No. 21-35567

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs/Appellants,

v.

CITY OF SEATTLE,

Defendant/Appellee.

Appeal from the United States District Court
Western District of Washington at Seattle
District Court No. 2:18-cv-736 JCC

ANSWERING BRIEF OF CITY OF SEATTLE

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I. INTRODUCTION

Seattle residents with criminal histories—disproportionately people of color—face significant barriers to accessing stable housing. After the City of Seattle comprehensively analyzed the problem, it adopted the Fair Chance Housing Ordinance to reduce those barriers. Appellants—Seattle landlords and an organization representing them ("Landlords")—challenge the Ordinance's provisions banning landlords from inquiring about, or taking adverse actions based on, a prospective tenant's criminal history. Landlords claim that the inquiry provision violates their free speech rights and the adverse-action provision violates their substantive due process rights.

Landlords are mistaken.

Because the inquiry provision is a regulation of commercial conduct, with only incidental impacts on speech, it does not implicate the First Amendment. But even if it did, it withstands the intermediate scrutiny governing commercial speech regulation because the request for criminal history for selecting a tenant is related to activity the Ordinance outlaws, the inquiry provision directly advances the City's substantial interests, and it is a reasonable response to the City's goals. The inquiry provision is not subject to strict scrutiny.

Landlords fail to carry their burden of proving that the adverse-action provision violates their substantive due process rights. Where, as here, a

challenged law implicates only economic or property-use interests, courts apply the deferential rational basis analysis, which the adverse-action provision passes. This Court should reject Landlords' attempts to rewrite settled law by converting the rational basis analysis into a debate over a law's efficacy or replacing that analysis with a combination of "substantially advances" and "undue oppression" standards.

Because Landlords' claims lack merit, the City respectfully asks this Court to affirm the district court's ruling.

II. JURISDICTION

The City agrees with Landlords' statement of jurisdiction.

III. STATEMENT OF THE ISSUES

1. A regulation of commercial conduct with only incidental impacts on speech does not implicate the First Amendment. The inquiry provision regulates commercial conduct with only incidental impacts on speech. Does the provision fail to implicate the First Amendment?

2. A regulation of commercial speech is subject only to intermediate scrutiny. The inquiry provision regulates speech in commercial transactions. If the provision implicates the First Amendment, is it subject to intermediate scrutiny?

3. A regulation of speech satisfies intermediate scrutiny if the speech is related to unlawful activity or the regulation directly advances, and is

a reasonable fit with, a substantial governmental interest. The inquiry provision limits speech related to activity that the adverse-action provision outlaws and directly advances substantial City interests without being overly broad. If the inquiry provision implicates the First Amendment, does it satisfy intermediate scrutiny?

4. Courts use the rational basis analysis to assess a substantive due process challenge to a law implicating economic and property-use rights. The adverse-action provision affects landlords' economic and property-use interests. Is Landlords' substantive due process claim governed by the rational basis analysis?

5. Under the rational basis analysis, a plaintiff must prove that the challenged law bears no substantial relation to a legitimate governmental purpose. The adverse-action provision advances the Ordinance's purpose to reduce barriers to housing for people with a criminal history, disproportionately people of color. Have Landlords failed to sustain their burden?

IV. ORDINANCE TEXT

The Addendum contains the Ordinance.

V. STATEMENT OF THE CASE

A. Seattle residents with criminal histories—disproportionately people of color—face significant barriers to accessing housing.

According to estimates, 30% of adults in the United States have an arrest or conviction record and nearly half of all children have one parent with a criminal record. 2-SER-444; U.S. Dep't of Justice Office of the Attorney Gen., *The Attorney General's Report on Criminal History Background Checks* at 51 (June 2006), https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf (last visited Jan. 10, 2022). In Seattle, approximately 30% of adults have an arrest or conviction record and 7% have a felony record. 1-SER-268. Due to a rise in using criminal background checks in the tenant screening process, people with arrest and conviction records face significant barriers to accessing housing. 2-SER-453. Some landlords categorically exclude people with any prior arrest or conviction—one study found 43% of Seattle landlords are inclined to reject an applicant with a criminal history. 1-SER-228. One in five people who leaves prison becomes homeless soon thereafter. *Id*.

Inmates in King County—home to Seattle—are disproportionately racial minorities. For example, African Americans are 6.8% of the overall County population, but account for 36.3% of the County Jail population, and Native Americans are 1.1% of the County population, but 2.4% of its jail population. *Id*.

In 2014, a fair housing test conducted by the Seattle Office for Civil Rights ("SOCR") found incidents of different treatment based on race 64% of the time, including incidents where minority testers were asked about criminal history when similarly situated white testers were not. SOCR, Press Release: *City Files Charge 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 (last visited Jan. 10, 2022); 2017 Seattle Off. for Civ. Rights Testing Program Exec. Sum. at 6, https://www.seattle.gov/Documents/Departments/CivilRights/Testing/2017%20Testing%20Program%20Report%20FINAL.pdf (last visited Jan. 10, 2022). *Accord* 1-SER-269.

B. The City comprehensively analyzed the problem.

In 2010 and 2011, community organizations and residents asked the City to address barriers to rental housing and employment, including the use of criminal history. 1-SER-269. One result was the passage in 2013 of an ordinance restricting the use of criminal history in employment decisions. Ord. 124201.[1]

The City undertook a detailed process to address access to housing for people with criminal records. The City convened a 19-person Fair Chance Housing Committee, which included a representative of Appellant Rental Housing

[1] City ordinances are available at https://seattle.legistar.com/Legislation.aspx (last visited Jan. 8, 2022).

Association of Washington ("RHA"). 1-SER-136–37, 232. Working for a year, the Committee heard from those facing barriers to housing due to their criminal records, considered academic research, and reviewed legislation from other jurisdictions that regulated the use of criminal records in tenant screening. 1-SER-226, 278–79. *See also* ER-076 ¶¶ 12–13.

Based on recommendations from the Committee and SOCR, the Mayor transmitted a fair chance housing bill to the City Council. 1-SER-262–63.

The City Council studied the issue and the bill. It heard from tenants, landlords, and RHA, learned of research into housing discrimination due to criminal history, and reviewed other jurisdictions' regulations. ER-076–80 ¶¶ 14, 15, 18–24.

Based on all this information, the Council amended the bill. ER-091 ¶ 31; 2-SER-523–24. Beyond limiting landlords' use of criminal histories, the amended bill also directed SOCR to conduct regular fair housing testing and launch a landlord training program to reduce biases against protected classes. 2-SER-301–03, 532, 569.

C. The Council adopted the Ordinance to address the problem.

The City Council unanimously passed the amended bill ("Ordinance"), now codified as Seattle Municipal Code ("SMC") Chapter 14.09.[2] ER-091 ¶¶ 31–33; 2-SER-561–92.

Landlords challenge the Ordinance's "inquiry" and "adverse-action" provisions:

> [No person may r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history, except for information pursuant to subsection 14.09.025.A.3 [regarding sex offender registries] and subject to the exclusions and legal requirements in Section 14.09.115 [including exemptions for, among other things, adverse actions taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy based on certain criminal history].

SMC 14.09.025.A.2 (emphasis added). This brief's references to "criminal history" include arrest and conviction records.

The Ordinance includes other provisions not challenged here. It:

- ❑ requires landlords to notify prospective tenants about the inquiry and adverse-action provisions (SMC 14.09.020);

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[2] The Addendum contains the Ordinance as originally codified. Its provisions remain operative. The Council amended SMC Chapter 14.09 in ways not germane to this appeal. *See* Ord. 125515 (correcting references and clarifying notice provisions); Ord. 126080 (barring use of pandemic-related eviction history).

- ❑ outlaws categorically excluding those with a criminal history from rental housing (SMC 14.09.025.A.1);
- ❑ bans adverse actions based on sex-offender registry information against an adult "unless the landlord has a legitimate business reason for taking such action," and against a juvenile or one who was convicted as a juvenile (SMC 14.09.025.A.3 – A.5);
- ❑ prohibits retaliation against anyone who exercises their rights under the Ordinance (SMC 14.09.030); and
- ❑ provides enforcement mechanisms (SMC 14.09.035 – .105).

D. Landlords challenged the inquiry and adverse-action provisions.

Landlords sued in state court. ER-146. They challenged only two provisions, under state and federal law, claiming that the inquiry provision violates their free speech rights and the adverse-action provision violates their substantive due process rights. Opening Brf. ("Opening"), Dkt. # 9, at 17. Landlords press only facial claims. *Id*. at 15–17.

The City removed this action to federal court. ER-141. The parties agreed to resolve this action on cross motions for summary judgment based largely on stipulated facts. *See* ER-005, ER-082–092.[3]

Given uncertainty in Washington's substantive due process law, the district court certified questions to the Washington Supreme Court, which answered that Washington "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, 699 (Wash. 2019).[4]

The district court then ruled in the City's favor on the cross motions for summary judgment. ER-004. Landlords appeal that ruling only under federal law. ER-166; Opening at 1–2.

VI. SUMMARY OF ARGUMENT

First Amendment. The inquiry provision is a regulation of commercial conduct, not speech. This prohibition on asking for information that may not be used in commercial transactions does not implicate the First Amendment. Even if it

[3] The stipulated facts, ER-083–92, refer to a stipulated record, which the SER provides. The parties agreed that they could cite "published material, such as articles in periodicals or papers posted online," outside the stipulated record. ER-084.

[4] The City cites the published version because the record does not contain the final, amended version. *See* ER-039–40 (order amending opinion); ER-042–70 (original opinion).

did, it is a valid regulation of commercial speech that satisfies intermediate scrutiny. Undisputedly, the City's interests are substantial. Its legislative approach to addressing these substantial interests is supported by much more than mere speculation or conjecture and its legislative choice effectively advances the City's interests. The City was not required to select the least restrictive means. Its reasonable regulation satisfies the First Amendment.

Substantive due process. Landlords cannot prove that the adverse-action provision facially violates landlords' substantive due process rights. Because that provision affects only landlords' economic and property-use interests, it is subject to the rational basis analysis. This Court must presume that the adverse-action provision passes that deferential review because the provision is substantially related to the Ordinance's purpose of reducing barriers to housing for people with a criminal history, disproportionately people of color.

Landlords fail to overcome that presumption, especially through their misplaced policy arguments. Mischaracterizing the Ordinance's purpose and complaining about its exemptions gain them nothing. The City's treatment of background checks in other contexts—none of which affects access to housing—is irrelevant. So too are the balances other governments strike in the housing context. Landlords' claims about landlord liability are unsupported, and they improperly

invite this Court to resolve complex debates over recidivism under the rational basis analysis.

This Court must reject Landlords' attempts to rewrite settled substantive due process law. The "right to exclude" is not a fundamental right subject to heightened scrutiny under due process law. Rational basis review does not probe the challenged law's efficacy. And the proper analysis is not some combination of "substantially advances" and "undue oppression" standards.

VII. STANDARD OF REVIEW

This Court reviews constitutional questions and a district court's grant of summary judgment de novo. *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016).

VIII. ARGUMENT

A. The inquiry provision does not run afoul of the First Amendment.

Landlords challenge only the inquiry provision on First Amendment grounds. Opening at 1. Contrary to the district court's conclusion, ER-012, this prohibition on asking for information that may not be used in commercial transactions does not implicate the First Amendment. Even if it did, the inquiry provision satisfies the intermediate scrutiny governing commercial speech regulation, as the district court held. ER-017. Landlords' efforts to trigger strict scrutiny fail.

1. The inquiry provision does not implicate the First Amendment.

The adverse-action provision prohibits the use of criminal history in selecting tenants. SMC 14.09.025.A.2. To prevent that unlawful use, the inquiry provision prohibits landlords from obtaining that history.

Like the adverse-action provision, the inquiry provision is a regulation of commercial conduct, with only incidental impacts on speech. The First Amendment extends only to conduct that is inherently expressive. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018). "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011). Regulating conduct that is facilitated by written or spoken language does not abridge freedom of speech. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017).

The threshold question is whether the desire to stifle speech motivated the regulation of "conduct with a 'significant expressive element'" or "the ordinance has the inevitable effect of 'singling out those engaged in expressive activity.'" *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015)

(quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–06 (1986)).[5] Because the inquiry provision does not single out those engaged in expressive activity—such as newspapers or advocacy organizations—this case turns on the "significant expressive element" standard. Applying it, this Court rejected a First Amendment challenge to the City's minimum wage ordinance because the regulated conduct lacked a significant expressive element:

> The ordinance, like a statute barring anti-competitive collusion, is not wholly unrelated to a communicative component, but that in itself does not trigger First Amendment scrutiny . . . . [T]he ordinance applies to businesses that have adopted a particular business model, not to any message the businesses express. It is clear that the ordinance was not motivated by a desire to suppress speech, the conduct at issue is not franchisee expression, and the ordinance does not have the effect of targeting expressive activity.

Id. at 408–09 (cleaned up).

The inquiry provision is likewise an economic regulation that does not target speech or expressive conduct and was not motivated by a desire to suppress speech. It "does not regulate conduct that communicates a message or that has an expressive element." *Rumsfeld*, 547 U.S. at 66.

The inquiry provision is like the statute in *Rumsfeld* that required law schools—despite their opposition to the military's treatment of gay and lesbian

[5] If Landlords suggest that the question is a function of the private or public nature of the information conveyed, they are mistaken. *Cf.* Opening at 20–22.

service members—to permit military recruitment of students. *Rumsfeld* upheld the statute as a regulation of conduct, not speech, analogizing it to an anti-discrimination measure: the government "can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id.* at 62.

The inquiry provision regulates business dealings between landlords and prospective tenants and prohibits landlords from asking others for criminal history, which they are prohibited from using. It is an economic regulation that does not target speech. *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019) (ordinance about housing and rental arrangements regulated nonexpressive conduct—booking transactions—despite incidental burdens on speech). The speech the inquiry provision restricts—a request for criminal history that landlords may not use lawfully—does not implicate the First Amendment because the speech is incidental to economic activity. *See id*. at 686. The inquiry provision implicates no landlord speech regarding their views on anything, let alone speech "with a significant expressive element." *Int'l Franchise*, 803 F.3d at 408. Beyond one topic—criminal history in the tenant-selection process—the

inquiry provision leaves landlords "free to discuss any issue with any person at any time." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 435 (2015).

Without discussing that case law, the district court mistakenly concluded that the inquiry provision implicates the First Amendment simply "because it regulates what people can *ask*," relying solely on this Court's inapposite decision about time, place, and manner restrictions in public parks, where speech rights are at their zenith. ER-012 (citing *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009)). Under controlling authority, the inquiry provision regulates commercial conduct without implicating the First Amendment.

2. If the inquiry provision implicates the First Amendment, it is subject only to intermediate scrutiny.

a. At most, the inquiry provision regulates commercial speech.

If the inquiry provision implicates the First Amendment, it is a valid regulation of commercial speech subject to intermediate scrutiny, as the district court ruled. ER-012–31. *See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

"Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (cleaned up).

Accord Sorrell, 564 U.S. at 579 (noting the government's legitimate interest in protecting consumers from commercial harms); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996).

Speech related to housing transactions is commercial speech. Rental housing is traditionally subject to government regulation to protect consumers who are not on equal footing with landlords. *See, e.g.*, *Equity Lifestyle Props., Inc. v. Cnty. of San Louis Obispo*, 548 F.3d 1184, 1193 (9th Cir. 2008). In *San Francisco Apartment Association v. City and County of San Francisco*, this Court ruled that "a discussion between a landlord and a tenant about the possibility of entering into a buyout agreement is commercial speech, as it relates solely to the economic interests of the parties and does no more than propose a commercial transaction." 881 F.3d 1169, 1176–77 (9th Cir. 2018). The Sixth Circuit agrees: when considering a challenge to a federal regulation prohibiting the discussion of race in applications for federal housing, it recognized that statements "made by a landlord to a prospective tenant describing the conditions of rental" constitute commercial speech. *Campbell v. Robb*, 162 Fed. Appx. 460, 469 (6th Cir. 2006). *See id*. at 471 (even if speech does not propose a commercial transaction, it is commercial if linked inextricably to a commercial transaction).

In *Bolger*, the seminal commercial speech case Landlords cite, the Supreme Court noted the breadth of commercial speech, holding 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 though it did not expressly propose a transaction and the only commercial element was a statement at the bottom of the last page noting that "the pamphlet [was] contributed as a public service by . . . the distributor of Trojan-brand prophylactics." *Bolger v. Youngs Drug Prods., Corp.*, 463 U.S. 60, 62 n.4, 68 (1983). *Bolger* emphasized that even speech about "important public issues" is entitled to less First Amendment protection when made in commercial transactions. *Id.* at 67–68. *Bolger* held that all of the speech at issue there—including the speech on public issues—was regulated as commercial speech. *Id.*

The same is true of the City's inquiry provision. Any regulated speech is commercial—it occurs within the context of, and is inextricably linked to, commercial transactions between landlords and tenants.

Even if the commercial nature of the speech at issue here presented a close question, the *Bolger* factors demonstrate that the prohibited inquiry is commercial speech. *Bolger* outlined three nonexclusive factors: "Strong support that the speech should be characterized as commercial speech is found where [1] the speech is an advertisement, [2] the speech refers to a particular product, and [3] the speaker has an economic motivation." *Hunt v. City of Los Aneles*, 638 F.3d 703, 715 (9th Cir. 2011) (cleaned up; citing *Bolger*, 463 U.S. at 66–67). *See Ariix, LLC v.*

NutriSearch Corp., 985 F.3d 1107, 1116 (9th Cir. 2021) ("These so-called *Bolger* factors are important guideposts, but they are not dispositive.").

Last year, this Court ruled in *Ariix* that a guide that rated and reviewed available nutritional supplements was commercial speech, even though the guide was not a traditional advertisement under the first *Bolger* factor. *Ariix*, 985 F.3d at 1116. As for the second *Bolger* factor, the guide plainly referred to specific products, but "this element does not shed much light, either." *Id.* "A publication that is not in a traditional advertising format but that still refers to a specific product can either be commercial speech—or fully protected speech." *Id. Ariix* found the third *Bolger* factor determinative: "This factor asks whether the speaker acted *primarily* out of economic motivation, not simply whether the speaker had *any* economic motivation." *Id*. at 1116.[6]

The Third Circuit likewise recently applied intermediate scrutiny to an ordinance prohibiting employers from asking potential hires about their previous wage history because the inquiry occurs in a commercial transaction: a job application. *Greater Phila. Chamber of Comm. v. City of Phila.*, 949 F.3d 116, 137 (3rd Cir. 2020). Considering the *Bolger* factors, *Greater Philadelphia* held:

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[6] This Court has explained that the commercial nature of speech does not hinge solely on whether the speaker has an economic motive, where the regulated speech concerns providing services, "not the exchange of ideas." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017).

"Expression pertaining to a possible offer of employment involves (1) an advertisement by the prospective employee to the employer; (2) the focus of the employee's services for hire; and (3) by definition, an economic motive." *Id.*[7] "Because the speech occurs in the context of employment negotiations, the economic motive is clear." *Id.*

What was true in *Ariix* and *Greater Philadelphia* is true here: the inquiry provision regulates commercial speech. Landlords do not address the first two *Bolger* factors, let alone dispute that, as in *Greater Philadelphia*, they show that the speech the inquire provision regulates is commercial. As for the third factor, Landlords concede that they "have some economic motivation for asking" for prospective tenants' criminal history, but they argue that, because this "profit motive" is not "primary," the requests fall outside the ambit of commercial speech. Opening at 25. Landlords point to the stipulated facts, which they say show that they have an economic interest and an independent noneconomic interest "to promote safety and well-being for themselves and their other tenants." *Id.* (citing ER-084–86). But the stipulated facts discuss only Landlords' economic interests.

[7] Landlords claim that *Greater Philadelphia* is distinguishable because Philadelphia's inquiry provision "affected a much narrower range of speech that was closely connected to a commercial transaction," but Seattle's inquiry provision "prohibits *everyone* from asking *anyone* about a potential or current tenant's criminal history." Opening at 29. Seattle's inquiry provision says no such thing. *See infra* § VIII.A.3.c.

The Yims "could not afford to live in Seattle without the rental income from their properties." ER-085. Ms. Lyles too "relies on rental income to afford living in Seattle." ER-085. The stipulated facts do not say that Landlords have an independent interest in the well-being of their community that does not directly derive from the commercial transaction of renting property for income. The stipulated record and logic affirm that, as in *Ariix*, Landlords "acted *primarily* out of economic motivation . . . ." *Ariix*, 985 F.3d at 1116. *Accord Valle del Sol, Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013) ("The act of soliciting work as a day laborer may communicate a political message, but the primary purpose of the communication is to advertise a laborer's availability for work and to negotiate the terms of such work."); *First Resort*, 860 F.3d at 1276 (advertising regarding anti-abortion counseling services provided for free "has a clear economic motivation"). But for their stated desire to earn income, Landlords would not inquire about prospective tenants' criminal history.

b. Landlords' arguments for strict scrutiny fail.

Landlords' arguments for applying strict scrutiny lack merit.

(i) Content-based commercial regulation is subject to intermediate scrutiny.

Landlords claim that the inquiry provision "must survive strict scrutiny because it restricts speech based on content." Opening at 19. But even a content-based regulation of speech that solicits a commercial transaction, or is involved

with consummating a commercial transaction, is tested under intermediate scrutiny. *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016). Thus, even speech that includes political messages is subject to intermediate scrutiny where it is communicated as part of a commercial transaction. *Valle del Sol*, 709 F.3d at 818–19. Landlords point to *Reed*, but it applied strict scrutiny to content-based regulations of noncommercial speech. Opening at 19 (citing *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015)). *See Contest Promotions, LLC v. City & Cnty. of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017) (rejecting "the notion that *Reed* altered *Central Hudson*'s longstanding intermediate scrutiny framework").

(ii) Commercial speech is not limited to speech proposing a transaction.

Even though Landlords concede that commercial speech includes speech "necessary to the consummation of a commercial transaction," Opening at 24 (quoting *Valle del Sol*, 709 F.3d at 818), they contend that commercial speech comprises only speech that does "no more than propose a commercial transaction," quoting *Bolger* out of context. *Id*. at 23 (quoting *Bolger*, 463 U.S. at 66).[8] But assessing whether the speech proposes a commercial transaction is "just a starting

[8] Landlords assert that the "the Ordinance encompasses speech that has no relationship to any commercial transaction," Opening at 28, apparently pointing to the imagined application of this housing ordinance to situations having nothing to do with housing. *See infra* § VIII.A.3.c.

point"; courts "instead try to give effect to a common-sense distinction between commercial speech and other varieties of speech." *Ariix*, 985 F.3d at 1115 (cleaned up). "[S]peech that does not propose a commercial transaction on its face can still be commercial speech." *Id.*

Landlords point to a California intermediate appellate decision that treated consumer credit reporting as noncommercial speech. Opening at 24 (citing *U.D. Registry, Inc. v. State of Cal.*, 40 Cal. Rptr. 2d 228 (Cal. Ct. App. 1995)). But they overlook how the California appellate court eventually deemed that decision "superseded by subsequent authority," noting that the "'speech proposing a commercial transaction' test is no longer the sole test" for commercial speech. *U.D. Registry, Inc. v. State of Cal.*, 50 Cal. Rptr. 3d 647, 658 (Cal. Ct. App. 2006).

(iii) Criminal history may be regulated as commercial speech.

Landlords mistakenly contend that criminal history cannot be regulated as commercial speech. *Cf.* Opening at 26.[9] They ignore the fundamental precept that context matters when assessing what speech is commercial. *United Reporting* is instructive. *United Reporting Publ'g Corp. v. Cal. Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998), *rev'd on other grounds*, 528 U.S. 32 (1999). It involved a statute requiring local law enforcement agencies to make public the address of persons

[9] If Landlords suggest that the public nature of criminal history subjects it to strict scrutiny, they are mistaken. *Cf.* Opening at 20–22.

arrested but prohibiting the use of that information to sell a product or service. *Id.* at 1135. Although a company that packaged and sold such information claimed that its speech was noncommercial, this Court disagreed—the speech was commercial because of how the company used the information, not its inherent nature. *Id.* at 1137.

The same was true in *Sorrell*, where data on physicians' prescription practices became part of commercial speech when used by pharmaceutical companies to market drugs. 564 U.S. at 557–58, 571–72. *See also, e.g., Trans Union Corp. v. Fed. Trade Comm'n*, 245 F.3d 809, 818 (D.C. Cir. 2001) (marketing lists with consumer names); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) (consumer credit reports).

And the same is true here. Although criminal history is not inherently commercial information, the inquiry provision regulates asking for that information only in commercial transactions.

(iv) The inquiry provision implicates no inextricably intertwined noncommercial speech.

Landlords mistakenly claim that, because the "commercial incentive for their inquiries into criminal background" is inextricably intertwined with their "non-commercial motivations," the inquiry provision must satisfy strict scrutiny. Opening at 25. The inextricable intertwining doctrine looks not at commercial and noncommercial motivations, but at the combination of commercial and

noncommercial speech. "If nothing prevents the speaker from conveying, or the audience from hearing, noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages, then the government may permissibly restrict the commercial message regardless of its proximity to noncommercial speech." *Charles v. City of Los Angeles*, 697 F.3d 1146, 1152 (9th Cir. 2012) (cleaned up).

The speech alleged to be at issue here—asking for criminal history regarding a prospective tenant—is unitary. There is no other alleged speech at issue that could be intertwined, inextricably or not, with the request for criminal history. *Compare Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase."), *with First Resort*, 860 F.3d at 1277 ("This misleading commercial speech is easily separated from other protected, non-misleading portions of First Resort's website.").

The "nuanced *Dex Media* analysis" Landlords now press is inapplicable. Opening at 27. As in all of the cases considering intertwined commercial and noncommercial speech, the Yellow Pages at issue in *Dex Media* were evaluated as "mixed-content publications" because they "contain components of both commercial and noncommercial speech." *Dex Media West, Inc. v. City of Seattle*,

696 F.3d 952, 957 (9th Cir. 2012). But the inquiry provision regulates only Landlords' ability to ask for criminal history regarding a prospective tenant in a commercial transaction. Otherwise, Landlords may ask anything they want of anyone about anything. *See Bolger*, 463 U.S. at 68 (cleaned up) ("advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech").

(v) RHA's speech is commercial.

Nothing about RHA's speech lifts it out of the commercial context. *Cf.* Opening at 27–28. It consists of criminal history reports it sells to landlords for selecting tenants. The district court correctly found 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." ER-016. "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?'" ER-017.

Landlords do not challenge this holding. They just analogize RHA's speech to the "protected speech" in a book, film, or play offered for sale. Opening at 28. Landlords identify no underlying "protected" message conveyed by the criminal history.

3. The inquiry provision satisfies intermediate scrutiny.

Central Hudson provides the intermediate scrutiny test for commercial speech restrictions:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson, 447 U.S. at 566 (bracketed numbers added).[10] As the district court held, the inquiry provision satisfies this test. ER-017–29. *Cf.* CDIA Brf. at 3 (incorrectly claiming that the district court applied "mere rational basis" scrutiny).

a. The request for criminal history is related to activity the Ordinance outlaws.

Under *Central Hudson*, a court "first evaluate[s] whether the affected speech is . . . related to unlawful activity." *Valle del Sol*, 709 F.3d at 816. "[A]ny First Amendment interest is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *HomeAway.com*, 918 F.3d at 686 (cleaned up).

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[10] Given this Court's en banc ruling to the contrary, Landlords do not ask this Court to apply strict scrutiny to commercial speech. Opening at 23 n.7. They simply argue the speech here is not commercial.

Because the adverse-action provision bans landlords from using criminal history in selecting tenants, the inquiry provision's prohibition on asking for criminal history regulates speech related to unlawful activity. The *Central Hudson* inquiry ends. The inquiry provision satisfies the First Amendment.

b. The inquiry provision directly advances the City's substantial interests.

Even if the other three *Central Hudson* prongs were relevant, they too demonstrate that the inquiry provision satisfies the First Amendment.

Landlords concede that the City's interests are substantial under the second prong. Opening at 30–31.

(i) Landlords do not argue that the inquiry provision fails to directly advance the City's interests.

The inquiry provision satisfies the third, "directly advances" prong of *Central Hudson* because it is supported by more than "mere speculation or conjecture" and "the harms it recites are real and . . . its restriction will in fact alleviate them to a material degree." *Edenfield v. Faine*, 507 U.S. 761, 770–71 (1993). As the district court recognized, "[t]he 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.'" ER-020 (quoting *Lorillard Tobacco Co v. Reilly*, 533 U.S. 525, 561 (2001) (cleaned up)). *Accord Greater Phila.*, 949 F.3d at 149 ("Notwithstanding our recitation of the impressive record that supports this

Ordinance, we think it important to emphasize that neither scores of empirical studies nor proof to scientific certainty is necessary to carry the City's burden here."). Although it has, Seattle need not produce empirical data to substantiate the need for the inquiry provision; it may rely on history, consensus, and common sense. *Fla. Bar*, 515 U.S. at 628.

"It is well established that a law need not deal perfectly and fully with an identified problem to survive intermediate scrutiny." *Contest Promotions*, 874 F.3d at 604. As Landlords correctly note, the First Amendment does not require that a law "'address all aspects of a problem in one fell swoop.'" Opening at 31 (quoting *Williams-Yulee*, 575 U.S. at 451). A regulation satisfies this standard if it has exceptions for "narrow and well-justified circumstances." *Sorrell*, 564 U.S. at 573. Where exceptions to a regulation "have a minimal effect on the overall scheme," the regulation is not unduly underinclusive. *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 850 (9th Cir. 2017) (en banc). The government need not exhaust the full breadth of its authority by regulating every instance of a harm. *Contest Promotions*, 874 F.3d at 604.

The district court recognized that its "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 interests in reducing barriers to housing for people with criminal histories."

ER-025. Based on more than ample evidence, the district court ruled that Seattle's conclusion was reasonable. ER-020–25. Studies demonstrate that criminal histories pose the largest barrier to those seeking housing and have a disparate impact on communities of color. 1-SER-274–76.

Landlords "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.'" ER-021 (quoting briefing). As Landlords recognize, reducing landlords' ability to obtain applicants' criminal histories reduces landlords' ability to commit the unlawful act of denying tenancy based on criminal history. Opening at 33 ("a landlord cannot take an adverse action because of information about which he cannot inquire"). And as below, Landlords do not argue that the inquiry provision "fails to directly advance the City's interest in combatting racial discrimination and the records shows that it does." ER-025.

(ii) The federal-law exemption is narrow, well-justified, and does not apply to the inquiry provision.

Instead, Landlords contend that the inquiry provision fails the third *Central Hudson* prong because "[t]he Ordinance's exception for federally assisted housing renders it fatally underinclusive." Opening at 32. But this federal-law exemption does not apply to the inquiry provision. Although the inquiry provision, like the

adverse-action provision, is "subject to the exclusions and legal requirements in Section 14.09.115" (SMC 14.09.025.A.2), Section .115 limits the federal-law exemption to the adverse-action provision: "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 . . . ." SMC 14.09.115.B (emphasis added). As the district court held, because the federal-law exemption does not apply to the inquiry provision, it is irrelevant to Landlords' First Amendment challenge to that provision. ER-019.[11]

Landlords contend that the Ordinance defines "adverse action" "in such a way as to reasonably include inquiries about criminal history." Opening at 33. To the contrary, the long list of possible adverse actions does not include inquiring or asking about anything. SMC 14.09.010. This is logical because the Ordinance separately regulates inquiries and adverse actions. SMC 14.09.025.A.2.

Landlords' claims that the City has conceded that the federal-law exemption says something it does not lacks support in the record. For this purported concession, Landlords point to two statements. First, they cite to the City's brief below. Opening at 32 (citing "Dkt. #33 at 15–16"), but that brief correctly stated:

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[11] Contrary to Landlords' claims, "the Yims could [not] inquire about the criminal history of someone with federal rent vouchers in one duplex unit" and also "cannot make the same inquiry about the tenant next door." Opening at 32.

"The exemption for those providers is limited to their decisions to deny tenancy (or take other 'adverse actions') where federal regulations require that decision." 2-SER-596–97. *Accord* 2-SER-597 n.79 ("The exception is only for 'adverse actions.'"). Second, Landlords reference a statement made in oral argument below, which did not undercut the inquiry provision's plain terms. Opening at 33 (citing ER-035 (addressing Landlords' argument "that Seattle's ordinance is underinclusive," not any argument that the inquiry provision is underinclusive).

The City's online answers to frequently asked questions ("FAQs") do not, as Landlords claim, cast the federal-law exemption as applying to the inquiry provision. *Cf*. Opening at 33 (citing https://www.seattle.gov/Documents/Departments/CivilRights/Fair%20Housing/Fair%20Chance%20Housing%20FAQ_amendments_FINAL_08-23-18.pdf (last visited Jan. 16, 2022)). Setting aside that the FAQs "should not be used as a substitute for codes and regulations," FAQs at 1, they speak only of the exemption applying to the adverse-action provision: "The ordinance does not preclude **adverse actions** taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy." *Id*. at 3 ¶ 8 (emphasis added).[12]

[12] Landlords incorrectly added the words "screening or" before "adverse actions" in their quotation of the FAQs. Opening at 33. Those two words do not appear in that sentence in the FAQs. *Id*.

In a further misreading of the federal-law exemption, Landlords claim that it improperly extends beyond two categories of convictions for which providers of federally assisted housing must deny tenancy: the manufacture or production of methamphetamine and lifetime sex offender registration. Opening at 34. The problem, they posit, is that the federal-law exemption also uses the words "including but not limited to" these two types of convictions. *Id*. 35. Landlords fail to recognize what those words modify. The federal-law 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" the two types of specified convictions. SMC 14.09.115.B (emphasis added). The federal-law exemption applies to "adverse actions" based on "federal regulations that require denial of tenancy," whatever those federal regulations may be.[13] If a federal regulation "require[s] denial of tenancy," that denial is exempt. Contrary to Landlords claim, that "broad exclusion" is "required by federal law." *Cf*. Opening at 35.

[13] Among those regulations are the two examples named in the exemption and, as CDIA notes, "persons evicted from public housing for drug-related criminal activity in the three years prior to the application" and "persons currently engaged in illegal drug use." CDIA Brf. at 6.

(iii) Even if the federal-law exemption applied to the inquiry provision, it would not render it unduly underinclusive.

Even if the federal-law exemption applied to the inquiry provision, the exemption would not undercut the provision's constitutionality. Under *Central Hudson*, there need only be "a logical connection between the interest a law limiting commercial speech advances and the exceptions a law makes to its own application." *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 905 (9th Cir. 2009). *Accord Valle del Sol*, 709 F.3d at 824 (the law, while somewhat underinclusive, still bans enough activity to advance the governmental interest); *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 743 (9th Cir. 2011) (a law "can withstand a *Central Hudson* attack so long as it is not so pierced by exceptions and inconsistencies, as to directly undermine the City's interests") (cleaned up).

As the district court held, the exception "support[s] the City's explanation that it sought to avoid enacting an Ordinance that could be preempted by federal law"; it does "not show that the City intended to burden private landlords while advantaging publicly founded housing." ER-019–20. Seattle's Ordinance cannot trump contrary federal law.

Landlords misapprehend *Central Hudson*'s third prong, claiming that "[a] law is underinclusive if it does not extend to equally harmful activity 'when judged

against [the law's] asserted justification,'" quoting out of context a snippet from *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 802 (2011). Opening at 31. But *Brown* was a noncommercial speech case that applied strict scrutiny, not *Central Hudson*'s intermediate scrutiny. *Brown*, 565 U.S. at 799. Landlords' reliance on the under-inclusivity discussion in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), is likewise inapposite. *Cf*. Opening at 31. That case concerned a statute that restricted publication of information in newspapers; it was not resolved under *Central Hudson*. Besides, courts will not punish government "for leaving open more, rather than fewer, avenues of expression, especially when," as here, "there is no indication that the selective restriction of speech reflects a pretextual motive." *Williams-Yulee*, 135 S. Ct. at 1670. Landlords concede that the City's "true interests lie in prohibiting adverse action based on criminal history, not barring access to information." Opening at 39.

c. The inquiry provision is no more extensive than necessary.

The final prong of *Central Hudson* requires "a reasonable fit between the government's legitimate interests and the means it uses to serve those interests." *Valle del Sol*, 709 F.3d at 825 (cleaned up). The government's fit need not be the least restrictive means, and it need not be perfect; it simply must be reasonable. *Greater New Orleans Broad. Ass'n, Inc. v U.S.*, 527 U.S. 173, 188 (1999). The law should "represent[] not necessarily the single best disposition," but a

"proportion[ate]" one. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). *Accord Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (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").

Landlords contend that the inquiry provision fails the final prong of *Central Hudson* because it is overinclusive—a "sloppy fit between means and end." Opening at 4. But in a facial challenge, such as this one, a law is overbroad only if "a substantial number of [the law's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep," *United States v. Stevens*, 559 U.S. 460, 473 (2010) (cleaned up), or the law is "significantly" overinclusive. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011).[14] As the district court held, the inquiry provision satisfies *Central Hudson*'s final prong. ER-026–27. There is a "'proportionate' fit" between the City's substantial interest "and its legislative attempt to advance that interest." *Greater Phila.*, 949 F.3d at 156.

[14] Landlords ignore this governing substantive law and instead cite to an inapposite decision addressing the standing of a plaintiff to challenge overbreadth under the First Amendment in regard to parties not before the court. Opening at 36 n.9. The City challenges Landlords' substantive argument, not their standing.

Landlords insist that the Ordinance applies outside the landlord-tenant context. In their estimation, the Ordinance "prohibits any person from asking anyone for any reason about the criminal history of a current or prospective tenant of rental housing in Seattle . . . ." Opening at 26. They say that "the speaker and the audience could be entirely divorced from any proposed commercial transaction and still fall within the Ordinance's scope, such as a journalist inserting a query into a criminal records database," or "employers, firearm dealers, [or] commercial lessors . . . ." *Id*. at 26–27, 36. The district court properly rejected this absurd interpretation. ER-029.

The inquiry provision must be viewed "in the context of the Ordinance as a whole." *First Resort*, 860 F.3d at 1274. The Ordinance's context and its language confirm its limited scope. The Ordinance applies to a person only with reference to housing: "A person is covered by this Chapter 14.09 when the physical location of the housing is within the geographic boundaries of the City." SMC 14.09.015. The City Council gave the "Fair Chance Housing Ordinance" its scope-describing title, which is part of the law. SMC 1.04.030 ("For purposes of construction and interpretation, unless stated otherwise, the names and headings of . . . chapters . . . of the [SMC] become part of the law"). The Ordinance defines "fair chance housing" to mean "practices to reduce barriers to housing for persons with criminal

records." SMC 14.09.010. The Ordinance's call for fair housing testing and landlord education further confirm the Ordinance's limited scope. 2-SER-569.

This Court will not interpret an ordinance "in a formalistic manner when such an interpretation would produce a result contrary to the [ordinance]'s purpose or lead to unreasonable results." *United States v. Combs*, 379 F.3d 564, 569 (9th Cir. 2004). Landlords' reading would produce an absurd result at odds with the Ordinance's purpose. Relief for a violation of the Ordinance includes ordering a "rent refund or credit, reinstatement to tenancy, [and] affirmative recruiting and advertising measures"—measures that could not logically extend beyond landlords. SMC 14.09.090. *See First Resort*, 860 F.3d at 1274 ("otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity") (cleaned up). Background checks in other contexts are covered elsewhere in the Code—reading the inquiry provision to cover them would create conflict within the Code. *See. e.g.*, SMC ch. 14.17 (employment); SMC 12A.14.180 (firearms sales).[15] And given that "person" includes any City instrumentality, SMC 14.09.010, Landlords' reading of the inquiry provision would mean that the Seattle Municipal Court could not inquire about a tenant-defendant's criminal history during sentencing.

[15] The SMC is available at https://library.municode.com/wa/seattle/codes/municipal_code (last visited Jan. 8, 2022).

Beyond misreading the Ordinance, Landlords point to less effective (or ineffective) alternate means of accomplishing the City's substantial purposes. But the Supreme Court "does not 'impose upon regulators the burden of demonstrating that the manner of restriction is absolutely the least severe that will achieve the desired end'"; the fit need only be proportionate. *Greater Phila.*, 949 F.3d at 154 (quoting *Fox*, 492 U.S. at 480) (cleaned up). The district court properly held that "most of Landlords' proposals would not achieve the City's objectives and none of them show that the City's choice to enact the [inquiry provision] was an unreasonable means of pursuing them." ER-027.

First, and "foremost," Landlords propose an alternative they never made to the district court: simply rest on the adverse-action provision. Opening at 39. But given that they concede that the inquiry provision is "designed to make it more difficult for landlords to violate the conduct prohibition," *id*. at 40, they must also concede that the provision enhances the adverse-action provision's efficacy. In offering their alternative, Landlords assert that the City must first have demonstrated that existing laws against housing discrimination could not address the problem. *Id*. at 45. The Third Circuit rejected a similar argument:

> The Chamber also suggests that more rigorous enforcement of current antidiscrimination laws is an alternative that the City must attempt *before* passing an Ordinance such as this. Intermediate scrutiny, however, does not require that the City adopt such regulatory measures only as a last alternative or that the City

> demonstrate that the legislation is the least restrictive response.

Greater Philadelphia., 949 F.3d at 156–57.[16]

Second, Landlords argue that it is "the City's own biased policing practices" that is "the source of the racial disparities resulting from criminal history." Opening at 41. They point only to an article regarding suspected over-surveillance of "racially heterogeneous spaces" and a City memo concluding that "[p]eople of color face compounding effects of criminal records due to racial bias in tenant selection as well as racial disparities in the criminal justice system." *Id*. (citing 1-SER-230).[17] The record, including the City memo cited by Landlords, demonstrates that "[c]riminal background screening" is a "source of the disparity that the City seeks to rectify." *Id.*

Third, Landlords contend that the City could have adopted a certification program requiring a probation officer's approval to access housing, such as the one in state law. *Id*. at 42 (citing Wash. REV. CODE § 9.97.020). But the City's Reentry Workgroup considered and rejected the statute's ability to meet Seattle's

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[16] Landlords' out-of-context reference to a 1963 decision about the regulation of political expression is inapposite. Opening at 40 (quoting *NACCP v. Button*, 371 U.S. 415 (1963)). *Comite de Jornaleros*, to which Landlords also point, *id.*, emphasized in a time, place, and manner case that the Court "cannot apply a stringent least-restrictive-alternative test . . . ." 657 F.3d at 949. The same is true here.

[17] Landlords did not include in the ER the report to which they cite.

substantial interests, finding that it may never be possible for most individuals leaving prison to meet the statute's requirements. *Seattle Reentry Workgroup Final Report* at 31–32 (Oct. 2018), https://www.seattle.gov/Documents/Departments/CivilRights/Reentry%20Workgroup%20Final%20Report.pdf (last visited Jan. 14, 2022).

Finally, Landlords claim that the City could "expand supportive public housing," without explaining how far. Opening at 42. They do not suggest that the City has the financial resources to provide public housing to each resident with a criminal history.

None of these alternatives addresses Seattle's substantial interests. As the district court explained, "[t]he problem with these suggestions is that they would require the City to substitute Landlords' objectives for the City's." ER-028. And even if effective, none of Landlords' alternatives would make the inquiry provision an unreasonable legislative choice. The district court correctly noted that "[r]easonable 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." *Id.*

B. The adverse-action provision passes substantive due process review.

Landlords cannot meet their burden of proving that the adverse-action provision facially violates their substantive due process rights. As the district court correctly ruled, ER-006–09, Landlords' claim is governed by, and passes, the deferential rational basis analysis. Landlords' attempts to rewrite settled substantive due process law lack merit.

1. The adverse-action provision is governed by and passes the rational basis analysis.

Where a challenged law implicates no fundamental right, the rational basis analysis controls. *E.g.*, *Yagman v. Garcetti*, 852 F.3d 859, 867–67 (9th Cir. 2017); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1058 (9th Cir. 2012).

Rational basis controls Landlords' substantive due process claim because the Ordinance implicates no fundamental right. The adverse-action provision implicates landlords' economic and property-use interests, which are not fundamental rights under substantive due process law. *Slidewaters LLC v. Wash. State Dept. of Labor & Indus*., 4 F.4th 747, 758 (9th Cir. 2021) ("The right to use property as one wishes is also not a fundamental right."); *Yagman*, 852 F.3d at 866–67; *Samson*, 683 F.3d at 1058. *Cf. Wash. v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (discussing fundamental rights).

The rational basis analysis defers "to legislative judgments about the need for, and likely effectiveness of, regulatory actions" because the Supreme Court has "long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 545 (2005). A court must presume a regulation is valid unless the plaintiff meets the "exceedingly high burden" of proving that the regulation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare," *Samson*, 683 F.3d at 1058, or advances no governmental purpose. *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008). The government has no obligation to produce evidence to sustain the rationality of a statute. *Heller v. Doe*, 509 U.S. 312, 320 (1993).[18] Legislation "may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993). A court must uphold the challenged law if "any reasonably conceivable state of facts" could provide a rational basis, even if they did not motivate the legislative action. *Id.* at 313, 315.

The adverse-action provision passes the rational basis analysis. It is aimed at legitimate governmental purposes, the importance of which Landlords concede.

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[18] The rational basis analysis is the same for equal protection claims—as in *Heller* and the other equal protection decisions this brief cites—and substantive due process claims. *Munoz v. Sullivan*, 930 F.2d 1400, 1404 n.10 (9th Cir. 1991).

Opening at 30–31. *Accord* ER-021 (district court quoting briefing). No one can, or does, seriously question that the adverse-action provision—no matter one's opinion of its policy merits—is substantially and rationally related to those purposes. This Court must presume that the provision is valid.

2. Landlords fail to sustain their burden under the rational basis analysis.

Landlords cannot sustain their substantial burden of disproving that presumption. Instead, they and their amici invite this Court to resolve debates over the adverse-action provision's efficacy and policy balance. Courts do not resolve such debates through a substantive due process claim. Avoiding the "hazards of placing courts in this role," *Lingle*, 544 U.S. at 544, courts adhere to the rational basis analysis, which stems from the belief that, unless a plaintiff can show a law lacks a rational foundation, "the people must resort to the polls not the courts." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (quoting other authority).

Even if Landlords' policy arguments were proper, they lack merit.

a. Landlords mischaracterize the adverse-action provision's purpose as reducing recidivism and fixing the criminal justice system.

To create a target for their policy arguments, Landlords miscast the adverse-action provision's purpose, first as reducing recidivism. Opening at 5, 14, 51, 56. Reducing recidivism is only a secondary effect of the Ordinance's purpose to

reduce barriers to housing for people with a criminal history, disproportionately people of color. *Compare* 2-SER-564–65 (Ordinance citing data linking lower recidivism to stable housing) *with* 2-SER-568 (Ordinance follows the recommendation that the City address barriers to housing).

Landlords also suggest that the Ordinance's purpose is to address the criminal justice system's racial impacts—just so they can claim that, to advance that alleged purpose, the adverse-action provision arbitrarily burdens "race-neutral" tenancy decisions. Opening at 55. Landlords' premises are baseless: that is not the Ordinance's purpose and tenancy decisions are not race-neutral. *See, e.g.* 1-SER-269–270, 565 (evidence of racial bias in tenant selection). And the only authority Landlords cite for the Due Process Clause prohibiting burden-shifting is a takings case that said no such thing. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 618 (2013).[19]

b. The exemptions are rational.

Landlords gain nothing from alleging that a trio of exemptions to the adverse-action provision cause it to fail rational basis review. Beyond offering no

[19] Landlords presumably refer to a line in *Koontz* that characterized *Nollan*: "the Due Process Clause protected the Nollans from an unfair allocation of public burdens." *Koontz*, 570 U.S. at 618 (citing *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 838 (1987)). But *Nollan*'s only discussion of substantive due process law distinguished it from takings law. *Nollan*, 483 U.S. at 834 n.3.

authority for exemptions undercutting a law's rational basis, Landlords' policy critiques of the exemptions miss the mark.

First, they attack the exemption for "an adverse action taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy." Opening at 54–55 (quoting SMC 14.09.115.B). The exemption is a rational recognition that, under the Supremacy Clause, a contrary federal regulation trumps the adverse-action provision. The exemption bears no resemblance to excluding households of unrelated persons from the federal food stamp program, which *Moreno* struck because it was for the irrational purpose to discriminate against "hippies." *Cf.* Opening at 55 (relying on *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 538 (1973)). The exemption does not undercut the adverse-action provision. Landlords neither assess the exemption's magnitude[20] nor recognize that, even without the exemption, a landlord subject to conflicting City and federal laws would have to choose the federal. *Cf.* Opening at 55. And the exemption is not a pretext to favor "the City's own housing authority." *Cf. id*. at 54. The City has no housing authority—the Seattle Housing Authority is "an independent municipal corporation" regulated by the City. *Seattle Housing Auth. v. City of Seattle*, 416 P.3d 1280, 1281 (Wash. Ct. App. 2018).

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[20] Public housing constitutes only 3% of housing nationwide. 2-SER-498.

Second, Landlords pick at how the Ordinance allows a landlord to reject an adult on a sex offender registry. Opening at 56–57 (citing SMC 14.09.025.A.3). They overlook Washington's extensive registry and post-release management program for sex offenders. 1990 Wash. Laws, ch. 3, § 401. *See, e.g.*, WASH. REV. CODE §§ 4.24.550 (mandating the creation of a registered sex offender website), 9A.44.130 (requiring sex offenders to register), 72.09.345 (process for assigning sex offender risk levels). The City Council rationally heeded that law and took a balanced approach to it by requiring a landlord to show that rejecting a person on the sex offender registry "is necessary to achieve a substantial, legitimate, nondiscriminatory interest" by demonstrating a nexus to resident safety in light of such factors as: the number, nature, and severity of the convictions; the age of the individual when convicted; and evidence of tenant history. SMC 14.09.010 (defining "legitimate business reason").

Finally, Landlords complain that the Ordinance, by exempting accessory dwelling units and subleases to a roommate, "treats similarly situated parties differently." Opening at 58. This Court should disregard this argument because Landlords plead no equal protection claim. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike"). Besides, the City Council could have rationally exempted those situations because they involve

more frequent and direct interactions between a small set of people. *See* SMC 23.44.041 (accessory dwelling unit regulations). That the Council did not imagine and exempt every scenario where a landlord might be in frequent contact with renters—such as when the Yims occupy one unit of their triplex—does not render the Ordinance irrational. *Cf.* Opening at 58.

c. The City's treatment of background checks outside the housing context is irrelevant, as is other governments' treatment of checks in the housing context.

Without tying it to a due process analysis—rational basis or otherwise—Landlords and amici Consumer Data Industry Association, et al. ("CDIA"), note that the City allows some criminal background checks beyond the housing context (such as for employment and for-hire driver's licenses) and that other governments allow or require criminal background checks for some prospective tenants. Opening at 9–10; CDIA Brf., Dkt. # 17, at 5–7. This is irrelevant under the rational basis analysis.

Again, complaints about treating different classes of businesses differently regarding background checks amount to arguments under an equal protection claim that Landlords have not made and this Court should disregard. Besides, the City permitting checks in other contexts is rational because none involves the unique harms that flow from an inability to access housing.

Landlords offer no case law supporting their suggestion that a law is irrational because a different government made a different policy choice. The rational basis analysis defers to legislative choices, *Lingle*, 544 U.S. at 545, ones that will vary by jurisdiction. And the City is no outlier—other local governments have adopted laws, each striking its own balance, limiting criminal background checks for housing. *See, e.g.*, 1-SER-279 (citing examples); BERKELEY, CA., MUN. CODE ch. 13.106 (2021), https://berkeley.municipal.codes/BMC/13.106 (last visited Jan. 16, 2022); LOUISVILLE, KY., METRO CODE OF ORDS. ch. 92 (2021), https://codelibrary.amlegal.com/codes/louisvillemetro/latest/loukymetro/0-0-0-7720 (same); OAKLAND, CA., MUN. CODE ch. 8.25 (2021), https://library.municode.com/ca/oakland/codes/code_of_ordinances?nodeId=TIT8HESA_CH8.25ROV.DESISHFACHACHOOR (same).

d. Claims about landlord liability are unsupported.

Again without mentioning a due process analysis, Landlords and CDIA complain that landlords face tort and criminal liability for not checking tenant backgrounds. Opening at 2–3; CDIA Brf. at 7–8. Even if that complaint were relevant, no law supports it.

In Washington, a residential landlord might have a duty to protect its tenant—just like a business's duty to its invitee—but against only the *foreseeable* criminal acts of others. *See, e.g.*, *Griffin v. West RS, Inc.*, 984 P.2d 1070, 1077

(Wash. Ct. App. 1999), *rev'd on other grounds*, 18 P.3d 558 (Wash. 2001).[21] Although Landlords cite *Griffin*, they omit foreseeability. Opening at 2, 12. Even granting the unfounded assumption that a criminal background check gauges foreseeable harm to others, Washington imposes no duty to conduct that check and a local law precluding a check would relieve landlords of any duty. A survey of states' law reports that a landlord "need not protect tenants from harm by investigating the backgrounds of other prospective tenants . . . ." 49 AM. JUR. 2D *Landlord and Tenant* § 434 (2021).

None of the cases Landlords and CDIA cite supports a landlord's duty to conduct and act upon criminal background checks:

- *Hutchins* involved no business-invitee or landlord-tenant relationship. *Hutchins v 1001 Fourth Ave. Assocs*., 802 P.2d 1360, 1365–71 (Wash. 1991).
- In dicta, *Widell* noted only that, *if* a landlord had a duty to protect a tenant from another's foreseeable criminal acts, a landlord should be able

[21] Although the lower court in *Griffin* (the only decision Landlords and CDIA cite) held that a residential landlord owed a duty to protect tenants against foreseeable criminal acts of others, the Washington Supreme Court declined to reach that issue in *Griffin*, and has yet to address it in any other case. *See Griffin,* 18 P.3d at 562.

to exclude that person. *City of Bremerton v. Widell,* 51 P.3d 733, 738–39 (Wash. 2002).

- *Peterson*, from Nebraska, held only that a duty of care existed between a landlord and tenant who was assaulted, but remanded to address whether the landlord breached that duty. *Peterson v. Kings Gate Partners-Omaha I, L.P.*, 861 N.W.2d 444, 448–50 (Neb. 2015).
- *Cure*, also under Nebraska law, followed *Peterson* but did not address the foreseeability question. *Cure v. Pedcor Mgmt. Corp.*, 265 F. Supp. 3d 984, 991–92 (D. Neb. 2016).
- And *Sigman* does not raise the generalized specter of landlords facing criminal liability for their tenants' criminal acts. *State v Sigman*, 826 P.2d 144 (Wash. 1992). *Sigman* applied a narrow criminal statute prohibiting a landlord from knowingly renting a space for illegal drug use. *Id.* at 145.

e. This is an improper forum for debating recidivism rates.

Still linking it to no due process analysis, Landlords and their amici point to studies about recidivism rates and anecdotes to stress their belief that the adverse-action provision is ill-advised. This is not a proper subject for rational basis review.

Data about recidivism and its implications for housing policy are matters of debate. Landlords and CDIA rely on Department of Justice reports on the rate at which former state prisoners are rearrested and convicted on new charges. Opening

at 10; CDIA Brf. at 8–10. But the data in those reports include sex offenders (against whom the Ordinance allows adverse action) and do not address whether the formerly incarcerated harmed their landlords' property or fellow tenants. And Landlords and CDIA overlook studies:

- addressing how stable housing reduces recidivism, *e.g.*, ER-127 (research "has established the strong empirical association between housing insecurity and recidivism"); 2-SER-500 ("As the research . . . indicates, stable housing is a vital component of effective re-entry.");
- demonstrating a downward trend in recidivism rates, *e.g.*, Gelb & Velázquez, *The Changing State of Recidivism: Fewer People Going Back to Prison* (Pew, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/08/01/the-changing-state-of-recidivism-fewer-people-going-back-to-prison (last visited Jan. 8, 2022);
- noting that the offense rate for the formerly incarcerated approximates that of the general population within a matter of years after release, *e.g.*, 2-SER-501; and
- critiquing recidivism statistics as a policy-making tool. *E.g.*, Rhodes, et al., *Following Incarceration, Most Released Offenders Never Return to Prison*, 62 CRIME & DELINQUENCY 1003, 1004–05 (2016) (traditional event-based sampling disproportionately represents high-risk offenders);

Butts & Schiraldi, *Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections* (Harvard, March 2018), available at https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/recidivism_reconsidered.pdf (last visited Jan. 8, 2022).

Amici also offer anecdotes outside the record. This Court cannot accept GRE Downtowner's assertion—based on unverified and untested claims—that the Ordinance caused the problems in its building, or rule on this facial challenge based on one landlord's alleged experience. *Cf.* GRE Downtowner Brf., Dkt. # 16. And this Court should disregard CDIA's citation to an Illinois news report and a summary of allegations in a Nebraska appellate decision, each of which describes a crime committed by a formerly incarcerated person against a fellow tenant, but neither of which reported that, had the landlord conducted a background check, the landlord would have denied tenancy to the accused, which would have prevented the crime. *Cf.* CDIA Brf. at 10.

3. Landlords' attempts to rewrite settled substantive due process law lack merit.

Landlords attempt to rewrite settled substantive due process law by: (1) claiming that they present a fundamental right under the Due Process Clause; (2) mischaracterizing the rational basis analysis as probing a law's efficacy; and

(3) insisting that the correct analysis combines "substantially advances" and "undue oppression" standards. Those attempts fail.

a. Landlords incorrectly claim that the "right to exclude"—like every property right—is a fundamental right under due process law.

Appealing to the "fundamental nature of property rights," Opening at 46, Landlords contend that the Ordinance implicates their "fundamental right to exclude," *id*. at 17, which, like any "deprivation of property," is subject to a higher standard of scrutiny. *Id*. at 18. The Washington Supreme Court rejected this contention under identical Washington constitutional law: "None of the [federal or state] cases cited by [Landlords] actually addresses the question of whether the use of property is a fundamental right for substantive due process purposes, and they certainly do not make such a holding." *Yim*, 451 P.3d at 703.[22] That remains true.

Landlords invoke *Lynch*, which held only that that a jurisdictional statute covers both property and personal rights; it did not reach the merits of the underlying due process claim or describe any right as fundamental. *See* Opening at 46; *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 542 (1972).

[22] Landlords incorrectly describe *Yim*, claiming that it held that rational basis controls "a claim that a plaintiff has been deprived of a fundamental property interest." Opening at 14. *Yim* held that property interests are not fundamental. *Yim*, 451 P.3d at 700.

Landlords and amicus Cato Institute rely principally on takings case law involving no due process claim. Opening at 3–4, 46–47; Cato Brf., Dkt. # 15, at 3-8.

- ❑ *Murr* mentioned neither due process, “exclude,” nor “fundamental.” *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).
- ❑ *Knick* never mentioned “fundamental” or a right to exclude and discussed due process only to distinguish it from takings. *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2174 (2019) (“the analogy from the due process context to the takings context is strained”).
- ❑ *Kaiser* did not mention due process and recognized the right to exclude as a “fundamental element of the property right” protected by the Takings Clause. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979). *Loretto* soon recognized that right as a per se right against government-imposed physical invasion under takings law. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 433–35 (1982) (citing *Kaiser*).
- ❑ Without mentioning due process, *Cedar Point* relied on *Loretto*’s per se physical invasion test and quoted *Kaiser*’s recognition that the right to exclude is a fundamental element protected by the Takings Clause. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072, 2077 (2021).

- ❑ The only authority Landlords offer that addresses a due process right to exclude is an unpublished district court order on a preliminary injunction motion, which mistakenly relied on *Kaiser* without recognizing that it was limited to takings law. *Lamplighter Vill. Apartments LLP v. City of St. Paul*, No. CV 21-413 (PAM/HB), 2021 WL 1526797, at *4 (D. Minn. Apr. 19, 2021).

The right to exclude—recognized as a per se right against physical invasion—might be a fundamental element of one's property right under takings law, but Landlords' economic and property-use interests constitute no "fundamental right" under due process law. *Slidewaters*, 4 F.4th at 758; *Yagman*, 852 F.3d at 866–67; *Samson*, 683 F.3d at 1058. Having failed to assert a takings claim, Landlords may not import takings law into their due process claim. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (plurality) ("The first problem with using substantive due process to do the work of the Takings Clause is that we have held it cannot be done.").

Landlords' asserted fundamental right is the first step down a slippery slope. If a landlord enjoys a fundamental due process right to exclude—or as Landlords cast it below, "the right of each residential landlord to rent her property to a person of her own choice," *Yim*, 451 P.3d at 698—it would not be limited to exclusion based on criminal history. The landlord could subject any law limiting a right to

exclude—based on religion, race, or any other ground—to heightened scrutiny. And neither Landlords nor the Cato Institute suggests that the bundle of "fundamental" property rights ends with the right to exclude.

b. Landlords mischaracterize the rational basis analysis as probing efficacy.

As this Court summarized in *Kawaoka*, rational basis requires no proof of the challenged law's efficacy: "[W]e 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." *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) (cleaned up). This Court has continued to cite *Kawaoka* for the rational basis standard. *E.g.*, *Slidewaters*, 4 F.4th at 758; *Yagman*, 852 F.3d at 866–67; *Samson*, 683 F.3d at 1058.

Without acknowledging that they ask this Court to overrule its precedent, Landlords falsely contend that *Kawaoka* "runs contrary to the overwhelming weight of authority" requiring evidence of a law's efficacy. Opening at 51–53. Landlords rely principally on *City of Cleburne*, but it applied the deferential rational basis analysis to a law that the Court could not imagine was rationally linked to a legitimate state interest—a zoning law that the Court concluded advanced only the impermissible goal of manifesting prejudice against the mentally disabled. *City of Cleburne*, 473 U.S. at 435–37, 447–50. *City of Cleburne* did not, as Landlords claim, look "to whether the zoning ordinance was actually

effective in achieving [its] goals." Opening at 52. The goal there—unlike the Ordinance's goal—was illegitimate.

Landlords' other attempts to rewrite the rational basis analysis fail. They mischaracterize *Romer* as requiring factual proof of efficacy. Opening at 53 (citing *Romer v. Evans*, 517 U.S. 620 (1996)). Like *City of Cleburne*, *Romer* did not probe a law's efficacy; it struck a state constitutional amendment directed to the illegitimate purpose of discriminating against a class of persons. *Romer*, 517 U.S. at 623–24.

Landlords' selective quotation of *Borden's Farm* fails to advance their claim that rational basis requires proof. Opening at 51 (citing *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194 (1934)). *Borden's Farm* reversed an order of dismissal and remanded for fact-finding because the challenged law's rational basis was "predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice." *Borden's Farm*, 293 U.S. at 210. The Ordinance is no such law—Landlords stipulated to facts and sought no discovery. And just four years after *Borden's Farm*, the Court said that even an inquiry such as the one *Borden's Farm* allowed "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for [the law]." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153–54 (1938).

Landlords miscast *Craigmiles*, from the Sixth Circuit, as disfavoring a circuitous path to a legitimate end when a direct path is available. *Cf*. Opening at 56 (citing *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002)). Applying rational basis to an equal protection claim, *Craigmiles* struck a law aimed at the illegitimate purpose of stifling competition. *Craigmiles*, 312 F.3d at 224, 225. *Craigmiles* recognized what Landlords reject: rational basis "does not require the best or most finely honed legislation to be passed." *Id*. at 227.

c. Landlords' combination of "substantially advances" and "undue oppression" standards lacks support.

Landlords address the rational basis analysis only in the alternative. They first maintain that the proper analysis is "substantially advances," a part of which involves an "undue oppression" analysis. Opening at 47–48. The Washington Supreme Court found no support for this hybrid substitute for rational basis. *Yim*, 451 P.3d at 700–02. None exits.

(i) "Substantially advances" was an error limited to takings law.

Landlords incorrectly cite *Nectow* as the source of a "substantially advances" analysis. Opening at 47 (citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928)). *Nectow*, along with *Euclid*, are the source of the *rational basis* analysis—both determined that a law survives a substantive due process challenge if it is not "clearly arbitrary and unreasonable, having no substantial relation to the

public health, safety, morals, or general welfare." *Nectow*, 277 U.S. at 187–188; *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926). This Court correctly traces the rational basis analysis to *Euclid* and *Nectow*. *E.g.*, *Kim v. United States*, 121 F.3d 1269, 1273–74 (9th Cir. 1997); *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997).

"Substantially advances" was an error limited to, and ultimately ejected from, takings law. It emerged in *Agins*, a 1980 takings decision that mistook *Nectow*—which involved no takings claim—as holding that a law effects a taking if it "does not substantially advance legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). In 2005, *Lingle* admitted the error and removed "substantially advances" from takings law. *Lingle*, 544 U.S. at 542–45. *Accord Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010) ("*Agins* was overruled by *Lingle*"). *Lingle* observed that *Agins* derived "substantially advances" from *Nectow*, a due process case, and lamented that "the language [*Agins*] selected was regrettably imprecise" for placing courts in the hazardous role of weighing evidence of a law's efficacy. *Lingle*, 544 U.S. at 540, 542, 544–55. Such judicial proceedings would be "remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation." *Id*. at 545. Nodding to rational basis, *Lingle* buried "substantially advances" with a terse eulogy: "The reasons for deference to

legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established . . . ." *Id*.

But Landlords and the Cato Institute misread *Lingle* as imposing a "substantially advances" analysis on substantive due process claims. Opening at 48–50; Cato Brf. at 3–8. This Court correctly recognizes that *Lingle* reinforced rational basis as the controlling analysis because the Supreme Court eschews the heightened review a "substantially advances" analysis would entail. *E.g.*, *Samson*, 683 F.3d at 1058; *Shanks v. Dressel,* 540 F.3d 1082, 1088 (9th Cir. 2008).

Nollan provides Landlords no support. *Cf.* Opening at 50 (citing *Nollan*, 483 U.S. at 834 n.3). *Nollan* involved no due process claim and explained that "substantially advances" was limited to takings law (a role that *Lingle* later eliminated) and that due process is governed by "rational basis." *Nollan*, 483 U.S. at 835 n.3.

Moore did not, as Landlords suggest, replace rational basis with a means-ends analysis. *Cf.* Opening at 50 (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977)). *Moore* invoked *Euclid*'s rational basis analysis and observed that "our cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose." *Moore*, 431 U.S. at 498 & n.6.

Finally, *Snyder's Drug*, which overruled *Liggett* as out of step with the rational basis analysis, only underscores the primacy of "rational basis." *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 167 (1973) (overruling *Louis K Liggett Co. v. Baldridge*, 278 U.S. 105 (1928)). Landlords cite a snippet of *Snyder's Drug*'s passage quoting *Liggett*'s dissent, omitting the context fitting that quote within mainstream rational basis law: "The Constitution does not make it a condition of preventive legislation that it should work a perfect cure. It is enough if the questioned act has a manifest tendency to cure or at least to make the evil less." *Id.* (quoting *Liggett*, 278 U.S. at 114–15 (Holmes, J., dissenting)). *Cf.* Opening at 50.

Even if "substantially advances" was the relevant analysis, Landlords do not apply it. They just declare victory because the City "failed to preserve any argument that the Ordinance survives the 'substantially advances' inquiry . . . ." Opening at 50. That is not how it works. The "considerable burden" is on Landlords to prove the Ordinance unconstitutional. *See United States v. Xiaoying Tang Dowai*, 839 F.3d 877, 879 (9th Cir. 2016). They have not attempted to meet that burden under their invented "substantially advances" analysis.[23]

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[23] Even if Landlords had applied a "substantially advances" analysis, the adverse-action provision would pass that analysis for the same reasons the inquiry provision passes the First Amendment "directly advances" analysis. *See supra* § VIII.A.3.b.i.

Landlords' displeasure with the Ordinance does nothing to illuminate its efficacy. CDIA invokes the results of a survey of landlords' perspective on three City tenant protection regulations, including the Ordinance. CDIA Brf. at 16–17 (discussing Crowder, *Seattle Rental Housing Study, Final Report* (June 2018), https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/UWSRHSFinal.pdf (last visited Jan. 4, 2022)). Landlords believe the regulations are "likely to be ineffective." Crowder at 2. Even if the Ordinance's efficacy were relevant, that survey fails to establish that the Ordinance is not efficacious.

(ii) "Undue oppression" has no place in due process law.

Landlords claim that an "undue oppression" standard is part of the "substantially advances" analysis, then insist it is part of the rational basis analysis. Opening at 48, 58–59. It is part of neither. It finds no place in substantive due process law—it is merely a vehicle for Landlords and their amici to press their policy arguments.

The Supreme Court last uttered "undue oppression" in 1962 in *Goldblatt*, which relied on a *Lochner*-era decision. *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962) (citing *Lawton v. Steele,* 152 U.S. 133, 137 (1894)).[24] "Undue oppression" is a dead letter—the Supreme Court confirmed its death soon after

[24] *See Amunrud v. Board of Appeals*, 143 P.3d 571, 580–81 (Wash. 2006) (discussing the perils of the *Lochner* era).

Goldblatt. *See Bhd. of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pac. R.R.*, 393 U.S. 129, 143 (1968) (oppression-based claims "require no further consideration"); *Ferguson v. Skrupa*, 372 U.S. 726, 728–29 (1963) (no court may "decide whether a statute bears too heavily upon [a] business and by so doing violates due process"). The Court eventually relegated *Goldblatt* to a pile of decisions conflating due process and takings law. *See Lingle*, 544 U.S. at 541; *Nollan*, 483 U.S. at 835 n.3 (criticizing *Goldblatt* for assuming similar inquiries under due process and takings claims). Landlords offer no opinion favorably citing *Goldblatt*'s invocation of "undue oppression."

Landlords gain nothing from *Mugler*, a nineteenth century relic predating rational basis and even *Lochner*. *Cf*. Opening at 48 (citing *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 289 (1887)). Besides, Landlords lift a line about the government being unable to enact "unnecessary" laws "that will be oppressive to the citizen" from the *Mugler* appellant's assignments of error, not the Court's opinion. *Compare Mugler*, 8 S. Ct. 285–93 (assignments of error) *with id*., 123 U.S. at 653, 8 S. Ct. at 295 (opinion).

Landlords also fail with the decisions they claim fix "undue oppression" within the rational basis analysis. Neither decision applied rational basis or mentioned undue oppression. Without identifying a standard of review, *Lawrence* found that criminalizing consensual homosexual sex ran afoul of "the due process

right to demand respect for conduct protected by the substantive guarantee of liberty." *Lawrence v. Tex.*, 539 U.S. 558, 574–75 (2003). And *Haynes* ruled that using a criminal defendant's coerced confession against him violated his *procedural* due process rights. *Haynes v. State of Wash.*, 373 U.S. 503, 504, 514–15 (1963).

Even if Landlords were correct that courts apply an "undue oppression" analysis, Landlords cannot carry their burden. Whatever that analysis required (Landlords identify no yardstick), it must be more than a business having to serve those they would prefer not to. *Cf.* Opening at 59.

IX. CONCLUSION

The Ordinance is a thoughtful approach to reducing significant barriers to accessing housing faced by Seattle residents with criminal histories, disproportionately people of color. Because the inquiry provision is a regulation of commercial conduct, with only incidental impacts on speech, it does not implicate the First Amendment. But even if it did, it withstands the intermediate scrutiny governing commercial speech regulation. Landlords fail to carry their burden of proving that the adverse-action provision effects a substantive due process violation under the governing rational basis analysis.

Because Landlords' claims lack merit, the City respectfully asks this Court to affirm the grant of summary judgment to the City.[25]

Respectfully submitted this 28th day of January, 2022.

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[25] If this Court should invalidate the adverse-action or inquiry provision, this Court should remand to assess whether any invalid provision is severable from the Ordinance. *See Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 861–62 (9th Cir. 2017) (discussing severability principles).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 21-35567

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs/Appellants,

v.

CITY OF SEATTLE,

Defendant/Appellee.

Appeal from the United States District Court
Western District of Washington at Seattle
District Court No. 2:18-cv-736 JCC

ADDENDUM TO ANSWERING BRIEF OF CITY OF SEATTLE

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A. Seattle Municipal Code Chapter 14.09 (as enacted by Ordinance 125393)

Chapter 14.09 USE OF CRIMINAL RECORDS IN HOUSING

14.09.005 Short title

This Chapter 14.09 shall constitute the "Fair Chance Housing Ordinance" and may be cited as such.

14.09.010 Definitions

"Accessory dwelling unit" has the meaning defined in Section 23.84A.032's definition of "Residential use."

"Adverse action" means:

A. Refusing to engage in or negotiate a rental real estate transaction;

B. Denying tenancy;

C. Representing that such real property is not available for inspection, rental, or lease when in fact it is so available;

D. Failing or refusing to add a household member to an existing lease;

E. Expelling or evicting an occupant from real property or otherwise making unavailable or denying a dwelling;

F. Applying different terms, conditions, or privileges to a rental real estate transaction, including but not limited to the setting of rates for rental or lease, establishment of damage deposits, or other financial conditions for rental or lease, or in the furnishing of facilities or services in connection with such transaction;

G. Refusing or intentionally failing to list real property for rent or lease;

H. Refusing or intentionally failing to show real property listed for rent or lease;

I. Refusing or intentionally failing to accept and/or transmit any reasonable offer to lease, or rent real property;

J. Terminating a lease; or

K. Threatening, penalizing, retaliating, or otherwise discriminating against any person for any reason prohibited by Section 14.09.025.

"Aggrieved party" means a prospective occupant, tenant, or other person who suffers tangible or intangible harm due to a person's violation of this Chapter 14.09.

"Arrest record" means information indicating that a person has been apprehended, detained, taken into custody, held for investigation, or restrained by a law enforcement department or military authority due to an accusation or suspicion that the person committed a crime. Arrest records include pending criminal charges, where the accusation has not yet resulted in a final judgment, acquittal, conviction, plea, dismissal, or withdrawal.

"Charging party" means any person who files a charge alleging a violation under this Chapter 14.09, including the Director.

"City" means The City of Seattle.

"Commission" means the Seattle Human Rights Commission.

"Consumer report" has the meaning defined in RCW 19.182.010 and means a written, oral, or other communication of information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected in whole or in part for purposes authorized under RCW 19.182.020.

"Conviction record" means information regarding a final adjudication or other criminal disposition adverse to the subject. It includes but is not limited to dispositions for which the defendant received a deferred or suspended sentence, unless the adverse disposition has been vacated or expunged.

"Criminal background check" means requesting or attempting to obtain, directly or through an agent, an individual's conviction record or criminal history record information from the Washington State Patrol or any other source that compiles, maintains, or reflects such records or information.

"Criminal history" means records or other information received from a

criminal background check or contained in records collected by criminal justice agencies, including courts, consisting of identifiable descriptions and notations of arrests, arrest records, detentions, indictments, informations, or other formal criminal charges, any disposition arising therefrom, including conviction records, waiving trial rights, deferred sentences, stipulated order of continuance, dispositional continuance, or any other initial resolution which may or may not later result in dismissal or reduction of charges depending on subsequent events. The term includes acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release, any issued certificates of restoration of opportunities and any information contained in records maintained by or obtained from criminal justice agencies, including courts, which provide individual's record of involvement in the criminal justice system as an alleged or convicted individual. The term does not include status registry information.

"Department" means the Seattle Office for Civil Rights and any division therein.

"Detached accessory dwelling unit" has the meaning defined in Section 23.84A.032's definition of "Residential use."

"Director" means the Director of the Seattle Office for Civil Rights or the Director's designee.

"Dwelling unit" has the meaning as defined in Section 22.204.050.D.

"Fair chance housing" means practices to reduce barriers to housing for persons with criminal records.

"Juvenile" means a person under 18 years old.

A "legitimate business reason" shall exist when the policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. To determine such an interest, a landlord must demonstrate, through reliable evidence, a nexus between the policy or practice and resident safety and/or protecting property, in light of the following factors:

A. The nature and severity of the conviction;

B. The number and types of convictions;

C. The time that has elapsed since the date of conviction;

D. Age of the individual at the time of conviction;

E. Evidence of good tenant history before and/or after the conviction occurred; and

F. Any supplemental information related to the individual's rehabilitation, good conduct, and additional facts or explanations provided by the individual, if the individual chooses to do so. For the purposes of this definition, review of conviction information is limited to those convictions included in registry information.

"Person" means one or more individuals, partnerships, organizations, trade or professional associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. It includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons, and any political or civil subdivision or agency or instrumentality of the City.

"Prospective occupant" means any person who seeks to lease, sublease, or rent real property.

"Registry information" means information solely obtained from a county, statewide, or national sex offender registry, including but not limited to, the registrant's physical description, address, and conviction description and dates.

"Respondent" means any person who is alleged or found to have committed a violation of this Chapter 14.09.

"Single family dwelling" has the meaning as defined in Section 22.204.200.A.

"Supplemental information" means any information produced by the prospective occupant or the tenant, or produced on their behalf, with respect to their rehabilitation or good conduct, including but not limited to:

A. Written or oral statement from the prospective occupant or the tenant;

B. Written or oral statement from a current or previous employer;

C. Written or oral statement from a current or previous landlord;

D. Written or oral statement from a member of the judiciary or law enforcement, parole or probation officer, or person who provides similar services;

E. Written or oral statement from a member of the clergy, counselor, therapist, social worker, community or volunteer organization, or person or institution who provides similar services;

F. Certificate of rehabilitation;

G. Certificate of completion or enrollment in an educational or vocational training program, including apprenticeship programs; or

H. Certificate of completion or enrollment in a drug or alcohol treatment program; or certificate of completion or enrollment in a rehabilitation program.

"Tenant" means a person occupying or holding possession of a building or premises pursuant to a rental agreement.

14.09.015 Applicability

A person is covered by this Chapter 14.09 when the physical location of the housing is within the geographic boundaries of the City.

14.09.020 Notice to prospective occupants and tenants

The written notice shall include that the landlord is prohibited from requiring disclosure, asking about, rejecting an applicant, or taking an adverse action based on any arrest record, conviction record, or criminal history, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in section 14.09.110. If a landlord screens prospective occupants pursuant to section 14.09.025.A.3, the landlord shall provide written notice of screening criteria on all applications for rental properties. Pursuant to section 14.09.025.A.3, applicants may provide any supplemental information related to an individual's rehabilitation, good conduct, and facts or explanations regarding their registry information. The Department shall adopt a rule or rules to enforce this Section 14.09.020.

14.09.025 Prohibited use of criminal history

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

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

2. Require disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant or a member of their household, based on any arrest record, conviction record, or criminal history, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in section 14.09.110.

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

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

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

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

C. If a consumer report is used by a landlord as part of the screening process, the landlord must provide the name and address of the consumer reporting agency and the prospective occupant's or tenant's rights to obtain a free copy of the consumer report in the event of a denial or other adverse action, and to dispute the accuracy of information appearing in the consumer report.

14.09.030 Retaliation prohibited

A. No person shall interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right protected under this Chapter 14.09.

B. No person shall take any adverse action against any person because the person has exercised in good faith the rights protected under this Chapter 14.09. Such rights include but are not limited to the right to fair chance housing and regulation of the use of criminal history in housing by this Chapter 14.09; the right to make inquiries about the rights protected under this Chapter 14.09; the right to inform others about their rights under this Chapter 14.09; the right to inform the person's legal counsel or any other person about an alleged violation of this Chapter 14.09; the right to file an oral or written complaint with the Department for an alleged violation of this Chapter 14.09; the right to cooperate with the Department in its investigations of this Chapter 14.09; the right to testify in a proceeding under or related to this Chapter 14.09; the right to refuse to participate in an activity that would result in a violation of City, state, or federal law; and the right to oppose any policy, practice, or act that is unlawful under this Chapter 14.09.

C. No person shall communicate to a person exercising rights protected in this Section 14.09.030, directly or indirectly, the willingness to inform a government employee that the person is not lawfully in the United States, or to report, or to make an implied or express assertion of a willingness to report, suspected citizenship or immigration status of a prospective occupant, a tenant or a member of their household to a federal, state, or local agency because the prospective occupant or tenant has exercised a right under this Chapter 14.09.

D. It shall be a rebuttable presumption of retaliation if a landlord or any other person takes an adverse action against a person within 90 days of the person's exercise of rights protected in this Section 14.09.030. The landlord may rebut the presumption with clear and convincing evidence that the adverse action was taken for a permissible purpose.

E. Proof of retaliation under this Section 14.09.030 shall be sufficient upon a showing that a landlord or any other person has taken an adverse action against a person and the person's exercise of rights protected in this Section 14.09.030 was a motivating factor in the adverse action, unless the landlord can prove that the action would have been taken in the absence of such protected activity.

F. The protections afforded under this Section 14.09.030 shall apply to any person who mistakenly but in good faith alleges violations of this Chapter 14.09.

G. A complaint or other communication by any person triggers the protections of this Section 14.09.030 regardless of whether the complaint or communication is in writing or makes explicit reference to this Chapter 14.09.

14.09.035 Enforcement power and duties

A. The Department shall have the power to investigate violations of this Chapter 14.09, as defined herein, and shall have such powers and duties in the performance of these functions as are defined in this Chapter 14.09 and otherwise necessary and proper in the performance of the same and provided for by law.

B. The Department shall be authorized to coordinate implementation and enforcement of this Chapter 14.09 and shall promulgate appropriate guidelines or rules for such purposes.

C. The Director is authorized and directed to promulgate appropriate guidelines and rules consistent with this Chapter 14.09 and the Administrative Code. Any guidelines or rules promulgated by the Director shall have the force and effect of law and may be relied on by landlords, prospective occupants, tenants, and other parties to determine their rights and responsibilities under this Chapter 14.09.

D. The Director shall maintain data on the number of complaints filed pursuant to this Chapter 14.09, demographic information on the complainants, the number of investigations it conducts and the disposition of every complaint and investigation. The Director shall submit this data to the Mayor and City Council every six months for the two years following the effective date of the ordinance introduced as Council Bill 119015.

14.09.040 Violation

The failure of any person to comply with any requirement imposed on the person under this Chapter 14.09 is a violation.

14.09.045 Charge—Filing

A. An aggrieved person may file a charge with the Director alleging a violation. The charge shall be in writing and signed under oath or affirmation before the Director, one of the Department's employees, or any other person authorized to administer oaths. The charge shall describe the alleged violation and should include a statement of the dates, places, and circumstances, and the persons responsible for such acts and practices. Upon the filing of a charge alleging a violation, the Director shall cause to be served upon the charging party a written notice acknowledging the filing, and notifying the charging party of the time limits and choice of forums provided in this Chapter 14.09.

B. A charge shall not be rejected as insufficient because of failure to include all required information if the Department determines that the charge substantially satisfies the informational requirements necessary for processing.

C. A charge alleging a violation or pattern of violations under this Chapter 14.09 may also be filed by the Director whenever the Director has reason to believe that any person has been engaged or is engaging in a violation under this Chapter 14.09.

14.09.050 Time for filing charges

Charges filed under this Chapter 14.09 must be filed with the Department within one year after the alleged violation has occurred or terminated.

14.09.055 Charge—Amendments

A. The charging party or the Department may amend a charge:

1. To cure technical defects or omissions;

2. To clarify allegations made in the charge;

3. To add allegations related to or arising out of the subject matter set forth or attempted to be set forth in the charge;

4. To add as a charging party a person who is, during the course of the investigation, identified as an aggrieved person; or

5. To add or substitute as a respondent a person who was not originally named as a respondent, but who is, during the course of the investigation, identified as a respondent. For jurisdictional purposes, such amendments shall relate back to the date the original charge was first filed.

B. The charging party may amend a charge to include allegations of retaliation which arose after the filing of the original charge. Such amendment must be filed within one year after the occurrence of the retaliation, and prior to the Department's issuance of findings of fact and determination with respect to the original charge. Such amendments may be made at any time during the investigation of the original charge so long as the Department will have adequate time to investigate the additional allegations and the parties will have adequate time to present the Department with evidence concerning the additional allegations before the issuance of findings of fact and a determination.

C. When a charge is amended to add or substitute a respondent, the Director shall serve upon the new respondent within 20 days:

1. The amended charge;

2. The notice required under subsection 14.09.060.A; and

3. A statement of the basis for the Director's belief that the new respondent is properly named as a respondent. For jurisdictional purposes, amendment of a charge to add or substitute a respondent shall relate back to the date the original charge was first filed.

14.09.060 Notice of charge and investigation

A. The Director shall promptly, and in any event within 20 days of filing of the charge, cause to be served on or mailed, by certified mail, return receipt requested, to the respondent, a copy of the charge along with a notice advising the respondent of respondent's procedural rights and obligations under this Chapter 14.09. The Director shall promptly make an investigation of the charge.

B. The investigation shall be directed to ascertain the facts concerning the violation alleged in the charge, and shall be conducted in an objective and impartial manner.

C. During the period beginning with the filing of the charge and ending with the issuance of the findings of fact, the Department shall, to the extent

feasible, engage in settlement discussions with respect to the charge. A pre-finding settlement agreement arising out of the settlement discussions shall be an agreement between the charging party and the respondent and shall be subject to approval by the Director. Each pre-finding settlement agreement is a public record. Failure to comply with the pre-finding settlement agreement may be enforced under Section 14.09.100.

D. During the investigation, the Director shall consider any statement of position or evidence with respect to the allegations of the charge which the charging party or the respondent wishes to submit, including the respondent's answer to the charge. The Director shall have authority to sign and issue subpoenas requiring the attendance and testimony of witnesses, the production of evidence including but not limited to books, records, correspondence, or documents in the possession or under the control of the person subpoenaed, and access to evidence for the purpose of examination and copying, and conduct discovery procedures which may include the taking of interrogatories and oral depositions.

E. The Director may require a fact-finding conference or participation in another process with the respondent and any of respondent's agents and witnesses and the charging party during the investigation in order to define the issues, determine which elements are undisputed, resolve those issues which can be resolved, and afford an opportunity to discuss or negotiate settlement. Parties may have their legal counsel present if desired.

14.09.065 Procedure for investigations

A. A respondent may file with the Department an answer to the charge no later than ten days after receiving notice of the charge.

B. The Director shall commence investigation of the charge within 30 days after the filing of the charge. The investigation shall be completed within 100 days after the filing of the charge, unless it is impracticable to do so. If the Director is unable to complete the investigation within 100 days after the filing of the charge, the Director shall notify the charging party and the respondent of the reasons therefor. The Director shall make final administrative disposition of a charge within one year of the date of filing of the charge, unless it is impracticable to do so. If the Director is unable to make a final administrative disposition within one year of the filing of the charge, the Director shall notify the charging party and the respondent of the reasons therefor.

C. If the Director determines that it is necessary to carry out the purposes of this Chapter 14.09, the Director may, in writing, request the City Attorney to seek prompt judicial action for temporary or preliminary relief to enjoin any violation pending final disposition of a charge.

14.09.070 Findings of fact and determination of reasonable cause or no reasonable cause

A. The results of the investigation shall be reduced to written findings of fact and a determination shall be made by the Director that there is or is not reasonable cause for believing that a violation has been, is being or is about to be committed, which determination shall also be in writing and issued with the written findings of fact. The findings and determination are "issued" when signed by the Director and mailed to the parties.

B. Once issued to the parties, the Director's findings of fact, determination, and order may not be amended or withdrawn except upon the agreement of the parties or in response to an order by the Commission after an appeal taken pursuant to Section 14.09.075; provided, that the Director may correct clerical mistakes or errors arising from oversight or omission upon a motion from a party or upon the Director's own motion.

14.09.075 Determination of no reasonable cause—Appeal from and dismissal

If a determination is made that there is no reasonable cause for believing a violation under this Chapter 14.09 has been, is being, or is about to be committed, the charging party may appeal such determination to the Commission within 30 days of the date the determination is signed by the Director by filing a written statement of appeal with the Commission. The Commission shall promptly deliver a copy of the statement to the Department and respondent and shall promptly consider and act upon such appeal by either affirming the Director's determination or, if the Commission believes the Director should investigate further, remanding it to the Director with a request for specific further investigation. In the event no appeal is taken, or such appeal results in affirmance, or if the Commission has not decided the appeal within 90 days from the date the appeal statement is filed, the determination of the Director shall be final and the charge deemed dismissed and the same shall be entered on the records of the Department.

14.09.080 Determination of reasonable cause—Conciliation

A. If the Director determines that reasonable cause exists to believe that a violation has occurred, is occurring, or is about to occur, the Director shall endeavor to eliminate the violation through efforts to reach conciliation. Conditions of conciliation may include, but are not limited to, the elimination of the violation, rent refunds or credits, reinstatement to tenancy, affirmative recruiting or advertising measures, payment of actual damages, and reasonable attorney's fees and costs, or such other remedies that will carry out the purposes of this Chapter 14.09. The Director may also require payment of a civil penalty as set forth in Section 14.09.100.

B. Any post-finding conciliation agreement shall be an agreement between the charging party and the respondent and shall be subject to the approval of the Director. The Director shall enter an order setting forth the terms of the agreement, which may include a requirement that the parties report to the Director on the matter of compliance. Copies of such order shall be delivered to all affected parties and shall be subject to public disclosure.

C. If conciliation fails and no agreement can be reached, the Director shall issue a written finding to that effect and furnish a copy of the finding to the charging party and to the respondent. Upon issuance of the finding, except a case in which a City department is a respondent, the Director shall promptly cause to be delivered the entire investigatory file, including the charge and any and all findings made, to the City Attorney for further proceedings and hearing under this Chapter 14.09, pursuant to Section 14.09.085.

14.09.085 Complaint and hearing

A. Following submission of the investigatory file from the Director, the City Attorney shall, except as set forth in subsection 14.09.085.B, prepare a complaint against such respondent relating to the charge and facts discovered during the Department's investigation. The City Attorney shall file the complaint with the Hearing Examiner in the name of the Department and represent the interests of the Department at all subsequent proceedings.

B. If the City Attorney determines that there is no legal basis for a complaint to be filed or proceedings to continue, a statement of the reasons therefor shall be filed with the Department. The Director shall then dismiss the charge. Any party aggrieved by the dismissal may appeal to the Commission.

C. The City Attorney shall serve a copy of the complaint on respondent and furnish a copy of the complaint to the charging party and to the Department.

D. Within 20 days of the service of such complaint upon it, the respondent shall file its answer with the Hearing Examiner and serve a copy of the same on the City Attorney.

E. Upon the filing of the complaint, the Hearing Examiner shall promptly establish a hearing date and give notice thereof to the Commission, City Attorney, and respondent, and shall thereafter hold a public hearing on the complaint which shall commence no earlier than 90 days nor later than 120 days from the filing of the complaint, unless otherwise ordered by the Hearing Examiner.

F. After the complaint is filed with the Hearing Examiner, it may be amended only with the permission of the Hearing Examiner, which permission shall be granted when justice will be served and all parties are allowed time to prepare their case with respect to additional or expanded charges.

G. The hearing shall be conducted by the Hearing Examiner, a deputy hearing examiner, or a hearing examiner pro tempore appointed by the Hearing Examiner from a list approved by the Commission, sitting alone or with representatives of the Commission if any are designated. Such hearings shall be conducted in accordance with written rules and procedures consistent with this Chapter 14.09 and the Administrative Code, Chapter 3.02.

H. The Commission, within 30 days after receiving notice of the date of hearing from the Hearing Examiner, at its discretion, may appoint two Commissioners, who have not otherwise been involved in the charge, investigation, fact finding, or other resolution and proceeding on the merits of the case, who have not formed an opinion on the merits of the case, and who otherwise have no pecuniary, private, or personal interest or bias in the matter, to hear the case with the Hearing Examiner. Each Commissioner shall have an equal vote with the Hearing Examiner. The Hearing Examiner shall be the chairperson of the panel and make all evidentiary rulings. The Hearing Examiner shall resolve any question of previous involvement, interest, or bias of an appointed Commissioner in conformance with the law on the subject. Any reference in this Chapter 14.09 to a decision, order, or other action of the Hearing Examiner shall include, when applicable, the decision, order, or other action of a panel constituted under this subsection.

14.09.090 Decision and order

A. Within 30 days after conclusion of the hearing, the Hearing Examiner shall prepare a written decision and order, file it as a public record with the City Clerk, and provide a copy to each party of record and to the Department.

B. Such decision shall contain a brief summary of the evidence considered and shall contain findings of fact, conclusions of law upon which the decision is based, and an order detailing the relief deemed appropriate, together with a brief statement of the reasons supporting the decision.

C. In the event the Hearing Examiner or a majority of the panel composed of the Hearing Examiner and Commissioners determines that a respondent has committed a violation under this Chapter 14.09, the Hearing Examiner may order the respondent to take such affirmative action or provide for such relief as is deemed necessary to correct the violation, effectuate the purpose of this Chapter 14.09, and secure compliance therewith, including but not limited to rent refund or credit, reinstatement to tenancy, affirmative recruiting and advertising measures, or payment of reasonable attorney's fees and costs, or to take such other action as in the judgment of the Hearing Examiner will carry out the purposes of this Chapter 14.09. An order may include the requirement for a report on the matter of compliance.

D. The Department in the performance of its functions may enlist the aid of all departments of City government, and all said departments are directed to fully cooperate with the Department.

14.09.095 Appeal from Hearing Examiner order

A. The respondent may obtain judicial review of the decision of the Hearing Examiner by applying for a Writ of Review in King County Superior Court within 14 days from the date of the decision in accordance with the procedure set for in chapter 7.16 RCW, other applicable law, and court rules.

B. The decision of the Hearing Examiner shall be final and conclusive unless review is sought in compliance with this Section 14.09.095.

14.09.100 Civil penalties in cases alleging violations of this Chapter 14.09

A. In cases either decided by the Director or brought by the City Attorney alleging a violation filed under this Chapter 14.09, in addition to any

other award of damages or grant of injunctive relief, a civil penalty may be assessed against the respondent to vindicate the public interest, which penalty shall be payable to The City of Seattle and the Department. Payment of the civil penalty may be required as a term of a conciliation agreement entered into under subsection 14.09.080.A or may be ordered by the Hearing Examiner in a decision rendered under Section 14.09.090.

B. The civil penalty assessed against a respondent shall not exceed the following amount:

1. $11,000 if the respondent has not been determined to have committed any prior violation;

2. $27,500 if the respondent has been determined to have committed one other violation during the five-year period ending on the date of the filing of this charge; or

3. $55,000 if the respondent has been determined to have committed two or more violations during the seven-year period ending on the date of the filing of this charge; except that if acts constituting the violation that is the subject of the charge are committed by the same person who has been previously determined to have committed acts constituting a violation, then the civil penalties set forth in subsections 14.09.100.B.2 and 14.09.100.B.3 may be imposed without regard to the period of time within which those prior acts occurred.

14.09.105 Enforcement of Department and Hearing Examiner orders and agreements

A. In the event a City respondent fails to comply with any final order of the Director or of the Hearing Examiner, a copy of the order shall be transmitted to the Mayor, who shall take appropriate action to secure compliance with the final order.

B. In the event a respondent fails to comply with any final order issued by the Hearing Examiner not directed to the City or to any City department, the Director shall refer the matter to the City Attorney, for the filing of a civil action to enforce such order.

C. Whenever the Director has reasonable cause to believe that a respondent has breached a settlement or conciliation agreement, the Director shall

refer the matter to the City Attorney for filing of a civil action to enforce such agreement.

14.09.110 Evaluation

The Department shall ask the Office of the City Auditor to conduct an evaluation of the Fair Chance Housing Ordinance to determine if the program should be maintained, amended, or repealed. The evaluation should include an analysis of the impact on discrimination based on race and the impact on the ability of persons with criminal records to obtain housing. The highest quality evaluation will be performed based on available resources and data. The Office of the City Auditor, at its discretion, may retain an independent, outside party to conduct the evaluation. The evaluation shall be submitted to City Council by the end of 2019.

14.09.115 Exclusions and other legal requirements

A. This Chapter 14.09 shall not be interpreted or applied to diminish or conflict with any requirements of state or federal law, including but not limited to Title VIII of the Civil Rights Act of 1968, the Federal Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., as amended; the Washington State Fair Credit Reporting Act, chapter 19.182 RCW, as amended; and the Washington State Criminal Records Privacy Act, chapter 10.97 RCW, as amended. In the event of any conflict, state and federal requirements shall supersede the requirements of this Chapter 14.09.

B. 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.

C. This Chapter 14.09 shall not apply to the renting, subrenting, leasing, or subleasing of a single family dwelling unit in which the owner or subleasing tenant or subrenting tenant occupy part of the single family dwelling unit.

D. This Chapter 14.09 shall not apply to the renting, subrenting, leasing, or subleasing of an accessory dwelling unit or detached accessory dwelling unit wherein the owner or person entitled to possession thereof maintains a permanent residence, home, or abode on the same lot.

E. This Chapter 14.09 shall not be construed to discourage or prohibit landlords from adopting screening policies that are more generous to prospective occupants and tenants than the requirements of this Chapter 14.09.

F. This Chapter 14.09 shall not be construed to create a private civil right of action.

14.09.120 Severability

The provisions of this Chapter 14.09 are declared to be separate and severable. If any clause, sentence, paragraph, subdivision, section, subsection, or portion of this Chapter 14.09, or the application thereof to any landlord, prospective occupant, tenant, person, or circumstance, is held to be invalid, it shall not affect the validity of the remainder of this Chapter 14.09, or the validity of its application to other persons or circumstances.