No. 21-35567

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHONG YIM, *et al*.,
Plaintiffs-Appellants,
v.
CITY OF SEATTLE,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Hon. John C. Coughenour, Case No. 2:18-cv-00736-JCC

BRIEF OF PIONEER HUMAN SERVICES, TENANTS UNION OF WASHINGTON, FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND ACLU OF WASHINGTON AS AMICI CURIAE IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), undersigned counsel for amici curiae make the following disclosures. Pioneer Human Services, the Tenants Union of Washington, the Fred T. Korematsu Center for Law and Equality, and the ACLU of Washington are not publicly held corporations, do not issue stock, and do not have parent corporations and consequently there exist no publicly held corporations which own 10 percent or more of their stock.

STATEMENT REGARDING CONSENT TO FILE

Undersigned counsel certifies that the parties have consented to the filing of the amicus brief pursuant to FRAP 29(a)(2).

FRAP 29 STATEMENT

Amici certify that, pursuant to Federal Rules of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief in whole or in part, nor did any party or party's counsel contribute money that was intended to fund preparing or submitting this brief. No person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE[1]

Amici curiae, Pioneer Human Services, Tenants Union of Washington, the Fred T. Korematsu Center for Law and Equality, and the ACLU of Washington, are community and legal advocacy organizations that frequently work on issues involving race disproportionality in the criminal legal system, including the collateral consequences that result from people of color being unfairly targeted at all stages of the criminal legal system and experiencing disparate impacts in various unrelated aspects of their lives. Amici submit this brief in support of the City of Seattle because they support the City's efforts to address the racially disparate harms to communities of color that result from the practice of using criminal records as a screening tool for tenancy through passage of the Fair Chance Housing Ordinance.

INTRODUCTION

> The Fair Chance Housing legislation . . . is the exact kind of change we still need to protect the safety of all Seattle renters. The current laws allow the rampant racial inequity and anti-Blackness within our criminal (in)justice system to be further reinforced in our rental housing.
>
> –The Tenants Union.[2]

[1] Complete statements of interest are included below in Appendix A.

[2] The Tenants Union, *Opinion: The Path to Housing Justice is Intersectional Tenant-Led Movements*, South Seattle Emerald (July 24, 2017), https://southseattleemerald.com/2017/07/24/the-path-to-housing-justice-is-intersectional-tenant-led-movements/.

When the Seattle City Council passed the Fair Chance Housing Ordinance ("the Ordinance"), it followed guidance of an advisory committee that recommended that the Council develop legislation to reduce barriers to housing for people with criminal records.[3] Specifically, the advisory committee found that "[persons] with a criminal record, who are disproportionately lower income and people of color, need fair access to suitable housing options," and noted that studies "show that people with stable housing are more likely to successfully reintegrate into society and less likely to reoffend."[4] These findings and recommendation paved the way for the passage of the Ordinance in 2017 to prevent private landlords from denying a rental application on the basis of an applicant having a criminal history, and from using criminal history as a proxy for race.[5]

With its deep history of racist housing policies and present crisis of housing access,[6] Seattle has a responsibility to prevent housing discrimination

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[3] Seattle Housing Affordability & Livability Agenda, *Final Advisory Committee Recommendations to Mayor Edward B. Murray and the Seattle City Council* (2015) (SER 20-95) [hereinafter HALA Report] at App. F-11 (SER 81). Where applicable, amici cite to the Supplemental Excerpts of Record (SER) which the City filed as an appendix to its Answering Brief and which is docketed as Dkt. Nos. 26-1 through 26-3, or to the Excerpts of Record (ER) which the Landlords filed as an appendix to their Opening Brief and which is docketed as Dkt. No. 10.

[4] *Id*. at 33 (SER 53).

[5] City of Seattle, Ord. 125393, § 2 (2017).

[6] Seattle is currently undergoing a significant housing crisis and has one of the highest rates of homelessness in the country. *See* The Seattle Times' Project

against people of color. In enacting the Ordinance, Seattle "aim[ed] to address the racially disproportionate impact that exclusionary tenant screening practices have on our communities."[7] The City acted consistently with the U.S. Supreme Court's 2015 pronouncement that confirmed that the 1968 Fair Housing Act incorporated the disparate impact principle, which reaches "artificial, arbitrary, and unnecessary" governmental or private policies that disparately harm individuals from a protected group. *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc*., 576 U.S. 519, 543 (2015) (quoting *Griggs v. Duke Power*, 410 U.S. 424, 431 (1971)).

In passing the Ordinance, the Seattle City Council recognized that an individual's criminal history does not predict whether they will be a good neighbor or tenant and that the criminal legal system disproportionately targets and punishes people of color.[8] It recognized that the practice of screening tenants based on

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Homeless, *See How Seattle's Homelessness Crisis Stacks up Across the Country and Region* (June 27, 2021), https://projects.seattletimes.com/2021/project-homeless-data-page/ (Seattle has third highest population of homeless residents).

[7] Preamble, City of Seattle, Ord. 125393 (2017), https://seattle.legistar.com/View.ashx?M=F&ID=5387389&GUID=6AA5DDAE-8BAE-4444-8C17-62C2B3533CA3 at 1-5 (SER 564-68).

[8] In addition to disproportionate arrests, a report on race and Washington's criminal justice system, published simultaneously in the flagship law reviews of Washington's three law schools, concluded that facially neutral policies "have a disparate impact on people of color" and "racial and ethnic bias distorts decision-making at various stages in the criminal justice system, thus contributing to disproportionalities in the criminal justice system." Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on*

criminal history was "artificial, arbitrary, and unnecessary," and because of the systemic racism that pervades the criminal legal system, resulted in landlords disparately excluding households that included people of color. Regardless of whether this practice masked covert discrimination or unintentionally discriminated against members of a protected class, the Council recognized its harm and, pursuant to its broad police powers to safeguard public welfare, instituted a measure to address it.

Amici present data, empirical research, and the personal experiences of impacted individuals to demonstrate the racial disproportionalities and harmful effects of using criminal history as a screening tool for tenancy. This information and context provides additional evidence of the legitimate governmental justifications for passing the Ordinance as a valid exercise of the City's police power to address disparate impacts in housing availability for people and families of color in Seattle.

Race and Washington's Criminal Justice System, 35 Seattle U.L. Rev. 623, 629 (2012); 87 Wash. L. Rev. 1, 6 (2012); 47 Gonzaga L. Rev. 251, 256 (2012); *see also* Research Working Group, Task Force 2.0 on Race and Washington's Criminal Justice System, *2021 Report to the Washington Supreme Court*, https://digitalcommons.law.seattleu.edu/korematsu_center/116/, (updating research from the Preliminary Report and concluding that racial disproportionalities and disparities persist in Washington's criminal legal system).

ARGUMENT

I. The Ordinance Benefits Individuals, Families, and Communities of Color Who Are Disparately Impacted by Criminal Records Screening Practices.

The Ordinance is an important tool to challenge policies and practices that prevent people with criminal records from finding housing. Before the Ordinance was enacted, Seattle landlords were permitted to inquire, often through third party vendors, about arrest records, criminal conviction records, or criminal history of any prospective tenant or member of their household. This screening practice disparately impacts communities and families of color, who are searched, arrested, convicted, and incarcerated at rates much higher than their white counterparts.

There are an estimated 2.14 million people in Washington who have a criminal record. Maya Leshikar, *Should people with criminal convictions be able to work in health care? A bill in Washington's Legislature would relax state laws*, Seattle Times (Feb. 14, 2021), https://www.seattletimes.com/seattle-news/politics/should-people-with-criminal-convictions-be-able-to-work-in-health-care-a-bill-in-washingtons-legislature-would-relax-state-laws/. Though a precise demographic breakdown of the 2.14 million is not known, it can be surmised that Black, Latinx, and Indigenous people are overrepresented, given that race disproportionality has been a persistent feature of Washington's

criminal justice system going back decades. *See* Task Force 2.0, *supra*, at 20.[9] In 1980, Black people were incarcerated at a rate 14.1 times greater than their white counterparts; in 2005, the rate was 6.4 times greater; and in 2020, it was 4.7 times greater. *Id*. While disproportionalities have improved over time, Black people continue to be grossly overrepresented in Washington's incarcerated population.

Arrest rates in Washington are similarly disparate. From 2017 to 2020, Black and Indigenous people have been arrested in Washington at rates far higher than white people—between 3.0 and 3.2 times greater during the time period. *Id.* at 15. And the disproportionalities carry through to charging, sentencing, and incarceration. From 2018-2020, Black people in Washington disproportionately received felony sentences at a rate 2.7 times greater than white people, *id*. at 17, and were incarcerated at a rate 4.7 times greater than their white counterparts, *id.* at 20.

Seattle is not immune from the race disproportionality documented more broadly in Washington. For example, data from the Seattle Police Department show 47,855 *Terry* stops from the period March 2015 to early June 2021. *Id*. at

[9] This report is forthcoming in the flagship law reviews of Washington's three law schools. 56 GONZAGA LAW REVIEW, 45 SEATTLE UNIVERSITY LAW REVIEW, 97 WASHINGTON LAW REVIEW (forthcoming 2022) (update on Race and Washington's Criminal Justice System).

13. Relative to Seattle's population, Black persons are stopped at a rate that is 4.1 times that of non-Hispanic white persons and Indigenous persons are stopped at a rate that is 5.8 times that of non-Hispanic white persons. *Id*.

The glaring racial disparities in rates of interactions with the criminal legal system and the severity of charges, convictions, and sentences mean that those living in the community with a criminal record are disproportionately people of color. For those people and their families, criminal record screening practices inevitably have a disparate impact, regardless of discriminatory intent. The Ordinance is an important tool that recognizes and begins to address some of these historical harms by challenging race-neutral policies and practices that prevent people with criminal records from finding housing.

The positive effects of the Ordinance extend beyond individuals with criminal records to benefit and strengthen families and communities by keeping families together and protecting children and other vulnerable community members. Nearly half of all children in the United States have at least one parent with a criminal record. *See* Rebecca Vallas, et al., Center for American Progress, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children* 1 (Dec. 2015) (available at SER 441-79). The effects of having a parent with a criminal record fall most heavily on children of color. In 2007, of the 1.7 million children with an incarcerated parent, more than seventy percent were

children of color. *See* Stephanie Hong, Note: *Say Her Name: The Black Woman and Incarceration*, 19 Geo. J. Gender & L. 619, 630 (2018). Black children are almost nine times more likely to have an incarcerated parent than white children.[10] *Id*. at 5.

In the absence of protective legislation and policies, the sheer number of children who have a parent with a criminal record necessarily means that the damaging impacts of a criminal record touch multiple generations. *See* Vallas, *supra*, at 1. Among these impacts are housing instability that can make family reunification post-incarceration "difficult if not impossible." *Id*. at 2. Parents who cannot find stable housing post-incarceration may not be able to regain custody of their children. *See* Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 Ind. L.J. 422, 433 (2018). When landlords screen for criminal history, a single parent whose partner has a record may have to choose between raising their children alone or losing their children to the foster care system. *See* Hong, *supra*, at 630-32. Even when families remain together, "the barriers to housing faced by parents with criminal records not only stand in the way of housing stability in

[10] There is no reason to believe that racial disproportionality in the number of children with a parent who is incarcerated does not extend to children with a parent with an arrest record, a parent who was charged but not convicted, or a parent who was convicted of an offense but who was not sentenced to prison.

the short term but also can carry substantial, negative, and long-term consequences for children," Vallas, *supra*, at 11, as frequent moves can have negative effects on children's educational outcomes as well as on their physical, cognitive, social, and emotional development. *Id*. at 10-11.

Barriers to housing based on an individual's criminal record can also arise from children with criminal records, a disproportionate number of whom are children of color,[11] which similarly affects families' ability to stay united in adequate housing. Racial Equity Toolkit- Fair Chance Housing at 3-4 (SER 268-69). During testimony at a community hearing on the Ordinance, one young man recounted, "I'm 20 years old and I'm a convicted felon. I'm currently a student. I would appreciate if you pass this because it will help me move back with my family and . . . be part of the community again."[12]

[11] Youth of color make up a disproportionate number of youth in juvenile detention in King County. Black youth account for 6.8 percent of the overall county population, but 47.3 percent of those in juvenile detention; Native American youth are 0.8 percent of the overall county population, but 3.4 percent of those in juvenile detention; Latino youth are 9.5 percent of the overall population and 20.6 percent of those in juvenile detention. *See* Racial Equity Toolkit at 3-4 (SER 268-69).

[12] Testimony of Alex Lopez, community member. Mr. Lopez testified in support of the Fair Chance Housing Ordinance at the July 13, 2017, Civil Rights, Utilities, Economic Development and the Arts Committee (CRUEDA) meeting. His testimony is available at https://www.seattlechannel.org/mayor-and-council/city-council/city-council-all-videos-index?videoid=x78912 at 1:59:08 – 2:00:04.

II. The Ordinance Eliminates an Arbitrary, Artificial, and Unnecessary Practice that Punishes People With Criminal Records After They Have Served Their Sentence.

Much attention has been paid to the detrimental effects of a criminal legal system that has resulted in mass incarceration, and in particular, mass incarceration of people of color. *See, e.g.*, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010). There is also an ongoing concern about collateral consequences—the direct sanctions that attach to convictions and can cause harm to individuals, their families, and their communities far beyond any incarceration sentence. Some examples include federal and state laws that restrict employment, housing, and other benefits and opportunities for people with convictions. *See* National Inventory of Collateral Consequences of Conviction, https://niccc.nationalreentryresourcecenter.org/ (last visited Jan. 28, 2022).

Less attention has been paid to the "informal" collateral consequences of a criminal conviction.[13] Unlike formal collateral consequences that arise from

[13] Professor Wayne Logan, an expert on the collateral consequences of criminal convictions, has used "informal collateral consequence" to describe discretionary penalties and punishment that are not formally imposed by the state but which fall within "the gamut of negative social, economic, medical, and psychological consequences of conviction[.]" Wayne Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103, 1104 (2013).

statutes and regulations [14]—such as narrowed eligibility for public housing, loss of voting rights, and disqualification from certain occupations—informal collateral consequences are not rooted in specific legal authority. People with convictions, and even those who were merely arrested, or charged and found not guilty, experience well-documented informal collateral consequences, including when they fill out a rental application and are judged by a landlord on an arbitrary basis.

As one criminal justice scholar has written, "[t]he U.S. criminal justice system 'piles on.' It punishes too many for too long." Eisha Jain, *Capitalizing on Criminal Justice*, 67 Duke L. J. 1381, 1382 (2018). The focus on overcriminalizing, excessive sentencing, and mass incarceration, and the racial inequities embedded in these systems, has been criticized by organizations across the political spectrum. *Id.* Private actors, like landlords, intentionally or not, also "pile on." *Id.* at 1384.

One woman who was formerly incarcerated and sentenced to 15 months in federal prison, three years of probation, and a $30,000 fine in 2002 stated, "I wasn't sentenced to a lifetime of homelessness, I wasn't sentenced to a lifetime of unemployment, I wasn't sentenced to anything but those three conditions. And I've met them all . . .. Unless my sentence says I'm going to struggle with employment

[14] Amici do not agree that all such legal conditions and consequences of convictions are appropriate or necessary, but a discussion of that issue is beyond the scope of this amicus brief.

the rest of my life and that I won't be able to find anywhere to rent, then to me, my debt is paid."[15] Her punishment appeared to be limited to the judgment imposed at sentencing, but the effects of that punishment persist even twenty years later in the form of housing discrimination.

The state creates the criminal records that become tools for private actors to deploy, to the detriment of people with criminal records, their families, and their communities. *Id.* As a result, landlords arbitrarily impose barriers on people with criminal records. Landlords do so even though, as the City recognized when enacting the Ordinance, "there is no sociological research establishing a relationship between a criminal record and an unsuccessful tenancy[.]" *See* Ordinance (SER 565). As one man, whose conviction was over 10 years old, recounted of his experience looking for housing, "for those of us who have spent our time, who have overcome whatever obstacles were in front of us and are in a position to find housing, we're just sick and tired of hearing no . . . I made more than enough money to pay the rent. I had good credit. I had a good rental history. But I kept hearing no."[16] Because people with criminal records are

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[15] Testimony of Susan Mason, community member. Ms. Mason testified in support of fair chance housing at the May 23, 2017 CRUEDA meeting. Her testimony is available at https://www.seattlechannel.org/mayor-and-council/city-council/city-council-all-videos-index?videoid=x76441 at 16:48 – 18:58.

[16] Testimony of Augustine City, Urban League of Seattle. Mr. Cita spoke in support of the Fair Chance Housing Ordinance at the July 13, 2017, CRUEDA meeting. His testimony is available at https://www.seattlechannel.org/mayor-and-

disproportionately people of color, landlords using criminal records as a proxy for determining who is and is not a "good tenant" are able to discriminate with impunity, whether intentionally or as a result of implicit bias.

To meaningfully address "piling on," restricting the use and abuse of criminal records is essential. *See* Jain, *supra*, at 1387 ("Responding to overcriminalization thus may require key institutions to change their practices, including by removing access to criminal record information."). It is thus appropriate and reasonable that the City take measures to restrain the unfettered discretion of private actors—landlords, in this case—to use arbitrary, "gut feelings," infected with implicit bias, to decide which people with criminal records have "redeemed" themselves and are worthy of being forgiven for their contact with the criminal justice system. The Ordinance is a reasonable step that helps protect persons and families from having additional consequences arbitrarily piled on based on previous involvement in the criminal legal system.

III. The Ordinance Addresses the Historical and Structural Nature of Housing Discrimination and the Harmful Consequences of Residential Segregation.

The barriers to housing faced by people with criminal records and their families hit hard in Seattle, where a history of racially restrictive covenants,

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council/city-council/city-council-all-videos-index?videoid=x78912 at 38:15 – 40:23.

entrenched redlining practices, zoning regulations, and, more recently, gentrification, have resulted in a segregated city. *See* Racial Equity Toolkit at 6, (SER 271); *see also* Seattle Civil Rights and Labor History Project, Univ. of Wash., *Segregated Seattle*, http://depts.washington.edu/civilr/segregated.htm (last visited Jan. 28, 2022). More recent practices, such as criminal record screening, have also pushed people of color disproportionately into homelessness. *See* City of Seattle, *Homelessness Response, The Roots of the Crisis*, https://www.seattle.gov/homelessness/the-roots-of-the-crisis (last visited Feb. 2, 2022) (documenting race disproportionalities in Seattle homeless population and noting the criminal justice system as a driver).

This Court has recognized that facially neutral housing policies and practices that result in segregation, whether as a result of conscious or unconscious bias, may violate the law. *See Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 509, 513 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 295 (2016) (holding a developer's disparate treatment and disparate impact claims could proceed and determining that exclusionary zoning practices that result in segregation, whether because of conscious or unconscious bias, can violate the FHA). Because more obvious and recognizable forms of discrimination have become less common, subtle forms of discrimination have come to plague those seeking housing. Consistent with the legal standard that its regulatory actions can be legally justified if informed by

"history, consensus, and common sense,"[17] the Seattle City Council enacted the Ordinance to address some of the practices that produced racially disparate outcomes. *See* Preamble, at 1-5 (SER 564-68).

Structural and institutional racism has also led to racial inequities in homeownership, with a disproportionate number of Seattle renters being people of color. *See* Racial Equity Toolkit at 6 (SER 271). As a result, practices common among Seattle landlords, such as discrimination against people with criminal records, have a disproportionate impact on tenants and communities of color. *Id*; *see* Racial Equity Toolkit at 3 (SER 268) (noting that one study found forty-three percent of Seattle landlords are inclined to reject applicants with criminal backgrounds). As George Lipsitz, a historian and Black studies scholar explains, "[h]ousing segregation . . . promotes the concentration of poverty in neighborhoods inhabited largely by [B]lacks and Latinos, making members of these groups especially vulnerable to the criminalization of poverty, the proliferation of punishments inside the criminal justice system, and the expansion of the collateral consequences of arrests and criminal convictions for ex-offenders, their families, and their communities[,]" consequences that include

[17] Commercial speech restriction need not "produce empirical data to support its conclusion that a speech restriction is necessary. Instead, it may rely on 'history, consensus, and "simple common sense."'" *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (citation omitted).

barriers to housing for people with criminal records. George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. Rev. 1746, 1749-50 (2012).

Being able to find housing only in a segregated and economically disadvantaged area of the city results in inequities in all aspects of social and civic life. *See* Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress Toward Racial Equality* 14-17 (2013). Because most aspects of social and civic life—schools, government services, electoral districts—are organized by geography, there is a direct relationship between where people live and the resources and opportunities available to them. *Id*. Racial segregation often corresponds with neighborhood inequities, even after accounting for differences in economic status. *Id*. at 14-15. These inequities can include differences in housing standards; access to basic services and public amenities like parks, recreation centers, and playgrounds; and exposure to environmental hazards and pollution. *Id*. And these effects are intergenerational, continuing to limit opportunities available to future generations. *Id*. at 9-10, 91-116. As one community member testified about the experience of finding housing for her family, including two children and a husband with a criminal record, "instead we sought out housing in areas where our kids lived in areas with less green space,

no sidewalks where we could go out and play, busy streets, mold in the homes, all of the things our people experience."[18]

The Ordinance will not eliminate racism and segregation in Seattle entirely. But by eliminating some of the barriers to finding adequate housing, it will strengthen families and, by extension, communities. Rather than being limited to substandard housing in already segregated and economically disadvantaged areas of Seattle, or otherwise pushed out of the city, people with criminal records and their families will have access to more resources and better services and, most important, will be able to live together.

IV. The Ordinance Recognizes that Facially Neutral Practices Sometimes Mask Covert Discrimination or May Cause Unintentional Discrimination.

Although discrimination today is less likely to be overt, practices that are neutral on their face can serve to conceal both covert and unintended forms of discrimination. Particularly where there is a long history of discrimination, courts have recognized that practices or policies that are facially neutral can mask covert discrimination. *See*, *e.g.*, *Tex. Dep't of Hous.*, 567 U.S. at 539-40 (recounting the history of housing discrimination and segregation and noting that the FHA

[18] Testimony of Abigail Echo-Hawk, Seattle Indian Health Board. Ms. Echo-Hawk testified in support of the Fair Chance Housing Ordinance at the July 13, 2017, CRUEDA meeting. Her testimony is available at https://www.seattlechannel.org/mayor-and-council/city-council/city-council-all-videos-index?videoid=x78912 at 2:01:18- 2:03:04.

"permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment"); *Griggs*, 401 U.S. at 432 (relating employer's history of overt employment discrimination and finding that "good intent or lack of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups"); *Gaston Cty. v. United States*, 395 U.S. 285, 297 (1969) (finding "impartial" use of a facially neutral literacy test for voting would perpetuate racial inequalities resulting from a historically segregated education system).

Facially neutral practices might also result in unintended disparate outcomes for communities of color. *See Ave. 6E Invs. LLC,* 818 F.3d at 503 (recognizing that barriers to housing "can occur through unthinking, even if not malignant, policies" that "'can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme'" (quoting *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1185 (8th Cir. 1974))). The pervasiveness of such subtle discrimination through criminal record screening is apparent in the research. Even when controlling for such factors as age, education, physical appearance, and criminal background information, Black people are more likely than white people to be screened out of opportunities due to having a criminal record.

It is especially troubling that studies of hiring practices have concluded that the negative effect of a criminal record was "substantially larger" for Black job

applicants than for white job applicants. Devah Pager, et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 Annals Am. Acad. 195, 199 (2009) (describing results of a study conducted in 2004 in New York City); Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 957-59 (2003) (describing results of a study conducted in 2001 in Milwaukee). More limited studies testing the impact of a criminal record on tenants searching for housing came to similar conclusions—that testers who presented with a criminal record had disparate results that appear to be associated with race. *See* Equal Rights Center, *Unlocking Discrimination: A DC Area Testing Investigation About Racial Discrimination and Criminal Records Screening Policies in Housing* 6, 20 (2016), https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf (finding Black women with a criminal record searching for housing in Washington D.C. area were treated differently, with white women favored forty-seven percent of the time); Greater New Orleans Fair Housing Action Center, *Locked Out: Criminal Background Checks as a Tool for Discrimination* 17-18 (2015), https://lafairhousing.org/wp-content/uploads/2021/12/Criminal_Background_Audit_FINAL.pdf (finding differential treatment toward Black testers posing as prospective tenants with a criminal record fifty percent of the time). Stated more starkly, even when landlords

screened for criminal history, Black applicants with a criminal history were treated worse than white applicants with a similar criminal history.

The problem is compounded by the substantial inaccuracies present in criminal records databases, including a high rate of false positives due to incorrect identification, misleading information, reporting of sealed records and expungements, and missing disposition information. *See* Persis S. Yu & Sharon M. Dietrich, Nat'l Consumer Law Ctr., *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* 3, 15-29 (2012), https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf. Even contacts with the criminal legal system that do not result in conviction or are inaccurate show up on a routine background check, further compounding the disparate impact on people of color, who, due to discriminatory policies and practices, are more likely to have contact with the system. *See* Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 Va. L. Rev 893, 907-10 (2014). Whether the resulting discrimination is intentional but covert or unintended, people of color suffer from the disparate results.

Although criminal record screening practices have yet to be expressly prohibited in federal anti-discrimination legislation, the U.S. Department of Housing and Urban Development's (HUD) General Counsel reaffirmed in 2016

that tenants may have cognizable disparate impact claims related to criminal record screening in housing. Helen R. Kanovsky, HUD, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions* 5 (Apr. 4, 2016) [hereinafter HUD Guidance], https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) (citing to *Tex. Dep't of Hous. & Cmty. Affs.,* 576 U.S. at 545-46 (holding that disparate impact claims are cognizable under the FHA)).

Although disparate impact theories of liability present one avenue to address such outcomes, the relief comes after the damage has been done—the victims of discrimination are rarely able to attain redress because of the difficulty of bringing and proving such claims. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 392-94 (2013) (conducting a qualitative analysis of disparate impact claims under the FHA and finding less than twenty percent of the claims successful). Where the disparate impact results from structures and institutions that have evolved as part of the culture over time, individual lawsuits are unlikely to make a significant difference in the problem on a societal level in a way that addresses the underlying racism. *Cf.* Lipsitz, *supra*, at 1800 ("The tort model of individual injury that dominates civil rights law . . .

largely fails to address and redress the dimensions of discrimination that are structural and systemic.").

The Seattle City Council, in proactively limiting a practice that it recognized has a racially disparate effect, chose a race-neutral method. In doing so, the Council acted well within the bounds approved by the Supreme Court. *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-90 (2007) (plurality opinion) (Kennedy, J., concurring) (recognizing that legislative branches of government may devise general measures to address the impact of policies and procedures on members of particular races); *Tex. Dep't of Hous*., 576 U.S. at 545 ("local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset"). Such measures are geared toward preventing unnecessary discrimination from occurring by looking at disparate outcomes and working to address the underlying causes of the disparities. *Cf. Tex. Dep't of Hous*., 576 U.S. at 545 (approving of local housing authorities' race-neutral efforts to address the consequences of discrimination).

Local governments have often been at the forefront of providing additional protections to address inequalities in their populations. *See* Amici Curiae Brief of the National League of Cities et al., *Masterpiece Cake Shop, Ltd. v. Colo. Civil*

Rights Comm., 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127318, at *3-10 (cataloging instances of greater municipal protections or grants of rights than available under federal law). Such protections are necessary to address the perpetuation of racially disparate outcomes here. Although no law can completely eliminate implicit bias that results in the association of "criminality" with Black people and other people of color, as with other laws and policies that attack implicit bias head-on, the Ordinance can play a role in raising awareness of that bias.

V. The Justifications Offered for Criminal Records Screening Are Not Supported by the Evidence.

Landlords' use of criminal records as a purported tool for maintaining safety and avoiding liability is a smoke screen for preserving the long-standing system of racial discrimination. Several factors indicate that by continuing to participate in criminal record screening, landlords are engaging in discrimination with no evidence that supports a substantial or legitimate interest in doing so. The Landlords argue that safety is a substantial interest that justifies the use of criminal records to screen out high risk applicants. Opening Br. at 17-18, 25, 29. But during public hearings on the Ordinance, one community member noted that no landlords had testified that safety had increased with criminal background checks, while many people shared stories demonstrating the obstacles the checks

present to finding housing.[19]

Widespread use of criminal record screening based on increasingly easy access to criminal records reinforces the false assumption that criminal records screening enhances safety. Schneider, *supra*, at 428-29. Despite the growing and largely unregulated trend of tenant criminal record screening, there is no empirical research that substantiates this assumption. *See* Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders,* 60 Psychiatric Servs. 224, 225 (2009); *see also* Merf Ehman & Anna Roesti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record Is No Crystal Ball*, N.Y.U. J. Legis. & Pub. Pol'y Quorum 1, 16-17 (2015) (ER 123-24).

Research also shows that criminal record screening practices, including blanket bans, do not have the intended effect of reducing crime, especially violent crime. One study conducted in Knoxville, Tennessee, tracked the effectiveness of a year-long residency-applicant-screening practice that systematically denied housing to individuals with a record of sex, violent, or property crimes. John W. Barbrey, *Measuring the Effectiveness of Crime Control Policies in Knoxville's Public Housing,* 20 J. Contemp. Crim. Just. 6, 15 (2004). The study found that screening out applicants with a criminal record had

[19] *See* Venkataraman Declaration, at 6, ¶ 22 (ER 79).

no discernable impact on violent crime, such as aggravated assault and rape. *Id.* at 24-25. The absence of data to support the practice of criminal record screening indicates that landlords justify screening out applicants with a criminal record on "[b]ald assertions based on generalizations and stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record." HUD Guidance, *supra*, at 5.

Nor is a criminal record indicative of decreased tenant longevity or compliance with lease terms, even among chronically homeless adults with mental illness.[20] Malone, *supra*, at 227. A 2009 study of Seattle's supportive housing environment showed that having a criminal record had no statistically significant impact on whether tenants were able to maintain their housing for a two-year period. *Id.* at 225. These findings run counter to common landlord beliefs that criminal records are predictive of a successful tenancy. *Id.* at 228.[21]

[20] Housing success for the study was defined as "maintaining continuous retention of housing for two years or, if moved out before then, going to appropriate living situations." Malone, *supra*, at 225.

[21] In discussing limitations on this study, Malone points out that "generalizing the results…to other situations may not be valid." *Id.* at 229. However, Malone then points out that the study results "call into question the wisdom of policies attempting to predict tenancy success by the use of criminal background information," and although "[a] link between criminal history and housing failure has been assumed…empirical evidence of the link has not been studied or reported. The fact that the study found no link should help establish the need for larger, multisite studies…about the predictive utility of criminal background information." *Id*.

By fixating on the mark of a criminal record, landlords erroneously deny housing to individuals who would otherwise be good tenants.

The Landlords also express fear that leasing to a tenant with a criminal record will expose them to liability for any harm caused by that tenant upon other tenants. Opening Br. at 2-3. Such fear of tort liability may be exploited by tenant screening companies that "often invoke the threat of premises liability suits in advertisements." David Thatcher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & Soc. Inquiry 5, 15 (2008). Although in limited contexts landlords may be liable for harm caused to tenants on leased premises, the Landlords' suggestion that landlords have an affirmative duty in Washington to protect tenants from the criminal acts of third parties is misleading.

In Washington, neither statutes nor case law place a duty on landlords to conduct tenant criminal record screenings or protect tenants from conduct of third parties. *See* Wash. Rev. Code § 59.18.257 (2016); *Griffin v. W. RS, Inc.,* 18 P.3d 558 (2001). In fact, the Washington Supreme Court declined to answer when directly presented with the question of whether landlords have a duty to protect tenants from third party criminal conduct where the landlord has control over the premises and the third-party conduct was reasonably foreseeable. *Griffin*, 18 P.3d at 562 (declining to reach issue of landlord duty of care because

the jury found landlord negligence was not proximate cause of the injuries); *but see Griffin v. W. RS, Inc.*, 984 P.2d 1070, 1073 (1999), *rev'd on other grounds*, 18 P.3d 558 (2001) (lower court finding that landlords have a special, though not absolute, duty to the tenant where they assert control over the premises and the third party conduct was reasonably foreseeable). Courts in other jurisdictions have also declined to place liability on landlords for negligently screening tenants because of the impossibility of predicting unknown future criminal conduct. *See e.g. Castaneda v. Olsher*, 41 Cal. 4th 1205, 1212, 1217 (2007) (rejecting argument that landlords have a duty to screen tenants for criminal history, in part, because it could raise liability for discrimination claims and would be "socially questionable"); *Dore v. Cunningham*, 376 So. 2d 360, 362 (La. 1979) (concluding that landlord's knowledge of perpetrator's criminal propensity and fact that he was invited onto premises by landlord created at most a remote association to injury).

As the City points out, the Ordinance effectively eliminates foreseeability in this context by prohibiting review of a potential tenant's criminal history. Answering Br. at 48-50. Because landlords simply cannot foresee what they are legally prohibited from knowing, their risk of liability for failure to screen is virtually non-existent.

CONCLUSION

The City's actions in passing the Ordinance in the name of racial justice are not only justified but are a necessary step to address the structural racism that pervades the City's housing market. *See* William Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 Ky. L.J. 1, 19 (2011) (recommending proactive measures to address structural racism); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1844 (2000) (noting society's responsibility for remediating institutionalized racial practices).

As with racially restrictive covenants and redlining in decades past, and with issues of housing access in present times, Seattle has a responsibility to prevent unjust housing discrimination against people of color. In enacting the Fair Chance Housing Ordinance, Seattle has acted responsibly to eliminate an arbitrary, artificial, and unnecessary barrier to individuals and families seeking fair access to housing.

For the foregoing reasons, the appeal should be denied.

Respectfully submitted,

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APPENDIX A: AMICI CURIAE STATEMENTS OF INTEREST

Pioneer Human Services, a Seattle-based nonprofit organization, is the oldest and largest reentry services provider in Washington. It was founded in 1963 to support people returning to the community post-incarceration. In addition to helping people with criminal records secure housing and employment, Pioneer develops affordable housing and is the sole provider in Washington of residential reentry services for people released from federal prison. A significant and disproportionate number of the people whom Pioneer serves are people of color.

Besides providing direct services, Pioneer advocates for legal and policy changes promoting the rights of people reentering the community and fights policies and practices that continue to punish people after they complete their sentences. Pioneer believes that no one should be forced into homelessness or put their family's housing stability at risk simply because they have a criminal record. To that end, one of Pioneer's advocacy priorities is supporting efforts to increase housing availability for people with criminal records. Pioneer also recognizes the need for anti-discrimination laws that address the consequences of racial bias and inequities in the criminal justice system, including housing discrimination.

Pioneer actively participates in the Fair and Accessible Renting for Everyone coalition (FARE), a group of community members and organizations whose efforts resulted in passage of the Ordinance. Central to FARE's advocacy are beliefs that housing is an essential right for everyone, regardless of an individual's criminal record; that criminal records disproportionately impact communities of color and remain an unnecessary barrier to rental housing; and that fair and effective housing laws like the Ordinance will help move Seattle beyond its history of segregation and discrimination.

Tenants Union of Washington is a Washington nonprofit organization that has engaged in tenant education, outreach, organizing, and advocacy since 1977. TU works to create improvements in tenants' living conditions and to challenge and transform unjust housing policies and practices. TU believes that tenants themselves must be the leaders of efforts to transform housing conditions and its work focuses on helping tenants build collective power in their buildings and communities. Most tenants TU serves are very low income, people of color, women, and/or immigrants or refugees.

In addition to its education and outreach work, TU and its members have taken a leadership role in legislative advocacy supporting tenants' rights, actively challenging displacement, economic eviction, and gentrification. Addressing the displacement of people and communities of color is an essential part of that

advocacy, as is supporting anti-discrimination laws limiting landlords' use of criminal records in rental decisions. TU's work on this issue is grounded in the recognition that Seattle residents with arrest or conviction records are disproportionately people of color and that laws recognizing racial bias in the criminal justice system can prevent the housing discrimination that bias creates. Like Pioneer, TU actively participates in FARE and was a key player in the Ordinance's passage.

The **Fred T. Korematsu Center for Law and Equality** ("Korematsu Center") is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center does not, in this Brief or otherwise, represent the official views of Seattle University. The Korematsu Center has a special interest in addressing actions toward persons based on race or nationality. Drawing from its experience and expertise, the Korematsu Center has a strong interest in ensuring that courts understand the subtle ways that discrimination operates in our social structures and institutions to oppress certain communities. The Korematsu Center examines and works to eradicate the historical – often racist – underpinnings of

doctrines asserted to support discrimination against people of color and other traditionally marginalized groups.

The **American Civil Liberties Union of Washington** is a statewide nonpartisan nonprofit organization with over 80,000 members and supporters that is dedicated to the preservation of civil liberties and civil rights, including working to remedy race discrimination generally and working to reduce racial disparities in the criminal justice system, in both state and federal courts.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitations of Circuit Rule 29-2(c) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains fewer than 7,000 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with a proportional typeface using Microsoft Word in Times New Roman 14-point font.

Dated: February 4, 2022

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number: **21-35567**

I hereby certify that on February 4, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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