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.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:18-cv-736 JCC
Hon. John C. Coughenour

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND CITY AND COUNTY OF SAN FRANCISCO IN SUPPORT OF APPELLEE AND AFFIRMANCE

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DISCLOSURE STATEMENT

Amicus Curiae International Municipal Lawyers Association, by and through its undersigned attorney, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

Amicus curiae International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy, and by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts. Numerous IMLA members have enacted or are considering enacting fair chance ordinances to limit the inquiry into and use of criminal history in evaluations of applicants for rental housing. While these ordinances reflect a variety of policy solutions, each represents efforts to address the need to improve housing access for those with criminal records.

Amicus curiae City and County of San Francisco ("San Francisco") has recognized the need to increase access to housing opportunities for individuals with criminal records, to enhance public safety by reducing recidivism and its associated criminal justice costs and societal costs, and to facilitate the successful reintegration into society of persons with arrest and conviction records. To that

end, San Francisco has enacted a fair chance ordinance to limit housing providers' inquiries into criminal background information and to limit the use of such information in evaluating prospective tenants. San Francisco is an IMLA member.

Amici have an interest in this matter because both San Francisco and IMLA's other members regulate landlord-tenant relations, in order to promote the public's health, safety and welfare. An overly broad interpretation of substantive due process and First Amendment law would undermine San Francisco's and IMLA members' ability to impose reasonable and necessary regulations on landlord-tenant relations, including the ability to regulate the inquiry into and use of criminal records information in rental housing transactions. Accordingly, *Amici*'s perspective on this matter is worthy of the Court's consideration and will assist the Court in reaching its decision.[1]

INTRODUCTION

Fair chance ordinances like Seattle's are a crucial tool for local governments to regulate landlord-tenant relations and address historic racial discrimination and

[1] *Amici* file this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29-3. All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person other than *Amici* or their counsel contributed money intended to fund preparation or submission of the brief.

inequity in the use of criminal background checks, in order to increase housing access for individuals with criminal records and their families. Stable housing helps these individuals reintegrate into the community and provide for themselves and their families. Barriers to housing for these members of the community result in increased recidivism, decreased public safety, and greater instability for affected families and their communities.

Seattle's Fair Chance Ordinance ("the Ordinance") is a constitutionally sound approach to addressing these important policy challenges. It prohibits landlords from inquiring about a tenant's criminal history and taking adverse actions against tenants based on such information. The adverse action provision is subject to rational basis scrutiny under substantive due process law and readily meets that standard. In addition, the inquiry provision raises no First Amendment issue, because it relates to unlawful conduct. To the extent the First Amendment does apply, the inquiry provision regulates commercial speech, and therefore at most is subject to intermediate scrutiny, which it satisfies.

The plaintiffs, landlords and an organization representing landlords (collectively "Landlords"), ask this Court to invalidate the Ordinance based on muddled theories that conflate due process and takings law and that distort First Amendment case law. This Court should reject that invitation and affirm the District Court's judgment.

ARGUMENT

I. Fair Chance Laws Are Important, Widely Used Policy Tools.

Seattle's Fair Chance Ordinance is part of an established strategy being implemented across the country to address the pressing policy concern of providing a fair chance to access housing to the formerly incarcerated and those with criminal records. These efforts unfold against the legacy of years of discrimination in the housing and criminal justice contexts. *See generally* Br. of Amici Curiae Fred T. Korematsu Center for Law and Equality and ACLU of Washington in Opp. to Pls.' Mot. for Summ. J. and in Support of Deft.'s Cross-Mot. for Summ. J. at 13-18, Case No. 2:18-cv-00736-JCC (Dkt. No. 38). Rental policies that deny housing to those with criminal records disproportionately impact racial minorities. *See, e.g.*, Phillip ME Garboden & Eva Rosen, *How Landlords Discriminate*, TalkPoverty (May 17, 2016) (reporting that landlords from a study in Baltimore, Dallas, and Cleveland generally would deny housing to an applicant with a felony record).[2] Local governments have a legitimate interest in addressing these historic and continuing wrongs and ameliorating their impact on the community.

[2] Available at https://talkpoverty.org/2016/05/17/when-landlords-discriminate/.

Cities like San Francisco are a part of that history. *See, e.g.*, Nicole Montojo, Eli Moore, and Nicole Mauri, *Roots, Race, and Place: A History of Racially Exclusionary Housing in the San Francisco Bay Area*, Haas Institute for a Fair and Inclusive Society, University of California, Berkeley, October 2019.[3] Accordingly, in 2014, San Francisco adopted a fair chance ordinance that covers discrimination in both housing and employment. *See* San Francisco Police Code, art. 49.[4] The City's Board of Supervisors found, after holding extensive hearings and upon reviewing volumes of documentary evidence, that barriers for persons with arrest or conviction records can increase recidivism and thereby jeopardize the safety of the public, disrupt the financial and overall stability of affected families, and prevent the City from achieving its maximum potential of economic growth. *Id*. at §§ 4901–02. Individuals with arrest or conviction records were discouraged from applying for housing or from obtaining housing because a "box" on the application required disclosure of criminal history information that likely would automatically exclude them from consideration. *Id*. Surveys showed that as many as 80% of private housing providers conduct background checks. *Id*. The information that such background checks may yield can have a devastating impact on the housing opportunities of persons with a criminal history, with damaging

[3] Available at https://belonging.berkeley.edu/rootsraceplace.

[4] Available at https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_police/0-0-0-8603.

spillover effects on families and communities. *Id*. Furthermore, regulating criminal background inquiries is an important step in increasing access to housing for those with criminal records. *Id.* ("Regulating inquiries into an individual's criminal history is gaining traction as one facet of the nationwide effort to reduce the recidivism that leads to serial incarceration."). The Board of Supervisors also found that encouraging reintegration can reduce recidivism and help reduce criminal justice costs, allowing scarce public dollars to be reinvested in programs that make San Francisco stronger and safer. *Id*.

Similar laws appear in at least three other California cities and at the state and local levels across the country. Like Seattle and San Francisco, the cities of Oakland, Berkeley and Richmond restrict criminal history inquiries and prohibit adverse rental housing actions based on certain criminal records. *See, e.g.,* Oakland Municipal Code Ch. 8.25; Berkeley Municipal Code Ch. 13.106; Richmond, Cal. Municipal Code, Ch. 7.110. Numerous other state and local governments also regulate both inquiries and adverse actions. *See, e.g.,* N.J. Stat. Ann. § 46:8-52 *et seq.* (West) (housing provider shall not inquire into applicant's criminal record prior to making a conditional offer and shall not evaluate applicants based on certain records); D.C. Code Ann. § 42-3541.02 (West) (prohibiting inquiry into previous arrest not resulting in conviction, prohibiting inquiry into pending criminal accusation or conviction prior to making conditional

offer, and restricting consideration of criminal history); Cook Cty., Ill. Human Relations Code § 42-38 (prohibiting inquiry into criminal history until tenant qualifications are confirmed and use of certain criminal history as basis for real estate transaction decisions). *See also* Colo. Rev. Stat. § 38-12-904(b); Or. Revised Statute § 90.303; Champaign Municipal Code, § Ch. 17, § 17.4.5; Louisville-Jefferson Municipal Code, Tit. IX, Ch. 92; Minneapolis Municipal Code, Tit. 12, § 244.2030; Portland City Code, § 30.01.086 (all prohibiting certain adverse actions based on criminal history in rental and other real estate transactions). And at the federal level, the U.S. Department of Housing and Urban Development has endorsed the fair chance approach, issuing guidance restricting private landlords' use of criminal records as a basis for adverse housing decisions. *See* Dept. of Hous. & Urban Dev., *Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* at 4-7 (Apr. 4, 2016).[5]

Many federal and state laws also recognize the importance of restricting criminal background inquiries as a tool to combat discriminatory action in the areas of lending and employment. *See, e.g.,* 12 C.F.R. § 1002.5(b), (b)(2), (d)(1) & (d)(3) (2019) (Equal Credit Opportunity Act regulations forbidding lenders,

[5] Available at http://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

including mortgage lenders, from asking about applicants' race, national origin, sex, religion, marital status, and reproductive decisions to prevent illegally discriminatory credit decisions); 29 C.F.R. § 1604.7 (2019) (pursuant to Pregnancy Discrimination Act, EEOC regulations prohibiting most employer inquiries about applicants' pregnancy status); *see also* 43 Pa. Stat. Ann. § 955 (West); Alaska Stat. Ann. § 18.80.240 (West); Colo. Rev. Stat. § 24-34-502(1)(a) (West); La. Rev. Stat. Ann. § 46:2254(C)(6) (West); Me. Rev. Stat. Ann. tit. 5, § 4581-A(1)(A) (West); Neb. Rev. Stat. § 20-318(5) (West); N.J. Stat. Ann. § 10:5-12(c) (West); Or. Rev. Stat. Ann. § 659A.030(1)(d) (West). Were the Court to adopt Landlords' argument that Seattle's inquiry provision violates the First Amendment, its decision would threaten the legitimacy of every one of these crucial and firmly established safeguards against housing, credit, and employment discrimination.

As commentators have noted, "[l]egislatures' interest in stopping discrimination before the fact is especially strong because after-the-fact enforcement is frequently slow, costly, and ineffective." Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. Chi. Legal F. 209, 211 (2020). The only way to ensure landlords and others involved in the tenant-evaluation process do not discriminate against tenants with criminal records is to limit access to that information. This is all that the inquiry provision does.

The fact that local, state, and federal jurisdictions in addition to Seattle widely recognize the need to implement fair chance policies is powerful evidence of how important these policies are.

II. Seattle's Fair Chance Ordinance Does Not Violate Substantive Due Process.

A. Rational Basis Review Applies.

Amici agree with Seattle that rational basis review applies to the substantive due process claim asserted by appellants ("Landlords"). *See* Appellee's Answering Brief ("AAB") at 41. Heightened scrutiny would apply only if the Ordinance implicated a fundamental right under due process. *Yagman v. Garcetti*, 852 F.3d 859, 867 (9th Cir. 2017). It implicates no such right.

In the due process context, "fundamental rights" covers rights and liberties that are "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations and quotations omitted). Examples include the rights to marry, have children, direct the education and upbringing of one's children, marital privacy, contraception, bodily integrity, and abortion. *Id.* at 720. But courts have been "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended," and courts should "exercise the utmost care whenever . . . asked to break new

ground in this field." *Id.* Landlords assert a fundamental right to exclude tenants based on their criminal history. Appellants' Opening Brief ("AOB") at pp. 45-47. That asserted right does not meet the high standard for a fundamental right, as Seattle demonstrates. AAB at 52-56.[6]

Landlords conflate the attributes of property ownership protected by the takings clause with fundamental rights receiving enhanced protection under substantive due process. This is a categorical error: the due process and takings clauses serve different ends. A substantive due process challenge asks whether a law rationally relates to a legitimate governmental purpose, whereas a takings challenge asks whether a law, even if its purpose is legitimate, nevertheless takes private property without just compensation. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 543 (2005). For purposes of a taking, the right to exclude is indeed "a fundamental element of the property right"—"one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. U. S.*, 444 U.S. 164, 176, 179-80 (1979). Extinguishing an owner's right to exclude may be tantamount to a direct physical occupation of the property and constitute a taking. *Id.* But even if the right to exclude is fundamental *to the idea*

[6] To the contrary, the Seattle Ordinance furthers rather than threatens the liberty and justice interests described in *Glucksberg*, by addressing and remedying the past effects of discrimination. *Supra*, Part I.

of private property under takings law, that does not make the right to deny a person housing based on their criminal history a fundamental right triggering heightened scrutiny under substantive due process.

Landlords invoke cases addressing the question of when appropriating the right to exclude takes the property itself. *Kaiser* held that the government could not force a property owner to convert a private pond into a public aquatic park. *Id.* at 180. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982), involved a permanent physical occupation of property. The Court explained that denying a person the right to exclude an uninvited guest ("a stranger") from their property, or denying a person "any power to control the use of their property," is a *per se* taking. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), held that a temporary forced occupation—an access regulation that forbade a property owner from excluding uninvited union representatives from the property—was a *per se* taking. By contrast, laws regulating the landlord-tenant relationship that results when a landlord chooses to rent property are not *per se* takings. *Ballinger v. City of Oakland*, No. 19-16550, 2022 WL 303262, at *3 (9th Cir. Feb. 1, 2022).

Although extinguishing an owner's right to exclude might constitute a taking if it resulted in a physical occupation of the property, Landlords have not shown that the Seattle Ordinance does that. Nor may they skip past the analysis that

Glucksburg requires to establish that the Ordinance triggers heightened scrutiny as a matter of substantive due process. This Court has already shut the door on Landlord's argument that heightened scrutiny applies. *See, e.g.*, *Slidewaters LLC v. Wash. State Dep't of Labor & Indus*., 4 F.4th 747, 758 (9th Cir. 2021) (rejecting substantive due process claim because "the right to use property as one wishes is . . . not a fundamental right").

Moreover, the Seattle Ordinance does *not* extinguish the "right to exclude." The right to exclude belongs to the person in lawful possession of the property, be that the property owner or their tenant. *City of Bellevue v. Jacke*, 978 P.2d 1116, 1118 (Wash Ct. App. 1999); *accord Allred v. Harris*, 18 Cal. Rptr. 2d 530, 533 (1993) ("As a general rule, landowners *and tenants* have a right to exclude persons from trespassing on private property . . . .") (citing *Loretto*, 458 U.S. 419 at 435; emphasis added). That right continues to exist and can be transferred under the Ordinance: a property owner in Seattle may retain exclusive possession of their unit, or they may convey that right to a tenant via a lease agreement. The owner remains free to exclude anyone he or she wishes from the property. But if that owner chooses to enter the rental marketplace and find a tenant, the Ordinance regulates how the owner may do so. *See Yee v. City of Escondido*, 503 U.S. 519, 526-31 (1992) ("Because they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their

inability to exclude particular individuals."); *accord Ballinger*, 2022 WL 303262, at *3.

In short, the Seattle Ordinance does not extinguish the "right to exclude," and had Landlords even argued it resulted in a taking, it would not be a *per se* taking because the government has not physically appropriated Landlords' property. The Ordinance merely regulates economic activity by property owners who wish to become landlords. Local governments have "broad power to regulate housing conditions in general and the landlord-tenant relationship in particular." *Ballinger,* 2022 WL 303262, at *3 (citations omitted). Under due process, "[t]he proper test for judging the constitutionality of statutes regulating economic activity . . . is whether the legislation bears a rational relationship to a legitimate state interest." *Slidewaters LLC*, 4 F.4th at 758. What Landlords seek to preserve is not the right to exclude but a license to discriminate.

Seattle does not exaggerate when it warns of the dangers that could result if this Court were to equate laws that restrict economic activity by property owners with true deprivations of the right to exclude or with fundamental rights under substantive due process. AAB at 55-56. The notion that landlords enjoy a fundamental property right to categorically deny housing to certain classes of tenants is antithetical to every fair housing law in this country. Its roots lie not in the majority opinion in *Cedar Point Nursery*, which even in the takings context

recognized that "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." 141 S. Ct. 2063, 2077 (contrasting the right to access recognized in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)). The ignoble history of Landlords' substantive due process claim can be traced to arguments that the Supreme Court unanimously rejected in *Shelley v. Kraemer*, 334 U.S. 1 (1948), when it struck down racially restrictive covenants governing sales of real property. In *Shelley*, the Supreme Court reversed *Sipes v. McGhee*, 316 Mich. 614 (1947), which stated that contractual restrictions "are valuable property rights." *Id*. at 625. Landlords make the same argument here that the *Shelley* Court rejected. It deserves no greater respect today than the United States Supreme Court gave it in 1948. The development of police-power case law and the history of rational-basis jurisprudence in the intervening 74 years render Landlords' due process claim legally and morally indefensible.

Countless laws regulate the economic activity of how property owners may rent their property. At the local level, these laws forbid refusal to rent to a prospective tenant based on criteria such as whether the tenant receives government rent subsidies, San Francisco Police Code § 3305 (prohibiting landlords from refusing to rent based on, among other things, the tenant's source of

income); retaliation against existing tenants for invoking their rights under local landlord-tenant law, San Francisco Administrative Code § 37.10A; evictions of existing tenants, *id.* at § 37.9; and rent increases on existing tenants, *id*. at § 37.3; *see also Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 155 (1976) (rejecting a substantive due process challenge to rent control laws under rational basis review, and noting that the theory that due process protects the freedom to contract against the local police power has been "completely repudiated"). These laws all impact property owners' economic activity, by regulating the terms under which they may select tenants and by defining the landlord-tenant relationship that will exist once a lease is signed. Rational basis is, and must remain, the correct tool to review these laws.

B. Seattle's Ordinance Has a Rational Basis, and Courts Should Defer to Local Governments' Legislative Judgments.

Under rational basis review, this Court should uphold Seattle's Fair Chance Ordinance because it bears a rational relationship to a legitimate state interest. Landlords cannot meet their exceedingly high burden to show the Ordinance is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *See, e.g.*, *Slidewaters*, 4 F.4th at 758; AAB at 42. Landlords and their *amici* try to graft a "substantially advances" or "undue oppression" requirement onto the rational basis test. AOB at 47-51, 58-59; *see also* Br. of The Cato Institute as Amicus Curiae in Support of Plaintiffs-

Appellants. But this is just a repackaging of their flawed "fundamental rights" argument, invoking heightened scrutiny through the back door. The district court properly rejected this argument. *Yim v. City of Seattle*, No. C18-0736-JCC, 2021 WL 2805377, at *4 (W.D. Wash. July 6, 2021). The Washington Supreme Court, applying federal law, did the same. *Yim v. City of Seattle*, 451 P.3d 694, 698-99 (Wash. 2021). Rather than repeat Seattle's explanation for why those two courts got it right, *Amici* emphasize that the Seattle Ordinance would survive even under Landlords' enhanced form of rational basis review. This is not a close case.

Landlords must concede that local governments have a legitimate interest in addressing historic wrongs and provided fairer access to housing in their communities. Seattle has that interest, *see* 2SER-564, as do San Francisco and state and local governments across the country, *supra,* Part I. Laws that prohibit landlords from denying rental housing to prospective tenants based on their criminal history bear a rational relationship to those goals. Landlords may question whether Seattle's law does *enough* or *too much*. But that is not the inquiry; each jurisdiction may strike its own balance. A court applying rational basis review must "defer[] to legislative judgments about the need for, and likely effectiveness of, regulatory actions" and may overrule a law only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health,

safety, morals, or general welfare." *Lingle*, 544 U.S. at 541, 545. Landlords cannot make that showing.

III. The Ordinance Does Not Violate the First Amendment.

Landlords' First Amendment arguments contradict both Supreme Court and Ninth Circuit precedent. This Court should reject those arguments. The purpose and effect of Seattle's Fair Chance Ordinance is to regulate commercial rental transactions, not speech. Because the Ordinance neither regulates conduct with a significant expressive element nor singles out those engaged in expressive activity, the First Amendment does not apply to the inquiry provision. And even if this Court were to apply the First Amendment to the inquiry provision, the provision is commercial speech that merits intermediate scrutiny under *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). It readily satisfies that test.

Landlords' First Amendment claim seeks to divorce the inquiry provision from the context in which it appears and applies. Their argument would entitle any landlord to inquire about every type of information that could lead to biased rental application decisions, including an applicant's race, ethnicity, religion, and sexual orientation. Landlords' strained interpretation of the First Amendment is not and cannot be the law.

A. Because the Ordinance Has Only Incidental Effects on Speech, the First Amendment Does Not Apply.

For the First Amendment to apply, a challenged law must regulate conduct with a "significant expressive element" or must have the inevitable effect of "singling out those engaged in expressive activity." *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019); *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015). Regulation of conduct that is "in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed," does not trigger First Amendment protection. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017); *Int'l Franchise Ass'n*, 803 F.3d at 408 ("[S]ubjecting every incidental impact on speech to First Amendment scrutiny 'would lead to the absurd result that any government action that had some conceivable speech inhibiting consequences . . . would require analysis under the First Amendment.'") (citation omitted). Under these principles, First Amendment analysis does not apply to the inquiry provision.[7]

First, the inquiry provision does not prohibit conduct with a significant expressive element. Although some form of speech—an "inquiry"—is necessary

[7] This Court can affirm the district court's decision "on any ground supported by the record." *Campbell v. Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 842 n.4 (9th Cir. 2011). *See, e.g., Williams v. Yamaha Motor Co. Ltd.*, 851 F.3d 1015, 1026 (9th Cir. 2017) (affirming district court's Rule 12(b)(6) dismissal on alternative grounds).

as the means of obtaining criminal history information, that inquiry has no significant expressive element and is merely the initial step in the potential commission of illegal conduct under the Ordinance. Second, the Ordinance does not target those engaged in expressive activity, such as newspapers or advocacy groups. *Int'l Franchise Ass'n*, 803 F.3d at 408. Landlords and others remain free to engage in all types of expressive activity, including commenting about the Ordinance, the practice of using criminal history to evaluate tenants, the link between criminal history and successful tenancies, or any other subject. The only thing they may not do is ask for criminal history information that could lead to an adverse action under the Ordinance.

Underlying Landlords' arguments is a radical and legally unsupported interpretation of the First Amendment that elevates free speech rights above other constitutional rights and would, if adopted, undermine federal, state and local laws that combat discriminatory conduct. If landlords' inquiries into rental applicants' criminal records enjoyed First Amendment protection, landlords and employers could likewise ask about applicants' race, religion, ethnicity, and other sensitive information that could lead to discrimination. That would be an "absurd result," *Int'l Franchise Ass'n*, 803 F.3d at 408, derailing anti-discrimination laws while shielding inquiries that have no significant expressive element.

As discussed above in Part II, the City's prohibition on the use of criminal history is a valid regulation of commercial rental transactions. The prohibition on inquiries is merely incidental to the conduct regulation. Because the inquiry provision neither regulates conduct with a "significant expressive element" nor has the effect of "singling out those engaged in expressive activity," the provision is not subject to First Amendment analysis.

B. To the Extent the Inquiry Provision Regulates Speech, that Speech is Commercial.

Although Landlords assert that the main purpose of their inquiries is non-commercial, the sole purpose for which they seek criminal records is to inform their decisions whether to enter into lease agreements. Undeniably, Landlords' purpose is primarily commercial in nature. *See Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1116-17 (9th Cir. 2021). Landlords claim that they want the information to evaluate whether renting to a prospective tenant would compromise their own or other tenants' safety, but such considerations, at bottom, relate to whether to enter into a commercial relationship. Thus, the inquiries regulated by the Ordinance constitute commercial speech.[8]

[8] Landlords argue that criminal background information may itself be non-commercial speech. This is incorrect. *See* AAB at 22-23. Moreover, this argument is a red herring: the inquiry provision does not regulate the content of criminal background reports. It regulates only inquiries into criminal records. Addendum to AAB at 6.

C. Strict Scrutiny Does Not Apply to the Inquiry Provision.

If this Court were to conclude that the First Amendment applies to the inquiry provision, then intermediate scrutiny, not strict scrutiny, would apply. Landlords argue that under *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015), and *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), the inquiry provision must survive strict scrutiny because it is content-based. AOB at 19. But in the next breath, Landlords concede that this is not the law. AOB at 23 n.7. As they admit, this Court has repeatedly rejected the proposition that commercial speech restrictions are subject to strict scrutiny after *Reed* and *Sorrell*. *See Contest Promotions, LLC v. City and Cty. of San Francisco*, 874 F.3d 597 (9th Cir. 2017); *Retail Digital Network v. Prieto*, 861 F.3d 839 (9th Cir. 2017) (*en banc*) ("*RDN*"); *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016).

In *Reed*, a town's sign code regulated three types of non-commercial signs—ideological, political and temporary directional signs—differently depending on the signs' communicative content. The Supreme Court held that the sign controls were content-based and therefore subject to strict scrutiny. But *Reed* is irrelevant to this case because it involved only non-commercial speech. The Supreme Court has "consistently accorded noncommercial speech a greater degree of protection than commercial speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490,

513 (1981). *Reed* did not purport to change that balance. It did not even cite *Central Hudson* or *Metromedia*, much less overturn them. *Reed* did no more than affirm that strict scrutiny applies to content-based restrictions on non-commercial speech. In *Sorrell*, the Supreme Court held that a statute prohibiting the sale of prescribers' information for marketing purposes was subject "heightened scrutiny," and went on to apply the *Central Hudson* intermediate scrutiny test to the challenged law. 564 U.S. at 565, 571–72.

This Court has subsequently held that neither *Reed* nor *Sorrell* changed *Central Hudson*'s intermediate scrutiny test for commercial speech restrictions. *See Lone Star*, 827 F.3d at 1198 n.3 (holding that commercial speech restrictions need only withstand intermediate scrutiny, citing *Central Hudson*); *Contest Promotions*, 874 F.3d at 601 ("We thus reject Plaintiff's argument that review more searching than intermediate scrutiny applies here."; citing *RDN* and *Lone Star*); *RDN*, 861 F.3d at 846 (". . . *Sorrell* did not mark a fundamental departure from *Central Hudson*'s four-factor test, and *Central Hudson* continues to apply."); *accord Vugo, Inc. v. City of New York*, 931 F.3d 42, 49 n.6 (2d Cir. 2019); *In re Brunetti*, 877 F.3d 1330, 1350 (Fed. Cir. 2017); *Missouri Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 300 n.5 (8th Cir. 2017); *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 533 (6th Cir. 2012). Thus, to the extent the

First Amendment even applies to the inquiry provision, intermediate scrutiny provides the correct test.

D. The Ordinance Satisfies the Intermediate Scrutiny Test for Commercial Speech.

Under *Central Hudson*, the First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. 447 U.S. at 563–64. A threshold question here, therefore, is whether the inquiry provision concerns unlawful activity. If it does, inquiring about a tenant's criminal record is not protected by the First Amendment. Next, a restriction on protected commercial speech is valid if it (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) reaches no further than necessary to accomplish its objective. *Id*. at 564.

The City's Answering Brief discusses all of these issues. *Amici* will focus here on two critical questions: whether the inquiry provision regulates speech that concerns unlawful activity, and whether the inquiry provision reaches further than necessary. The answers to these questions show that Landlords' argument fails.

1. The Inquiries Relate to Unlawful Conduct.

"The government may ban . . . commercial speech related to illegal activity . . . ." *Central Hudson*, 447 U.S. at 563–64 (citations omitted). In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 387–89 (1973), the Court considered an ordinance that made it illegal for (1) employers to

discriminate in hiring based on sex; (2) employers, employment agencies and labor organizations to publish employment advertisements that indicate discrimination based on sex; and (3) "any person . . . to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance." Pursuant to the third prong of that ordinance, the Pittsburgh Commission on Human Relations issued an order prohibiting a newspaper publisher from using separate column headings for jobs for "Male" and "Female" applicants.

The U.S. Supreme Court rejected the publisher's First Amendment challenge to that order. It observed, "Discrimination in employment is not only commercial activity; *it is illegal commercial activity under the Ordinance*." *Id.* at 388 (emphasis added). Restrictions on the publisher were valid because the column headings aided the discriminatory conduct that was the ultimate target of the ordinance. *See id*. at 388–89. The Court concluded that free speech interests are at their nadir when the speech is about illegal activity:

> Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

Id. at 389. *See also Valle del Sol Inc. v. Whiting*, 709 F.3d 808, 822 (9th Cir. 2013) (citing *Pittsburgh Press*). The Court provided examples of unprotected speech associated with illegal conduct:

> We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes Wanted' rather than stated within the four corners of the advertisement.

Pittsburgh Press, 413 U.S. at 388. Subsequently, in *Central Hudson*, the Supreme Court incorporated *Pittsburgh Press*'s holding into its requirement that commercial speech must relate to lawful activity in order to enjoy First Amendment protection. 447 U.S. at 563–64.

Like the ordinance considered in *Pittsburgh Press*, Seattle's Ordinance targets certain conduct—denials of tenancies and other adverse actions based on criminal history—as well as speech relating to that conduct. The limitation on criminal records inquiries serves a purpose similar to the prohibition in *Pittsburgh Press* against "aiding" in sex-based employment discrimination: in both cases, the regulated speech is merely a vehicle for conducting an illegal act. Landlords have asserted no reason to request criminal history information other than to use it to evaluate potential tenants, which the Ordinance forbids. Thus, they have alleged no lawful use of the information obtained through an inquiry. Because the inquiry provision relates to unlawful conduct, it enjoys no First Amendment protection.

2. The Inquiry Provision Reaches No Further than Necessary.

Landlords claim the inquiry provision is overbroad, positing an absurdly expansive interpretation of that provision. They argue that no one can inquire into

the criminal background of anyone who happens to be a tenant or an applicant for any rental unit in Seattle, for any purpose. But the City interprets the inquiry provision as applying only in the context of rental housing. AAB at 36. This Court should defer to the City's narrower, common-sense interpretation of the inquiry provision. *Ward v. Rock Against Racism*, 491 U.S. 781, 795-796 (1981) ("[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.") (citations and internal quotation marks omitted).

Limiting criminal history inquiries in the housing context is necessary for Seattle to achieve its policy objectives. While Landlords argue for alternatives to prohibiting inquiries, regulating inquiries is necessary to avoid potential bias. As courts have recognized, it is very difficult, if not impossible, for listeners to ignore highly prejudicial information once they receive it. *See, e.g., Stars & Bars, LLC v. Travelers Casualty Ins. Co. of Am.*, No. SACV 16-01397-CJC, 2020 WL 4342250, at *1 (C.D. Cal. May 28, 2020) ("The advantage of a motion in limine is 'to avoid the futile attempt to unring the bell in the event a motion to strike is granted in the proceedings before the jury.'") (citation omitted); *United States v. Davis*, 904 F. Supp. 564, 569 (E.D. La. 1995) ("Emphatic jury instructions to disregard prejudicial publicity is an unsatisfactory solution. It is difficult, if not impossible, to 'unring a bell.'").

Landlords also argue the Ordinance denies them equal access to publicly available information. AOB at 20-22. But bias stemming from viewing criminal records has the same effect, regardless of whether the information comes from a commercial background check company that harvests public records or directly from public records themselves. The restriction on inquiries goes no further than necessary—it is tailored precisely to prevent the bias that Seattle seeks to combat. Whether or not the records are public, under the intermediate scrutiny standard the inquiry provision is constitutionally sound.

Neither *Legi-Tech v. Keiper*, 766 F.2d 728, 732–35 (2d Cir. 1985), nor *Sorrell* supports Landlords' argument. *Cf.* AOB at 21. In those cases, unlike this one, the alleged First Amendment violations rested on the plaintiffs' status as publishers and speakers and on their use of the information for legal purposes. In *Legi-Tech*, the court held that the plaintiff, a legislative reporting service, was "an organ of the press," and as such was engaged in core political speech. The court found that the state's purpose in limiting access to legislative information was to prevent the plaintiff from legally competing with the state's own reporting service. In *Sorrell*, the plaintiffs sought prescribers' information in order to use that information to assert their own right to speak by legally marketing pharmaceuticals to doctors. The Court held that a statute prohibiting the sale of the information for marketing purposes improperly disfavored marketing speech. 564 U.S. at 564.

Here, Landlords are not members of the press, and do not assert any right to speak in any expressive or substantive way. Moreover, unlike the *Legi-Tech* and *Sorrell* plaintiffs, Landlords seek the information for an unlawful purpose, and the limitation on access is necessary to achieve the City's legitimate policy objectives. Thus, these cases are inapposite.

Because the City's inquiry provision goes no further than necessary to combat bias against individuals with criminal records, in order to achieve the City's policy objectives, it is valid under *Central Hudson*.

CONCLUSION

For the reasons stated above, *Amici* respectfully ask this Court to affirm the District Court's decision.

Dated: February 4, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Dated: February 4, 2022

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UNITED STATES COURT OF APPEALS
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