

## Unofficial, Automated Transcription

- Speaker 1: [00:03](#) Yes, Mr. Blevins, who may proceed.
- Speaker 2: [00:17](#) Good morning, your honors. May I please the court? My name is Ethan Blevins counsel for appellants I'll plan to reserve about five minutes of my time for rebuttal this morning, excuse me. Housing providers seek to access the same information that the city and governments and industries across this country routinely rely on and assessing risk and reliability. The fair chance housing ordinance cannot selectively deny housing providers, access to public information or arbitrarily deny them the right to exclude the city can achieve all of its interests without restricting these rights I'll plan today to address three points. First, the proper standard of review with which this court should examine the inquiry provision. Um, second, whether the inquiry provision survives intermediate scrutiny, should this court decide that that's a proper standard to apply. And third, whether the adverse action provision survives rational basis review on the first question, the Supreme court and the ninth circuit are quite clear that commercial speech is speech that proposes a commercial transaction.
- Speaker 2: [01:29](#) And this case is very similar. I think, to this circuit's decision in *imdb.com* versus *Besera*, which involved online profiles published by *imdb.com* that were used by employers to decide whether or not to, um, extend an offer of hire. And in that case, this court said that just because the information might be used ultimately to engage or facilitate a commercial transaction, did not render the speech commercial nature, that this was encyclopedic information and not transactional. And we would submit that background checks are very much like an online profile. They provide information about an individual that may facilitate or help someone decide whether to enter into a commercial transaction, but that information itself is not a proposal to engage in commercial transaction
- Speaker 3: [02:21](#) Counsel. I'm gonna ask your friend this too, but so under this ordinance, can somebody go to the, uh, king county superior court and say to, uh, the records custodian, uh, please give me all records on my tenant application, John Smith, that reflect whether or not he's been convicted of assaulting his landlords are, is that prohibited or allowed?
- Speaker 2: [02:49](#) Our understanding is that is prohibited your honor, in part, because it's, it's clear that the ordinance defines person very broadly and then says that no person may, but`

Speaker 3: [02:59](#) I I'm using inquiry. Somebody who is the, the, who is the, the, the, the landlord, the prospective landlord of a tenant applicant in my question.

Speaker 2: [03:08](#) Yes, your honor. It it's still, the answer is the same, the information can't be inquired about. So, um, regardless of who is making the inquiry or, um, who is being inquired to the ordinance prohibits that

Speaker 3: [03:22](#) Question. So I can inquire, for example, if in Washington state, like my state, if misdemeanor sexual assaults are on the registry, I can inquire about misdemeanor sexual assaults, but I couldn't inquire about convictions for selling heroin to tenants, children, or, uh, assaulting of, uh, every landlord

Speaker 2: [03:44](#) That is correct, your honor. And it's that distinction that we have noted under, under rational basis review does not survive. Um, the arbitrariness standard that applies in that context under due process under the due process

Speaker 3: [03:58](#) Climate, I'm referring here to, um, the first, your first amendment issue. I think you have a much, uh, tougher amount to climb under your due process. Uh, but, but my question is, is basically dealing with the first amendment issue.

Speaker 2: [04:13](#) Certainly. Yes. So it, it is true that in individuals who are on a sex offender registry, this information can be requested. Um, it's permissible to use it for a legitimate business reason, but is not permissible regardless of the gravity of the offense, um, to ask about other criminal history, whatever it may be. And this runs to why even under intermediate scrutiny, the fair chance housing ordinance is not narrowly tailored. When we're looking at narrow tailoring under the context of the commercial speech test, we look to whether the ordinance directly advances the government's interest and whether it is more extensive than necessary to satisfy that interest. And on the direct advancement prong of that test, the city certainly has an interest in, um, or I should say it's primary interest is in regulating conduct. And the way to do that is to enforce a conduct prohibition, which it already has in place in the adverse action

Speaker 3: [05:15](#) Prohibition. But doesn't the city point out that, um, it's real hard to prove why someone doesn't rent to someone that's a very tough mountain to climb, but by prohibiting, uh, any inquiry, uh, they, uh, advance the goal of preventing discrimination.

Speaker 2: [05:40](#) I don't think that that's a valid reason for restricting the speech, your honor, based on this

Speaker 3: [05:46](#) Court's press well, that may not be a valid reason for, uh, restricting the speech, but your argument was it doesn't advance the goal.

Speaker 2: [05:55](#) Yes, your honor. But the I, the Supreme court and the circuit have been cleared that the direct advancement prong asks, whether it directly and materially advances, the government's interest. And this is the burden carried by the city to just to show that, uh, this prophylactic of re of prohibiting the inquiry materially advances, the interest above and beyond what the adverse action provision already deals with. And we can look to cases, for example, like, um, the city of Redondo beach case in the ninth circuit, where, um, this court applied the commercial speech test to a restriction on street solicitation. And the court in that case said the way to deal with the problems that arise from street solicitation, such as traffic and congestion is to enforce jaywalking laws and similar laws that, that prohibit the conduct or regulate the conduct, the underlying conduct that it's,

Speaker 3: [06:51](#) That's, that's another question I'm gonna also ask your friend, but the way I read this ordinance, um, there would be nothing that would prohibit me as the prospective landlord from asking the tenant applicant. Uh, do you support selling heroin to children? I I, if I wasn't tying it to his, uh, criminal record, I could ask that question right.

Speaker 2: [07:16](#) Based on how criminal background is defined in this ordinance.

Speaker 3: [07:19](#) I think that's so I could ask him if he supports, um, selling heroin to children. I just couldn't ask him if he's been convicted of selling heroin to children.

Speaker 2: [07:28](#) That is correct, your honor. And we would submit that for the landlord's situation, that latter question is the more relevant to their interests in providing a safe housing community. Um, and even if the court decides that this ordinance is directly advanced by the, uh, by the inquiry provision, then we would still look to whether this is more extensive than necessary to fulfill the government's interests. And the question there largely is one of whether there are readily available alternatives that the city has seriously considered, and that this is that the inquiry provision really is a last resort option. The fulfilling government's interests and the city simply hasn't carried that burden. Um, we've already discussed the existence of the adverse action provision,

which we would submit is itself, um, available, less restrictive alternative. Um, there's also in the record, uh, submitted by the city's own housing affordability and livability agenda, the, um, king county LA landlord liaison project, which provides support services to landlords who agree to rent to homeless individuals. Um, the city has hasn't even considered whether a similar program might be used to encourage landlords and help them, should they decide to rent to individuals with a criminal history.

Speaker 3: [08:44](#) Your view also is the city could limit the crimes you couldn't inquire about, um, to those that bore no relation to landlord or tenant safety, right?

Speaker 2: [08:55](#) That's correct. Your honor. And I think that that is reflected in, in the record that the city itself relied on, um, a landlord survey, for example, back in the 1990s that showed that landlords were by and large, very willing to rent to individuals with criminal history that did not bear on, um, safety in the community, for example, or the treatment of the property. And so drug drug offenses, for example, landlords were overwhelmingly willing to ignore in determining whether or not to rent to an indivi, a prospective occupant with a criminal history, but there are, are other avenues by which the city can fulfill all of these interests. It can expand public housing, which under the record here is clear that that is the housing that's most valuable to individuals who are, who've been formerly incarcerated. The city's answer simply has been that appellants have not proven that the city can afford that, but it's the city's burden to show that that's not a viable option, which is difficult for them to show when, again, the housing affordability and livability agenda report repeatedly throughout, um, over and over again, um, suggests ways to expand public housing.

Speaker 3: [10:01](#) Cancel I have an unrelated question. So, um, the way I read the ordinance, uh, I, I tend to agree with your friend that, uh, there is nothing in the ordinance, which, um, uh, in dealing with section eight housing, uh, applies, um, anything, um, more than that, that, uh, it doesn't exempt section eight housing from the inquiry provision. I mean, that seems to me to be the way the statute reads or the ordinance reads your argument is that section eight housing is excluded from the inquiry provision, right?

Speaker 2: [10:49](#) Yes.

Speaker 3: [10:50](#) And explain, explain to me from the language of the ordinance first, how you get to that. And then second, if you're looking at parole, explain that to me.

Speaker 2: [11:00](#) Certainly, your honor. So, uh, the ex the ex the relevant exclusion is chapter 14 0 9 1 15. Exclusion is another legal requirements, uh, subsection B there. And, uh, it says that this chapter shall not apply to adverse action taken by landlords of federally assisted housing. Right. But

Speaker 3: [11:21](#) Adverse action doesn't include inquiry, right?

Speaker 2: [11:24](#) So the, there is a, there, this is an issue of debate between the parties. Uh, the, the original frequently asked questions published by the city said that this exemption applied to the inquiry it's been since amended. Um, we believe that adverse action based on the city's reading could be reasonably defined to include the inquiry, but it's certainly clear from this, that it, that, that it, the exemption expressly applies to adverse action. The question then will become whether the inquiry is itself adverse action, um, but federally assisted housing is not defined. So the question of whether that includes section eight, housing is gonna be determined by whether subject section eight, housing housing is subject to federal regulations that require denial of tendency and HUD regulations are clear that, um, not only is, um, federally assisted onsite housing, um, included in the HUD regulations that are condition of funding that require denial for certain criminal history. But section eight housing is included in that as well. So under that reading, we would understand both those types of public federal assist to housing to be within the scope of this exemption.

Speaker 2: [12:36](#) But yes, the, the, the question of whether or not this applies to inquire provision, the, the, the city has throughout the course of this litigation. Um, if, uh, to look back at the district court briefing is clear, the city has never defended, never argued until the district court raised it in some summary judgment order, um, that the exemption does not apply to the inquiry provision. They've always defended it as a legitimate, um, exemption, even if it did apply to the inquiry provision. So our understanding has always been that's the city's reading of the ordinance until recently, and the, the FAQs were amended post litigation during the course of this litigation. Um, I'd like to briefly go back to, um, the question of whether or not the inquiry provision essentially makes it easier to enforce the conduct prohibition. Um, first of all, there is clear evidence in the record that fair, fair housing testing reveals discrimination.

Speaker 2: [13:38](#) The city has relied on that testing as, um, valid evidence, the discrimination's occurring. This is done through control testing in a variety of other means that could be applied in this context as well. Um, and the city has not argued or demonstrated that it

somehow can't be done, um, in this context either. But it's important also to note that, um, in McCullin versus Coakley, and again, in very recently in Americans, uh, for prosperity versus Bonta, the Supreme court has said the fact that restricting speech will make it easier to enforce some other conduct. Prohibition is not a good enough reason, uh, for restricting it. And I think this goes back to a point made, uh, by the Supreme court in ver Virginia state board of pharmacy, a commercial speech case in which the court said it is precisely this kind of choice between the dangers of suppressing information and the dangers of its MIS misuse, if it is freely available, that the first amendment makes for us.

Speaker 2: [14:37](#) So even if this were to be easier to enforce, if it was easier to prevent this kind of adverse action from occurring, should the inquiry be prohibited? Um, we think under IMS health and Virginia state board of farming, seeing similar commercial speech cases, that's not a valid reason for restricting it. Uh, just to briefly touch on the adverse action provision. Um, the federal assisted housing exemption that we've already taught touched on briefly, even if it were to apply only to adverse action, uh, does raise a due process concern largely because the city's defended the exemption on the grounds that it's required by HUD regulations. Um, we pointed out in our district court briefing below and again on appeal that it's actually not required by HUD regulation. HUD regulation requires that the, um, that landlords of federally assisted housing reject tenants who manufactured methamphetamine or produced methamphetamine on

Speaker 3: [15:34](#) Federally housing cancel, even if you're right on that, why wouldn't it be rational for the city, uh, to say, you know, we don't even want to step into this mess. We don't want to have lawsuits with the United States. We don't want to have these kinds of problems, even if we're, even if we're overreading the federal regulations, this makes sure we don't have this mess. Why isn't that, um, rational? Why doesn't that serve some legitimate government objective in a non arbitrary irrational way?

Speaker 2: [16:10](#) Well, I think that if the HUD regulations lacked clarity, then perhaps there would be a different question there. Um, but hu regulation does two things. Really. It says that this very narrow set of offenses, there has to be a rejection of an application for federally assisted housing, but then it goes on to clarify that the public housing authority has discretion to reject individuals with other, um, types of criminal history. They're not specifically tagged as something they have, they have discretion to allow it

or rejected at their will. So we think it's clear enough that the city would have no interest in sort of drawing a broader line around it.

- Speaker 3: [16:48](#) I don't know council. I mean, I think you have an enormous mountain to climb, um, in, in invalidating under a rational basis test, what is essentially economic regulation?
- Speaker 2: [17:01](#) Well, the will, your honor, we would submit that it is in fact burdening a fundamental property interest of the right to exclude, but in any case, um, landlords have a right to ask a question. They have a right to access public information that all these other entities, including the city itself routinely rely on. Thank you, your honor.
- Speaker 1: [17:19](#) Thank you. Are you reserving your three minutes?
- Speaker 2: [17:22](#) I will reserve my room. Remain time. Thank
- Speaker 1: [17:23](#) You, your honor. All right, Ms. Savadi you're on video.
- Speaker 4: [17:29](#) Yes, ma'am good morning. And may it please? The court. I am Jennifer Sarva and I'm here on behalf of the consumer data industry association and the professional background screening association.
- Speaker 3: [17:40](#) If you, sorry, judge. We luck. Would it be alright if you ask council to try to turn up their audio, I'm having a
- Speaker 1: [17:46](#) Little bit of a problem. Um, council, we're having a bit of a problem hearing you. Can you turn up your volume settings?
- Speaker 4: [17:54](#) Sure. I'm also holding my microphone closer. Is this better?
- Speaker 1: [17:59](#) That is much better.
- Speaker 3: [18:00](#) Thank you, counsel. Sorry to interrupt.
- Speaker 4: [18:02](#) Of course. And thank you for letting me know. And also I thank the court for granting leave to me to appear today on behalf of my clients and Micki. In this case, housing providers owe a duty to other residents and their invitees to provide safe habitable residences. This ordinance strips away housing providers, ability to fulfill this duty Congress, even re recognized this duty to protect residents when it's engaged in the role of a housing provider, as you've discussed already with Mr. Blevins, federal law, prohibits or permits, excuse me, and even requires at times

that an application be denied when certain offenses have occurred in an applicant's history, it helps no one, if a housing provider has to rely on their gut or intuition or their sense of an applicant in evaluating whether an applicant poses risk to others in the community, we believe that people make better decisions with actual data collected from and available in the public record. Other than those hunches or feelings, which may be based unknown or unknown biases. Background screening companies provide consumer reports that contain necessary information, which property owners use to fairly and objectively evaluate people who apply for jobs, credit and housing. This information includes criminal conviction information and separately may include sex offender, registration information, as well as other types of information, the right to exclude others from one's property is one of the most treasured rights of property ownership says the Supreme court and has been universally held to be a fundamental element of one's property rights,

- Speaker 3: [19:56](#) The right, the right to exclude on what basis,
- Speaker 4: [20:02](#) Certainly not a discriminatory basis, but on a legally permissible basis.
- Speaker 3: [20:07](#) Well, but what and hearing, but what, but, but I, I mean, when you say that though, um, uh, we would all agree. I think that the, the constitution doesn't forbid, uh, discrimination laws in, in housing, but why can't the state rationally decide that it doesn't want to allow exclusion based on someone's criminal record? Uh, I, I, I mean, why is that not some legitimate government objective that is neither arbitrary nor irrational
- Speaker 4: [20:45](#) Because the government would be, The government would be ignoring the facts that recidivism occurs
- Speaker 3: [21:00](#) Well, but in the past, but, but, but, but the government rationally can ignore certain facts and pay attention to others under the rational basis test. I mean, hasn't the Supreme court time and time again, emphasized in rational basis, review of economic regulation that if where to draw a line is open to any type of doubt, the courts are not gonna step in and tell the legislature where to draw the line
- Speaker 4: [21:31](#) Well, and respectfully, your honor, this case in our view is not one of pure economic regulation. The mere fact that a consumer reporting agency may sell this information in the form of a report to a user in and of itself does not strip away the first amendment right of the CRA to provide that or



Speaker 3: [21:52](#) More inform. But that's a, that's a, that's a different, that's a different question. You, your argument just now, as I took, it was going to the right to exclude, not the first amendment, right? You agree that the adverse action right to exclude provision is governed by rational basis test, right?

Speaker 4: [22:13](#) No, your honor, I would submit that this would go beyond and that like SORL we are talking about at least an intermediate level of

Speaker 3: [22:22](#) Scrutiny. No, but again, I'm not talking about inquiry. I'm talking about the adverse action provision.

Speaker 4: [22:29](#) I'm not sure they should be evaluated under a different approach. Your honor. I think the ordinance as written prohibits under section a two, the inquiry and the taking of adverse action with respect to a prospective tenant based on arrest record conviction, information or criminal history, which is broader than just the conviction record question. The first question you asked Mr. Blevins, would the individual landowner be allowed to go? I see, my time has expired. May I complete my thought? Yes,

Speaker 3: [23:04](#) You may.

Speaker 4: [23:05](#) Thank you. Um, the landlord would not be able to go to the public courthouse and look up the criminal history information of the applicant because section a two prevents any inquiry, unless the panel has other questions for me. I see my time has

Speaker 5: [23:25](#) Expired. I, I have a question if judge Woodlock go ahead. Let me go time a little, please. Go ahead. Um, how many cities have fair chance ordinances like the city of Seattle?

Speaker 4: [23:40](#) I can certainly provide you with an exact number, but I know that a number of cities across the country have adopted some form of a fair chance ordinance. However, Seattle, I believe is one of only two that prohibits the inquiry in its entirety. Most of the others like New York city and others prohibit the timing of the inquiry to the initial part of the application process. Most of them require some form of an assessment of the eligibility of the applicant. And then the, the criminal inquiry follows as a secondary, uh, phase of the process.

Speaker 5: [24:17](#) Okay. So of a related question as the us Supreme court opined on these fair chance ordinances at all,

Speaker 4: [24:29](#) N not as to the constitutionality of them, your honor, I do not believe so.

Speaker 1: [24:35](#) You, you hedged on that answer, you said not as to the constitutionality, have they opined in any other way?

Speaker 4: [24:41](#) Uh I'm as I'm trying to remember, your honor, I believe that, um, no, I do not think so, but I will, I can certainly check on that and, and update the court. If my answer is incorrect,

Speaker 1: [24:52](#) What, what about other intermediate courts of appeals?

Speaker 4: [24:57](#) We have, um, the, the name of course is escaping me at the moment, but there is a case that went up on a preliminary injunction issuance with respect to, um, a, a preliminary injunction that was issued with respect to a similar ordinance. Um, and that preliminary injunction was set aside. Um, and, uh, that case is proceeding.

Speaker 1: [25:22](#) Um, did you, is that case in the case materials you cited to us?

Speaker 4: [25:27](#) If it is not, I will supplement it to the court.

Speaker 1: [25:30](#) Do you know which circuit? Okay, nevermind. We can

Speaker 4: [25:38](#) Drawing a blank,

Speaker 1: [25:39](#) Your honor, we have very skillful law clerks who can figure this out. <laugh>

Speaker 4: [25:42](#) Apologies

Speaker 1: [25:43](#) Very quickly.

Speaker 4: [25:44](#) Excellent question. And I apologize. I don't have the answer.

Speaker 1: [25:47](#) All right. Thank you very much, counsel.

Speaker 4: [25:49](#) Thank you so

Speaker 1: [25:49](#) Much. You have further judge gold?

Speaker 4: [25:51](#) Yep.

Speaker 1: [25:51](#) No. Okay. All right. Um, Mr. Wyn for the city of Seattle.

Speaker 6: [26:04](#) Thank you, judge. Ward lock. Good morning. And may I please the court? I am Roger Wyn for the city of Seattle, even though the city's fair chance housing ordinance fits within a nationwide body of local laws, reducing barriers to those with a criminal history plaintiffs and their Amici. Think the ordinance is a bad idea, but there is no bad idea clause in the constitution. And there

Speaker 3: [26:25](#) That's. So counsel, going to my colleagues' questions, are you aware of any other ordinance, whether it's called a fair chance ordinance or not, that has the type of absolute inquiry, uh, bar that this one does that is, that stops someone from going down to the hall of records and looking up public records on a perspective tenant, even if it's for murder or selling heroin convictions,

Speaker 6: [26:52](#) Your honor. Um, I now regret, I did not look up the citations from our Amicus, the national housing justice project. They cite to Berkeley, Oakland and Ann Arbor saying that they're just like the cities. I did not independently look at that. And I, um, can't say right now, um, that I can come up with an example, although we do have in our briefing. And I would like to rely on our briefing rather than my recollection standing before you various examples of other cases, urban, um, in a, um, well, I could, I could try to list some that come to mind, but, uh, the

Speaker 3: [27:26](#) All right, but, but, but you, I, I mean, I went to the, the king county website and it says the superior court clerk's office says three records, access public areas, offering customers the option to view court documents for free during business hours as a landlord. If my tenant, if someone is applying to be a tenant, I can't go down to the superior court and ask to look at conviction records for my perspective tenant. Correct. That

Speaker 6: [27:54](#) Is correct. That would be an inquiry that is prohibited under the ordinance.

Speaker 3: [27:56](#) Okay. Now I could, for example, ask my perspective tenant, if he favored selling heroin to children, right. That's not prohibited by the ordinance. That is correct, but I couldn't ask him if he's been convicted of selling heroin to children. That is correct. I could ask him if he favors assaulting his landlords, right? Correct. But I couldn't go down. I couldn't ask him if he's ever been convicted of assaulting his landlords.

Speaker 6: [28:22](#) That is

- Speaker 3: [28:22](#) Correct. And so how is that, what, what I'm prohibited from doing, how is that purely commercial, economic type speech? Uh, I have 50 units and, uh, I'm really concerned about heroin being sold to the children who live there. And I'm asking because I don't want somebody who's been convicted of heroin, uh, living in my premises. How is my inquiry purely commercial?
- Speaker 6: [28:52](#) Well, judge Bennett, that, that covers a lot of ground. Let me see if I can, uh, catch up to you. Um, this court reminds us in Eric's that when determining whether speech is commercial, we take a fact specific, common sense approach that looks at the context and the party's primary motivation for engaging in that speech. And here we certainly have, uh, a primary motivation. Well, well, let's, let's look at how that plays out in two respects. And then I would like to add the third with the courthouse example. So as to the, the parties before you, um, we have commercial speech in two ways. One when landlords ask of a tenant about their, um, about their criminal history, that is exactly what we had in, uh, what this court had in San Francisco apartment association, where it held that, uh, a landlord asking about a, the prospect of a buyout provision with a tenant was core commercial speech. Here. We have, uh, a conversation that happens at the beginning of the relationship, not at the end and from the landlord's perspective, the landlord's commercial, economic motivation is evident, but for their desire to potentially use criminal information, to violate the adverse action provision, they would have no reason to inquire about that criminal history.
- Speaker 3: [30:09](#) Wouldn't you have a reason to inquire, to see, uh, if the person coming is gonna be a safe person, um, or not a safe person to evaluate that. I, I mean, irrespective of the, the convictions, it would, it would shed light on whether this is somebody who is like assaulted their last 10 landlords, um, or, uh, even, uh, was, was somebody who had sold heroin at their last 10, 10 projects. And the reason you don't wanna rent to them is cuz you don't want people selling heroin there. Not because they've been convicted of it, but because they did it
- Speaker 6: [30:51](#) Well, judge Bennett, um, that still does not make it any less commercial speech. So, um, let let's say, take a manufacturer, uh, with a, with a big manufacturing plant, they will always say that safety of their workers is their paramount concern. So when that manufacturer returns to an equipment maker to potentially buy equipment for the plant, they're gonna ask about the safety of those pieces of equipment, but that doesn't make that conversation or that transaction any less commercial. Clearly the clinic that challenge the San Francisco ordinance in

first resort was motivated to build an abortion free world, but that still didn't erase the fact that they engaged in commercial speech when they spoke to their prospective clients and in VA Del. So the court held that it did not matter that prospective day laborers might be motivated politically when they engage with prospective employers in their speech and what we have here at heart in the context. And again, and Eric says, we have to look at the context, a context of a potential commercial transaction with a potential tenant and landlords can't disaggregate the speech or their motivations for that speech and lift out parts that are relevant to safety or to happiness or to

Speaker 3: [32:05](#) Anything else. I honestly don't see why when you're saying we take a look at common sense. Uh, common sense to me is that, uh, a lot of landlords, maybe not every landlord, but a lot of landlords feel, uh, that they're in large part responsible for the safety of their tenants and they don't want their tenants murdered, raped, sold heroin too. And it's not out of an economic motivation in common sense. It's out of a caring landlord who doesn't, who doesn't want horrible things happening to their tenants, uh, from a prospective tenant who has a huge violent history.

Speaker 6: [32:45](#) Uh, I'm gonna have to respectfully disagree with you, your honor. Uh, just like the manufacturer who asks about safety, it still doesn't make it any less in the common sense context of what we have here is a potential commercial transaction. Okay.

Speaker 3: [32:59](#) Well, let's say I agreed with you, which I don't, but let let's say, I let's say hypothetically, I agreed with you. Explain to me how this ordinance is, uh, not more extensive than it needs to be. Why, for example, um, uh, would you need to exclude, uh, inquiry about crimes that go directly to public safety? Uh, why couldn't you have something like you do with the sex offender part where you have, uh, I, I don't know why it's defined as legitimate business reason, but whatever you call it, that same definition, uh, why is all inquiry okay. As opposed to just the stuff that doesn't actually go to the safety of the tenants.

Speaker 6: [33:48](#) Okay. So now we're getting into the, the final two prongs of central Hudson. Yes. And, uh, the Supreme court, at least since 1989 in, uh, board of trustees versus Fox has held that those two final prongs require a reasonable fit between means and ends. That fit need not be perfect. It need not be the single best and it need not be the least restrictive on speech. It just has to be proportionate to the interest served. And within those bounds courts defer to legislative and governmental decision

Speaker 3: [34:18](#) Within those bounds

Speaker 6: [34:19](#) Within those bounds. Yes. So, um, when we look at what the other alternatives are, what the court could, excuse me, what the, the city council could have done. We have to keep in mind that this is not an exercise in the possible of course the council could have chosen from an infinite number of

Speaker 3: [34:37](#) You mean like they, like they did with the sex offender provision.

Speaker 6: [34:41](#) They had many options that they could choose from.

Speaker 3: [34:43](#) Yes. Why, why, by the way, you know, I'm sort of changing T here and I apologize for that, but, uh, in terms of under inclusiveness, um, uh, why is, uh, misdemeanor sex assault excluded, but murder isn't,

Speaker 6: [35:06](#) I'm sorry, you you're

Speaker 3: [35:07](#) Saying you, you can inquire about a misdemeanor sex assault if that's on the Washington registry. Thank you. But you can't inquire about murder.

Speaker 6: [35:15](#) That was a decision that the council made based on the unique approach that Washington takes to sex offenders and the sex offender registry. Washington has a, a very intense manner of, of regulating that. And I think out of deference to that, the council decided to

Speaker 3: [35:29](#) Exempt that I, I imagine Washington also has robust laws on selling heroin to children and murderers.

Speaker 6: [35:34](#) It certainly does, but again, your honor, the question is whether the alternative that the council chose is proportionate and here it is, um, the, the, um, the, the fit just has to be proportionate. It doesn't have to be, uh, impacts on speech does not have to be the last resort as my friends, uh, argue Fox held that central Hudson does not require elimination of all less restrictive alternatives, just a reasonable fit between the means and ends and discovery network explained that whether there are numerous and obvious other, uh, less burdens of alternatives is only reasonable to the fit. There is no bright line rule here.

Speaker 3: [36:20](#) Could, could there have been a greater restriction on inquiry,

Speaker 6: [36:27](#) I suppose. So, although I'm struggling to think of, uh,

Speaker 3: [36:30](#) Me, me too example, it, it, it sounds like most of the cases we look at, uh, the legislature has perhaps not picked something in the middle, um, but maybe close to the middle. I, it's hard for me to think of something that could possibly be more restrictive on the right of inquiry as to publicly available information than this law.

Speaker 6: [36:53](#) Well, your honor, it's still the question then comes down to whether the fit is proportionate. The first amendment does not put a, um, it's not a limit on innovation by law makers. Somebody can be the first to have this. And so if this indeed is the first, then we have to ask whether the fit is proportionate and here we believe it is.

Speaker 5: [37:13](#) So Mr. WN, let me interject a question if I may. So they asked the same question to your colleague of earlier, and that is as the us Supreme court said anything at all on the subject of fair housing, fair chance, uh, ordinances like seas,

Speaker 6: [37:40](#) I'm aware of no such case. If there is such a case, I would be chagrined because we were looking for

Speaker 5: [37:44](#) Authority. We would be writing on a, on a blank sleeve here.

Speaker 6: [37:48](#) This is true, your honor, at at least directly, uh, with respect to such limitations on inquiry about, um, criminal history.

Speaker 5: [37:56](#) Okay. How, how about any other circuit court? Same. Is there any other circuit court issued a ruling on

Speaker 6: [38:02](#) Same answer again, if it has I'm chagrined, because we should have found it in the briefing for this case.

Speaker 5: [38:08](#) Okay.

Speaker 6: [38:10](#) Thank you. I'd like to, um, turn to, actually, I'm not gonna turn to the substantive due process question. I want to turn to the issue you were raising, uh, judge Bennett about the federally assisted housing exemption. Uh, we maintain, as you said, that the, uh, exemption does not apply, uh, to the inquiry provision, but even if it did in retail digital network, this court said that exceptions matter only if they render a law irrational or so inconsistent that it lacks coherence and the third circuit in greater Philadelphia, uh, chamber added that under inclusiveness is important only if it raises serious, serious doubts about whether the government is in fact pursuing the interest. It invokes rather than just favoring a particular speaker and the

federal law exemption here, withstands those tests. Uh, the ordinance is the, the, the, um, exception that we have here is a supremacy clause imperative. It just is out of respect for federal law. In fact, if we didn't include it expressly for the reason that you said, so we didn't have to litigate it, the same result would, would, uh, would happen in the real world because any housing provider faced with a choice between complying with federal law and city law should choose federal law.

Speaker 3: [39:32](#) Well, but I mean, I don't, uh, correct me if I'm wrong, but I don't know that there's anything in federal law, whether dealing with section eight housing or other federally assisted housing, that deals with the question of whether a landlord can go to the house of records and inquire is there.

Speaker 6: [39:49](#) I, I don't, I don't know if that, I don't know if that is, so I'm not that familiar with the federal law, but that's not my point with respect,

Speaker 3: [39:56](#) But you were, but you were also saying even if this included the inquiry provision, I mean, I, I, I think you're, um, you, you, you, I'm not sure that, that it helps you to, to, to go there, but if it included the inquiry provision, um, this supremacy clause issue would only be relevant if there were something in the federal housing laws that protected the rights of the landlords to go to the hall of records. Right.

Speaker 6: [40:24](#) I agree. Uh, so again, really, it, it, the exception is just out of respect for the supremacy clause, nothing more I'd like to address, uh, plaintiff's claim that the law, that the ordinance is over inclusive, uh, because it applies outside of the context of landlord tenant transactions for housing. Now, red in isolation, the ordinance does say, no person may inquire, but we need to avoid such a formalistic ruling, uh, reading here for two reasons. First, we have to read it in context of the rest of the ordinance.

Speaker 3: [40:56](#) It, your position is basically it would be absurd to read any person to include. For example, me that I couldn't go look up, uh, the record of somebody who's applying. Uh, if I were a Washington state resident or Seattle resident to look up the criminal record of somebody who was applying to be a tenant, uh, randomly somewhere else in Seattle.

Speaker 6: [41:19](#) Correct. And it would also be absurd to say that the Seattle municipal court could not inquire into the criminal history of a defendant before it, and it would also be absurd to have this provision swallow. The city's other provisions that take a different approach to regulating criminal history in the context



of say, firearm sales and, uh, employment. But also we have to read it in context. And the context here is that this ordinance applies with reference only to a transaction for a specific housing unit. I'll quote, a person is covered by this chapter. This ordinance, when the physical location of the housing is within the geographic boundaries of the city close quote and the city, unlike other jurisdictions has a provision in its code saying that chapter names matter for purposes of construction and interpretation. And here this chapter is named use of screening records in housing, not in any other context.

- Speaker 1: [42:12](#) My, my only question for you is whether or not this ordinance is, um, narrowly drawn enough to satisfy the central Hudson case. It seems to me it's, it is rather overbroad. And I think, um, judge, um, Bennett has, has pointed out ways in which he thinks it's, um, over broad too. And, um, I just like to hear your argument on what and why you think this is narrowly drawn to meet the, the city's, um, substantial motivations,
- Speaker 6: [42:50](#) Right? So again, the Supreme court has held that the fit here need not be perfect. It need not be, well,
- Speaker 1: [42:56](#) I understand least restrictive. Those are just, you know, I mean, any side of an argument can,
- Speaker 6: [43:02](#) So it is, let me say it this way. It is narrowly drawn. The inquiry provision works hand in glove with the adverse action provision the landlord has, but
- Speaker 1: [43:10](#) It prohibits all inquiry.
- Speaker 6: [43:13](#) It only prohibits inquiry in the context of a transaction for a particular housing unit. Again, this, the, the ordinance says it applies only. So
- Speaker 1: [43:21](#) I'm, I'm accepting it's commercial speech. I'll accept it's commercial speech. Now I'm asking about the standards that we apply to commercial speech to determine whether it's constitutionally, um, stand, withstand, constitutional challenge
- Speaker 6: [43:37](#) Understood judge Wardlaw. Um, but the, the, the fit here is tight. The, um, the inquiry provision is limited to an inquiry only about the information that could be used to violate the adverse action provision. I'm what my point about the, the ordinance is that the ordinance is limited. It says a person is covered by this chapter. Only we

Speaker 1: [44:03](#) You're saying the limit is because it relates only to commercial transactions. I'm suggesting that another limit might be to certain types of crimes.

Speaker 6: [44:14](#) So, um,

Speaker 1: [44:16](#) That we're related or not related to legitimate safety concerns, for example.

Speaker 6: [44:21](#) But again, we need to defer to the governmental decision maker if it's staying within the bounds of their proportionate fit. So the fact that the city council had decided

Speaker 1: [44:30](#) To, we don't give total difference to the state on this

Speaker 6: [44:34](#) Of, of course not your honor, but we are not asking for total difference. We are saying that the, the decisions that the city made to exempt federal housing or to exempt, I,

Speaker 1: [44:45](#) I have no problem with the federal housing one. I think that that's perfectly appropriate in the context of this, given that if, if, if federal government has made a law affecting this, it's probably gonna preempt anyway. So no problem with that. Okay. I'm just wondering about things that were tied to the landlord's legitimate safety interests. Okay.

Speaker 6: [45:07](#) But again, the, you know, you can look to our Amici and our briefing as well at the, the vast record that the council considered in terms of the predictive value of criminal background checks, when it comes to their ability to actually predict, predict whether somebody will be violent in their housing context or whether they will be a bad tenant. And the, the, the council made a rational decision that this court should defer to that those studies mean that it is, it is permissible. It is within those bounds for the city, not to say you can check about heroin or not to say you can check about murder because, because again, the predictive value of those histories is limited. And that is a factual debate, which we don't think this court should try to resolve. If I may, I'd like to turn to, uh, plaintiff's um, substantive due process argument.

Speaker 1: [46:01](#) Well, I think, I mean, I don't think that argument isn't strong. I think, I think you're looking at judges who are wrestling with this first amendment

Speaker 6: [46:08](#) Claim. Fair enough. Then let me add, uh, another couple of arguments to the, um, to the free speech claim that I, I glossed

over first, we have to ask the threshold, whether this ordinance is a speech regulation or a regulation of conduct. And we think actually this is a regulation of conduct. Consider the Rumsfeld decision. That's the case where this us Supreme court, um, upheld a federal ban on funds, going to law schools that, that did not provide equal access to military recruiters on campus at Rumsfeld held that that law was a conduct regulation, even though, even though that ne that law necessarily meant that the law schools would have to send emails about the, the recruiters

- Speaker 3: [46:53](#) Counsel, I'm sorry, is your argument that this law is not a speech regulation saying to a tenant, for example, they can't go to the county clerk and say, let me have your records on whether prospective tenant DOE has ever been convicted of murder. That that's not a speech regulation, that's a conduct regulation. And so the first amendment is irrelevant.
- Speaker 6: [47:18](#) So what I'm saying, and I'm not certain, did you say that, that it would prevent a tenant from going to ask,
- Speaker 3: [47:23](#) I'm sorry, a landlord from going and asking, uh, the clerk, can I have the record on perspective tenant of whether he is been convicted of murder? That's not a, this is not a speech regulation
- Speaker 6: [47:32](#) That we look at the ordinance as a whole and say it is a conduct regulation. Again, I'm analogizing to Rumsfeld here. So again, in that case, it was, it was a necessary implication that the law schools would have to send emails. I don't think the result of Rumsfeld would there have been any different. If the law there had said expressly, you have to send emails. And so what we, because the court there found that the law was a, um,
- Speaker 3: [47:58](#) This, this regulation forbids me, is the landlord from speaking from uttering words, but it's not a speech regulation
- Speaker 6: [48:05](#) Just like in Rumsfeld, the law school had to send emails. Same. It is, it is speech either way. Yes. Inquiring about criminal history is speech just like sending emails was
- Speaker 3: [48:17](#) Speech. Well, here, I can't send an email either. I can't send an email to the clerk. I, I can't send smoke signals to the clerk. I can't do anything to get this information, but it's not a speech regulation
- Speaker 6: [48:29](#) Because I'm anal analogizing to Rus FLER. It certainly had. I

Speaker 5: [48:33](#) Thought your position was that it's a it's regulating commercial speech.

Speaker 6: [48:40](#) Um, my position is if it is speech, if it regulates speech, it is commercial speech. We also have the argument that, um, it is regulating that the ordinance as a whole is a conduct regulation, not a speech regulation. Let me, let me try one other point that I glossed over, uh, in this, uh, which is that if we get to the, um, to the central Hudson factors, the first factor is whether the speech relates to unlawful activity. If it does, then, uh, we don't go further in the analysis again, here, the context matters. The adverse action provision makes it unlawful to deny tendency on the basis of criminal history. The inquiry provision is limited to speech that could only support that unlawful activity.

Speaker 3: [49:24](#) No, that's, that's just, I don't agree with you counsel because the speech could disclose whether someone has murdered landlords. You can, you can choose to not rent to someone who's murdered landlords. You can't choose to not rent to someone who's been convicted of or arrested for murdering landlords.

Speaker 6: [49:41](#) Right. But judge Bennett, the only, the only speech that we are limiting is the speech that would, uh, could only be used potentially to violate the adverse action

Speaker 3: [49:50](#) Provision. Why, why would I, if, if I knew without an inquiry that my tenant, I had murdered his landlord and been convicted of it, couldn't I refuse to rent with, to him because he had murdered his landlord as a irrespective of whether he'd been convicted of it or not.

Speaker 6: [50:08](#) Well, because that is based on their criminal history. No, no.

Speaker 3: [50:11](#) It's based on it's based on that he murdered his landlord. It's based on that. He took a gun and shot his landlord.

Speaker 6: [50:17](#) Well, with respect, I would believe that would be, um, criminal history and that an adverse action based on that criminal history would be prohibited. But my point is that the inquiry provision works hand in glove with the adverse action provision and plaintiffs concede that the only, the only reason that they want this information for safety or other concerns is to potentially deny, um, tendency in a way that would violate the adverse action provision. And this is different from via Del. So where this court struck the Arizona in street employment, solicitation statute, the court there ruled that because it's legal

to be hired or to hire speech about that was not unlawful was not related to yes, judge,

- Speaker 5: [50:56](#) Can I just ask you a question that's so simple that I may be drummed off the bench for asking <laugh>, But my question is if the purpose of the inquiry is to decide on whether or not to enter a lease, does that make it commercial speech?
- Speaker 6: [51:17](#) That would certainly under the, the context fact specific comment sense approach? Yes. Because the primary motivation of both parties to that is economic. See that I've run out of time.
- Speaker 1: [51:27](#) Wait, I'm just, I have a question for you. Do you does the city of, I have two actually does the city of Seattle, um, otherwise prohibit discrimination based on a criminal history record in housing,
- Speaker 6: [51:41](#) In housing,
- Speaker 1: [51:43](#) Does it, you have any ordinance to say, uh, uh, a landlord cannot discriminate, um, in renting, based on a criminal history?
- Speaker 6: [51:52](#) No, I believe it's only in this ordinance.
- Speaker 1: [51:54](#) It's only this one and it's only in connection with the inquiry,
- Speaker 6: [51:58](#) Correct. I, I could be wrong. I I'm unaware of any
- Speaker 1: [52:01](#) Other, it's important to know if you also have that on the book somewhere else. And then my other question is, um, if this is a regulation of expressive conduct, what, what standard do we apply to that? Isn't that the O'Brien case would we apply that standard?
- Speaker 6: [52:21](#) I don't know that we have researched and briefed or personally I have researched and briefed.
- Speaker 1: [52:24](#) You make the argument that it's expressive conduct and you rely on Rumsfeld, but you don't give in your brief, but you don't tell us exactly what precise standard. I think that's also intermediate scrutiny,
- Speaker 6: [52:35](#) Even if, well, but I think Rumsfeld held that this wasn't expressive conduct.
- Speaker 1: [52:39](#) No, I know we would, Rumsfeld did hold. It was conduct because the military people, I agree with you on that part. But,

um, but what standard did they, what if it's expressive conduct, which is another area? Well,

- Speaker 6: [52:54](#) Again, because
- Speaker 1: [52:55](#) Think that's also intermediate scrutiny, right?
- Speaker 6: [52:58](#) Because Rumsfeld held that it was not expressive conduct. I just apologized. It did not research further. I was analogizing to, to Rumsfeld, which held this was not expressive conduct.
- Speaker 1: [53:07](#) Well, I can see the analogy, but I do think there's an expressive component to this inquiry provision. And so it could be expressive conduct. And then I'm wondering if we just back, maybe we're not in central Hudson, but we are in an intermediate scrutiny world.
- Speaker 6: [53:21](#) Well, your honor, I'm, I'm, I'm gonna have to respectfully disagree that there's any, uh, expressive component of a, of conduct when a landlord inquires about someone's criminal history, they're acting in their commercial, in their commercial, um, context, not any expressive
- Speaker 1: [53:35](#) Way in commercial speech context is what you're saying.
- Speaker 6: [53:37](#) Correct solely. And there is no expressive conduct embedded in that.
- Speaker 1: [53:41](#) Okay. All right. Um, your honors, thank you very much, counsel. Um, we'll hear from, uh, Amici or will we no. Okay. We may proceed.
- Speaker 2: [53:58](#) Thank you. Your honors, just very briefly. Um, the eight circuit case that Ms Sarva referred to is a series of apartment numbers. So it's better to give the case number it's 23, 4 93, and it's a municipal ordinance coming out of Minneapolis that I think is a good example of a less restrictive means and would suggest it for that reason. I also wanted to just briefly touch on the city's argument, that there's no reason to ask about this information, unless it were to engage in unlawful versus action. Um, and that simply isn't true, a landlord might want to ask so that they know whether or not they need to increase security on the premises by purchasing cameras, by hiring more security personnel
- Speaker 1: [54:41](#) Council with all respect. They're they're not gonna ask that question for purposes of spending more money on, on, uh, security measures. They'll just, won't, they'll just reject the

application. They're not gonna wanna spend more money, you know? Oh, oh yes. I wanna high risk, um, tenant who I have to take other precautions for. And I'm gonna, that won't cost me a lot of money. I don't think most landlords are in the business of bringing on tenants that they perceive will cost them more money. So I don't think that's correct.

- Speaker 2: [55:11](#) Okay, your honor. Well, let's imagine a world, for example, where the inquiry provision does not exist, but the adverse action provision does. So now the landlords cannot reject someone so
- Speaker 1: [55:22](#) That they that's, that's, that's a world that I just asked your, your friend across the aisle about whether or not there's independently on the books in Seattle, a law that prohibits discrimination against persons based on their prior criminal history.
- Speaker 2: [55:38](#) Certainly, but this ordinance does prohibit, um, the, this ordinance itself does prohibit denial of tendency based on criminal history. And unless it's
- Speaker 1: [55:47](#) Legitimate, not generally only in connection with the inquiry, right?
- Speaker 2: [55:52](#) No. So if, if a landlord were able to ask about this information, they'd still be prohibited from using it under the direct language of the, the, the ordinance, but in any case, the point is, uh, I mean, we could look for example, for the Amicus Goodman real estate, who had to increase security costs, many fold because of, um, because of the impact of this ordinance. And one of the, one of the perverse effects of the ordinance is that inoculates itself against effective, um, criticism, because landlords can't demonstrate the impact that the ordinance is having by showing for example, that individuals that they have been required to, to rent, to have a criminal history and have caused such and such an issue. Um, just a briefly note on other jurisdictions, um, the, uh, Amicus for the city that provides, um, I think it's a, a national association of municipal lawyers provides other ordinances what's striking about those is they don't restrict asking the question. What they tend to restrict is for example, you can't deny tendency based on an arrest arrest that did not result in conviction, but this ordinance goes above and beyond any ordinance that we've seen around the country in prohibiting the, in the question entirely. Um, and just, I see my time is expired. Thank you, your honor.

Speaker 1: [57:14](#) Okay. Thank you, counsel inverse. Um, Seattle is submitted and this court will be in recess for 10 minutes.

Speaker 7: [57:27](#) All rise. This court.