

Case No. 21-35567

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

Landlords/Appellants,

v.

CITY OF SEATTLE,

Defendant/Appellee.

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

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**AMICUS BRIEF OF NATIONAL HOUSING LAW PROJECT, SHRIVER  
CENTER ON POVERTY LAW, TENANT LAW CENTER, FORMERLY  
INCARCERATED & CONVICTED PEOPLE AND FAMILIES  
MOVEMENT AND JUST CITIES INSTITUTE**

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*Filed with consent of all parties*

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## **RULE 26.1 DISCLOSURE STATEMENT**

The National Housing Law Project, Shriver Center On Poverty Law, Tenant Law Center, Formerly Incarcerated & Convicted People And Families Movement, and Just Cities Institute are nonprofit organizations. None has any parent corporation nor any stock; there is no publicly held corporation that owns 10% or more of its stock.

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## **IDENTITY AND INTEREST OF AMICI CURIAE**

The National Housing Law Project (NHLP) is a nonprofit organization that works to increase housing opportunities for underserved communities, and to preserve and expand the nation's supply of safe and affordable homes. NHLP pursues these goals primarily through technical assistance and support to legal aid attorneys and other housing advocates. For over 40 years NHLP has coordinated the Housing Justice Network, a national group of more than 1,600 legal aid and other housing advocates who share information and collaborate on significant housing issues. Since 1981 NHLP has published *HUD Housing Programs: Tenants' Rights*; commonly known as the "Greenbook," it is seminal authority on the rights of HUD tenants and program participants.

With restrictive criminal history screening policies often shutting people with criminal records out of housing opportunities, NHLP launched its Reentry Initiative to increase access to affordable housing for people who have had contact with the criminal legal system. NHLP offers training to legal services attorneys and other housing advocates on reentry issues, engages in federal policy advocacy aimed at increasing housing opportunities for people with criminal records, and partners with housing and reentry agencies advocating for change on a local level. NHLP has created two publications for advocates and organizers working on reentry issues. NHLP also advocates for rental housing owners to adopt more

flexible admission policies, to set aside affordable housing units for individuals returning to the community, and for the adoption of broad fair chance policies at the state and local level.

The Shriver Center on Poverty Law is a Chicago-based non-profit working toward economic and racial justice. Over the past 50 years, the organization has secured hundreds of law and policy victories with and for people experiencing economic instability in Illinois and across the country. As a central focus of its housing equity and racial justice work, the Shriver Center works closely with advocates and directly impacted communities to enhance housing access for those with criminal records. For example, the Shriver Center leads the Partnership for Just Housing, a national forum of organizations which operate at the nexus of housing and criminal justice. The Shriver Center also helps lead the Federal Housing Justice Working Group and Reentry and Housing Working Group, which, together, advocate for federal policy changes to protect housing access for those with records. More locally, the Shriver Center has been instrumental in passage and enforcement of the Cook County Just Housing Amendment, which limits the discretion of housing providers to exclude tenant applicants based upon their criminal records. Each of these coalitions the Shriver Center works with draws its membership, in part, from directly-impacted individuals, whose voices and experiences are particularly prioritized.



The Tenant Law Center (TLC) is a program of the Catholic Community Services. TLC has over 28 years of demonstrated success through meaningful, measurable performance outcomes, to help 89 percent of clients secure and stay housed. TLC provides holistic legal services using a race and social equity lens, to provide legal advocacy that often requires intentional coordination with social, mental and behavioral health services to help renters address a myriad of housing issues. TLC knows that renters impacted by the criminal justice system are locked out of housing. Renters across the state of Washington are asking legislators to adopt these policies to equally protect all renters with criminal histories so they can secure safe, affordable housing. Moreover, families need to be able to welcome home members of their family, released from incarceration, without the fear of eviction. TLC seeks improved tenant protections for renters with criminal records screening in rental admissions. The current plight for most criminally impacted renters places a scarlet letter on their chest and it only furthers the racist purposes of mass incarceration. Housing for people formerly incarcerated, should not be forced to live unhoused simply because they have been released from prison. This policy reduces homelessness and is an action towards ending racial and economic segregation.

Established in 2011, the Formerly Incarcerated & Convicted People and Families Movement (FICPFM) is a network of over 50 civil and human rights

organizations led by policy experts, subject matter experts, organizers, thought-leaders, artists, healers and attorneys who also have conviction histories or are family members who are closely involved with people living with conviction histories. Each of the individual non-profit organizations is led by formerly incarcerated people, as are each of the national steering committee members.

Access to fair and affordable housing is critical to FICPFM's members and core to its mission.

The Just Cities Institute is a non-profit focused on incorporating community power and love into the world of policy advocacy. Specifically, the Just Cities Institute has worked in conjunction with formerly incarcerated people to pass Fair Chance Housing legislation in Berkeley and Oakland to give community members a fair shot at obtaining housing. The Just Cities Institute is currently in the process of coordinating with more community groups to bring Fair Chance Housing legislation online in many more jurisdictions.

No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person or entity other than Amici, their staff, and their counsel contributed money that was intended to fund the preparation or submission of this brief.

All parties have consented to the filing of this amicus brief.

## ARGUMENT

- A. Criminal records screening in rental admissions furthers the racist purposes of mass incarceration and undermines public policies in reducing homelessness and ending racial segregation, all without making communities any safer.

Over-policing in communities of color and a deeply racist criminal legal system have led to disproportionate rates of incarceration for Black, Latinx, and Indigenous peoples.<sup>1</sup> A significant portion of this disparity is attributable to the “War on Drugs,” crimes, for which Black people are about 6.5 times more likely to face incarceration for drug crimes despite committing drug offenses at similar rates as whites.<sup>2</sup> The mass incarceration policy accelerated in the 1990s with aggressive federal efforts, including strict sentencing laws, and made the U.S. prison

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<sup>1</sup> The incarceration rate is 5 times higher for Black and 1.3 times higher for Latinx people compared with whites. The incarceration rate for Native Americans, though subject to data limitations, was 38 percent higher in 2010 than the national rate. *See* Ashley Nellis, “The Color of Justice: Racial and Ethnic Disparity in State Prisons,” The Sentencing Project (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>

<sup>2</sup> *See* Brookings Institution, “Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race” (Oct. 21, 2016), [https://www.hamiltonproject.org/charts/rates\\_of\\_drug\\_use\\_and\\_sales\\_by\\_race\\_rates\\_of\\_drug\\_related\\_criminal\\_justice](https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice)

population “by far the largest in the world.”<sup>3</sup> From 390,000 people in 1980, the U.S. incarcerated 2.3 million by 2005.<sup>4</sup>

Those released from jails and prisons have increasingly found themselves excluded from jobs, housing opportunities, and other aspects of society through extensive “collateral consequences.”<sup>5</sup> As many scholars have observed, imposing these various forms of second-class citizenship upon Black and Brown people was a precise objective of mass incarceration—a scheme that never had much to do with crime prevention, but rather with maintaining the country’s racial caste system in the wake of Jim Crow.<sup>6</sup>

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<sup>3</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Prisoners in 2005, (2007), *available at*: <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=912>; *see also* Dept. of Hous. & Urban Dev., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions at 1 (Apr. 4, 2016) (hereafter “HUD 2016 Guidance”).

<sup>4</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Prisoners in 2005, *supra*.

<sup>5</sup> *See, e.g.*, Cameron Kimble & Ames Grawert, “Collateral Consequences and the Enduring Nature of Punishment,” Brennan Center for Justice (June 21, 2021) (discussing “more than 45,000 state and local laws and regulations” that deny formerly incarcerated persons “jobs, housing, and fundamental participation in our political, economic, and cultural life.”), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment>

<sup>6</sup> *See, e.g.*, Elizabeth Hinton and DeAnza Cook, “The Mass Criminalization of Black Americans: A Historical Overview,” 4 Annual Review of Criminology 261 (June 29, 2020) (collecting scholarship on the use mass incarceration as a tool of maintaining white supremacy), <https://www.annualreviews.org/doi/10.1146/annurev-criminol-060520-033306>; *see* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* at 6 (2010) (“The stark and sobering reality is that, for reasons

The collateral consequences of mass incarceration have especially stark racial impacts on access to rental housing. “Regardless of the nature of the crime, its recency, or its relation to an individual’s likelihood to fulfill his or her obligations as a tenant, such criminal records (or in many cases, even an arrest record with no ultimate conviction) have often served as an absolute bar to finding housing[.]”<sup>7</sup> Among private landlords, about 90% conduct criminal background checks and will deny admission for at least some criminal records.<sup>8</sup> Social scientists have documented “a strong negative effect of a criminal record on housing opportunity.”<sup>9</sup> The racial disparities in the criminal legal system means such criminal history screening disproportionately forces Black and Latinx households to accept lower-quality housing in areas of diminished opportunity, as

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largely unrelated to actual crime trends, the American penal system has emerged as a system of social control unparalleled in world history. And while the size of the system alone might suggest that it would touch the lives of most Americans, the primary targets of its control can be defined largely by race.”).

<sup>7</sup> Valerie Schneider, “The Prison to Homelessness Pipeline: Criminal Records Checks, Race, and Disparate Impact,” 93 *Indiana L. J.* 421, 431 (Spring 2018), <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11290&context=ilj>.

<sup>8</sup> See Andrea Collatz, “Landlord Survey: Optimism in Renting Your Property,” *TransUnion SmartMove* (June 6, 2017), <https://www.mysmartmove.com/SmartMove/blog/transunion-landlord-survey-summary.page>

<sup>9</sup> Laura DeMarco, “Going Off the (Criminal) Record: Stigma, Place, and Access to Housing,” *Ohio State University* (2020), [https://etd.ohiolink.edu/apexprod/rws\\_etd/send\\_file/send?accession=osu1593512778784186&disposition=inline](https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=osu1593512778784186&disposition=inline)

well as being “more likely to experience things like homelessness, housing insecurity, and high levels of residential mobility.”<sup>10</sup>

Policymakers began to reconsider the sustainability and practicality of mass incarceration in the 2000s, by which time studies had begun to show “the increased use of incarceration accounted for nearly zero percent of the overall reduction in crime.”<sup>11</sup> Aside from being ineffective from a crime control standpoint, mass incarceration was imposing high financial, human, and social costs.<sup>12</sup> These impacts worsened as those being released from jails and prisons—over 600,000 people annually—struggled to find jobs, obtain housing, and reintegrate into society.<sup>13</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> Don Stemen, “The Prison Paradox: More Incarceration Will Not Make Us Safer,” For the Record (July 2017), [https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf)

<sup>12</sup> National Housing Law Project, “The Importance of Housing for Formerly Incarcerated Individuals,” Housing Law Bulletin 60 (2010); Illinois Sentencing Policy Advisory Counsel, “The High Cost of Recidivism” (2018). For example, people who are incarcerated have dramatically higher rates of disease when compared with the population as a whole and jails and prisons are ill-equipped to provide sufficient medical care and treatment. Upon reentry, the cost to the public health can be enormous.” VERA Institute of Justice, “On Life Support: Public Health in the Age of Mass Incarceration” (2014).

<sup>13</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2008, Table 3 Number of sentenced prisoners admitted to and released from state and federal jurisdiction, 2000-2008* (December 2009), available at:

B. Coping with the problems mass incarceration has caused requires facilitating reentry and lessening the collateral consequences of criminal records.

The U.S. government long contributed to the collateral consequences of criminal records on housing opportunities and related racial disparities, through policies such as “One Strike and You’re Out,” a 1996 Department of Housing and Urban Development’s (HUD) initiative that instructed local housing authorities to, among other things, strictly screen applicants for criminal history.<sup>14</sup> This began to change in 2011, when the Federal Interagency Reentry Council—a collaboration of 20 federal agencies—launched a coordinated effort to identify and remove barriers to successful reentry.<sup>15</sup> One of those agencies was HUD, whose Secretary wrote housing authorities and private subsidized housing owners to announce, after years of strict admission screening and “one-strike” policies, a sea change in the federal government’s approach to family reunification and reintegration of “people who have paid their debt to society.”<sup>16</sup> Noting research showing recidivism rates are

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<https://www.bjs.gov/content/pub/pdf/p08.pdf>; Chris Suellentrop, *The Right has a Jailhouse Conversion*, New York Times Magazine, (Dec. 24, 2006).

<sup>14</sup> U.S. Dept. of Hous. & Urban Dev., “One Strike and You’re Out” Screening and Eviction Guidelines for Public Housing Authorities, PIH 96-16 (Apr. 12, 1996).

<sup>15</sup> See website of the National Reentry Resource Center, <https://csgjusticecenter.org/nrrc/projects/firc/>, last visited Feb. 1, 2022.

<sup>16</sup> Letter from Shaun Donovan, HUD Secretary, to PHA Exec. Directors at 2 (June 17, 2011),

lower when persons returning from incarceration have access to housing,<sup>17</sup> HUD now urged assisted housing providers to establish admission and eviction policies that offered second chances for people returning from the criminal legal system—for example, by electing not to reject applicants for drug-related criminal history where federal law authorized, but did not require, denial of admission.<sup>18</sup>

Most recently, HUD has renewed its commitment to “addressing the housing needs of returning citizens and people with criminal records, and by doing so, increasing public safety within our communities [...] advancing equity and reversing systemic racism.”<sup>19</sup> Last year, HUD used its authority under the American Rescue Plan Act to eliminate drug-related criminal activity as a basis for denial altogether and imposed a 12-month limit on other types of criminal history

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[https://www.usich.gov/resources/uploads/asset\\_library/Rentry\\_letter\\_from\\_Donovan\\_to\\_PHAs\\_6-17-11.pdf](https://www.usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf);

<sup>17</sup> *See Id.*; see Letter from Shaun Donovan, HUD Secretary and Carol Galante, Acting Asst. Sec. to Owners and Agents (Mar. 14, 2012), <https://nhlp.org/files/HUD%20Letter%203.14.12.pdf>

<sup>18</sup> *Id.* at 2; see also 24 C.F.R. § 982.553(a)(2)(ii) (permissive rather than mandatory prohibitions).

<sup>19</sup> Letter from HUD Secretary Marcia L. Fudge to PHAs, Continuums of Care, Multifamily Owners, and HUD Grantees (June 23, 2021), [https://www.hud.gov/sites/dfiles/PA/documents/SOHUD\\_reentry\\_housing\\_letter.pdf](https://www.hud.gov/sites/dfiles/PA/documents/SOHUD_reentry_housing_letter.pdf)



screening in the issuance of Emergency Housing Vouchers (created to help house those currently experiencing or at risk of homelessness).<sup>20</sup>

A major part of HUD's modernized approach to criminal history screening in housing was reflected in a pair of agency memoranda concerning the fair housing implications of criminal records screening in housing. The agency's 2015 Guidance to housing authorities and project owners barred the use of arrest records as the basis for eviction or denial of admission to a federally housing program.<sup>21</sup> HUD went a step further in a 2016 Guidance, which analyzed the use of criminal records in housing decisions under the federal Fair Housing Act.<sup>22</sup>

The 2016 HUD guidance, which applied equally to private and federally assisted housing, observed that arbitrary or excessive criminal history screening likely could violate the Fair Housing Act because Black and Latinx renters are much more likely to have criminal records.<sup>23</sup> While the Fair Housing Act does not prohibit criminal history screening per se, the abysmal racial and ethnic disparities

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<sup>20</sup> HUD, PIH Notice 2021-15 (HA), Emergency Housing Vouchers – Operating Requirements (May 5, 2021), <https://www.hud.gov/sites/dfiles/PIH/documents/PIH2021-15.pdf>.

<sup>21</sup> Dept. of Hous. & Urban Dev., Guidance for Public Housing Agencies and Owners of Federally Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, PIH 15-19 at 3-4 (Nov. 2, 2015) (hereafter “HUD 2015 Guidance”).

<sup>22</sup> See HUD 2016 Guidance, *supra*.

<sup>23</sup> See HUD 2016 Guidance at 10.

in criminal legal system involvement mean that such screening is likely to have a disproportionate effect in excluding Black and Latinx households from rental housing—and therefore must be necessary to serve a substantial, legitimate interest of the housing provider.<sup>24</sup> As HUD explained, the denial of housing (i) based on a record of arrest only, or (ii) pursuant to a “blanket prohibition on any person with any conviction record – no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since,” or (iii) without an opportunity for case-specific consideration of “the nature, severity, and recency of criminal conduct,” likely could not be so justified given the availability of less-discriminatory alternatives.<sup>25</sup>

The Department of Justice echoed HUD’s interpretation in a statement of interest filed in one of the first cases to test this interpretation.<sup>26</sup> And in the time since, multiple federal courts have either found HUD’s analysis persuasive or

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<sup>24</sup> See HUD 2016 Guidance at 5.

<sup>25</sup> HUD 2016 Guidance at 2, 5-7.

<sup>26</sup> See U.S. Dept. of Justice, United States of America’s Statement of Interest at 19, *Fortune Society Inc. v. Sandcastle Towers Housing Dev. Fund Corp.*, Case No. 1:14-cv-06410-VMS (E.D.N.Y. Oct. 18, 2016) (U.S. “has a strong interest in ensuring the correct interpretation and application of the FHA in this case, thereby promoting the dismantling of unlawful barriers to housing for formerly incarcerated individuals.”).

similarly interpreted the Fair Housing Act's application to criminal history screening cases on their own.<sup>27</sup>

C. Other states and cities have similarly undertaken efforts to increase housing access for people with criminal records.

States and localities are increasingly limiting the use of criminal records in rental housing decisions as well. And while the fair housing lens is critically important, curbing discrimination in the use of criminal records screening does not necessarily address the more direct and practical problem that states and localities, like Seattle, face in simply meeting the housing needs of returning citizens. Many states and cities have thus gone much further in restricting the use of criminal history in rental admissions. Seattle's ordinance is not an outlier, but part of a broad and expanding trend at all levels of government toward enabling housing access for people reentering society.

Oregon, for example, prohibited landlords from considering arrests not leading to conviction in both private and publicly-assisted housing in 2018.<sup>28</sup> The

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<sup>27</sup> See, e.g., *Connecticut Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols., LLC*, 478 F. Supp. 3d 259, 298 (D. Conn. 2020) (finding HUD 2015 Guidance persuasive and applying it in criminal records screening case); *Fortune Society v. Sandcastle Towers Hous. Dev. Fund Corp.*, 388 F. Supp. 3d 145, 173 (E.D.N.Y. 2019) (landlord's alleged "blanket ban against individuals with criminal convictions" could violate Fair Housing Act if shown to have racially-disparate impact).

<sup>28</sup> Or. Rev. Statutes §§ 90.303(2), 90.110.

Oregon law also restricts criminal records screening to only those crimes related either to the health, safety or right to peaceful enjoyment of others or to property.<sup>29</sup>

Illinois has enacted a law making persons with arrest records not leading to conviction, juvenile records, and sealed or expunged criminal records a protected class under state fair housing law.<sup>30</sup> A second Illinois law prohibits a housing authority from excluding tenants from public housing based on certain categories of criminal records, including all arrest and indictment records and felony records for offenses more than six months old.<sup>31</sup>

Through administrative guidance, the state of New York prohibits blanket bans on applicants with criminal history in state-funded housing.<sup>32</sup> The New York guidance also requires state-funded housing providers to conduct individualized assessments denying admission for criminal history; such an individualized assessment must consider mitigating circumstances surrounding any criminal activity including “(a) seriousness of the crime, (b) the time elapsed since the offense, (c) the age of the applicant at the time of the crime, (d) evidence of the

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<sup>29</sup>Or. Rev. Statutes §90.303(2).

<sup>30</sup> 775 ILCS § 5/3-102

<sup>31</sup> 310 ILCS § 10/25(e-5)

<sup>32</sup> New York State Office of Homes and Community Renewal, *Management Memorandum- Access to Reduce Housing Barriers for New Yorkers with Criminal Convictions* (April 20, 2016) available at:

<http://www.nyshcr.org/AboutUs/Offices/HousingOperations/2016-B-04.pdf>.

applicant’s rehabilitation and (e) whether they are an actual danger to their neighbors.”<sup>33</sup>

Similarly, Georgia’s Department of Community Affairs, which oversees the state’s low-income housing tax credit (“LIHTC”) portfolio of 144,000 privately-owned units, adopted an administrative regulation in 2018 that prohibits blanket bans on applicants with criminal histories.<sup>34</sup> The regulation also bars screening policies that consider an applicant’s prior arrests, and allows denial because of a criminal conviction “only if the reason for their convictions clearly demonstrates that the safety of residents and/or property is at risk.”<sup>35</sup> Pennsylvania<sup>36</sup> and Louisiana<sup>37</sup> have since instituted similar policies for their LIHTC programs, with proposals under consideration in additional states.<sup>38</sup>

At the municipal level, four cities—Oakland and Berkeley in California, and Ann Arbor, Michigan—now have fair chance laws that, like Seattle’s, substantially prohibit any use of criminal history in rental admissions except as required by state

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<sup>33</sup> *Id.*

<sup>34</sup> Georgia Dept. of Comm. Affairs, Qualified Allocation Plan, § 18(K) (2022).

<sup>35</sup> *See Id.*

<sup>36</sup> *See* Pennsylvania Hous. Finance Agency, Qualified Allocation Plan at 20 (2021).

<sup>37</sup> *See* Louisiana Hous. Corp., Memorandum on Fair Housing and Tenant Selection with Regard to Criminal Record Screening (July 14, 2021).

<sup>38</sup> *See, e.g.*, Ohio Hous. Finance Agency, Draft Qualified Allocation Plan (2022-2023), <https://www.novoco.com/sites/default/files/atoms/files/ohio-lihtc-full-draft-2022-2023-qap-08032021.pdf>

or federal law in certain assisted housing programs.<sup>39</sup> Other cities achieve the same result by making “people with prior arrest or conviction record” a protected class under municipal open housing laws.<sup>40</sup> Still other cities have enacted a range of restrictions on the use of criminal records in housing, such as limiting the types of criminal records a landlord may consider<sup>41</sup> or requiring an opportunity to present mitigating circumstances before rejecting an applicant.<sup>42</sup> Many housing authorities across have also enacted policies greatly limiting the use of criminal records in admissions or other housing decisions.<sup>43</sup>

Seattle’s ordinance is also not unique in prohibiting landlords from inquiring into applicant criminal history as a prophylactic means of preventing pretextual denials of applicants with records. Indeed, in both the housing and employment spheres, “many other recent antidiscrimination laws prohibit gatekeepers’ reliance

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<sup>39</sup> See Ann Arbor, Mich. Code §§ 9:603, 9:605; Berkeley, Cal., Municipal Code § 13.106.040; Oakland, Cal., Municipal Code § 8.25.030(A).

<sup>40</sup> Urbana, Ill., Code of Ordinances, §§ 12-37, 12-64; Champaign, Ill., Municipal Code, §§ 17.2, 17.3, 17.4.5; Ypsilanti, Mich., City Code §§ 58-61(a), 58-62.

<sup>41</sup> See Minneapolis, Minn., Code § 244.2030(c); Richmond, Cal. Municipal Code § 7.110.050; San Francisco, Cal., Police Code, § 4906; Cook County, Ill., Code § 42-38(a), (e)(1)–(2).

<sup>42</sup> See District of Columbia Code § 42–3541.02(e); see Newark, N.J., Ordinance 14-0921 (2017).

<sup>43</sup> See John Bae, Kate Finley, Margaret diZerega, and Sharon Kim, “Opening Doors: How to develop reentry programs using examples from public housing authorities,” Sept. 2017, <https://www.vera.org/publications/opening-doors-public-housing-reentry-guide>.

on, and often inquiries about, certain life experiences like applicants’ marital or reproductive choices, current unemployment status, credit histories, status as domestic violence victims, certain arrest records, and veteran status” in order to prevent discrimination on the basis of such information.<sup>44</sup>

For one example, since 2004 more than 150 cities, 37 states, the District of Columbia, and the federal government have adopted “ban-the-box policies” that prohibit employers from inquiring into a job applicant’s criminal history until after an interview or sometimes until a conditional job offer is made.<sup>45</sup> New Jersey enacted a housing ban-the-box law in 2021, which prohibits consideration of a rental applicant’s criminal record before a conditional offer of housing.<sup>46</sup>

Restricting access to information a landlord that may not lawfully use in making a rental admission decision does not impermissibly infringe upon freedom of speech because “when a legislature exercises its constitutional power to prohibit

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<sup>44</sup> Helen Norton, “Discrimination, the Speech That Enables It, and the First Amendment,” 2020 U.Ch. Legal Forum 209, 218 (2020) (“[A]ntidiscrimination law prohibits gatekeepers from relying on information about certain characteristics in their decision-making when the legislature concludes that such reliance is unfair, unwise, or both. And once legislatures so regulate, it then makes sense for them to restrict gatekeepers’ inquiries eliciting the information that enables what is now illegal discrimination.”), <https://scholar.law.colorado.edu/articles/1317/>

<sup>45</sup> Beth Avery & Han Lu, National Employment Law Project, Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies, (Oct. 1, 2021), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>

<sup>46</sup> See N.J. Stat., § 46:8-56.

certain commercial activity, speech that facilitates that now- illegal activity loses its First Amendment value to listeners, and thus its constitutional protection.”<sup>47</sup>

And just as communications between employers and prospective employees about job qualifications constitute commercial speech, so do transactional discussions between landlords and prospective tenants; prohibiting inquiries into impermissible criminal history considerations directly advances substantial governmental interests such as promoting successful reentry and redressing the discriminatory impacts of mass incarceration.<sup>48</sup>

D. Empirical evidence does not support the use of criminal history screening in rental admissions.

Many of the policies that created mass incarceration remain on the books, including criminal history screening requirements with respect to HUD housing.<sup>49</sup> But Appellants’ unsupported contention that criminal records are “an important indicator of reliability and risk” with significant probative value for “employers, landlords, and governments” is contrary to the empirical research.<sup>50</sup> Criminal

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<sup>47</sup> Helen Norton, 2020 U.Chi. Legal Forum at 236.

<sup>48</sup> *See, accord, Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 138 (3d Cir. 2020) (regulation of commercial speech in employment discussion context requires “only be a ‘reasonable fit’ between the legislature’s ends and the means chosen to accomplish those ends”).

<sup>49</sup> *See, e.g.*, 24 C.F.R. § 960.203 (promoting criminal history screening in conventional public housing).

<sup>50</sup> Appellants’ Opening Brief at 10.



history screening is rooted not in social science or predictive analytics but in mere (highly racialized) “stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record[.]”<sup>51</sup>

A 2009 study into the relationship between criminal history and housing outcomes among formerly homeless individuals in Seattle found “the criminal history of those who succeeded in housing was nearly indistinguishable from that of those who failed in housing.”<sup>52</sup> Using multivariate regression analysis, the study concluded that past involvement in the criminal-legal system generally plays no role in predicting whether an individual will be a responsible tenant.<sup>53</sup>

A more recent study in the Twin Cities corroborated these findings, finding similarly that most criminal records “show[ed] no evidence of a significant link to negative housing outcomes.”<sup>54</sup> The Minnesota study observed that a small handful

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<sup>51</sup> See HUD 2016 Guidance at 5.

<sup>52</sup> See Danel K. Malone, “Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders,” *Psychiatric Services* (Jan. 13, 2015), <https://doi.org/10.1176/ps.2009.60.2.224>

<sup>53</sup> *Id.*; see also Suzanne Zerger, Q&A with Daniel Malone: Criminal History Does Not Predict Housing Retention, Homeless Hub, <https://www.homelesshub.ca/resource/qa-daniel-malone-criminal-history-does-not-predict-housing-retention>.

<sup>54</sup> Cael Warren, “Success in Housing: How Much Does Criminal Background Matter?” Wilder Research at 15 (January 2019), [https://www.wilder.org/sites/default/files/imports/AEON\\_HousingSuccess\\_CriminalBackground\\_Report\\_1-19.pdf](https://www.wilder.org/sites/default/files/imports/AEON_HousingSuccess_CriminalBackground_Report_1-19.pdf)

of crime types (“property offenses, major drug offenses, fraud, and assault”) could predict at most a marginally higher probability (3-9 percentage points) of a negative outcome, though the study authors questioned even that predictive value and found it “declines rapidly over time; the impact of a misdemeanor becomes insignificant after 2 years, while felonies become insignificant after 5 years.”<sup>55</sup>

Studies in the employment context have repeatedly shown that criminal background checks are poor tools for predicting such matters as employee performance—both because extensive errors in the reports and underlying records render such background checks consistently unreliable,<sup>56</sup> and because denials are driven by stigma rather than a genuine risk of repeated criminal behavior.<sup>57</sup>

Despite the social science data, landlords commonly screen out applicants for criminal records that make no material difference in housing outcomes, such as

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<sup>55</sup> *Id.* at 15.

<sup>56</sup> See Marina Duane et al., “Criminal Background Checks: Impact on Employment and Recidivism,” Urban Institute (Nov. 2017), [https://www.urban.org/sites/default/files/publication/88621/2001174\\_criminal\\_background\\_checks\\_impact\\_on\\_employment\\_and\\_recidivism\\_2.pdf](https://www.urban.org/sites/default/files/publication/88621/2001174_criminal_background_checks_impact_on_employment_and_recidivism_2.pdf)

<sup>57</sup> See, e.g., Dallas Augustine et al., “Why Do Employers Discriminate Against People with Records? Stigma and the Case for Ban the Box,” UCLA Institute for Research on Labor and Employment (July 2020) (“Our four main results all indicate that employer aversion to hiring people with records is not explained by repetition risk alone and that the additional negative influence is attributable to stigma.”), <https://irle.ucla.edu/wp-content/uploads/2020/07/Criminal-Records-Final-6.pdf>,

prostitution, minor drug offenses, or alcohol-related crimes.<sup>58</sup> Very few landlords establish their criminal history screening policies based on data or empirical research.<sup>59</sup> And while criminal history has very little value in predicting unsuccessful tenancies, there is no evidence that criminal records screening helps landlords protect other tenants or the physical premises at all.<sup>60</sup>

Appellants suggest otherwise, pointing to general recidivism statistics showing that a high percentage of state prisoners are re-arrested within 10 years of their release.<sup>61</sup> Yet about a third of those arrests are based on parole violations rather than new court commitments, and more than 30% do not even result in

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<sup>58</sup> *See Id.* at 17; *see also* Michael Klazema, “What Background Checks Do Landlords Do?” BackgroundChecks.com (April 2, 2019) (all drug offenses are “red-flag issues that might lead a landlord to disqualify an applicant.”), <https://www.backgroundchecks.com/blog/what-background-checks-do-landlords-do>

<sup>59</sup> *See* National Apartment Association, Criminal Background Checks Toolkit, Analysis of Results from Member Screening Policy Survey at 13 (Oc. 22, 2012) (only 6 of 97 landlords surveyed reported using “reference books/research” to establish criminal history screening policies), <https://www.naa.org/sites/default/files/naa-documents/government-affairs/protected/business-management-operations/fair-housing/CBC-Toolkit-FINAL.pdf>

<sup>60</sup> Importantly, a negative tenancy outcome for purposes of that study included any kind of lease violation (such as nonpayment of rent)—not just criminal activity or other behavioral issues. *See* Cael Warren, *supra*, at 11.

<sup>61</sup> Appellants’ Opening Brief at 10, *citing* Leonardo Antenangeli & Matthew R. Durose, Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018), Bureau of Justice Statistics Special Report 1 (2021).

convictions.<sup>62</sup> Yet recidivism statistics, which “do not account for variation in subsequent crimes committed” and tend to reflect underlying biases in the criminal legal system, are a poor metric for assessing successful tenancies.<sup>63</sup> Recidivism rates also fail to account for differences in policing, charges, or post-release supervision, or to consider access to critical supports, such as stable housing.<sup>64</sup> Indeed, housing instability is itself among the most significant contributors to recidivism; high rates may not necessarily persist among returning citizens who have stable housing.<sup>65</sup>

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<sup>62</sup> See Antenangeli & Matthew R. Durose at 2, 7.

<sup>63</sup> See Libby Doyle, “Why Recidivism Isn’t a Strong Metric for Determining a Housing Program’s Success,” Housing Matters (Feb. 2, 2022), <https://housingmatters.urban.org/articles/why-recidivism-isnt-strong-metric-determining-housing-programs-success>

<sup>64</sup> See Jeffrey A. Butts & Vincent Schiraldi, Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections, Harvard Kennedy Sch. Prog. in Crim. Just. Pol. and Mgmt., (Mar. 2018), [https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/recidivism\\_reconsidered.pdf](https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/recidivism_reconsidered.pdf); see Jack Duran & Shawnda Chapman Brown, Fewer People are Going Back to Prison—But that Doesn’t Paint the Entire Picture, Vera Inst. (Aug. 7, 2018), <https://www.vera.org/blog/fewer-people-are-going-back-to-prison-but-that-doesnt-paint-the-entire-picture>.

<sup>65</sup> See Leah Jacobs and Aaron Gottlieb, “The Effect of Housing Circumstances on Recidivism,” 47 Criminal Justice Behavior 1097 (Aug. 6, 2020) (“This study finds that people on probation may not recidivate, but for unstable housing and homelessness. This is especially the case for those relatively low in risk, and relatively low-level reoffending.”), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8496894/> —

E. Prohibiting landlords from excluding tenants with criminal records is an appropriate governmental response to a community-wide need for housing access and successful re-entry policy.

Even if one Appellants' assumptions that rental applicants with criminal records pose higher risks, allowing landlords to reject such tenants does not make Seattle any safer. Those applicants denied housing would wind up elsewhere in the community—so one landlord's rejection of an applicant with a criminal record merely transfers the supposed risk to another housing provider. This does not enhance public safety for the city of Seattle overall. Even worse, some returning citizens may fail to qualify at any rental properties—and wind up in situations of homelessness where studies show much higher risks of recidivism.<sup>66</sup> As discussed above, studies show that criminal history screening does not meaningfully enable landlords to choose safer or even better-performing tenants. But even if it did, criminal history screening would still be overall more harmful than helpful to Seattle's public safety objectives.

Removing criminal records as a contributor to homelessness and housing insecurity is also good policy for cities like Seattle (as well as Oakland and Berkeley, which have passed similar laws) that face extreme challenges with housing affordability and availability. Much of the country has been mired in an affordable housing crisis for some time; currently, about 11 million U.S. renter

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<sup>66</sup> See Jacobs and Gottlieb, *supra*.

households pay an unsustainable 50% or more of their income for housing.<sup>67</sup> But Seattle's housing affordability problem is among the nation's worst. The city's rental market is one of the most expensive in the U.S., with the median cost of a one-bedroom apartment at \$1,690 per month and two-bedroom units over \$2,200.<sup>68</sup> Fully 68% of the lowest-income households (i.e., those making less than 30% of area median income) pay over half their incomes for housing.<sup>69</sup>

Seattle, with an estimated population over 755,000 people, has only about 8,200 units of federally subsidized housing and 11,750 tenant-based vouchers.<sup>70</sup> The competition for those affordable units is overwhelming. Seattle Housing Authority's waitlist for section 8 vouchers is currently closed and when the list is open, applicants must win a lottery just to add their names.<sup>71</sup> Seattle Housing Authority also has no available units in any of its project-based buildings and many

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<sup>67</sup> National Low-Income Housing Coalition, *The Gap: A Shortage of Affordable Homes at 7* (2021), available at [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2021.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf):

<sup>68</sup> Alec Regimbal, "Report: Seattle is 14th most expensive US city to rent in," *SeattlePI* (Sept. 28, 2021), <https://www.seattlepi.com/realestate/article/seattle-is-14-most-expensive-city-to-rent-in-us-16491835.php>

<sup>69</sup> See NLIHC, "*The Gap*," Appx. B, link at fn 66 *supra*.

<sup>70</sup> Seattle Housing Authority, *About Us*, <https://www.seattlehousing.org/about-us> (last visited Jan. 31, 2022).

<sup>71</sup> Seattle Housing Authority, *Housing Choice Voucher Waitlist*, <https://www.seattlehousing.org/waitlist> (last visited Jan. 31, 2022).

of the waitlists for individual projects are also closed.<sup>72</sup> Once a family does get on a wait list, waiting times range from 1-8 years.<sup>73</sup> The entire metropolitan area has just 47 affordable dwelling units for every 100 households at or below 50% of the area median income, and only 30 affordable units for every 100 households at or below 30% of median income.<sup>74</sup>

Permanent supportive housing, which pairs housing with services such as medical, drug and alcohol treatment, and education and job training, is especially helpful for those who have been out of the workforce or other social systems for some time and is associated with positive outcomes for people reentering the community.<sup>75</sup> Again, however, Seattle has only enough permanent supportive

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<sup>72</sup> Seattle Housing Authority, *SHA Housing*, <https://www.seattlehousing.org/housing/all/list>, (last visited Jan. 31, 2022).

<sup>73</sup> *Id.*

<sup>74</sup> National Low-Income Housing Coalition, *The Gap: A Shortage of Affordable Homes*, Appx. B (2021), available at [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2021.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf).

<sup>75</sup> Jocelyn Fontaine, Urban Institute, *The Role of Supportive Housing in Successful Reentry Outcomes for Disabled Prisoners* (2013).

housing resources (about 1,482 units<sup>76</sup>) to meet a small fraction of the need (most recently estimated at about 13,300 units<sup>77</sup>).

These high rents and shortages of affordable and supporting housing means many individuals and families who need it go without. Seattle’s point-in-time count for 2020 found 11,751 persons experiencing homelessness on that night.<sup>78</sup> Criminal history screening exacerbates these affordability challenges by disqualifying persons from rental housing even when they have the financial means to afford the housing and could live there successfully.

“Since 2004, an average of over 650,000 individuals have been released annually from federal and state prisons, and over 95 percent of current inmates will be released at some point.”<sup>79</sup> Making sure those formerly incarcerated individuals returning to communities in Washington have the ability to find a home is a

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<sup>76</sup> Washington State Department of Corrections, *Number of Prison Admissions by County of Admission Number of Prison Releases by County of Release*, available at: <https://www.doc.wa.gov/docs/publications/reports/200-RE001.pdf>; *What Seattle Has Spent on Housing for the Homeless*, Seattle King 5 News, May 29, 2018.

<sup>77</sup> Seattle King 5 News, *supra*.

<sup>78</sup> King County, “Point-in-Time count estimates a 5 percent increase in people experiencing homelessness, newly updated data dashboards reveal more people receiving shelter and services,” (July 1, 2020), <https://kingcounty.gov/elected/executive/constantine/news/release/2020/July/01-homeless-count.aspx> .

<sup>79</sup> *Id.* at 1.



paramount public policy.<sup>80</sup> Indeed, the Legislature has further recognized that “[r]esidents must have a choice of housing opportunities within the community where they choose to live.”<sup>81</sup>

In King County, 1,253 people were released from prison in 2021 alone.<sup>82</sup> The local existing affordable housing and permanent supporting housing resources are insufficient to meet the needs of this population. Seattle is right to require that private landlords—which operate 87.1% percent of the city’s rental housing stock<sup>83</sup>--do their part to house returning citizens as a condition of participating in the city’s lucrative rental market.

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<sup>80</sup> See RCW 43.185B.009 (“The objectives of the Washington housing policy act shall be to attain the state's goal of a decent home in a healthy, safe environment for every resident of the state...”).

<sup>81</sup> RCW 43.185B.005(1)(d).

<sup>82</sup> Washington State Department of Corrections, *Number of Prison Admissions by County of Admission Number of Prison Releases by County of Release*, available at: <https://www.doc.wa.gov/docs/publications/reports/200-RE001.pdf>

<sup>83</sup> *Id.*; Joan Petersilia, California Policy Research Center, *Understanding California Corrections* (2006); Gene Balk, *No major city has enough affordable housing to meet demand, but how does Seattle stack up?*, *Seattle Times*, Feb. 16, 2018.

## CONCLUSION

For the foregoing reasons, this Court should AFFIRM the decision below.

Respectfully submitted this 4<sup>th</sup> day of February, 2022,

s/Eric Dunn

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