No. 24-6214

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs – Appellants,

v.

THE CITY OF SEATTLE,

Defendant – Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Honorable Barbara J. Rothstein, District Judge

APPELLANTS' OPENING BRIEF

Brian T. Hodges
Pacific Legal Foundation
1425 Broadway #429
Seattle, Washington 98122
Telephone: (916) 419-7111
Fax: (916) 419-7747
BHodges@pacificlegal.org

Deborah J. La Fetra
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 1000
Arlington, Virginia 22201
Telephone: (202) 888-6881
Fax: (916) 419-7747
DLaFetra@pacificlegal.org

Attorneys for Plaintiffs – Appellants

CORPORATE DISCLOSURE

Plaintiff-Appellant Eileen, LLC, is a limited liability corporation organized under the laws of the State of Washington. It has no parent corporation and issues no shares. Rental Housing Association of Washington is a nonprofit corporation organized under the laws of the State of Washington. It has no parent corporation and issues no shares.

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INTRODUCTION

Seattle's "Fair Chance Housing Ordinance" (FCHO) provides that no one may "[r]equire disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history." SMC § 14.09.025(A)(2). In a previous appeal, this Court ruled that the Ordinance's speech ban violated the First Amendment. *See Yim v. City of Seattle*, 63 F.4th 783, 798 (9th Cir. 2023). The FCHO returns to this Court on appeal from a district court order that failed to give effect to the Seattle City Council's legislative intent and this Court's prior First Amendment ruling by severing only two words—"inquire about"—from the Ordinance's unconstitutional "inquiry provision." ER-8–9. In so doing, the court below improperly split the dual ask-and-answer portion of the "inquiry provision," and failed to recognize the inextricable linkage between the inquiry provision and the adverse action provision. Severing only the "ask" results in an ordinance never intended by the Seattle City Council and that is rendered ineffective.

Under Washington law, a provision is not severable if the constitutional and unconstitutional provisions are so connected that the legislature would not have passed one without the other, or if severance will frustrate the City's legislative purpose. *Leonard v. City of Spokane*, 127 Wash. 2d 194, 201 (1995). Seattle conceded both points in its prior briefing, stating that the City Council "considered"

adopting a less-restrictive inquiry provision when developing the FCHO and "rejected this approach as ineffective." ER-117. According to Seattle, anything less than a complete ban on any discussion of criminal history between the landlords and prospective tenants would frustrate the City's unique legislative objective. *See infra* at 4–6. Relying on the City's assertions, a panel of this Court concluded that the Ordinance's ban on criminal history discussions between landlords and prospective tenants was so central to the Ordinance's function and purpose that it cannot operate effectively without it. *Yim v. City of Seattle*, 63 F.4th at 792 n.16; *see also id*. at 800 ("the very core of the Ordinance here [is] a prohibition on requiring disclosure or making inquiries about criminal history generally on rental applications") (Wardlaw, J., concurring).

That core centrality controls whether the inquiry provision can be severed from the Ordinance without frustrating its function and purpose and undoing the City Council's intent: it cannot. For these reasons, Plaintiffs-Appellants Chong and MariLyn Yim, Kelly Lyles, and Eileen, LLC, and Rental Housing Association of Washington (collectively, the Yims) respectfully request this Court to reverse the district court's severance order, rule that the inquiry provision cannot be severed from subsection 2 of the Ordinance's "Prohibited use of criminal history" section, and enjoin any further enforcement of that section.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331, the federal district court had subject matter jurisdiction over this dispute, which arose under the United States Constitution. On July 23, 2024, that court issued an order granting summary judgment to the City of Seattle and entered an amended final judgment on September 17, 2024. Appellants filed a timely notice of appeal on October 8, 2024, under Rule 4 of the Federal Rules of Appellate Procedure. This Court granted an extension on November 1, 2024, setting the deadline for filing the opening brief on appeal as December 20, 2024. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

REGULATION AT ISSUE

Subsection 2 of the FCHO's "Prohibited use of criminal history" section reads as follows:

> A. It is an unfair practice for any person to:
> …
> 2. Require disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in Section 14.09.115.

SMC § 14.09.025(A)(2).

ISSUES PRESENTED

1. Whether the inquiry provision comprises both inquiry and disclosure in response to the inquiry.

2. Whether the unconstitutionality of the FCHO's inquiry provision requires invalidation of the entirety of subsection 2 of the Ordinance?

STATEMENT OF THE CASE

A. The Purpose, Intent, and Effect of the "Fair Chance Housing Ordinance"

The Seattle City Council enacted the FCHO as part of a nationwide effort to reduce barriers to housing and address the racially disparate impacts of the criminal justice system. *Yim*, 63 F.4th at 787–90. Specifically, the City enacted the Ordinance to address concerns that people with criminal histories generally face difficulties when trying to secure rental properties, and that this may disproportionately impact people of color who "are significantly more likely to have a criminal history than their white counterparts." *Id.* at 788. But where the vast majority of municipalities that have addressed this issue have done so by regulating (rather than prohibiting) landlords' use of criminal history reports when making rental decisions, *id*. at 790, 796–98, Seattle's City Council chose the "more ambitious goal" of flatly preventing landlords from learning about or considering a tenant-applicant's criminal history "no matter how violent or how recent." Addendum 1 at 18 (reproducing Seattle Petition for Rehearing En Banc, 9th Cir. No. 21-35567 (April, 18, 2023)); *see also* ER-27 (*Yim v. City of Seattle*, No. C18-0736-JCC, 2021 WL 2805377, at *13 (W.D. Wash. July 6, 2021)).

Seattle's FCHO makes it an "unfair practice" for any person to: "Require disclosure, inquire about, or take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history, ..."[1] SMC § 14.09.025(A)(2). There are no exceptions related to the gravity of an applicant's crimes, the number of convictions, the time since the last conviction, the risk of recidivism, or other indicators that the applicant poses a risk of harm to an owner's family or other tenants.[2] *Yim*, 63 F.4th at 789 (citing SMC § 14.09.025(A)(2)). The portion of the statute addressing required disclosure and inquiries comprises the "inquiry provision," while acting on discovered or disclosed information is designated the "adverse action provision." *Yim*, 63 F.4th at 790.

Critically, in developing its FCHO, the City Council "considered" adopting a less-speech-restrictive inquiry provision but "rejected this approach as ineffective." ER-117; *see also Yim*, 63 F.4th at 797–98 (discussing the less restrictive alternatives). According to Seattle, "[n]one of these [less restrictive] alternatives

[1] Failure to comply with the Ordinance's outright ban on discussing an applicant's criminal history subjects landlords to rent refunds, tenancy reinstatement, and payment of tenants' attorneys' fees as well as civil penalties ranging from $11,000 to $55,000. SMC § 14.09.100.

[2] A single narrow exception allows property owners to exclude adult sex offenders by demonstrating a "legitimate business reason" that exclusion is "necessary to achieve a substantial, legitimate, nondiscriminatory interest." SMC § 14.09.025(A)(3).

addresses Seattle's substantial interests." Appellee's Answering Br., *Yim v. City of Seattle*, No. 21-35567, 2022 WL 333224, at *40 (9th Cir. Jan. 28, 2022). Seattle adopted its "more ambitious goal" based in part on studies suggesting that the mere act of asking whether an applicant has a criminal history could result in disparate racial impacts, regardless of whether the landlord uses that information in making a tenancy decision. ER-117 ("Without a business reason, any criminal conviction screening can be a tool for racial discrimination because it disproportionately affects people of color."). Thus, the City adopted the position that anything less than an outright ban on such inquiries and corresponding disclosures would undermine the City's objectives by "allowing landlords to ask about—and discriminate based on—more criminal history information." Addendum 1 at 8.

B. The Yims' Lawsuit Challenged the City's Complete Ban on Discussion of Criminal History Between Landlords and Tenant-Applicants

In 2018, the Yims filed a Complaint in King County Superior Court, alleging in relevant part that the inquiry provision violated the First Amendment's Free Speech Clause.[3] *Yim*, 63 F.4th at 790. The Complaint, filed in state court and subject

[3] The City removed proceedings to the Federal District Court, where the parties filed cross-motions for summary judgment based on a stipulated record. *Yim*, 63 F.4th at 790. The Complaint also included a substantive due process challenge to the FCHO's adverse action provision. *Id*. That claim, however, was dismissed and is not at issue here. *Yim*, 63 F.4th at 790–91, 798–99.

to Washington's liberal notice pleading rule,[4] paraphrased the challenged inquiry provision as follows: "The Ordinance declares it an 'unfair practice' for a residential landlord to consider—or even request—an applicant's criminal history when making a rental decision." ER-50; *see also* ER-52 ("The Ordinance declares it an 'unfair practice' to inquire about a prospective tenant's arrest records, conviction records, or other criminal history[.]").

The City understood the Yims' free speech claim to include the inquiry provision's twin bans on asking and requiring disclosure of an applicant's criminal history, stating that "Plaintiffs' First Amendment challenge is limited to Subsection 2's prohibition on a landlord requiring disclosure of, or inquiring about, a prospective tenant's criminal history." ER-106; *see also* ER-100 ("Plaintiffs … challenge the Ordinance's prohibitions on landlords requiring disclosure of, and inquiring about, prospective tenants' criminal history"); ER-136 (acknowledging that Plaintiffs challenged "Subsection 2's restriction on requiring disclosure or inquiring about criminal history"). Indeed, even when discussing the Ordinance's severability clause in its initial summary judgment motion, the City stressed that Plaintiffs' First Amendment claim "challenge[s] Subsection 2's prohibition on requiring disclosure of, and inquiring about, prospective tenants' criminal history." ER-129.

[4] *See Stansfield v. Douglas County*, 146 Wash. 2d 116, 123 (2002).

C. District Court's Summary Judgment Order Confirmed that the Speech Ban Was Central to Seattle's Legislative Purpose

The Yims' First Amendment claim was litigated on cross-motions for summary judgment based on a stipulated record. *Yim*, 63 F.4th at 790–91. First, as relevant here, the district court held that "the central purpose of the Ordinance is to prevent landlords from *learning and using* true information about prospective occupants' criminal histories." ER-28; *see also* ER-15 ("at its core, [the FCHO] prohibits landlords from asking anyone about prospective or current tenants' criminal or arrest history"). Second, the court concluded that the speech restriction was "necessary" to "achieve the City's objectives," ER-37–38, and that less-speech restrictive alternatives "would not achieve the City's objectives." ER-38. And third, the court dismissed Plaintiffs' challenge to the applicant-disclosure prong of the City's speech ban on the same grounds as the inquiry ban. ER-20 ("To the extent Plaintiffs challenge the requirement provision, the Court concludes that it does not violate the First Amendment because it governs conduct and only incidentally burdens speech.").

D. This Court Declared that the Speech Ban Is Central to the FCHO's Purpose and Denied Rehearing

This Court reversed the district court's summary judgment order dismissing the Yims' First Amendment claim, holding that the inquiry provision violated the commercial speech doctrine. *Yim*, 63 F.4th at 798. In reaching that conclusion, this

Court—like the parties—characterized the speech ban as prohibiting landlords from "requiring disclosure or inquiring about 'any arrest record conviction record, or criminal history' of current or prospective tenants." *Id*. at 789 (quoting SMC § 14.09.025(A)(2)); *see also id*. at 796 (concluding that the "Inquiry Provision" imposed "a complete ban on any *discussion* of criminal history between the landlords and prospective tenants."); *id.* at 797 (background checks generate "the information a landlord would be most interested in."). The Court, thereafter, confirmed that the speech ban was central to the FCHO, concluding that "[t]he very purpose of the Ordinance was to reduce barriers to housing and housing discrimination by barring landlords from considering an applicant's criminal history." *Id.* at 792.

This conclusion drew the support of the full panel. Writing in concurrence, Judge Wardlaw determined that "the very core of the Ordinance here [is] a prohibition on requiring disclosure or making inquiries about criminal history generally on rental applications[.]" *Id*. at 800 (Wardlaw, J., concurring). And, even when dissenting from the Court's First Amendment analysis, Judge Gould agreed that "[r]estricting access to records of recent or violent offenses is at the core of, and no less necessary to accomplishing, Seattle's aims than restricting access to older and less violent criminal records." *Id*. at 811 (Gould, J., concurring in part, dissenting in part).

This Court furthermore held that the FCHO would be rendered ineffective without any restriction on criminal history inquiries and applicant disclosures. *Yim*, 63 F.4th at 795 n.16. This Court reached that conclusion after evaluating seven similar criminal history laws that employed less-speech-restrictive means to accomplish similar government objectives.[5] *Id*. at 795–98. As part of that evaluation, this Court also considered and rejected the Yims' argument that Seattle could have simply adopted the adverse action provision with no restriction on speech whatsoever (the very formulation of the FCHO that severance of the inquiry provision would establish). *Id*. at 795 n.16. This Court concluded that the City would be unable to achieve its ambitious objective of outright preventing disparate racial impacts without any restriction on a landlord's ability to inquire and obtain information about an applicant's criminal history:

> The landlords ... argue that the City could have omitted the inquiry provision entirely, and simply passed the adverse action provision. However, if landlords are allowed to *access* criminal history, just not act on it, it makes the Ordinance extremely difficult to enforce, and

[5] The Court considered those alternatives under the fourth prong of the U.S. Supreme Court's test for evaluating a burden on commercial speech, which asks whether the challenged restriction "is not more extensive than is necessary to serve [the government's] interest." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980). In making that determination, the existence of "less-burdensome alternatives to the restriction on commercial speech ... is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826 (9th Cir. 2013) ("[B]ecause restricting speech should be the government's tool of last resort, the availability of obvious less-restrictive alternatives renders a speech restriction overinclusive.").

> makes it more likely that unconscious bias will impact the leasing process. *See* Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. Chi. L. For. 209, 218 (2020) ("Legislatures' interest in stopping discrimination before the fact is especially strong because after-the-fact enforcement is frequently slow, costly, and ineffective.").

Yim, 63 F.4th at 795 n.16 (emphasis added); *id*. at 812 ("For all the reasons set forth in the opinion's footnote 16, … the landlords' [less speech-restrictive] alternatives do not proportionately and adequately address Seattle's aims.") (Gould, J., concurring in part, dissenting in part); *see also see id.* at 810 (opining that anything less than an outright ban on criminal history inquiries would undermine the City's objectives by "open[ing] the door for more undetectable (and unenforceable)" disparate racial outcomes) (Gould, J., concurring in part, dissenting in part). Indeed, Seattle emphasized this footnoted holding[6] in its Petition for Rehearing En Banc, stating that the "majority conceded that an adverse-action provision without an inquiry provision would not be effective at all." Addendum 1 at 19.

E. Remand Proceeding and Severability

This Court remanded this case to the district court to enter judgment in favor of the Yims on the First Amendment claim and to determine whether the inquiry provision could be severed from the remainder of the Ordinance under Washington's severability doctrine. *Id*. at 799. On remand, the case was reassigned to a different

[6] Footnotes may contain judicial holdings as well as any other portion of a court's opinion. *See, e.g.*, *Rodriguez v. Newsom*, 974 F.3d 998, 1008 n.8 (9th Cir. 2020).

judge and the parties litigated the severability question on cross-motions for summary judgment. The Yims argued that the core centrality, and thus non-severability, of the inquiry provision was effectively determined by this Court's prior decision and by Seattle's judicially-adopted prior assertions about legislative intent and the necessity of the speech ban to the Ordinance's effectiveness.

On remand, however, the City foreswore its prior assertions on two key points relevant to severance. First, Seattle disclaimed its earlier acknowledgement that the Yims' free speech claim challenged the Ordinance's "prohibition on a landlord requiring disclosure of, or inquiring about, a prospective tenant's criminal history," ER-105, newly asserting that the Yims challenged only the ban on landlords *asking* about an applicant's criminal history, not the companion ban of requiring an applicant to *answer* the question. ER-172; *see also* ER-8. The City's new position is that this Court's First Amendment ruling applies only to the ban on landlord inquiries, and leaves property owners liable for penalties should they require an answer to their constitutionally protected question. ER-173–74; *see also* ER-8–9.

Second, Seattle disclaims its earlier statement that the City Council "considered" adopting a less-restrictive inquiry provision when developing the FCHO but "rejected this approach as ineffective." ER-178. On remand, the City took the opposite position, stating—contrary to the record—that "the Council likely would have adopted the rest of the Ordinance had it foreseen the inquiry provision's

invalidity." ER-181. The City also reversed course on the importance of the speech ban to the City Council's objectives, insisting that the remainder of the Ordinance—including the Prohibited Use of Criminal History section—would remain effective without it. ER-181, 183.

The district court adopted Seattle's new position in its entirety, holding that "the language to be excised from the Ordinance is limited to 'inquire about' in the Prohibited Use Section, and 'asking about' in the Notice Section." ER-9. The district court did not address either the judicial estoppel warranted by the City's prior statements or this Court's conclusions—law of the case—that the very purpose of the Ordinance was to ban speech and that anything less than the total ban on criminal history inquiries would render it ineffective. Instead, the district court evaluated the parties' severability arguments against a very different legislative objective of *regulating*—rather than *prohibiting*—the use of criminal histories to conclude that, "even if not as effective as the City desired the Ordinance to be," eliminating the prohibition on inquiry does not make the Ordinance "useless to accomplish the purposes of the legislature" and therefore severed "inquire about" from the Ordinance. ER-10.

The Yims timely appealed.

SUMMARY OF THE ARGUMENT

Seattle chose to make an unconstitutional speech restriction—the inquiry provision—the essential centerpiece of the FCHO. As an initial matter, this Court must reverse the district court's absurd notion that the invalidated inquiry provision allows landlords' questions while simultaneously granting potential tenants a legal license to lie or refuse to answer in response. Once the Court establishes that the inquiry provision includes *both* the question and required disclosure, the core centrality of the "Prohibited use of criminal history" section of the Ordinance requires a determination of non-severability under Washington's volitional and functional severability tests. *State v. Abrams*, 163 Wash. 2d 277, 285–86 (2008).

This centrality of the "inquiry provision" is demonstrated both by this Court's previous ruling interpreting the statute, which is a matter of law, *City and Cnty. of San Francisco v. Barr*, 965 F.3d 753, 760 (9th Cir. 2020), and law of the case. *United States v. Lewis*, 611 F.3d 1172, 1179 (9th Cir. 2010). It is further supported by Seattle's assertions and litigation positions until its tactical reversal on the severability motion. Previously, the City Council considered a less-restrictive inquiry provision when developing the FCHO but the City explained to this Court that it "rejected this approach as ineffective." ER-117. Relying on the City's characterization of its own ordinance, this Court's prior opinion determined that the speech restriction was essential to achieving the City's objective of "prohibit[ing]

landlords from considering *any* crimes, no matter how violent or how recent." ER-25 (emphasis in original); *see also Abrams*, 163 Wash. 2d at 285–86 (provision is non-severable where "the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.").

This Court now must determine how much of the Ordinance should fall along with the unconstitutional inquiry provision. Under Washington's severability doctrine, the entire Ordinance could be invalidated. *Lynden Transport, Inc. v. State*, 112 Wash. 2d 115, 124 (1989) (striking an entire statute where an invalid provision is "intimately and inseparably connected" with an essential component of the law). But according to a Ninth Circuit decision applying California's comparable severability doctrine,[7] the Court may employ a more tailored remedy and invalidate only the ordinance section that contains the unconstitutional speech ban. *Acosta v. City of Costa Mesa*, 718 F.3d 800, 817 (9th Cir. 2013) (unconstitutional phrases in

[7] Although severability is determined by state law, Washington's Supreme Court routinely relies on out-of-jurisdiction caselaw to inform the severability test. *See, e.g.*, *Ass'n of Washington Bus. v. Washington State Dep't of Ecology*, 195 Wash. 2d 1, 18–19 (2020) (adopting the functional and volitional severability tests as set out by the United States Supreme Court in *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988), and *Alaska Airlines*, *Inc. v. Brock*, 480 U.S. 678, 684–87 (1987)); *McGowan v. State*, 148 Wash. 2d 278, 295 (2002) (adopting the three-part grammar, function, and volition inquiries applied in several other states, especially California, and as summarized by 2 Norman J. Singer, *Statutes and Statutory Construction* § 44:4 at 578 (6th ed. 2001)). Since there are no material differences between Washington's test and the cited out-of-jurisdiction tests, those precedents remain persuasive authority.

an ordinance's subsections were non-severable, requiring invalidation of the entire section); *see also Abrams*, 163 Wash. 2d at 288 (adopting the volitional severability test set out by the California Supreme Court in *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805 (1989)). The limited remedy of *Acosta* more closely follows the narrow issues presented by this case, which arise from a constitutional challenge to subsection 2 of the FCHO's "Prohibited use of criminal history" section, SMC § 14.09.025(A)(2).

STANDARD OF REVIEW

This appeal asks the Court to review the district court's ruling on severability, which raises a question of state law and is reviewed de novo. *Washington State Republican Party v. Washington State Grange*, 676 F.3d 784, 798 (9th Cir. 2012). To resolve this, the Court must determine the effect of its earlier First Amendment ruling in *Yim*, which is also a pure question of law subject to de novo review. *See Readylink Healthcare v. Lynch*, 440 F.3d 1118, 1119 (9th Cir. 2006). Because this matter returns on appeal after this Court entered a final ruling on the merits, this Court's prior decision establishes the law of the case.[8] The law-of-the-case doctrine

[8] None of the exceptions to the doctrine apply here. *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) ("A Court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result.").

requires that "'when a court decides upon a rule of law, that decision should continue to govern the same issues in *subsequent stages in the same case*.'" *Musacchio v. United States*, 577 U.S. 237, 244–45 (2016) (citation omitted; emphasis added); *United States v. Lewis*, 611 F.3d 1172, 1179 (9th Cir. 2010) (the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case). Even where the law of the case doctrine does not apply, judicial estoppel prevents litigants from abdicating positions on which courts previously relied. *Musacchio*, 577 U.S. at 245.

ARGUMENT

I. The "Inquiry Provision" Comprises Both Asking and Answering

The key provisions of the FCHO are the "Inquiry Provision" and the "Adverse Action Provision." *Yim*, 63 F.4th at 789–90. This Court defined the "Inquiry Provision" as "a complete ban on any *discussion* of criminal history between the landlords and prospective tenants." *Id*. at 796 (emphasis added); *see also id.* at 797 (inquiries enable "screening," which is possible only upon disclosure). This Court held that the Inquiry Provision—banning *discussion*—was unconstitutional yet the court below split that provision into two: (1) asking about criminal history and (2) disclosing the answer to the question. Divorcing these complementary

provisions—two sides of the same coin[9]—is the definition of absurdity. *See State v. Montano*, 557 P.3d 86, 92 (N.M. 2024) (interpretation of a statute is absurd when it "contradicts the values of rationality, reasonableness, and common sense. Thus, '[t]he absurd result principle is both a surrogate for, and a representative of, rule of law values.'") (citation omitted). Contrary to such a result, statutory interpretation tracks "common sense intuition." *Fischer v. United States*, 603 U.S. 480, 487 (2024).

Seattle recognized the dual nature of the Inquiry Provision until it became convenient to disavow the obvious. In prior proceedings in this Court, the City defined the "inquiry provision" as including the applicant-disclosure ban and defended the full provision. Appellee's Answering Br., *Yim v. City of Seattle*, 2022 WL 333224, at *7 (setting out the full provision as being subject to the First Amendment claim). Thereafter, Seattle repeatedly defined the inquiry provision as imposing a "prohibition on asking for information," necessarily inferring that such questions would elicit disclosure. *Id*. at *12 ("the inquiry provision prohibits landlords from *obtaining* [an applicant's criminal] history). Seattle's Petition for Rehearing En Banc candidly stated that, under the inquiry provision invalidated by the panel decision, "a landlord may not say to a prospective tenant, '*provide me* your criminal history.'" Addendum 1 at 12 (emphasis added).

[9] *See Murthy v. Missouri*, 603 U.S. 43, 75 (2024) (recognizing a "First Amendment right to 'receive information and ideas' … where the listener has a concrete, specific connection to the speaker") (citing *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

The City's position before this Court echoed its presentation to the district court. *See* ER-106. In its cross-motion for summary judgment on the merits, the City stated that "Plaintiffs' First Amendment challenge is limited to Subsection 2's prohibition on a landlord requiring disclosure of, or inquiring about, a prospective tenant's criminal history." *Id*. Seattle's summary judgment briefs repeatedly referred to the phrases banning both history inquiries and disclosure as the inquiry provision. ER-100 ("Plaintiffs … challenge the Ordinance's prohibitions on landlords requiring disclosure of, and inquiring about, prospective tenants' criminal history[.]"); *see also* ER-136 (acknowledging that Plaintiffs challenged "Subsection 2's restriction on requiring disclosure or inquiring about criminal history"); ER-108 (FCHO "prohibit[ed] landlords from requiring prospective tenants *to hand over* their criminal history to landlords in the first place.") (emphasis added). Even when discussing the Ordinance's severability clause in its initial cross-summary judgment motion, the City stressed that Plaintiffs' First Amendment claim "challenge[s] Subsection 2's prohibition on requiring disclosure of, and inquiring about, prospective tenants' criminal history." ER-129. The Yims never disputed these statements because they accurately described the scope of their challenge to the Inquiry Provision.

All of this makes far more sense than the strained interpretation adopted by the court below. The context of a particular sentence or clause in an ordinance

"comprises those parts of the text which immediately precede and follow it." *Lacey Nursing Ctr., Inc. v. State, Dept. of Revenue*, 103 Wash. App. 169, 176 (2000). There is no affirmative right to refrain from answering legitimate questions on rental applications—particularly where applicants commonly affirm that all answers are honest and complete to the best of the applicant's knowledge. ER-184; *see also* ER-91–92 (sample application with affirmance). Even when someone owes no duty to disclose particular facts, he or she has no "license to lie when asked point blank about those facts." *Equity Capital Corp. v. Kreider Transp. Svc., Inc.*, 967 F.2d 249, 253 (7th Cir. 1992).

The City should not be presumed to have intended to encourage omissions and deceit in rental applications when the overall tenor of Washington law is to criminalize such omissions and deceit. *See City of Seattle, Seattle Police Dep't v. Werner*, 163 Wash. App. 899, 910 (2011) (defining "lie of omission"); *State v. David*, 13 Wash. App. 2d 1047, 2020 WL 2114390, at *1 (2020) (unpublished) (lies of omission are dishonest);[10] *Marquette v. State Bar*, 44 Cal. 3d 253, 262 (1988)

[10] Washington statutes frequently criminalize omissions and misrepresentations in applications. *See, e.g.*, RCWA 46.12.750(1) (felony to make omission or false statement in application for a certificate of title); RCWA 51.48.270 (same for workers' compensation application); RCWA 74.09.230 (same for application for public assistance); Rules of Professional Conduct, RPC 8.1 (penalty for false statement or omission on bar admission application). *See also In re Recall of Pearsall-Stipek*, 141 Wash. 2d 756, 774 (2000) (false swearing statute, RCWA 9A.72.040, applies to a false statement, which the speaker knows to be false, when spoken under an oath required or authorized by law, regardless of materiality).

(concealing information in a lease application amounted to a "willful attempt to deceive" and a "misrepresentation"). Indeed, such a legislative purpose to permit deceit cannot be assumed without support from the record because the government's "primary obligation is to comport itself with compunction and integrity." *Seago v. Bd. of Trustees, Teachers' Pension and Annuity Fund*, 257 N.J. 381, 397 (2024) (citation omitted). There is no record evidence supporting the district court's absurd interpretation. Certainly, the City's arguments and this Court's analysis focused on the "asking," because without the ability to ask, there would be no response. But having determined that landlords have a constitutional right to ask, the analysis and opinion in no way suggests that tenant applicants may refuse to answer or lie in response. This Court plainly understood that the entire point of the inquiry was to generate a response. *See Yim*, 63 F.4th at 794 ("[R]eviewing and obtaining criminal records is generally a legal activity. A prohibition on *reviewing criminal records* therefore is not speech that 'proposes an illegal transaction' and does not escape First Amendment scrutiny") (emphasis added).

Moreover, divorcing disclosure from inquiry renders the sex offender status provision unworkable. *Cf. Assoc. Gen. Contractors of Wash. v. State*, 2 Wash. 3d 846, 863 (2024) ("The goal is to avoid interpreting statutes to create conflicts between different provisions so that we achieve a harmonious statutory scheme because we presume that the legislature does not intend to create inconsistent

statutes.") (cleaned up). As this Court explained, "landlords may inquire about a prospective tenant's sex offender status and take certain adverse actions based on that information." *Yim*, 63 F.4th at 789 (citing SMC §§ 14.09.025(A)(2), 14.09.115(B)). The inquiry presupposes disclosure, or there would be no adverse actions, authorized or otherwise.

Yet Seattle continues to enforce the Ordinance's unconstitutional ban penalizing landlords who require that tenant-applicants answer the question whether they have a criminal history. This Court may take judicial notice that shortly after it issued its opinion declaring the speech ban unconstitutional, Seattle's Office for Civil Rights posted an "update" to the "Criminal History Protection" section of its "Housing Rights" website, stating that it would "continue to enforce" the FCHO's ban "on requiring a tenant or applicant to disclose their criminal history."

> As of June 6, 2023, due to a recent ruling from the U.S. Court of Appeals for the Ninth Circuit, the Seattle Office for Civil Rights (SOCR) will no longer enforce the portion of the Fair Chance Housing Ordinance (FCHO) that bans a landlord from inquiring about a tenant's or applicant's criminal history. *SOCR will continue to enforce all other portions of the FCHO, including bans (subject to exceptions) on requiring a tenant or applicant to disclose their criminal history* or taking an adverse action based on that history.

Criminal History Protections, "June 2023 Update: Fair Chance Housing Ordinance" (Seattle Office for Civil Rights) (emphasis added).[11] On June 6, 2023, Seattle's Office for Civil Rights updated its "Frequently Asked Questions" webpage to claim that this Court's ruling had invalidated only the phrase, "inquire about," and did not affect the provision's "require disclosure" language:[12]

> What does "require disclosure" and "inquire about" mean?
>
> Although a landlord may inquire about criminal history, they may not … require someone to disclose criminal history ….

Fair Chance Housing Ordinance, SMC 14.09, *Frequently Asked Questions*, Seattle Office for Civil Rights, at 7 (Edited June 6, 2023). The website confirms Seattle's current position that a landlord may ask about an applicant's criminal history but may not require an answer to the question:

> Can I write or ask, "Have you or any household member ever been convicted of a crime?" on a rental application or when talking to an applicant?

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[11] Available at https://www.seattle.gov/civilrights/housing-rights/criminal-history-protections (visited Dec.17, 2024), excerpts reprinted at Addendum 2. The Yims request that this Court take judicial notice of Seattle's "June 2023 Update: Fair Chance Housing Ordinance" under Federal Rule of Evidence 201, which permits courts to take notice of facts that are "not subject to reasonable dispute." *United States ex rel. Parikh v. Premera Blue Cross*, No. C01-0476P, 2006 WL 2841998, at *3–4 (W.D. Wash. Sept. 29, 2006) (reports found on government websites are self-authenticating under Fed. R. Evid. 902(5)).

[12] Available at https://www.seattle.gov/documents/Departments/CivilRights/Enforcement/Fair%20Housing%20Posters/FairChanceHousing/Fair-Chance-Housing-FAQ-June-6-2023.pdf (visited Dec. 17, 2024) and reprinted at Addendum 3.

> Yes, but you cannot require the applicant to answer or take an adverse action based on the applicant refusing to provide an answer.

Id. at 5.

Seattle's continuing efforts to prohibit constitutionally protected speech is strong evidence that the City views its "complete ban on any *discussion* of criminal history between the landlords and prospective tenants" as essential to the City's Council's legislative objectives. *Yim*, 63 F.4th at 796 (emphasis added); *see also id.* at 792 ("The very purpose of the Ordinance was to reduce barriers to housing and housing discrimination by barring landlords from *considering* an applicant's criminal history.") (emphasis added). The district court's decision to endorse Seattle's post-decision position by severing only the phrase "inquire about" effectively reinstates the unconstitutional speech ban because a "discussion … between a landlord and a prospective tenant" is not a monologue, and a landlord cannot "consider" information that it doesn't have. This Court's conclusions in this regard presuppose a response to an inquiry. And courts must review the text and structure of statutory schemes in light of any "necessary and inescapable inference." *AMG Capital Mgmt., LLC v. Federal Trade Comm'n*, 593 U.S. 67, 79 (2021) (citations omitted); *In re Tragopan Properties, LLC*, 164 Wash. App. 268, 273 (2011) (acknowledgement of debt necessarily infers agreement to pay). Both inquiries and disclosures comprise the "Inquiry Provision." The court below erred in holding otherwise.

II. The Inquiry Provision Is Not Severable

The FCHO's inquiry provision is not severable from subsection 2 of the Ordinance's "Prohibited use of criminal history" section, which reads:

> A. It is an unfair practice for any person to:
> …
> 2. *Require disclosure, inquire about, or* take an adverse action against a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history, except for information pursuant to subsection 14.09.025.A.3 and subject to the exclusions and legal requirements in Section 14.09.115.

SMC § 14.09.025(A)(2) (emphasis added).

Severability is a matter of state law. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 631 n.11 (2020) (citation omitted). Under Washington law, the presence of a severability clause is "not necessarily dispositive" of the issue. *McGowan v. State*, 148 Wash. 2d 278, 295 (2002); *see also United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) (The "ultimate determination of severability will rarely turn on the presence or absence of such a clause."); *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 139 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981) (no severability of unconstitutional provision of state law despite a severability clause). Instead, courts must meaningfully examine the challenged ordinance to determine whether the unconstitutional provision is grammatically, functionally, and/or volitionally severable from the remainder of the ordinance. *Ass'n of Washington Bus.*, 195 Wash. 2d at 18 (severability clause not dispositive of functional

severability); *League of Women Voters of Washington v. State*, 184 Wash. 2d 393, 412 (2015) (severability clause not conclusive of volitional severability). Under the volitional and functional severability tests, a provision is non-severable if either (1) "the constitutional and unconstitutional provisions are so connected ... that it could not be believed that the legislature would have passed one without the other," or (2) "the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature." *Abrams*, 163 Wash. 2d at 285–86 (citations omitted).

A. Grammatic Severability

As shown above, the phrase "inquire about" cannot be severed from "require disclosure" without rendering the provision nonsensical. However, the Yims acknowledge that the combined phrases "require disclosure," and "inquire about," could be severed from "ask about" Ordinance without doing grammatical violence to the sentence. *See Abrams*, 163 Wash. 2d at 287. But that is not the end of the inquiry—the volitional and functional severability tests must also be satisfied before an unconstitutional provision may be severed. *State v. Anderson*, 81 Wash. 2d 234, 236 (1972); *McGowan*, 148 Wash. 2d at 294–95. As shown below, they are not.

B. Volitional Severability

The test for volitionally severability asks "if the balance of the legislation would have likely been adopted had the legislature foreseen the invalidity of the

clause at issue." *Abrams*, 163 Wash. 2d at 288; *see also Acosta*, 718 F.3d at 817–18 ("Text passes the test for volitional severability if it can be said with confidence that the enacting body's attention was sufficiently focused upon the parts to be validated so that it would have separately considered and adopted them in the absence of the invalid portions.") (cleaned up). This is "the 'most important' factor in the severability analysis." *Acosta*, 718 F.3d at 817; *see also McGowan*, 148 Wash. 2d at 294–95.

The Seattle City Council's decision to make an outright ban on constitutionally protected speech the centerpiece of the FCHO's "Prohibited use of criminal history" section compels a conclusion that the inquiry provision is not volitionally severable. The question posed by the volitional severability test is controlled by Seattle's prior statement, accepted as true by the district court and this Court in prior proceedings in this case, that the City Council "considered" adopting a less burdensome inquiry provision and "rejected [that] approach as ineffective."[13] ER-117. During the merits phase of this litigation, the City argued that it was impossible to achieve its legislative objectives via less-speech-restrictive means than

[13] An early, unadopted version of Seattle's FCHO contained a less-restrictive inquiry provision that "permitted landlords to inquire about *some* criminal convictions, while still banning them from asking about: 'arrests not leading to convictions; pending criminal charges; convictions that have been expunged, sealed, or vacated; juvenile records, including listing of a juvenile on a sex offense registry; and convictions older than two years from the date of the tenant's application.'" *Yim*, 63 F.4th at 797.

a complete ban on criminal history inquiries. ER-115. The Yims countered that Seattle could have *reduced* barriers to housing and the risk of disparate racial outcomes either by adopting one of the less-speech-restrictive alternatives enacted by other municipalities or by adopting the adverse action provision without restrictions on landlord inquiries (the very formulation of the FCHO that severance of the inquiry provision would establish). ER-84–85. Seattle disagreed, explaining that the City Council's intent to prevent (rather than merely reduce) discriminatory impacts regardless of the severity of one's crimes was "more ambitious" than other municipalities' goals[14] and therefore required a ban that "prohibit[ed] landlords from requiring prospective tenants to hand over their criminal history to landlords in the first place." ER-108.

This Court accepted this expressed intent as true (*Yim*, 63 F.4th at 795, n.16, 811), making the City's position subject to judicial estoppel. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782–83 (9th Cir. 2001) (judicial estoppel prevents a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position); *see also Heimbecher v. City and Cnty. of Denver*, 97 Colo. 465, 473 (1935) ("Litigants are not allowed to blow both hot and cold at the same time."). Even if formal judicial estoppel does not apply, Seattle's pivots cannot prove its point. *Cf. United States v. Taylor*, 596 U.S. 845, 860

[14] Addendum 1 at 18.

(2022) ("The government quickly abandons the legal theory it advanced in the courts of appeals—and neither of the two new options it auditions before us begins to fill the void.").

Seattle's concession that the City Council would not have adopted the FCHO without the speech ban—a position adopted by the district court and this Court when considering the merits, *see supra* at 4–11 (citing briefs and decision)—establishes the provision's volitional non-severability. *See Leonard*, 127 Wash. 2d at 202 (declining to sever provision that was the "heart and soul" of challenged legislation); *City of New Haven v. United States*, 809 F.2d 900, 907 (D.C. Cir. 1987) (denying severability where the unlawful provision was "the '*raison d'etre*' of the entire legislative effort"); *BNSF Ry. Co. v. Ore. Dep't of Rev.*, 965 F.3d 681, 692 n.5 (9th Cir. 2020) (rejecting government's argument that backtracked from an earlier stipulation).

There is "no precedent for holding that a clause of a statute, which as enacted is unconstitutional, may be changed in meaning in order to give it *some operation*, when admittedly it cannot operate as the Legislature intended." *Acosta*, 718 F.3d at 818–19 (emphasis in original) (quoting *Metromedia, Inc. v. City of San Diego*, 32 Cal. 3d 180, 189 n.10 (1982)). Excising the text of the inquiry provision from subsection 2 subverts the City's legislative objective to remove all barriers to asking for, learning about, and considering an applicant's criminal history. *Acosta*, 718 F.3d

at 821; *see also Yim*, 63 F.4th at 810 (anything less than an outright ban on criminal history inquiries would undermine the City's objectives by "open[ing] the door for more undetectable (and unenforceable)" discrimination against people with criminal records) (Gould, J., concurring in part, dissenting in part). In this way, severance would result in an Ordinance that does not "address[] Seattle's substantial interests." *See* Appellee's Answering Br., *Yim v. City of Seattle*, 2022 WL 333224, at *40 (stating that anything less than an outright speech ban "would require the City to substitute Landlords' objectives for the City's").

C. Functional Severability

The inquiry provision (comprising both asking and answering) is also functionally non-severable. An invalid provision is functionally severable only "if it is not necessary to the ordinance's operation and purpose." *Acosta*, 718 F.3d at 820 (applying California test as stated in *Calfarm*, *supra*); *Abrams*, 163 Wash. 2d at 285–86 (asking whether the unconstitutional provision "is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature") (citation omitted); *Alaska Airlines*, 480 U.S. at 685 ("The more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of [the legislature]."). Here, because the litigation concerns only the FCHO's "Prohibited use of criminal history" section, the functional severability test focuses on whether the inquiry provision's speech ban is necessary

to carry out the challenged section's purpose. *Acosta*, 718 F.3d at 820. The answer to that question is yes.

1. Courts reviewing the FCHO on the merits recognized the core centrality of the inquiry provision

The questions posed by the functional severability test were fully litigated in the prior proceedings on the merits and finally decided by this Court's prior opinion. This Court considered the centrality of the inquiry provision while evaluating seven similar criminal history laws that employed less-speech-restrictive means to accomplish similar government objectives. *Yim*, 63 F.4th at 795–98. As part of this evaluation, this Court concluded that the City would be unable to achieve its objective of preventing disparate racial impacts without restricting a landlord's ability to inquire into an applicant's criminal history: "However, if landlords are allowed to access criminal history, just not act on it, it makes the Ordinance extremely difficult to enforce, and makes it more likely that unconscious bias will impact the leasing process." *Yim*, 63 F.4th at 795 n.16.

Indeed, Seattle emphasized this point in its Petition for Rehearing En Banc, where it explained that anything less than a near-total ban on criminal history inquiries would undermine its legislative objectives by "allowing landlords to ask about—and discriminate based on—more criminal history information." Addendum 1 at 8. Accordingly, Seattle insisted that Judge Gould's concurring and dissenting opinion "correctly understood that allowing access to—and facilitating action on—

a wider array of criminal-history information would undermine Seattle's goal" when he determined that "[r]estricting access to records of recent or violent offenses is at the core of, and no less necessary to accomplishing, Seattle's aims than restricting access to older and less violent criminal records." Addendum 1 at 18 (quoting *Yim*, 63 F.4th at 811–12 (Gould, J., concurring in part, dissenting in part)). Seattle also stated that Judge Gould correctly determined that "there is no basis from which we could reasonably conclude that [less restrictive] alternatives would achieve Seattle's aims." *Id*. Yet this is precisely the result if the adverse action provision remains after severing the unconstitutional inquiry provision. *See also Yim*, 63 F.4th at 810 (opining that anything less than an outright ban on criminal history inquiries would undermine the City's objectives by "open[ing] the door for more undetectable (and unenforceable)" disparate racial outcomes) (Gould, J., concurring in part, dissenting in part).

2. Legislative and litigation history confirm the core centrality of the inquiry provision

In determining whether the City intended to make the inquiry provision the central thrust of the Ordinance, this Court properly looks to Seattle's litigation positions on the subject. *See Garcia v. City of Los Angeles*, 11 F.4th 1113, 1122–23 (9th Cir. 2021) (court properly considers "a party's actual method of enforcing a partially invalid law" and relying on city's assertions in briefs and arguments to the court as to whether the unconstitutional provision is "'inextricably connected' to full

enforcement"). Throughout its prior pleadings, Seattle stated that "an adverse-action provision without an inquiry provision *would not be effective at all*." Addendum 1 at 19 (emphasis added); *see also* Appellee's Answering Br., 2022 WL 333224, at *38 ("most of Landlords' proposals [including a proposal to eliminate the inquiry provision] would not achieve the City's objectives"); ER-117 (City Council determined that the Ordinance would be "ineffective" without the inquiry provision's speech bans because "any criminal conviction screening can be a tool for racial discrimination"). Indeed, Seattle emphasized this point in its response and cross-motion for summary judgment, admitting that a "less-restrictive inquiry provision[] … would have been ineffective means of preventing screening inquiries from serving as a tool for discrimination—they would have enabled landlords to ask about, and more readily discriminate on, a wider range of history information." ER-178.

As the City explained in its summary judgment brief, its decision to ban criminal history inquiries was based on studies suggesting that the mere act of asking such a question could result in disparate racial impacts. ER-117 ("Without a business reason, any criminal conviction screening can be a tool for racial discrimination because it disproportionately affects people of color."). Indeed, according to the City's legislative history, simply asking an applicant to disclose any convictions could deter an individual with a criminal past from applying for an apartment,

regardless of whether the landlord uses that information in making a tenancy decision. ER-160.

Even though the City's studies concluded that the risk of discrimination could be *reduced* by requiring that landlords provide a legitimate business reason for denying an application,[15] Seattle was determined to *prevent* any possibility that criminal history inquiries may result in disparate outcomes. ER-113. As Seattle explained to this Court, its unique legislative objective included the "more ambitious goal" of protecting even those individuals with "more recent, serious offenses" from having to disclose past crimes. Addendum 1 at 18; *see also* ER-39 (district court opinion concluding that Seattle made the "policy decision to prohibit landlords from considering *any* crimes, no matter how violent or how recent."). When the government chooses a "novel" approach, the court is "obligate[d] ... to consider what it meant by making that considered choice." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 937 (9th Cir. 2004). Here, the City chose a uniquely broad prohibition to disallow "landlords from requiring prospective tenants to hand over their criminal history to landlords in the first place." ER-108.

[15] Seattle acknowledged that legitimate business reasons could mitigate the potential that a criminal history may be used as a tool for discrimination, but chose to allow a "business reason" exception only for information contained in an adult sex offender registry. SMC § 14.09.025(A)(3).

The City's positions on the merits warrant greater weight in ascertaining the purpose and operation of the FCHO than its tactical backtracking now. *See Bittner v. United States*, 598 U.S. 85, 97 n.5 (2023) ("[W]hen the government (or any litigant) speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one."); *Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 144 S. Ct. 2440, 2469 (2024) (Kavanaugh, J., concurring) (government's "apparent attempt to back away from its extreme stance" reveals "the weakness of its position"); *Chew v. Gates*, 27 F.3d 1432, 1456 (9th Cir. 1994) (Norris, J., concurring in part and dissenting in part) (holding government to concession it made for summary judgment purposes); *Schofield v. Spokane Cnty.*, 96 Wash. App. 581, 589 (1999) (holding County to its concession).

3. Severance frustrates the function and purpose of the Ordinance

An invalid part of a law is functionally severable "if it is not necessary to the measure's operation and purpose." *NetChoice v. Bonta*, 113 F.4th 1101, 1125 (9th Cir. 2024). That is, the "part to be severed must not be part of a partially invalid but unitary whole. The remaining provisions must stand on their own, unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations. They must be capable of separate enforcement." *Id.* (citing *CalFarm* and similar cases). Moreover, a provision is functionally non-severable where it is "doubtful whether the purpose of the original ordinance is

served by a truncated version" and severance would "leave the city with an ordinance different than it intended, one less effective in achieving the city's goals." *Acosta*, 718 F.3d at 819.

The district court's severance order first erred in establishing the predicate of the functional severability analysis, that is the *purpose* of the FCHO. The court below misstated the City's legislative objective as "*regulating* the use of criminal history in rental housing" (ER-10 (emphasis added)), when this Court held that the City's objective was to *prohibit* such use. *Yim*, 63 F.4th at 792 n.16, 810 (specifically distinguishing other ordinances that merely regulated the adverse use of criminal history). As a result, the district court's opinion did not address whether (let alone, how) Seattle can achieve its central, "more ambitious" goal of preventing landlords from asking about an applicant's criminal history if the inquiry provision is severed. ER-10 (noting that severance will render the Ordinance "not as effective as the City desired it to be").

This foundational error was compounded by the court's decision to sever only the "inquire about" portion of the inquiry provision, which effectively amended the "Prohibited use of criminal history" section to authorize precisely what the City Council sought to forbid by removing any restriction on a landlord's ability to inquire about an applicants' criminal history. The City, however, enacted the FCHO's speech ban based on its belief this mere act of inquiry discourages potential

tenants with criminal histories from applying for rental housing, exacerbating the disparate racial impacts of the criminal justice system and the homelessness crisis. ER-101–05, 117, 160; *Yim*, 63 F.4th at 796 (noting that the Ordinance imposed a "complete ban on any *discussion* of criminal history between the landlords and prospective tenants.") (emphasis added); *see also id*. at 800, 802 (Wardlaw, J., concurring) (concluding that "requiring disclosure" is "protected speech") (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011).

The nature of the inquiry provision's unconstitutionality emphasizes this point, because courts must "reconcile full protection for First Amendment liberties with the discernable intent of the enacting body." *Acosta*, 718 F.3d at 821. *See also In re Berry*, 68 Cal. 2d 137, 156 (1968) (holding severability "inapplicable" when "a provision encompasses both valid and invalid restrictions on free speech and its language is such that a court cannot reasonably undertake to eliminate its invalid operation by severance or construction."). That is because "gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case ... does not respond sufficiently to the peculiarly vulnerable character of activities protected by the first amendment." *Acosta*, 718 F.3d at 821 (citation omitted). The inquiry and corresponding disclosure provisions are at the heart of Seattle's Ordinance. The City *rejected* an ordinance that targeted only adverse action, plainly establishing that the FCHO's broad sweep was essential to its

function. If the City wishes to regulate adverse action based on criminal history in the future, as other states do, it retains the option. But it must start from scratch because the existing Ordinance deliberately intertwined the unconstitutional speech aspect with the permissible regulation such that they cannot be untangled. The Ordinance fails the functional severability test.

III. Invalidation of Subsection 2 of the FCHO's "Prohibited Use of Criminal History" Section Is the Appropriate Remedy

Because the inquiry provision is neither functionally nor volitionally severable from the FCHO's adverse action provision, this Court is presented with two options: (1) invalidate the whole Ordinance, or (2) invalidate subsection 2 of the "Prohibited use of criminal history" section. Invalidating the entire Ordinance is the default remedy contemplated by Washington's severability caselaw. *See, e.g.*, *Davis v. Cox*, 183 Wash. 2d 269, 295 (2015) (invalidating entire statute where a single subsection is non-severable), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 191 Wash. 2d 392 (2018); *Leonard*, 127 Wash. 2d at 202 (invalidating entire statute where the invalid section is the "heart and soul of the Act"); *Lynden Transport, Inc.*, 112 Wash. 2d at 124 (striking an entire statute where an invalid provision is "intimately and inseparably connected" with an essential component of the law); *see also City of Seattle v. Yes for Seattle*, 122 Wash. App. 382, 395 (2004) (affirming trial court order striking entire initiative from ballot

where invalid provisions were found to be non-severable from the remainder of the proposed law).

Indeed, the Yims are unaware of any Washington cases that apply the doctrine of severability more narrowly to invalidate only the section containing the invalid provision, like this Court did when applying California's severability test in *Acosta*, 718 F.3d at 821. That said, Plaintiffs believe that the tailored approach of *Acosta* is more appropriate here, given the limited scope of the Yims' constitutional challenge, the nature of the evidence and argument presented by the parties, and the narrowness of this Court's prior ruling. Under this approach, the Court will hold that the disclosure and inquiry phrases comprising the full inquiry provision cannot be severed from the remainder of subsection 2, invalidating the entire subsection.

Contrary to the City's arguments raised below, an order declaring subsection 2 unconstitutional in its entirety will not affect the City's ability to encourage housing for applicants with criminal histories, or to punish discrimination pursuant to existing civil rights laws. *See* ER-83–85 (discussing various opportunities to expand housing opportunities and police against discrimination); *see* Appellee's Answering Br., 2022 WL 333224, at *38–40 (admitting that several of the alternatives proposed by Plaintiffs could be effective to some degree). Seattle has at its disposal an array of less-speech-restrictive legislative options for regulating the use of criminal histories. *Yim*, 63 F.4th at 796–98. An array of federal, state, and city

antidiscrimination laws also prevent landlords from using an applicant's criminal history as a proxy for discrimination. *See, e.g.*, ER-117 (listing several antidiscrimination ordinances). While the City's decision to outright prohibit asking for, considering, or acting on an applicant's criminal history may have made it easier to achieve its goals, the prohibitions are not the only way to do so and, therefore, are not strictly necessary. *See* Appellee's Answering Br., 2022 WL 333224, at *38. Thus, a conclusion that the inquiry provision is not severable will not unduly impair the City's objectives.

CONCLUSION

The Yims respectfully request the Court to reverse the district court's order below and rule that the inquiry provision cannot be severed from the remainder of subsection 2 of the FCHO's "Prohibited use of criminal history" section, and to enjoin any further enforcement of subsection 2 of the Ordinance.

DATE: December 20, 2024.

Respectfully submitted,

PACIFIC LEGAL FOUNDATION
Brian T. Hodges
Deborah J. La Fetra

s/ Brian T. Hodges
Brian T. Hodges
Attorneys for Plaintiffs – Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2024, 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 the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Brian T. Hodges
Brian T. Hodges
Attorney for Plaintiffs – Appellants

CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number: 24-6214

I am the attorney or self-represented party.

This brief contains 9,507 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

DATE: December 20, 2024. s/ Brian T. Hodges

Brian T. Hodges

Attorney for Plaintiffs – Appellants

ADDENDUM

1. Seattle Petition for Rehearing En Banc, Case No. 21-35567, April 18, 2023, excerpt
2. Seattle Office of Civil Rights, Criminal History Protections, excerpt
3. Seattle Office of Civil rights, Fair Chance Housing FAQ, June 6, 2023

No. 21-35567

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

CITY OF SEATTLE,

Defendant-Appellee.

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

DEFENDANT-APPELLEE CITY OF SEATTLE'S PETITION FOR REHEARING EN BANC

Jessica L. Goldman, WSBA #21856
SUMMIT LAW GROUP PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
Tel: (206) 676-7000
jessicag@summitlaw.com
Attorney for the City of Seattle

Roger D. Wynne, WSBA #23399
Sara O'Connor-Kriss, WSBA #41569
SEATTLE CITY ATTORNEY'S OFFICE
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Tel: (206) 684-8200
roger.wynne@seattle.gov
sara.oconnor-kriss@seattle.gov
Attorneys for the City of Seattle

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I. RULE 35(b)(1) STATEMENT

Like other jurisdictions inside and outside the Ninth Circuit, the City of Seattle adopted a Fair Chance Housing Ordinance designed to reduce barriers to housing for people with a criminal history. The Ordinance prohibits a landlord from taking an adverse action, such as denying a person tenancy, based on their criminal history. In service of the adverse-action provision, the Ordinance also prohibits a landlord from inquiring about a prospective tenant's criminal history.

Through a fractured, four-opinion ruling, a divided panel held that the inquiry provision violates the First Amendment. Purporting to apply intermediate scrutiny, the majority concluded that the provision is not sufficiently narrowly tailored because seven other less-restrictive laws "would appear to" meet Seattle's goals. Slip op. 27–28.

The full Court should rehear this appeal for two reasons.

First, neglecting this Court's precedent, *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 960 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2870 (2022), the panel failed to address the necessary threshold question: whether the inquiry provision implicates the First Amendment. Furthermore, the panel's assumption that the provision implicates the First Amendment conflicts with Supreme Court and Ninth Circuit precedent establishing that regulations touching on speech that is incidental to legitimately regulated conduct—here, the adverse-

action provision—do not implicate the First Amendment. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60–64 (2006); *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 706–07 (1986); *Int'l Franchise Ass'n, Inc. v. City of Seattle* ("*IFA*"), 803 F.3d 389, 408 (9th Cir. 2015). Correcting the panel's error is important within and beyond the Ninth Circuit, given the range of bans on discriminatory activity bolstered, or even effectuated, by bans on inquiring about the factual bases for such discrimination.

Second, even if the inquiry provision implicates the First Amendment, the majority's approach to intermediate scrutiny conflicts with Supreme Court and Ninth Circuit precedent holding that such scrutiny requires only a reasonable fit between the government's means and ends—not that the government follow the least-restrictive path. *Greater New Orleans Broad. Ass'n, Inc. v U.S.*, 527 U.S. 173, 188 (1999); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Retail Dig. Network, LLC v. Prieto*, 861 F.3d 839, 849 (9th Cir. 2017) (en banc); *Hunt v. City of Los Angeles*, 638 F.3d 703, 717 (9th Cir. 2011). The majority's approach also conflicts with the Third Circuit's application of intermediate scrutiny to an ordinance with an inquiry provision like Seattle's. *Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 154–57 (3d Cir. 2020). The majority's approach imperils not just

antidiscrimination laws that bolster an adverse-action provision with an inquiry provision, but all commercial speech regulations in the Ninth Circuit.

II. BACKGROUND

Seattle enacted the Ordinance to reduce barriers to housing for people with a criminal history. 2-SER-561–92. Among other provisions, the Ordinance bans most "adverse action" against "a prospective occupant, a tenant, or a member of their household, based on any arrest record, conviction record, or criminal history." 2-SER-575.[1] An "adverse action" includes refusing to offer tenancy. 2-SER-569–70. Bolstering the adverse-action provision is a ban on inquiring about those same persons' criminal history. 2-SER-575.

Plaintiffs-Appellants ("Landlords") are Seattle landlords and an organization representing them and providing criminal background checks. ER-154–56. They sued in state court, challenging the adverse-action provision as a facial violation of substantive due process and the inquiry provision as a facial violation of the First Amendment. ER-158–62. The City removed to federal court. ER-141. The parties agreed to resolve this action on cross motions for summary judgment based largely on stipulated facts. ER-005, 082–092.

The district court ruled in the City's favor. ER-004. Landlords appealed.

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[1] This brief's references to "criminal history" include arrest and conviction records. The Ordinance includes exceptions related to sex-offender registry status and actions compelled by federal law. 2-SER-575, 589–90.

A panel of this Court unanimously upheld the adverse-action provision. Slip op. 28–30 (majority); *id.* at 38 (Bennett, J., concurring in part); *id*. at 51 (Gould, J., same).

But the panel fractured into four opinions, with two judges voting to invalidate the inquiry provision on First Amendment grounds. Judge Wardlaw authored the majority opinion. *Id*. at 6–31. Purporting to apply intermediate scrutiny, the majority struck down the inquiry provision because the panel found seven other jurisdictions adopting different approaches to protecting tenants with criminal histories from discrimination "that would appear to meet Seattle's housing goals" while allowing landlords to ask about—and discriminate based on—more criminal history information. *Id*. at 25–28. Unlike Seattle's Ordinance, those alternatives allow landlords to deny tenancy based on a wider array of offenses, including more violent or recent acts. *Id*. at 25–27.

Judge Wardlaw added a separate concurrence to state her view that the inquiry provision is a commercial speech regulation subject to intermediate scrutiny. *Id*. at 31–38.

Judge Bennett concurred in part. *Id*. at 38–50. He believed that the inquiry provision is a noncommercial speech regulation subject to strict scrutiny—a standard he concluded the provision necessarily fails under the majority's intermediate-scrutiny analysis. *Id*.

Judge Gould concurred in part and dissented in part. *Id*. at 51–59. He agreed with Judge Wardlaw that the inquiry provision regulates commercial speech subject to intermediate scrutiny. *Id*. at 51. But he disagreed with the majority's mode of analysis. *Id*. at 51–56. He would have applied intermediate scrutiny consistent with Supreme Court and Ninth Circuit precedent and a recent Third Circuit decision to uphold Seattle's inquiry provision. *Id*. at 56–59. He criticized the majority for assuming—with no factual basis—that the alternatives they cited meet the City's goals: "If anything, it is more reasonable to assume that the alternatives would be *less* effective." *Id*. at 53.

III. ARGUMENT

A. The panel mistakenly assumed that the inquiry provision implicates the First Amendment.

In the district court and before the panel, the City argued as a threshold matter that the inquiry provision does not implicate the First Amendment. City's Answering Brf., Dkt. # 25 at 24–27; 2-SER-594 (district court brief). Yet no member of the panel addressed this question. That failure contravenes Ninth Circuit precedent that, before undertaking First Amendment review, courts "must assess whether the law regulates speech in the first place." *Am. Soc'y of Journalists*, 15 F.4th at 960. *Accord Monarch Content Mgmt. LLC v. Ariz. Dep't of Gaming*, 971 F.3d 1021, 1029 (9th Cir. 2020) ("Our inquiry begins, and ultimately ends, with whether [the statute] regulates speech.").

Worse yet, the panel proceeded on the mistaken assumption that the inquiry provision implicates the First Amendment, apparently because the provision precludes landlords from asking a question. That assumption conflicts with Supreme Court and Ninth Circuit precedent. A conduct regulation is not subject to First Amendment scrutiny "merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . ." *Rumsfeld*, 547 U.S. at 62 (quoting other authority). *But see Greater Philadelphia Chamber*, 949 F.3d at 134–36 (acknowledging *Rumsfeld*, yet finding the First Amendment implicated by a law regulating conduct executed by speech). The First Amendment applies only if the desire to stifle speech motivated the regulation of conduct with a significant expressive element or the regulation has the inevitable effect of singling out those engaged in expressive activity. *Arcara,* 478 U.S. at 706–07; *IFA*, 803 F.3d at 408; *see also Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("States may regulate professional conduct, even though that conduct incidentally involves speech."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech"); *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928, 935 (9th Cir. 2022) (same), *pet'n for cert. filed* (Mar. 10, 2023) (No. 22-865).

The principle is illustrated by *Rumsfeld*, where the Supreme Court held that a federal requirement that law schools offer military recruiters the same access they provide to other recruiters did not implicate the First Amendment. *Rumsfeld*, 547 U.S. at 52–55, 58–65. That law forced the schools to speak: "[I]n assisting military recruiters, law schools provide some services, such as sending e-mails and distributing flyers, that clearly involve speech." *Id.* at 60. But that compelled speech—even insofar as it supported military policy with which the law schools disagreed—created no First Amendment issue because the burden was incidental to the ban on discriminating against military recruiters and the speech lacked an expressive element:

> The compelled speech to which the law schools point is plainly incidental to the [law's] regulation of conduct, and it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading "White Applicants Only" hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.
>
> . . .
>
> A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

Id. at 62, 64 (quotation marks & citations omitted). To entertain a claim against such a speech burden would "trivialize[] the freedoms protected" by the First Amendment. *Id.* at 64; *see also HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685, 686 (2019) (First Amendment interests are absent when a commercial speech restriction is incidental to a valid regulation of economic activity).

This Court likewise holds that the First Amendment does not apply to incidental burdens on speech lacking a significant expressive element and targeting no expressive activity. *E.g.*, *HomeAway.com*, 918 F.3d at 686 (the inevitable effect of regulating platforms offering temporary housing rentals "is to regulate nonexpressive conduct—namely, booking transactions—not speech"); *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018) ("A law regulating wages does not target conduct that communicates a message nor does such conduct contain an expressive element."); *IFA*, 803 F.3d at 408 (the challenged law "is not wholly unrelated to a communicative component, but that in itself does not trigger First Amendment scrutiny").

The same is true here. The Ordinance's primary thrust is a prohibition against conduct: landlords taking adverse actions against prospective tenants based on their criminal history. Even though the inquiry provision also affects the use of language—a landlord may not say to a prospective tenant, "provide me your

criminal history"—it is incidental to the adverse-action provision. The inquiry provision merely prevents the acquisition of information that the landlord is prohibited from using to violate the adverse-action provision. And the inquiry provision limits speech with no significant expressive element—a landlord contributes nothing to the marketplace of ideas by asking in a private interaction about criminal history that the landlord may not use to make a tenancy decision anyway.

Correcting the panel's error is important within and beyond the Ninth Circuit. Most immediately, states and local jurisdictions have adopted bans on housing discrimination based on criminal history. *See* slip. op. 12 n.10, 27–28 nn.18–24 (listing ten examples). But the issue extends to any ban on discriminatory activity effectuated in part by a ban on inquiring about the basis for such discrimination or otherwise speaking certain kinds of words. Take these examples:

- Because Title VII of the Civil Rights Act bans an employer from discriminating based on religion, 42 U.S.C. § 2000e–2(a), the Equal Employment Opportunity Commission ("EEOC") advises that "[q]uestions about an applicant's religious affiliation or beliefs . . . are generally viewed as non job-related and problematic under federal law." EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs*, https://www.eeoc.gov/pre-employment-inquiries-and-

religious-affiliation-or-beliefs (last visited April 16, 2023). Under the panel's approach, such evidence of a Title VII violation raises First Amendment problems.

- ❑ Title VII also bans employment discrimination based on sex, 42 U.S.C. § 2000e–2(a), which necessarily limits what an employer may say. But "since words can in some circumstances violate laws directed not against speech but against conduct," the Supreme Court recognized that Title VII regulates merely a "class of speech [that] can be swept up incidentally within the reach of a statute directed at conduct rather than speech." *R.A.V. v. St. Paul,* 505 U.S. 377, 389 (1992). *Accord Hishon v. King & Spalding,* 467 U.S. 69, 78 (1984) (rejecting a claim that Title VII infringes free expression rights). The panel's approach conflicts with that authority.
- ❑ Some states ban universities from basing admission decisions on race. *See, e.g.,* CAL. CONST. art. 1, § 31; WASH. REV. CODE § 49.60.400. Such a ban could be extended to private schools. Must legislators assume, as the panel did, that bolstering that ban by prohibiting schools from inquiring about race during the admissions process results in First Amendment scrutiny?

These are just some of the thorny problems the panel's decision raises. But they all can—and should—be easily avoided. On rehearing en banc, this Court should hold that the Ordinance's inquiry provision does not implicate the First Amendment.

B. The majority's approach to intermediate scrutiny warrants further review.

Even if the inquiry provision implicated the First Amendment, this Court should still rehear this appeal to follow binding Supreme Court precedent and return consistency to this Circuit's application of intermediate scrutiny to commercial speech regulations. The majority's mode of analysis not only is, as Judge Gould lamented, "out of line with commercial speech precedent," slip op. 51, but it also imperils virtually any regulation of commercial speech in this Circuit.

1. The majority's approach conflicts with Supreme Court, Ninth Circuit, and Third Circuit precedent.

The majority's approach to intermediate scrutiny conflicts with Supreme Court and Ninth Circuit case law requiring only a reasonable and proportionate—not perfect—fit between governmental means and ends under intermediate scrutiny. It also conflicts with a recent Third Circuit decision upholding a similar ordinance.

A regulation of commercial speech is subject to intermediate scrutiny under the four-prong test announced in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Critical to this appeal is *Central Hudson*'s fourth prong, which asks whether the regulation is no more extensive than necessary to serve the government's asserted interest. *Id.*[2]

That prong requires only a reasonable fit between the government's interests and the means it uses to serve them—"a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480 (cleaned up). The government "need not use the least restrictive means conceivable . . . ." *Greater New Orleans*, 527 U.S. at 188. *Accord Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 742 (9th Cir. 2011) (*Central Hudson* "does not demand that the government use the least restrictive means to further its ends"). A speech restriction does not fail intermediate scrutiny "simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). "'[A]lmost all of the restrictions disallowed under *Central Hudson*'s fourth prong

[2] The majority agreed that the inquiry provision satisfied each of the other *Central Hudson* prongs. Slip op. 20-23 (majority opinion); *id.* at 51 (Gould, J., concurring in part).

have been substantially excessive, disregarding far less restrictive and more precise means.'" *Hunt*, 638 F.3d at 717 (quoting *Fox*, 492 U.S. at 479).

Acknowledging in passing that intermediate scrutiny requires only a reasonable fit between means and ends, slip op. 24, the majority struck down the inquiry provision because seven other jurisdictions adopted different approaches to protecting tenants with criminal histories from discrimination "that *would appear to* meet Seattle's housing goals" while burdening less speech. *Id.* at 27–28 (emphasis added). This reasoning makes two critical errors: (a) it substitutes other jurisdictions' goals for Seattle's specific goals; and (b) it assumes without factual basis that other jurisdictions' laws are equally effective. It is effectively strict scrutiny in the guise of intermediate scrutiny.

a. The majority substituted other jurisdictions' ends for Seattle's.

The majority never addressed how well Seattle tailored its means—the inquiry provision—to *its* chosen end of preventing landlords from taking adverse action on a wider array of criminal offenses than other jurisdictions prevent. That fit is precise: Seattle's inquiry provision limits only speech that a landlord could use to violate Seattle's adverse-action provision.

Instead, the majority declared Seattle's means a bad fit with the less ambitious ends that some other jurisdictions pursue. *Id.* at 28. Unlike Seattle, those jurisdictions allow landlords to deny tenancy based on more violent or recent

criminal history. *Id*. at 25–27. The majority favored those alternatives because they "would permit the landlords to ask a potential tenant about their most recent, serious offenses, which is the information a landlord would be most interested in." *Id.* at 27. But the only reason landlords in those jurisdictions are interested in that information is to use it to deny tenancy to a subset of persons that Seattle—pursuing a more ambitious goal that the panel unanimously upheld against a substantive due process challenge—has chosen to protect from discrimination.

Judge Gould correctly understood that allowing access to—and facilitating action on—a wider array of criminal-history information would undermine Seattle's goal:

> Restricting access to records of recent or violent offenses is at the core of, and no less necessary to accomplishing, Seattle's aims than restricting access to older and less violent criminal records. How is restricting access to information at the heart of the discrimination that Seattle aims to eliminate "substantially excessive" in relation to Seattle's goals? *Hunt*, 638 F.3d at 717. How would excluding such records from the scope [of] the inquiry provision make Seattle's law "more precise"? *Id.*
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> . . .
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> [T]here is no basis from which we could reasonably conclude that the majority's alternatives would achieve Seattle's aims. The alternatives simply do less.

Id. at 55, 57.

b. The majority assumed falsely that other jurisdictions' means are effective.

Even if the majority could generalize Seattle's goal to one of preventing only *some* discrimination based on criminal history, its analysis still contravenes precedent. The majority conceded that an adverse-action provision without an inquiry provision would not be effective at all:

> [I]f landlords are allowed to access criminal history, just not act on it, it makes the Ordinance extremely difficult to enforce, and makes it more likely that unconscious bias will impact the leasing process. *See* Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. Chi. L. For. 209, 218 (2020) ("Legislatures' interest in stopping discrimination before the fact is especially strong because after-the-fact enforcement is frequently slow, costly, and ineffective.").

Id. at 23 n.16.[3] And the majority lacked any factual support for its conclusion that the inquiry provisions in the seven alternative jurisdictions could attain even the general goal of preventing some discrimination based on criminal history. This failure constitutes a fundamental flaw in the majority's analysis.

The existence of "obvious less-burdensome alternatives" can be relevant to assessing the reasonableness of the fit between ends and means. *Ballen v. City of Redmond*, 466 F.3d 736, 742 (9th Cir. 2006) (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 US. 410, 416 n.13 (1993)). But nothing about the efficacy of the seven alternatives here is obvious, as Judge Gould explained:

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[3] Judge Gould supported this footnote. Slip op. 53.

> [T]here is nothing in the record (or otherwise) from which we could reasonably reach that conclusion. The fact that five cities, one county, and the State of New Jersey enacted these alternative measures in an attempt to address some of the same issues as Seattle does not mean that they *will* "accomplish the same goals[.]" In fact, the majority identifies no data or evidence that these alternatives have been or will be, effective at *all*, let alone as effective as Seattle's inquiry provision. The opinion's reasoning rests entirely on one federal panel's take as to what works in housing policy based on summaries of statutes alone.

Id. at 52–53 (citation to majority opinion omitted).

The majority merely offered what this Court has rejected under intermediate scrutiny: a "blithe" suggestion of alternatives "[w]ithout any support as to correlation with [legislative] goals." *Minority TV. Project, Inc. v. F.C.C.*, 736 F.3d 1192, 1208 (9th Cir. 2013).

c. The majority effectively engaged in strict scrutiny.

A least-restrictive-means approach is reserved for strict scrutiny, under which a speech regulation is valid only if there is no other less-speech-restrictive alternative available to further a compelling government interest. *Porter v. Martinez*, ___ F.4th ___, 2023 WL 2820332, *5 (9th Cir. 2023). *See Fox*, 492 U.S. at 477 ("The ample scope of regulatory authority [over commercial speech] would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State."); *Retail Dig. Network*, 861 F.3d at 849 (same).

But that is the approach the majority applied. By substituting other jurisdictions' ends for Seattle's and failing to consider the efficacy of other jurisdictions' means, the majority effectively engaged in strict scrutiny in the guise of intermediate scrutiny. Under intermediate scrutiny, if the regulation is reasonable and in proportion to the government's asserted interest, courts must "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Fox*, 492 U.S. at 480. The majority did not do that. As Judge Gould asked of the majority's approach: "How is this anything other than a federal court 'second-guess[ing]' the considered judgment of a democratically elected local government?" Slip op. at 53 (quoting *Fox*, 492 U.S. at 478).

The majority's approach also conflicts with the Third Circuit's decision applying intermediate scrutiny to an ordinance that, like Seattle's, bolstered a ban on using previous wage history in hiring decisions by banning employers from inquiring about that history. *Greater Philadelphia Chamber*, 949 F.3d at 137. That court recognized that the Supreme Court "does not 'impose upon regulators the burden of demonstrating that the manner of restriction is absolutely the least severe that will achieve the desired end'"; the fit need only be proportionate. *Id.* at 154 (quoting *Fox*, 492 U.S. at 480) (cleaned up). Intermediate scrutiny "does not require . . . that the City demonstrate that the legislation is the least restrictive response." *Id.* at 156–57. The Third Circuit did not, like the majority here, scour

the nation for examples of other less-expansive approaches to the same problem and, with no consideration of efficacy, declare them good enough.

2. The majority's approach imperils all commercial speech regulations in the Ninth Circuit.

Having the full Court apply binding Supreme Court precedent and return uniformity to this Circuit's application of intermediate scrutiny is important for jurisdictions that already have—or are considering—laws limiting inquiries into someone's attributes to bolster laws banning discrimination on those attributes. No such regulation is safe under the majority's approach. They refused to say even that the seven alternatives they preferred would survive the majority's brand of intermediate scrutiny. Slip op. 25 ("we do not address the constitutionality of any of these ordinances"). This portends a truly *least*-restrictive means approach, under which any limit on commercial speech fails if a judge can find *one* other law with fewer speech limitations that "would appear to be" good enough to that judge.

The majority opinion promises further ripple effects. Its mode of analysis applies to any regulation that limits commercial speech. Local governments wrestling with complex issues will be unable to regulate—at least with confidence or much success—in any area that touches on commercial speech because a judge might deem a less comprehensive or ineffective alternative good enough. The full Court should rehear this case to reject that mode of analysis under binding Supreme Court law and return uniformity to this Circuit's precedent.

IV. CONCLUSION

The panel failed to consider whether the inquiry provision—which exists only to bolster the adverse-action provision and limits speech with no expressive element—implicates the First Amendment. Under controlling Supreme Court and Ninth Circuit precedent, it does not.

The panel's approach to intermediate scrutiny conflicts with Supreme Court, Ninth Circuit, and Third Circuit precedent. It imperils not just antidiscrimination laws that use an inquiry provision to effectuate an adverse-action provision, but all commercial speech regulation in the Ninth Circuit.

The City respectfully asks the full Court to rehear this appeal to follow binding Supreme Court precedent and return uniformity to this Court's treatment of important free speech law.

Respectfully submitted April 18, 2023.

SUMMIT LAW GROUP PLLC

By: *s/ Jessica L. Goldman*
Jessica L. Goldman, WSBA #21856
SUMMIT LAW GROUP PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
Tel: (206) 676-7000
jessicag@summitlaw.com
Attorney for the City of Seattle

ANN DAVISON
Seattle City Attorney

By: *s/ Roger D. Wynne*
Roger D. Wynne, WSBA #23399
By: *s/ Sara O'Connor-Kriss*
Sara O'Connor-Kriss, WSBA #41569
SEATTLE CITY ATTORNEY'S OFFICE
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Tel: (206) 684-8200
roger.wynne@seattle.gov
sara.oconnor-kriss@seattle.gov
Attorneys for the City of Seattle

The Seattle Office for Civil Rights is open Monday through Thursday from 10:00am - 3:00pm.
We are closed between 12:00 - 12:30pm for lunch.

Seattle Office for Civil Rights (civil-rights)

Criminal History Protections

JUNE 2023 UPDATE: Fair Chance Housing Ordinance

As of June 6, 2023, due to a recent ruling (https://cdn.ca9.uscourts.gov/datastore/opinions/2023/03/21/21-35567.pdf) from the U.S. Court of Appeals for the Ninth Circuit, the Seattle Office for Civil Rights (SOCR) will no longer enforce the portion of the Fair Chance Housing Ordinance (https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.09USSCREHO_14.09.005SHTI) (FCHO) that bans a landlord from inquiring about a tenant's or applicant's criminal history. SOCR will continue to enforce all other portions of the FCHO, including bans (subject to exceptions) on requiring a tenant or applicant to disclose their criminal history or taking an adverse action based on that history.

If you are a landlord, property manager, housing provider, or community organization, please contact us at discriminationquestions@seattle.gov (mailto:discriminationquestions@seattle.gov) or call (206) 684-4500 (tel: +1 (206) 684-4500) to answer your questions.

If you are a person with criminal history, please contact us at discrimination@seattle.gov (mailto:discrimination@seattle.gov) or call (206) 684-4500 (tel: +1 (206) 684-4500) to answer your questions.

In August 2017, the City of Seattle passed Fair Chance Housing legislation to help prevent unfair bias in housing against renters with a past criminal record.

The new ordinance prevents landlords from unfairly denying applicants housing based on criminal history. It also prohibits the use of advertising language that automatically or categorically excludes people with arrest records, conviction records, or criminal history.

The legislation caps a decade-long effort to address bias against people who have served their time, are seeking to provide for themselves and their families, and yet have faced barriers to accessing safe, stable housing.

The ordinance went into effect on Feb. 19, 2018, and is enforced by the Seattle Office for Civil Rights. Our office will also offer training opportunities for landlords, tenants, and others to learn about the requirements under the new law.

Useful Links and Resources

Frequently Asked Questions (FAQ) (documents/Departments/CivilRights/Enforcement/Fair%20Housing%20Posters/FairChanceHousing/Fair-Chance-Housing-FAQ-June-6-2023.pdf) (Updated June 6, 2023)

Training Opportunities for Tenants, Landlords and Service Providers (//www.seattle.gov/civilrights/about/news-and-events/event-calendar)

Final Administrative Rules (documents/Departments/CivilRights/Enforcement/Fair%20Housing%20Posters/FairChanceHousing/Fair%20Chance%20Housing%20-%20final.pdf)

Fair Chance Housing Ordinance (http://seattle.legistar.com/LegislationDetail.aspx?ID=3089232&GUID=49272C76-0464-4C6E-A1FF-140591D00410)

Press Release - Council Committee Approves Fair Chance Housing Legislation (http://council.seattle.gov/2017/08/08/council-committee-approves-fair-chance-housing-legislation/) (August 8, 2017)

GARE Blog - Seattle: A Fair Chance Housing Ordinance Centering Racial Equity (https://www.racialequityalliance.org/2018/04/17/6894/) (April 17, 2018)

Seattle
Office for Civil Rights

Fair Chance Housing Ordinance, SMC 14.09
Frequently Asked Questions

The Fair Chance Housing Ordinance prohibits discrimination in housing against renters with arrest records, conviction records, or criminal history. The legislation caps a decade-long effort to address discrimination against people who have served their time, are seeking to provide for themselves and their families, and yet have faced barriers to accessing safe, stable housing.

The Seattle Office for Civil Rights (SOCR) is responsible for administering and enforcing this ordinance. SOCR conducts free, fair, and impartial investigations when someone believes there has been a violation of the law. SOCR does not provide legal advice or representation to parties involved in a claim. Compliance with the law is reached by SOCR playing a neutral role in process.

SOCR also provides free technical assistance to rental housing providers, community organizations, members of the public, and anyone else that is impacted by this law. This Frequently Asked Questions (FAQ) document addresses some of the most common questions about Seattle's Fair Chance Housing protections (Seattle Municipal Code 14.09).

If you are a **prospective renter, applicant, or tenant** and have a question that is not covered by this FAQ, please contact SOCR at 206-684-4500 or email us at discrimination@seattle.gov. You may also contact us in these ways if you believe the law has been violated.

If you are an **owner, housing provider, property manager, or community advocate** and have a question that is not covered by this FAQ, please contact SOCR at 206-684-4500 or email us at discriminationquestions@seattle.gov.

Reasonable accommodations for disabilities and language interpretation are always available.

IMPORTANT NOTE: This FAQ should not be used as substitute for codes and regulations. The reader is responsible for compliance with all code and rule requirements.

TABLE OF CONTENTS

A. OVERVIEW

This section provides an overview of the ordinance, the effective date, and exclusions.

1. **Why is the Fair Chance Housing Ordinance needed?**

    - **Increase racial equity in housing.** Fair Chance Housing aims to address the racially disproportionate impact that exclusionary tenant screening practices have on our communities.

    - **Fair access to housing helps keep families together.** Nearly half of all children in the U.S. have one parent with a criminal record. Fair Chance Housing ensures that parents who have served their time can remain in their home, which provides for much needed stability.

    - **Fair access to housing is the bedrock of a strong and inclusive community.** This legislation addresses gaps in housing access and ensures that people who have served their time and found employment can also find a safe and stable place to call home.

2. **What does the Fair Chance Housing Ordinance do?**
   The Fair Chance Housing Ordinance, Seattle Municipal Code (SMC) 14.09, prohibits any person from committing unfair practices against renters in the City of Seattle based on their arrest records, conviction records, or criminal history.

3. **When does the Fair Chance Housing Ordinance go into effect?**
   The Seattle Office for Civil Rights (SOCR) will begin enforcement on **February 19, 2018.** Prospective occupants or tenants have a year from the date of the incident to file a claim with SOCR.

4. **Does the Fair Chance Housing Ordinance apply in all instances?**
   No. The ordinance does not apply to:

    - Single-family dwellings where the owner occupies part of the single-family dwelling.

    - Accessory dwelling unit (ADU) or detached accessory dwelling unit (DADU) when the owner or person entitled to possession maintains a permanent residence in a single-family dwelling. An example of an ADU is a basement apartment or “mother-in-law” unit. These are separate living units with kitchen, sleeping, and bathroom facilities. They are smaller in size and appearance than the primary home and may have separate entrances. An example of a DADU is a backyard cottage.

   Federally assisted housing must comply with the ordinance; however, there is an exclusion for adverse actions that are required by federal regulations. Read more about Federally Assisted Housing in section B.

5. **When and how can a landlord use a criminal background check?**

   The law does not prohibit a landlord or anyone else from running a criminal background check on an applicant. Unless there is an exclusion, the landlord is prohibited from taking an adverse action against an applicant based on that history, except as permitted for registry information.

   Landlords may review registry information for an individual listed on a sex offender registry. The practice must be written on the application and meet the requirements of Fair Chance Housing. Read more about Notice to Prospective Occupants and Tenants in section C.

   Before a landlord or any person rejects an applicant or takes an adverse action against a prospective occupant or tenant based on registry information, there must be a legitimate business reason for doing so. Read more about Registry Information and Legitimate Business Reason in section E.

6. **Can I sue someone in court under this Ordinance?**
   No. This ordinance does not provide for the individual right to file in court.

B. FEDERALLY ASSISTED HOUSING

Federally assisted housing must comply with the ordinance; however, there is an exclusion for adverse actions when denial of tenancy is required by federal regulations. The following section explores what qualifies as federally assisted housing subject to federal regulations that require denial of tenancy and some requirements.

7. **How do I know if my organization qualifies as "federally assisted housing subject to federal regulations that require denial of tenancy" that qualifies as an exclusion under SMC 14.09?**
   The ordinance does not preclude adverse actions taken by landlords of federally assisted housing subject to federal regulations that require denial of tenancy. For example, the Seattle Housing Authority when acting in accordance with federal law or regulations must follow federal screening requirements when specifically related to, but not limited to: 1) lifetime sex offender registration; and 2) manufacture or production of methamphetamine on the premises of the federally assisted housing. All other portions of SMC 14.09 such as the notice requirements and anti-retaliation provisions apply to public housing authorities unless specifically exempt under federal regulations.

8. **My organization qualifies as federally assisted housing that is required to deny admission based on a lifetime sex offender registration. Can we notify prospective occupants and tenants that they may be denied if they are found to have a lifetime sex offender registration and/or a conviction for manufacture or production of methamphetamine on the premises of the federally assisted housing?**
   Yes. Your organization is subject to the other requirements of the Fair Chance Housing Ordinance.

C. NOTICE TO PROSPECTIVE OCCUPANTS AND TENANTS

The ordinance requires landlords to provide notice of SMC 14.09 to prospective occupants and tenants. The following questions and answers explore those requirements.

9. **How does a landlord provide the required notice?**
   A landlord must have the requirements of SMC 14.09 written on all applications for rental properties. If an application is online, the required notice must be written on the online application.

10. **What needs to be included in the written notice?**
    The ordinance requires the language quoted below. The information following the quoted language provides more detail about the requirements.

> "The landlord is prohibited from requiring disclosure, rejecting an applicant, or taking an adverse action based on any arrest record, conviction record, or criminal history, except for registry information as described in subsections 14.09.025.A.3, 14.09.025.A.4, and 14.09.025.A.5, and subject to the exclusions and legal requirements in Section 14.09.115."

The **registry information** in the quoted language is defined as information solely obtained from a county, statewide, or national sex offender registry that can include information such as the person's physical description, address, and conviction description and dates.

If a landlord screens a prospective occupant for registry information, the written notice shall also include this screening criteria and must inform applicants that they may provide any supplemental information related to their rehabilitation, good conduct, and facts or explanations about their registry information.

SMC 14.09.025.A.3 requires a legitimate business reason analysis before a landlord, or any person takes an adverse action based on registry information of an **adult** prospective occupant, tenant, or household member.

SMC 14.09.025.A.4 prohibits taking an adverse action based on registry information of a **juvenile** prospective occupant, tenant or household member.

SMC 14.09.025.A.5 prohibits adverse actions based on registry information against adults if the conviction occurred when the individual was a juvenile.

Under SMC 14.09.115, the exclusions include, but are not limited to, accessory dwelling units and detached accessory dwelling units as described in question #4, and adverse actions when denial of tenancy is required by federal regulations in federally assisted housing in section B.

11. **Can Fair Chance Housing information be included in the screening criteria?**
    Yes. Fair Chance Housing information can be included in the screening criteria. However, the landlord must still provide written notice on the application.

12. **I'm a landlord and I screen for registry information on the sex offender registry. Is there anything else I need to include in the written notice?**
    Yes. A landlord or any person is not required by SMC 14.09 to screen for registry information. However, if a landlord or any person chooses to screen for registry information, the written notice must include this as screening criteria and inform applicants that they may provide

supplemental information about their rehabilitation, good conduct, and facts or explanations about the registry information.

D. ADVERTISING, APPLICATIONS, AND SCREENING

The ordinance describes prohibited uses of criminal history that applies to "any person," not just landlords. The following questions and answers explore advertising, applications, and screening.

13. **Can I write or say, "no criminal records," "no felons," "clean record required," or something similar when advertising a unit for rent or talking to potential applicants?**
    No. Landlords or any person cannot advertise, publicize, or have a policy that automatically or categorically excludes applicants with an arrest record, conviction record, or criminal history from rental housing in the City of Seattle.

14. **Can I write or ask, "Have you or any household member ever been convicted of a crime?" on a rental application or when talking to an applicant?**
    Yes, but you cannot require the applicant to answer or take an adverse action based on the applicant refusing to provide an answer. Although a landlord may inquire about criminal history, they may not (subject to the gathering of registry information and other exclusions in SMC 14.09) require someone to disclose criminal history.

15. **Can a landlord or any person use one application for renters in the City of Seattle and for areas outside Seattle?**
    If the application complies with all the requirements of SMC 14.09, a landlord or any person can use it for renters within Seattle.

16. **How does the use of a screening company impact the landlord's obligations under the ordinance?**
    Landlords are required to provide notice under Fair Chance Housing protections. Landlords may ask a third-party contractor providing screening services to screen an applicant or tenant for arrest records, conviction records, criminal history, or registry information.

    Subject to exceptions for registry information and other exclusions in SMC 14.09, neither a landlord nor a third-party contractor may require an applicant or tenant to disclose whether they have an arrest or conviction record or criminal history. If a third-party contractor violates the law on behalf of a landlord, the landlord and third-party contractor could be held liable for the violation.

E. REGISTRY INFORMATION AND LEGITIMATE BUSINESS REASON

The ordinance describes prohibited uses of criminal history that applies to "any person," not just landlords. The following questions and answers explore issues about the use of registry information and the legitimate business reason analysis.

17. **What is "registry information?"**
    Registry information is defined as information solely obtained from a county, statewide, or national sex offender registry that can include information such as the person's physical description, address, and conviction description and dates.

18. Can I write or say, "no sex offenders," or something similar when advertising a unit for rent or talking to potential applicants?

No. Although you may screen applicants through a sex offender registry, you may not automatically or categorically exclude applicants with criminal histories related to sex offenses.

19. Can I ask, "Are you or any household member on a sex offender registry?" on my rental application.

Yes. However, the landlord or any person can only take an adverse action against a prospective adult occupant, an adult tenant, or an adult member of their household:

a. if the conviction occurred when the person was an adult; and
b. only if there is a legitimate business reason. See question #20.

Landlords or any person must go through the factors of the legitimate business reason analysis or risk violating SMC 14.09.

A landlord cannot take an adverse action based on the registry information of: 1) juveniles; and 2) adults if the conviction occurred at the time the individual was a juvenile.

20. What standard must landlords use to determine whether there is a legitimate business reason for denying a person tenancy in their rental housing?

If a landlord or any person finds information about a prospective adult occupant or adult tenant on a sex offender registry, there must be a legitimate business reason analysis before taking an adverse action. Each situation is different and landlords or any person should think about "legitimate business reason" as a process, rather than a checklist.

A legitimate business reason is when a landlord's policy or practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. To determine such an interest, a landlord must demonstrate, through reliable evidence, a nexus between the policy or practice and resident safety and/or property.

There is no bright line rule about legitimate business reason. Rather, the following factors should be considered:

- The nature and severity of the conviction;
- The number and types of convictions;
- The time that has elapsed since the date of conviction;
- Age of the individual at the time of conviction;
- Evidence of good tenant history before and/or after the conviction occurred; and
- Any supplemental information related to the individual's rehabilitation, good conduct, and additional facts or explanations provided by the individual, if the individual chooses to do so.

If, after considering the factors noted above, a landlord or any person decides to deny, evict, or take other adverse action against an applicant or tenant based on an adult's registry information, the landlord or any person must notify the applicant in writing by email, mail, or in person of the specific registry information that was the basis for the denial.

21. **I'm a landlord and a person convicted of a sex offense is trying to rent a unit where I have 10 families residing in the building. Can I automatically tell the person I won't rent to them?**
    No, a landlord or any person must have a legitimate business reason for taking an adverse action like denying tenancy and it is critical that all factors listed above in question #20 are considered.

22. **Are landlords required to deny an applicant based on registry information?**
    No. Under SMC 14.09, landlords or any person are not required to deny tenancy to an applicant that is on a sex offender registry. Furthermore, a landlord or any person may take such an action only with a legitimate business reason.

23. **I'm a landlord and "I will not accept level 3 sex offenders." Is that okay?**
    No. You cannot automatically or categorically deny applicants based on arrest records, conviction records, or criminal history. You may screen applicants listed on a sex offender registry, but cannot say "no level 3 sex offenders." A legitimate business reason analysis is required.

24. **What is "status registry information?"**
    The phrase "status registry information" has the same meaning as registry information.

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

F. REQUIRE DISCLOSURE ABOUT AND ADVERSE ACTION

The ordinance describes prohibited uses of criminal history that applies to "any person," not just landlords. The following questions and answers focus on what landlords and any person can require disclosure about and taking adverse actions.

25. **What does "require disclosure" and "inquire about" mean?**
    Although a landlord may inquire about criminal history, they may not (subject to the gathering of registry information and other exclusions in SMC 14.09) require someone to disclose criminal history and/or take an adverse action such as refusing to rent to the applicant because the applicant refused to disclose this information on the application**.**

26. **What should I do if an applicant provides a comprehensive reusable tenant screening report that includes criminal history information, or if the applicant or someone else shares criminal history information with me?**
    If an applicant shares criminal history information with you, show the applicant the required notice on your application and let them know you cannot use the information when making a housing decision about their tenancy, except for registry information. Consider providing SOCR as a resource to the applicant.

    If someone other than the applicant such as another tenant, shares criminal history information with you, you cannot use that information when making a housing decision about a prospective occupant or tenant.

G. OTHER PROHIBITIONS

The ordinance requires landlords to provide information to prospective occupants and tenants if a consumer report is used in the screening process. The ordinance also prohibits retaliation.

27. **I just applied for a unit and a landlord told me I have bad credit, which isn't true. What are my rights?**
    If a consumer report is used by a landlord as part of the screening process, they must provide you with the name and address of the consumer reporting agency. They also must inform you of your right to obtain a free copy of the consumer report if your application was denied and your right to dispute the accuracy of information in the report.

28. **A tenant has not paid rent for 6 months and just filed a claim under SMC 14.09. Can I evict the tenant or is that retaliation?**
    It is a violation of the ordinance to take any adverse action against any person because the person exercised their rights under SMC 14.09. If the tenant is evicted within 90 days of filing the complaint, the landlord is presumed to have violated the law. The landlord can rebut the presumption by showing the eviction was permissible because of non-payment of rent.