 Wash.2d 442, 447, 826 P.2d 144 (1992), the Washington Supreme Court has stated "[i]t would seem only reasonable that the housing provider should at the same time enjoy the right to exclude persons who

may foreseeably cause such injury." *City of Bremerton v. Widell*, 146 Wash. 2d 561, 572, 51 P.3d 733 (2002).

Criminal record data can be used to estimate the potential risk of future criminal activity, and in *amici*'s members' experience, housing providers do not treat all offenses equally. In particular, housing providers are rightfully more concerned about the presence of violent offenses in a criminal history as opposed to nonviolent—and less severe—crimes. Moreover, the length of time since the offense occurred is a relevant factor that is considered by industry. The purpose for consideration of this information is the risk of harm created by someone likely to re-offend. A recent study released by the federal Bureau of Statistics of the U.S. Department of Justice in July of 2021 substantiates the concern regarding violent offenders, finding that "[a]bout 1 in 3 (32%) prisoners released in 2012 after serving time for a violent offense were arrested for a violent offense within 5 years.[8] "Violent offenses" were defined to include homicide, rape or sexual assault, robbery, assault, and other miscellaneous or unspecified violent offenses.[9]

In 2013, the Department of Housing and Urban Development ("HUD") released its guidance relating to the use of criminal record information in tenant

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[8] *Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2021-2017),* https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf p. 12.

[9] *Id.* at 24.

screening.[10] In its Guidance, HUD explained the potential for disparate treatment and disparate impact on minorities resulting from housing eligibility decisions that relied on criminal record history information, where the policy or practice lacked a legally sufficient justification. In its Guidance, which applies to providers of all housing types, HUD did not adopt a blanket ban on the use of criminal record information in housing decisions.[11] Instead, the Guidance requires housing providers to engage in an individualized assessment of the applicant, including information related to the criminal history, and requires them to adopt non-discriminatory policies regarding the use of criminal record information in screening that considers the nature, recency, and severity of the crime.[12] In this way, HUD balanced the risk for potentially discriminatory conduct against the need that housing providers have to protect their residents and employees. This allows housing providers to utilize this key information to manage risk but at the same time, provides protections for those who may be victims of its misuse.

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[10] U.S. Dept. of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* (Apr. 4, 2016), *available at* https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF ("Guidance").

[11] The Guidance expressly noted that Section 807(b)(4) of the Fair Housing Act "does not prohibit conduct against a person because such person has been convicted … of the illegal manufacture or distribution of a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)."

[12] *See, gen, id.* at 6-7.

Sadly, tragic consequences can result when criminal record information is not utilized in tenant screening. For example, in 2016, a Nebraska tenant's minor child was kidnapped and raped by another resident who had been allowed to move into a rental community without first undergoing a background check. *Cure v. Pedcor Mgmt. Corp*., 265 F. Supp. 3d 984, 988–89 (D. Neb. 2016) (denying motion to dismiss because plaintiff alleged sufficient facts to argue that if the housing provider had conducted a background check, it would have discovered that the perpetrator had multiple convictions for assault and public indecency). Another child was raped and murdered in 2017 by a resident in an apartment community who had a history of violent offenses but was allegedly permitted into the community without undergoing a background check.[13] Tenant screening reports help property managers and housing providers do what they can to protect their residents.

II. Even If the Speech Is Commercial Speech, The Ordinance Violates the First Amendment.

The Seattle Ordinance burdens the rights of specific groups of people, including housing providers, property managers, and potentially CRAs, from exercising their rights to free expression under the First Amendment with regard to specific content.[14] As such, Seattle has unlawfully enacted speaker-specific and

[13] https://abc7chicago.com/tiffany-thrasher-rape-murder-schaumburg/2267952/

[14] The Supreme Court "has held that the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) citing *Bartnicki, supra,* at 527, 121 S. Ct. 1753 ("[I]f the

content-driven restrictions. Unfortunately for Seattle, just because the City does not like the speech does not mean it can ban that speech.

The Supreme Court has clearly held that the "right to speak is implicated when information [one] possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011) (quoting *Seattle Times Co. v. Rhinehard*, 467 U.S. 20, 32 (1984). Appellees argued, and the District Court found, the use of consumer report information serves only a commercial purpose and thus it is subject to a lower standard of judicial scrutiny. *Amici* respectfully disagree. The rights infringed upon by the Ordinance are fundamental rights related to their property interest and safety.[15] However, *even if* the publication and use of public record data for tenant screening purposes is commercial speech, it must be examined under heightened scrutiny. Where, as here, the restrictions are imposed on the basis of the speaker's

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acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct" (some internal quotation marks omitted)); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 481, 115 S. Ct. 1585, 131 L.Ed.2d 532 (1995) ("information on beer labels" is speech). As such, the First Amendment rights of CRAs as well as its users (landlords and property managers) are infringed upon by the Ordinance.

[15] *See, gen.,* Appellant's Brief, p. 19-29.

identity and the content of commercial speech, heightened scrutiny is therefore appropriate. *Sorrell*, 564 U.S. at 572-73.[16]

Just like the legislation in *Sorrell*, however, "the outcome [of the constitutional analysis] is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.* at 571. In *Sorrell*, Vermont attempted to limit the sharing and use of certain medical prescriber information for marketing purposes (unless the prescriber consented to the sharing). *Id.* at 559-559. The Supreme Court found that "[on] its face, Vermont's law enacts content-and-speaker-based restrictions on the sale, disclosure and use of" the information, explaining that the "statue thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers." *Id.* 563-564. The Supreme Court reiterated that the "First Amendment requires heightened scrutiny whenever the government creates 'a

[16] In addition, the Supreme Court has long recognized that heightened scrutiny should be applied to restrictions on truthful, accurate and non-misleading information, even if that information is furnished through speech made for a commercial purpose. *See, e.g., Va. State Bd. Of Pharma. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). Indeed, as the Supreme Court has repeatedly stated, a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). Just as in *Sorrell*, the Ordinance imposes speaker-and-content related restrictions, and heightened judicial scrutiny is appropriate.

regulation of speech because of disagreement with the message it conveys.'" *Id.* at 565, quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Here, as in *Sorrell*, whether or not the speech is commercial, the Ordinance is facially unconstitutional.

Even under a commercial speech inquiry,

> it is the State's burden to justify its content-based law as consistent with the First Amendment.. . .To sustain the targeted, content-based burden {Vermont's law] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.

Id. at 571-572 (emphasis added); *see also Central Hudson Gas & Electricity Corp. v. Public Service Commission of New York.*, 447 U.S. 557 (1980). The "critical inquiry" is whether the suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the substantial government interest. *Sorrell*, 131 S. Ct. at 569-70.

In *Sorrell*, even though the interests sought to be protected by the law included protecting privacy of providers and patients, the Supreme Court found that the law was not actually "drawn to serve that interest." *Id.* at 572. The state argued that the law was designed to promote public health and lower the costs of medical services. *Id.* at 576. However, the Supreme Court held that the act did "not advance [those goals] in a permissible way." The Court explained:

> The State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by

> diminishing detailers' ability to influence prescription decisions. **Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects.** But the "fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech.

Id. at 577 (emphasis added) citations omitted). In this case, the Ordinance is not drawn to achieve the stated interests of the City as compared against the degree of the infringement on the First Amendment rights of the affected persons.

The City's goals in adopting the Ordinance were "using racial equity, keeping families together, building inclusive communities, and addressing homelessness." Declaration of Asha Venkataraman p. 4. [ER-077]. While these may be laudable goals, the Ordinance is not actually crafted to achieve them. It prohibits the use of relevant, publicly available information by only a class of people, while allowing other (more favored) persons to use the same information for the allegedly discriminatory purpose. In explaining, perhaps, the basis for distinguishing between classes of housing providers, the City found "except for landlords operating federally assisted housing programs, conducting a criminal background check to screen tenants is a *discretionary choice* for landlords that they have no legal duty under City or state law to fulfill." [ER-140] (emphasis added). This assertion presumes that (a) housing providers have no duty to ensure the safety of their residents, and (b) because such housing providers have a "choice" whether to use criminal record

information, the City can simply take that choice away from them with no consequences. The City is wrong on both fronts.

Housing providers in Washington State are required to keep properties "fit for human habitation," RCW 59.18.060, and courts have held that the warranty of habitability includes a duty to take reasonable security measures against foreseeable crime.[17] Criminal background checks are a necessary part of ensuring the safety of residents, as has been borne out in the experience of Washington housing providers following the adoption of this Ordinance. As evidenced by the Brief of Amicus Curiae filed by GRE Downtowner LLC herein, residents of at least one Seattle property have experienced skyrocketing crime rates, forcing some long-term residents to vacate the property entirely, all of which occurred—pre-COVID—during a two-year period in which violent crime rates remained stable nationwide.[18] GRE Downtowner reports that since the Ordinance went into effect in February of 2018, which prompted GRE to cease reviewing criminal history

[17] *See* Irma W. Merrill, *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 Vanderbilt Law Review 431, 442-444 (1985), available at https://scholarship.law.vanderbilt.edu/vlr/vol38/iss2/3.

[18] *See, e.g.,* Federal Bureau of Investigation *UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES (*2019), *available at*: https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/violent-crime. *See also, id*., Tables 1 and 1A, *available at*: https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-1.

information in its screening process, that for the first two years' since the Ordinance's effective date:

- calls to 911 from the building have more than doubled, fire alarms are set off randomly during the night, employees have been assaulted, residents have sold drugs from their units, there was a stabbing, and the hallways are littered with feces, trash, and used needles;
- longtime residents are moving out, the number of evictions have increased substantially (up from 1.48 to 3.96 per month-an increase of 168%), employee turnover is 400 percent, . . . and employees now work in teams because they are afraid to work alone; and
- GRE has had to adopt additional security measures to protect residents of the property, including installing controlled access systems, limiting resident access to their floors, and hiring armed security guards.

GRE Amicus, pp. 6-9. In GRE's words, the Ordinance has imposed an "unduly oppressive and irrational" burden on GRE. *Id.* at 9.

To the contrary, *amici* are aware of no study, report, or finding that demonstrates that the Ordinance has had a positive impact on Seattle's tenant population or made material progress towards any of the stated goals. In fact, a year after its adoption, Seattle's Auditor conducted a survey of the experiences of renters and housing providers operating in the Seattle market as well as the distribution, condition, cost, and change in rental housing from August 2017-April 2018.[19] The

[19] *Results of Seattle Rental Housing Study required by ordinances 125114, 125222*; (July 20, 2018), found at https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/UWSRHSFinal.pdf. The study results indicated the Auditor's office intended to gather baseline data to be used as a basis for future evaluations of the impact of the

report found, among other facts: (i) that the availability of housing, especially affordable housing, across the City was declining; (ii) that roughly 40% of housing providers have sold, or plan to sell, property in response to City ordinances governing the housing market; (iii) about three-fourths of the respondents agree or strongly agree with the idea that the Ordinance would jeopardize the safety of other residents in the property (with those operating moderate to larger properties affirming this sentiment more often); and (iv) there was "a strong consensus" among housing providers that the process of adopting the Ordinance "largely ignored housing providers' perspectives, resulting in a set of ordinances perceived by landlords as highly burdensome and ineffective." *Id.* at p.26.

III. The Ordinance Is Preempted by the Fair Credit Reporting Act as Applied to Consumer Reporting Agencies.

On its face, the Ordinance limits most housing providers' use of and inquiry into a prospective tenant's criminal history. Seattle Mun. Code § 14.09.025. As discussed below, the Seattle Office for Civil Rights ("SOCR") has applied this ban to prohibit *amici's* member consumer reporting agencies from furnishing consumer reports containing criminal record information:

> Under the Ordinance,
>
> it is an unfair practice for any person to:. . .[r]equire disclosure, inquire about, or take adverse action against a prospective occupant, a tenant,

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Ordinance and related policies; however, to date, no further report has been published.

> or a member of their household, based on any arrest record, conviction record, or criminal history, except for the information pursuant to subsection 14.09.025.A.3 and subject to the exclusion and legal requirements in Seattle Mun. Code § 14.09.110.

Seattle Mun. Code § 14.09.025(2).[20] Although the Ordinance expressly states that it *"shall not be interpreted or applied to diminish or conflict with any requirements of state or federal law, including but not limited to . . . the Federal Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.,"* Seattle Mun. Code. § 14.09.115(A) (emphasis added), the SOCR—which is charged with the enforcement of the Ordinance[21]—has interpreted this provision in a manner that brings it into direct conflict with the FCRA and other federal law. Specifically, the SOCR maintains that the Ordinance bars consumer reporting agencies from providing reports from using and reporting this data:

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

[20] Seattle Mun. Code § 14.09.025.A.3 provides for a limited exception for the inquiry into and use of sex offender registry data related to adults so long as "the landlord has a legitimate business reason for taking such action" but not juvenile records. Seattle Mun. Code § 14.09.025(3)–(5).

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

SOCR, "Fair Chance Housing Ordinance, SMC § 14.09 Frequently Asked Questions" (hereinafter "Seattle SOCR FAQs"), p. 3 (emphasis added). The Seattle SOCR FAQs also state that "[a]ny attempt of a landlord **or any person** to gather information about arrest records, conviction records, or criminal history from any other source [other than a sex offender registry] will be a violation of SMC § 14.09, unless an exclusion applies." Seattle SOCR FAQs, p. 8. The Seattle SOCR FAQs specifically target *amici's* members as well as housing providers.

Therefore, as applied by the SOCR, the Ordinance prohibits both the inclusion of criminal record information in a tenant screening report, which is preempted by the FCRA's express preemption provisions, [22] but also the use of a tenant screening report containing such information by a specific group of citizens in Seattle, which violates CRAs' and housing providers' First Amendment and Substantive Due process rights.[23]

This differing treatment of some of Seattle's housing provider population makes clear that the City does not believe that the use of criminal records for tenant screening is a *per se* discriminatory practice warranting state action. If it were,

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[22] In this way, the Ordinance is clearly preempted by the Fair Credit Reporting Act, pursuant to §1681t(b)(1)(E), which prohibits states from adopting laws that attempt to regulate the content of consumer reports. *See CDIA v. Frey*, 495 F. Supp. 3d 10 (D. Me. 2001).

[23] *Amici* agree that the Ordinance is also a violation of the substantive Due Process rights of Appellants and CRAs, as applied; however, in the interest of brevity, *amici* do not present additional arguments on that issue here.

Appellee would not have carved out exemptions to the practice, and certainly not for one of the most vulnerable populations in the city: those benefitting from public housing assistance. Instead, the Ordinance amounts to a content-driven and speaker-based restriction on speech in violation of the First Amendment, simply because the City does not like the practice.

In sum, what Appellee has done is taken public burdens such as homelessness, the ability of formerly incarcerated individuals to re-enter society, mitigating the risk of recidivism, and familial instability, and placed them solely on the shoulders of a small number of private citizens, causing those citizens to assume "oppressive and unduly burdensome" personal and economic risk, instead of allocating public resources to solve these problems. This Court should find the Ordinance is unconstitutional and reverse the decision of the District Court below.

CONCLUSION

For the foregoing reasons, *amici* Consumer Data Industry Association and the Professional Background Screening Association prays that this Court reverse the decision of the District Court, enter judgment in favor of Appellants declaring the Ordinance unconstitutional and unenforceable, and grant any such other relief as the Court deems just.

Dated: November 5, 2021 HUDSON COOK, LLP

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CERTIFICATION OF COMPLIANCE

1. This document complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document listed in Fed. R. App. 32(f), this document contains 5,667 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word in 14 point font, Times New Roman.

Dated: November 5, 2021

By: *s/Jennifer L. Sarvadi*
Jennifer L. Sarvadi

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November 2021, I electronically filed the foregoing Brief of Amicus Curiae Consumer Data Industry Association and the Professional Background Screening Association In Support of Appellants' Request for Reversal with the clerk of this Court using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the CM/ECF system.

Dated: November 5, 2021 HUDSON COOK, LLP

By /s/ *Jennifer L. Sarvadi*

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National Association of Professional
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