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' REPLY BRIEF

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DISCLOSURE STATEMENT

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 (RHA) 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 decision to make an unconstitutional speech restriction the centerpiece of Subsection 2 of the Fair Chance Housing Ordinance's (FCHO) "Prohibited Use of Criminal History" section requires severance of the entire subsection. *State of Washington v. Carter*, 3 Wash. 3d 198, 213 (2024); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (severance provides a remedy for partially unconstitutional statutes).

Severance of Subsection 2 is the appropriate remedy to cure the constitutional defect for several reasons. Principally, the inquiry provision (including the disclosure element) is the core, unconstitutional portion of the FCHO that cannot be extricated from the coordinate adverse action provision. Severance of Subsection 2 most faithfully accords with the City Council's intent as written into its severability clause. *See* SMC § 14.20.120 (declaring that "each provision [is] separate and severable," and instructing that, if any clause "is held to be invalid," the provision containing the offending language must be severed); *State v. Anderson*, 81 Wash. 2d 234, 235–36 (1972) (a severability clause constitutes the legislature's advance directive for dealing with a finding of unconstitutionality in a statute).

Severance of all offending portions of the law is, moreover, the remedy required by current Washington caselaw when addressing a partially unconstitutional statute. *Carter*, 3 Wash. 3d at 212–13, 217. And a determination

here that Subsection 2 must be severed in its entirety follows from a straightforward application of the severability doctrine as set out by *Carter*, 3 Wash. 3d at 213. At base, this Court must excise all unconstitutional language, which includes both the inquiry and disclosure prongs of the City's speech ban. *Yim v. City of Seattle*, 63 F.4th 783, 798 (9th Cir. 2023).

But this Court's inquiry does not end there. When faced with a statutory scheme that burdens the speech rights of one class of persons, the Court must ensure that the severance remedy is sufficiently tailored to eliminate the unequal treatment. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 632 (2020). This necessarily requires the Court to also sever the adverse action clause, which is so inextricably interwoven with the City's unconstitutional speech ban that one cannot operate without the other. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (the "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of" the legislative body); *Carter*, 3 Wash. 3d at 215 (addressing how a truncated statute would work "as a logistical matter"). Before the City shifted to its new litigation posture, it cleaved to the view endorsed by this Court "that an adverse-action provision without an inquiry provision would not be effective at all." Seattle Pet. Rh'g. En Banc, 9th Cir. No. 21-35567, Dkt. # 61 at 19 (April 18, 2023). That is determinative of the issue. For these

reasons, this Court should rule that Subsection 2 of the FCHO's "unfair practices" section must be severed from the remainder of the Ordinance.

Seattle's response argues past the issues presented on appeal. Instead of addressing the extent of language that must be excised from Subsection 2 to bring the FCHO into compliance with the First Amendment, the City reframes the Yims' appeal as asking the very different question whether the constitutional problems in Subsection 2 are so central to the Ordinance as a whole as to require that the entire law be invalidated. As a result, the City does not meaningfully oppose the Yims' request for relief on this appeal.

CORRECTION TO SEATTLE'S MISSTATEMENT OF FACTS

In the prior appeal, the Yims vindicated the free speech rights of thousands of private housing providers against a City ordinance that targeted only landlords with a ban on asking for, receiving, or considering truthful information that is generally available to all other persons in Seattle. *Yim*, 63 F.4th at 808 (the speech ban "completely suppresses one group of citizens from accessing information that is freely available to another group of citizens") (Wardlaw, J., concurring) (cleaned up). The only issue in this appeal is how to remedy that constitutional violation in order to save the rest of the Ordinance from being invalidated.

This straightforward process focuses on the extent to which Subsection 2 (and all cross references thereto) must be severed from the FCHO. Indeed, throughout the

prior proceedings, this Court, Seattle, and the Yims all viewed Subsection 2 as comprised of two elements: the inquiry provision and the adverse action provision, with the inquiry provision including the disclosure ban. But Seattle has chosen to continue enforcing the disclosure prong of its speech ban against private landlords. To justify its actions, the City now claws back many statements of fact and its previous legal arguments. Worse, Seattle supports its new, different take on the facts and law by falsely accusing the Yims of misrepresenting the record. Such accusations are a distraction. The record speaks for itself.

A. The Yims Challenged the Disclosure Prong

Seattle's response largely hinges on misstating a key fact about this litigation. Answering Br. at 4–5, 15. The Yims' Complaint alleged that Subsection 2 of the FCHO's "unfair practices" section prohibited private landlords from asking about, receiving, or considering an applicant's criminal record (ER-50, 52), depriving them of "the right to access truthful information [which is] 'a necessary predicate to the recipient's meaningful exercise of his own right of speech.'"[1] ER-60 (citation omitted); *see also* ER-60 (Subsection 2 "violates speech rights on its face and as

[1] Washington is a notice pleading state that directs courts to liberally construe a party's complaint. *Dewey v. Tacoma Sch. Dist. 10*, 95 Wash. App. 18, 23 (1999); *see also* Wash. Court Rule 8(f) ("All pleadings shall be so construed as to do substantial justice"). The pleading's purpose "is to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process." *State v. Adams*, 107 Wash. 2d 611, 620 (1987).

applied by prohibiting individuals and organizations from accessing and sharing truthful information about housing applicants."). Consistent with those allegations, the Yims argued that Subsection 2's speech ban deprived them of the rights to request *and receive* publicly available information at each stage of the proceedings. *See* ER-75–78 (summary judgment brief); *see also* Opening Br. of Appellant, *Yim v. City of Seattle*, Ninth Cir. No. 21-35567, at 2, 20–22 (Oct. 29, 2021).

Seattle's summary judgment brief readily acknowledged that "Plaintiffs contend Subsection 2's restriction on requiring disclosure or inquiring about criminal history is different [from a commercial regulation] because it 'regulates information directly.'"[2] ER-136–37 (cross-motion for summary judgment). Indeed, the City's defense necessarily linked the inquiry and disclosure prongs, arguing that the Ordinance's "prohibitions on disclosure of and inquiry about criminal history do not implicate the First Amendment," (ER-107), because the primary purpose of the speech ban was to prohibit landlords "from requiring prospective tenants to hand over their criminal history to landlords." ER-108; *see also* ER-113 (City argued that the challenged provision "regulates unlawful activity by prohibiting landlords from inquiring about *or forcing tenants to hand over* criminal history") (emphasis added). Notably, Seattle presented this defense under a heading that read: the "prohibitions

[2] *See also* ER-106 ("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-100 (same), ER-129 (same).

on disclosure of and inquiry about criminal history do not implicate the First Amendment." ER-107 (emphasis added). The disclosure prong also figured prominently at oral argument, where Seattle confirmed that the "inquiry provision *only prohibits landlords from obtaining criminal history information* for use in deciding who to rent to." SER-25 (emphasis added); *see also* SER-11–14, 18 (Yims arguing that the ban on disclosures burdened their right to obtain that information).

Seattle repeated these claims on appeal, stating once again that the challenged "inquiry provision prohibits landlords from obtaining that history." Answering Br. of City of Seattle, *Yim v. City of Seattle*, Ninth Cir. No. 21-35567, Dkt. # 25 at 12 (Jan. 28, 2022); *see also id.* at 29 (explaining that the inquiry provision "reduc[ed] landlords' ability to obtain applicants' criminal histories"); *see also* Seattle Pet. Rh'g. En Banc, Ninth Cir. No. 21-35567, Dkt. # 61 at 12 (stating that under the challenged provision, "a landlord may not say to a prospective tenant, 'provide *me* your criminal history.'"). Accordingly, when listing the other provisions of the Ordinance's "unfair practices" section that were "not challenged," the City conspicuously did not include the disclosure prong. Answering Br. of Seattle, Ninth Cir. No. 21-35567, Dkt. # 25 at 7–8.

Consistent with the parties' arguments, this Court determined that the FCHO regulated speech in a manner that necessarily included both prongs of the speech ban, stating that the Ordinance prohibited landlords from both "inquiring about

information that is of record" and "reviewing and obtaining criminal records." *Yim*, 63 F.4th at 793–94; *see also id.* at 794 (characterizing the ban as a "prohibition on reviewing criminal records"); *id.* at 796 (characterizing the speech ban as "a complete ban on any discussion of criminal history between the landlords and prospective tenants").

Indeed, the disclosure prong played a prominent role in the Court's analysis of less-speech-restrictive alternatives, which observed that, unlike the FCHO, other municipalities allowed landlords to obtain and consider criminal background checks, subject to certain limitations. *Id.* at 796–97; *see also id.* at 810 ("If anything, it is more reasonable to assume that the alternatives will be *less* effective [because b]oth alternatives permit landlords to access at least some of a prospective tenant's criminal history.") (Gould, J., concurring in part and dissenting in part).

Seattle's disavowal of its many prior statements as "mistaken" is baseless. Answering Br. at 20 n.6. The City cannot simply claim a mistake—it must prove it. *Johnson v. State, Oregon Dep't of Hum. Res., Rehab. Div.*, 141 F.3d 1361, 1369 (9th Cir. 1998) (a party is not typically allowed to disavow material statements of fact). The district court's statement that it "understood" plaintiffs' claim to focus on the inquiry prong does not prove a mistake—it begs the question. ER-20, n.6. This is particularly true where the court thereafter accepted that Plaintiffs challenged the disclosure prong and resolved that claim on the merits. *Id.* If Seattle truly believed

that the passage "corrected" its statement of material facts, then it was under a duty to timely notify the courts, which it did not do. *United States v. Adams*, 76 U.S. 554, 559 (1869); *see also* Fed. R. App. P. 11 (if an attorney makes a misstatement in a legal brief, the attorney must correct it promptly upon discovery). Instead, Seattle waited nearly three years—after this Court's decision on the merits—to first raise this argument in a proceeding where adopting an opposite position on the facts would limit the effect of this Court's ruling and benefit Seattle's position. ER-8–9; ER-183–85.

B. The City Misstates Procedural Facts to Concoct a Waiver Argument

Seattle falsely claims that the Yims waived their right to argue for a limited severance remedy. Answering Br. at 23 (arguing that the Yims first requested severance of Subsection 2 in their reply brief). *Id.* Indeed, the brief that Seattle calls a "reply" was a combined response/reply brief in which the Yims agreed with the City's argument that the facts of the case called for a more limited remedy. ER-208–09; 220–22. Plaintiffs' argument in support of a more tailored remedy directly responded to Seattle's cross-motion for summary judgment argument that, under the terms of the FCHO's severability clause, unconstitutional language could be stricken

on a provision-by-provision basis.[3] *See* ER-169, 175–76, 180 (Seattle cross-motion); *see also AccelGov, LLC v. United States*, 164 Fed. Cl. 345, 360 (2023) (a cross-respondent has the right to address arguments raised in a cross-motion for summary judgment). This back-and-forth argument on an issue presented in cross-motions is typical and provides no basis for a waiver claim.

Seattle's claim that it was deprived of an opportunity to respond is similarly without merit. Answering Br. at 23. As discussed above, the City argued that the severability doctrine can be applied on a provision-by-provision basis in both of its motions for summary judgment. ER-129–30, ER-175–76. And as a cross-movant for summary judgment, Seattle was free to seek leave to file a reply but chose not to do so. *See* Judge Barbara Rothstein, Standing Order for All Civil Cases at 3 § F (W.D. Wash. Jan. 11, 2024);[4] *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (a cross-motion for summary judgment "must be considered on its own merits"). The City suffered no prejudice in this situation.

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[3] Even in a standard reply brief, the Yims still were entitled to directly reply to the City's arguments regarding the appropriate remedy. *See Novosteel SA v. U.S., Bethlehem Steel Corp.*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) ("reply briefs *reply* to arguments made in the response brief"); *see also United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (a party's reply brief may address any new issue raised in the response).

[4] Available at https://www.wawd.uscourts.gov/sites/wawd/files/BJR%20Standing%20Order%20-%202nd%20update.pdf

Seattle won on this issue below and now addresses this issue for a third time before this Court.

C. Seattle Mischaracterizes this Court's Prior Opinion

To avoid addressing the severability question ordered by this Court, Seattle falsely claims that the Yims did not appeal from the district court's decision to uphold the disclosure ban under the commercial speech doctrine. Answering Br. at 20. This Court acknowledged that the Yims appealed the district court's First Amendment ruling without limitation. *Yim*, 63 F.4th at 791. Nonetheless, the City states that "[t]his Court noted that Plaintiffs did not challenge that ruling and limited its First Amendment decision to the inquiry provision." *Id.* (citing *Yim*, 63 F.4th at 791 n.13) (cleaned up). The footnote says no such thing. Instead, this Court recognized that the Yims did not appeal the district court's very different conclusion "that the landlords had standing to challenge the application of the provision to inquiries *about prospective tenants only*. The landlords do not appeal *this* holding." *Yim*, 63 F.4th at 791 n.13 (emphasis added).

ARGUMENT

I. Washington Law Requires Courts to Focus the Remedial Severance Inquiry on the Portion of the Law that Contains the Unconstitutional Language

A. Seattle's Position on Appeal Relies on Out-of-Date Caselaw

Seattle's position on the appropriate severance remedy has shifted drastically since it first argued this issue to the district court. On summary judgment, Seattle

argued that, if the Yims' constitutional challenge was successful, then the remainder of the FCHO can be saved by severing all or a portion of Subsection 2. ER-129–30; *see also* ER-169. In its first motion for summary judgment, the City argued that severing Subsection 2 was the remedy required by the terms of the Ordinance's severability clause and *United States v. Booker*, 543 U.S. 220, 258–59 (2005). ER-129–30, n.159 & n.160. In its second motion for summary judgment, the City similarly argued that, should the Yims prevail, the court would appropriately sever the constitutionally offending provisions from the "remaining, unconnected provisions." ER-169–70. In making these arguments, Seattle invited the court below to determine the degree to which the inquiry ban is connected to the disclosure and adverse action bans, despite its insistence that each ban was a separate provision within the same subsection. ER-176–77. And when applying the functional severability test, specifically, the City urged the court to focus solely on the language of Subsection 2. ER-180.

Although it was unclear at the time whether Seattle's proposed remedy was allowed by Washington caselaw,[5] the Yims agreed that the proper question is how much of Subsection 2 must be excised to cure the Ordinance's constitutional flaws.

[5] *See* Opening Br. at 38–39; *see also, e.g.*, *State v. Abrams*, 163 Wash. 2d 277, 288 (2008) (observing that the court had only severed individual provisions that were procedural in nature).

ER-208–09; 220–22; *see also Barr*, 591 U.S. at 624 (a severability clause establishes the extent to which portions of a law may be excised).

Seattle, however, no longer wants this Court to focus on the close connection between the inquiry, disclosure, and adverse action bans and, as a result, has radically changed its position on the law. For the first time on appeal, the City argues that Washington's severability doctrine is an all-or-nothing proposition under which either (1) only the specific challenged words may be severed (without any consideration of how the constitutionally offending words are related to connected provisions), or (2) the entire law must fall. Answering Br. at 1, 23–25. In making this argument, Seattle urges this Court to apply an articulation of the severability test that was devised to address the *very different circumstance* where a plaintiff seeks to invalidate the entire law based on the unconstitutionality of a single provision. Answering Br. at 15 (quoting *El Centro De La Raza v. State*, 192 Wash. 2d 103, 132 (2018) (to invalidate a statute, a plaintiff must show that severing the unconstitutional provision would render every other provision "useless")).

Putting aside, for the moment, that the Yims have not asked this Court to declare the FCHO invalid in its entirety, that is not the holding of *El Centro*. That case applies the typical rule that, even where a plaintiff cannot meet the standard for invalidating an entire law, the severability doctrine still requires the court to evaluate the unconstitutional portion of the law and excise all problematic provisions—which

was the result in *El Centro*.[6] 192 Wash. 2d at 128, 133 (severing two statutory sections, not simply the problematic words therein); *see also Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 36 (2012) (admonishing that "the first rule of case law as well as statutory interpretation is: Read on"). Moreover, Seattle's proposed "useless in the entirety" severability rule cannot be reconciled with the Washington State Supreme Court's most recent severability ruling, instructing courts to focus the remedial severance inquiry on the problematic portions of the law when faced with a partially unconstitutional statute. *Carter*, 3 Wash. 3d at 212–13, 217.

B. *Carter* Requires this Court to Sever all Problematic Portions of the FCHO

The Washington State Supreme Court's recent decision in *Carter* confirmed that the state follows the severability doctrine as set out by the U.S. Supreme Court. *Carter*, 3 Wash. 3d at 213; *see also Ass'n of Washington Bus. v. Washington State Dep't of Ecology*, 195 Wash. 2d 1, 19 (2020) ("Like the United States Supreme Court, we believe the test for the severability of regulations should be governed by the concepts of intent and workability that inform our test for the severability of

[6] No published case cites *El Centro*'s severability analysis to stand for the rule that Seattle proposes. The only unpublished case to cite that portion of *El Centro* does so for a test that "permits the unconstitutional text to be stricken if it is 'distinct and separable' from the unproblematic text." *Kitcheon v. City of Seattle*, No. 85583-2-I, 2024 WL 5040630, *8 (Wash. App. Dec. 9, 2024) (unpublished).

statutes."). This guides this Court's analysis in several significant ways. Most immediately, the U.S. Supreme Court has long held that the courts must evaluate the relationship between clauses within the same problematic subsection when determining how much language must be severed to cure the constitutional infirmities. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312–13 (1936). The Washington Supreme Court followed suit, holding that, "[w]hen confronting a constitutional flaw in a statute, the doctrine of severability requires courts to try to limit the solution to the problem, [by] severing any problematic portions while leaving the remainder intact." *Carter*, 3 Wash. 3d at 213 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) (further quoting *Ayotte*, 546 U.S. at 328–29 (cleaned up)).

At issue in *Carter* was the legislature's use of the word "shall" in a subsection that provided the guidelines for sentencing adults convicted of aggravated first-degree murder.[7] 3 Wash. 3d at 212–13 (citing Wash. Rev. Code § 10.95.030(1)). Although the parties agreed that inclusion of an imperative rendered the subsection unconstitutional, they disagreed about the extent of language that must be severed to save the remainder of the sentencing statute. *Id.* at 213. Thus, the threshold

[7] Like this case, the statute at issue in *Carter* contained a severability clause providing that "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." Laws of 1981, ch. 138, § 22 (available at https://leg.wa.gov/media/nglnartq/1981c138.pdf).

question before the Court was how to apply the severability doctrine to a discrete subsection of a larger sentencing statute.

The Court found the answer in caselaw from the U.S. Supreme Court, which instructs that, to save a partially unconstitutional statute, the severability doctrine "requires" courts to sever all problematic portions of the law. *Carter*, 3 Wash. 3d at 213 (quoting *Free Enter. Fund.*, 561 U.S. at 508, and *Ayotte*, 546 U.S. at 328–29 (cleaned up)). To make that determination, courts must apply the functional and volitional severability tests directly to the problematic provisions. *Id.* In doing so, courts "must retain those portions . . . that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." *Id.* (quoting *Booker*, 543 U.S. at 258–59 (further quoting *Alaska Airline*, 480 U.S. at 684 (cleaned up)). Thus, the Washington Supreme Court's most current case on the severability doctrine "requires courts to sever unconstitutional (or otherwise invalid) portions and leave the remainder intact, wherever possible." *Id.* at 217.

Carter's application of the severability doctrine illustrates the absurdity of Seattle's proposed rule. Indeed, it would have been counterintuitive for *Carter* to ignore the relationship between the word "shall" and the immediately adjacent language contained in the challenged subsection simply because the inclusion of that word would not render "useless" an entirely separate subsection pertaining to

juvenile offenders—let alone provisions providing for victim impact testimony, compliance with community custody conditions, or the criteria for post-release assessments. *See* Wash. Rev. Code § 10.90.030(1), (2). The same holds true here: whether the inquiry ban has an effect on an unrelated and later-enacted provision establishing COVID-19 eviction protections, for example (Answering Br. at 4, 13), has absolutely no bearing on whether the disclosure and adverse action bans are so closely connected to the inquiry ban that they comprise the constitutionally problematic portion of the Ordinance.

By following *Booker*, moreover, *Carter* also demonstrates that Washington law is consistent with and relies on caselaw from the U.S. Supreme Court and other courts to inform the doctrine's application.[8] *Mutual of Enumclaw Ins. Co. v. Cross*, 103 Wash. App. 52, 60 (2000) (stating that severability decisions from other state courts are persuasive authority). *Booker* further compels a focused application of the severability tests. That case considered the extent to which unconstitutional sentencing provisions must be severed from the Federal Sentencing Act and Guidelines. *Booker*, 543 U.S. at 258–59. Obviously, the full Act was a "highly complex statute" that contained multiple related and unrelated provisions (*id.* at

[8] While complaining about the Yims' citation to California-based severability decisions, Seattle never explains how Washington's iteration of the functional and volitional severability tests differ from those set out by the U.S. Supreme Court—let alone, offer how those same tests derived from the same U.S. Supreme Court decisions are applied differently in California.

248), "most of [which are] perfectly valid." *Id*. at 258. That did not end the Court's inquiry. Instead, the U.S. Supreme Court applied the functional and volitional severability inquiries directly to the two provisions that contained unconstitutional language (*id.* at 246–47), and concluded that it "must sever and excise [those] two specific statutory provisions." *Id.* at 259. "With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements." *Id.* ("the existence of [the challenged provisions] is a necessary condition of the constitutional violation").

This Court should apply the same focused inquiry as in *Carter*, *Booker*, and *Carter Coal* to determine the extent to which the three substantive provisions of Subsection 2 must be severed from the FCHO.

II. At Minimum, the Inquiry and Disclosure Prongs Must be Excised from the Ordinance

This Court's prior ruling compels a conclusion that both prongs of Seattle's speech ban must be severed from the FCHO. *Yim*, 63 F.4th at 798. The first step in any severability analysis is to excise all constitutionally problematic language from the Ordinance. *Carter*, 3 Wash. 3d at 213; *see also Free Enter. Fund.*, 561 U.S. at 508–10 (when a statutory provision violates the Constitution, it must be invalidated). Seattle does not contest that the disclosure ban, like the inquiry ban, burdens protected speech. *Yim*, 63 F.4th at 793 (concluding that "the Ordinance" regulates

speech); *see also id.* at 802 (Wardlaw, J., concurring) ("There is no question that 'the creation and dissemination of information' is protected speech and requiring disclosure of information is as well.") (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011)). Seattle conceded this point at summary judgment when it argued that, although the inquiry prong *alone* would implicate "core First Amendment rights," the Yims challenged a ban on the "*use of* (and demand for) criminal history in selecting tenants," which regulates protected commercial speech. ER-111 (emphasis added).

Seattle offers no argument or authority explaining how its ban on landlords requiring an applicant to disclose truthful public information when asked (*i.e.*, check a box and affirm its truth) can be squared with the First Amendment—let alone how its decision to target only private landlords with the speech ban can be cured without excising the entire speech ban. Instead, Seattle tries to avoid this issue by arguing that this Court does not need to sever the unconstitutional speech ban because an inquiry does not *necessarily* presuppose disclosure from the person asked where the information may be discovered from third parties. Answering Br. at 18–19. But that observation does not address any of the questions posed by the severability doctrine. Indeed, that a criminal conviction may be unearthed through independent investigation does not grant a tenant applicant a license to lie or refuse to answer a constitutionally legitimate question seeking truthful information. Opening Br. at 17–

19 (explaining that inquiries and disclosures are two sides of the same coin); *cf. Forest Guardians v. United States Fed. Emergency Mgmt. Agency*, 410 F.3d 1214, 1218 (10th Cir. 2005) (noting that the Freedom of Information Act authorizes inquiries for the primary purpose of generating disclosures that "let citizens know what the government is up to") (cleaned up).

Seattle offers no authority to counter the Yims' citations establishing that omissions may violate Washington's "false swearing" statute and that Washington law routinely requires complete and truthful responses in applications for employment, insurance, and receipt of public benefits. *See State v. Jones*, 22 Wash. App. 506, 513 and n.4 (1979); Opening Br. at 20–22. The Yims rightly "conflate declining to answer with answering falsely," Answering Br. at 22, as supported by multiple Washington statutes and caselaw. Opening Br. at 20–21 & n.10. As a practical matter, a criminal history inquiry in a rental application is typically a question followed by boxes to indicate "yes" or "no." ER-91 (sample application). And rental applications almost always include an affirmation that responses are "full and complete to the best of my knowledge." ER-184; *see also* ER-91–92. Thus, a refusal to answer in this circumstance is objectively untruthful.

Seattle alternatively recharacterizes the disclosure ban as an anti-coercion measure. Answering Br. at 18–19. But no one is compelled to apply for a particular rental. *Cf. United States v. Smith*, 365 F. App'x 781, 786 (9th Cir. 2010) (person who

voluntarily spoke to FBI and testified before grand jury was "not compelled" to incriminate himself); *United States v. Doe*, 465 U.S. 605, 610 (1984) (business records voluntarily created are not protected by Fifth Amendment's protection from "*compelled* self-incrimination"). If someone *voluntarily* submits an application and affirms that the application is complete and accurate, then he or she must answer questions legally put to them at risk of having the application denied.

Even if Seattle could relitigate the merits to show that the disclosure ban did not unconstitutionally burden protected speech, the disclosure provision would still be subject to the doctrine's functional and volitional severability tests. *Carter*, 3 Wash. 3d at 213. The City's brief does not address the functional relationship between the inquiry and disclosure prongs, Answering Br. at 13–15, 17, relying instead on the non-sequitur that Seattle could still achieve other unrelated objectives if the inquiry ban is severed. *Id.* at 23–24, 29–31. Nor does Seattle provide any evidence that the City Council would not have enacted Subsection 2 without the inquiry ban. Instead, the City speculates that "the Council *likely* would have adopted the rest of the Ordinance had it foreseen the inquiry provision's invalidity," Answering Br. at 17 (emphasis added), but even speculation must rest on some evidence and Seattle offers none. *Cf. Kaufmann v. Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022) (court looks to evidence related to the "text, structure, or history of the statute" to determine the legislating body's intent).

Seattle offers no evidence to counter this Court's conclusion 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." *Yim*, 63 F.4th at 792; *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); *id.* at 811 ("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.") (Gould, J., concurring in part, dissenting in part).

Finally, Seattle overlooks the significance of its decision to impose its speech ban on a narrow class of persons where criminal history information is ordinarily relied upon by government and private businesses to gauge the trustworthiness of applicants. *Yim*, 63 F.4th at 792 (concluding that the speech ban applied only to the landlord or occupant of the unit the prospective tenant is seeking to rent). When the government targets a particular class of persons with an outright speech ban, the severance remedy must be sufficiently tailored to eliminate the unequal treatment of their rights. *Barr*, 591 U.S. at 632 ("The First Amendment is a kind of Equal Protection Clause for ideas.") (citation omitted); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 51–53 (1994) (the appropriate solution to a targeted speech ban is to remove language providing for unequal treatment); *City of Lakewood v. Willis*, 186

Wash. 2d 210, 227 n.2 (2016) (Stephens, J., concurring) (court should eliminate the chilling effect of a sweeping speech ban by declaring the law void and direct the legislature to go back to the drafting table to craft a constitutionally permissible ordinance).

Seattle's decision to make a targeted and unconstitutional speech restriction the centerpiece of its FCHO requires the Court to sever all constitutionally infirm language, which includes, at minimum, the inquiry and disclosure prongs of Subsection 2's speech ban. *Carter*, 3 Wash. 3d at 213.

III. The Adverse Action Provision Must Also be Severed

The record in this case compels the conclusion that the speech ban is neither functionally nor volitionally severable from the adverse action provision because provisions that were "obviously meant to work together" and be "deployed in tandem" cannot be severed. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 483–84 (2018). Together, the functional and volitional severability tests ask, "whether the statute will function in a manner consistent with the intent of [the legislature]," *Alaska Airlines*, 480 U.S. at 685 (followed by *Carter*, 3 Wash. 3d at 213), and whether "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. The City conceded both points throughout its briefing on the merits. *See*

Opening Br. at 1–2, 5–6, 12–13, 27–28 (detailing concessions with citation to the record).

Seattle's only defense to these concessions is to claim that it was either mistaken when it made them, or that it did not mean what it said. Answering Br. at 20 n.6, 29 n.9, 31–34. But to disavow a material statement of fact, the City must do more than assert a mistake—it must prove it. *Johnson*, 141 F.3d at 1369. Seattle cannot meet such a burden here. "Indeed, the record demonstrates that Seattle considered a narrower version of the Ordinance, as well as many fair housing ordinances from other jurisdictions, and rejected those versions with little stated justification." *Yim*, 63 F.4th at 797. Seattle provided the Council's missing justification in its briefing when it stated that the City Council had "considered" adopting a less burdensome inquiry provision and "rejected [that] approach as ineffective," ER-117, and further stated that the City Council adopted a more ambitious goal of preventing a landlord from denying tenancy based on an applicant's criminal history, no matter how serious, and therefore imposed an outright ban that "prohibit[ed] landlords from requiring prospective tenants to hand over their criminal history to landlords in the first place." ER-108. Nothing in the record refutes these freely offered statements. *See Garcia v. City of Los Angeles*, 11 F.4th 1113, 1123–24 (9th Cir. 2021) (relying on "[t]he City's own statements" in

merits briefing that an invalid clause was "'inextricably connected' to full enforcement of the Provision" and thus could not be severed).

IV. Seattle's Amici

The amicus brief filed by Legal Services for Prisoners with Children, et al., does not warrant a substantial response because, to the extent it addresses Washington's severability doctrine, it largely duplicates Seattle's arguments and relies on the same out-of-date caselaw. *See, e.g.*, Amicus Br. 17–18 (parroting Seattle's erroneous claim that Washington law does not allow courts to sever discrete provisions of a partially unconstitutional ordinance); *id.* at 27–34 (repeating Seattle's mistaken arguments based on *El Centro*, 192 Wash. 2d at 132). Like Seattle, amici omit the Washington State Supreme Court's most recent severability decision, *Carter*, 3 Wash. 3d 198.

The amicus brief, moreover, improperly raises abstention issues never raised or briefed by the parties and seeks relief—*i.e.*, certifying the case to Washington's Supreme Court—that neither party has requested. Amicus Br. at 35–40; *Rodriguez-Hernandez v. Garland*, 89 F.4th 742, 752 n.7 (9th Cir. 2023) ("An amicus curiae generally cannot raise new arguments on appeal, and arguments not raised by a party in an opening brief are waived. . . .") (citation omitted). Such new arguments are not properly before the Court. Thus, unless this Court requests supplemental briefing on abstention and certification, it should suffice to point out that this Court regularly

applies Washington's severability doctrine. *See, e.g.*, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 920 (9th Cir. 2020).

The brief offers one unique argument deriding the so-called "candor trap." Amicus Br. at 14. Candor in response to a legitimate question assesses an applicant's honesty. *See Janson v. N. Valley Hosp.*, 93 Wash. App. 892, 901–03 (1999) (employee's later-discovered omission of a criminal conviction from her job application revealed dishonesty, a legitimate cause for discharge); *Patterson v. Superintendent of Pub. Instruction*, 76 Wash. App. 666, 672–73 (1994) (deliberate omission from employment application is "unprofessional conduct" warranting suspension of teaching certificate). Honesty is a relevant characteristic for property owners seeking tenants, especially those such as the Yims who not only engage in a business relationship but also share living quarters with their tenants. ER-184; *see also* ER-91–92 (sample rental application requiring affirmation that responses are "full and complete to the best of my knowledge").

A desire for honesty is not unique to rental decisions. For example, job applicants seeking security clearances must disclose even the most minor infractions or risk rejection when their answers diverge from third-party reporting. *See Nat'l Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 154–55 (2011). Witnesses in court proceedings may be impeached by evidence of a prior criminal conviction, Fed. R. Evid. 609, and must account for discrepancies in their testimony as well,

because our judicial system depends on complete and accurate responses to questions asked. Candor—*honesty*—is not a "trap," it is among the foundations of civilized society and highlights the inextricable linkage of the inquiry, disclosure, and adverse action elements of Subsection 2.

Finally, amici's desire to address the policy considerations underlying the Ordinance are more properly addressed to the legislature if and when the City Council chooses to revisit the FCHO. Amicus Br. at 9–10, 13–14, 19–26; *City of Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir. 1983).

CONCLUSION

The Yims respectfully request the Court to reverse the district court's severance order and rule that Subsection 2 of the "Prohibited use of criminal history" section, and cross-references thereto, must be excised from the FCHO.

DATE: March 13, 2025.

Respectfully submitted,

PACIFIC LEGAL FOUNDATION
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STATEMENT OF RELATED CASES

Counsel for Appellants state there are no related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2025, 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 6,246 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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DATE: March 13, 2025.

s/ Brian T. Hodges
Brian T. Hodges
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