**Legal Analysis of the 9th Circuit Decision in *Yim v. City of Seattle* (*Yim II*) for Fair Chance Housing Advocates**

*July 2023*

In March 2023, the 9th Circuit issued a decision in *Yim v. City of Seattle (Yim II)*, a constitutional challenge to Seattle's Fair Chance Housing Ordinance (the Ordinance). At issue were two of the Ordinance's provisions:

1. ***The inquiry provision***, which prohibits landlords from asking tenants and applicants about past arrest records, conviction records, or conviction history; and

2. ***The adverse action provision*****,** which prohibits landlords from taking an adverse action, such as rejecting applicants or evicting tenants, based on a person's past arrest records, conviction records, or conviction history.

In a victory for advocates, the court upheld the adverse action provision, the core protection of the Ordinance. Advocates in other jurisdictions should feel confident that they can push for legislation that prohibits landlords from taking adverse actions against people with records without narrowing the scope of that prohibition in terms of lookback periods or categories of offenses, at least as a constitutional matter. The Ordinance remains the most progressive and protective fair chance housing ordinance in the country.

Significantly, however, the 9th Circuit struck down the inquiry provision as an unconstitutional restriction of the landlords' right to free speech under the First Amendment. Removing the inquiry provision complicates enforcement of the adverse action provision. At the same time, the balance of this mixed ruling likely tips in favor of tenants and applicants. A landlord who asks about criminal history and subsequently takes an adverse action should not be able to seriously argue that the adverse action was unrelated to the criminal history that the landlord asked about.

This memo outlines the 9th Circuit's analysis; discusses next steps for the parties; and offers suggestions for advocates who are campaigning for or implementing similar fair chance housing ordinances in their jurisdictions.

## I. The 9th Circuit's analysis: What did the court decide?

### A. Adverse action provision

The Ordinance prohibits landlords from taking adverse action based on "*any* arrest record, conviction record or conviction history" of tenants or applicants. S.M.C. 14.09.025(A) (emphasis added). An adverse action includes, among other things, "[r]efusing to engage in or negotiate a rental real estate transaction," "denying tenancy," "[e]xpelling or evicting an occupant," and applying different rates or terms to a rental real estate transaction. Id. 14.09.010.

The Ordinance stands out from other fair chance housing laws because it does not carve out a period of time during which landlords may consider a person's conviction history. In Cook County, Illinois, for

example, landlords may consider convictions that take place within three years of application. Cook County, Ill., Code § 42-38.

In a significant win for advocates, the court upheld the adverse action provision. According to the court, the city had two legitimate reasons for passing the ordinance: (1) reducing barriers to housing faced by persons with arrest and conviction records, and (2) decreasing the use of arrest and conviction history as a proxy to discriminate on the basis of race. *Yim v. City of Seattle*, 63 F.4th 783, 799 (9th Cir. 2023). Prohibiting landlords from taking adverse actions based on arrest and conviction records is legitimately connected to these two goals; therefore, the adverse action provision survived this legal challenge.

### B. Inquiry provision

The court's analysis of the Ordinance's inquiry provision is more problematic. The plaintiff-landlords argued that by prohibiting them from asking about arrest and conviction history, the Ordinance restricts their First Amendment right to free speech.

There were several legal issues at play here, but the most important question for the court was: **Is the Ordinance's inquiry provision "narrowly drawn" to achieve the City's stated interests** of (1) reducing barriers to housing faced by persons with arrest and conviction records and (2) decreasing the use of arrest and conviction history as a proxy to discriminate on the basis of race?

In other words, in enacting the Ordinance, did the City "carefully calculate[] the costs and benefits associated with the burden on speech" placed on the landlords by the Ordinance's inquiry provision? *Yim v. City of Seattle*, 63 F.4th 783, 796 (9th Cir. 2023) (quoting *City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 417 (1993) A key part of the court's analysis in answering this question focused on whether the inquiry provision struck a reasonable balance between the interests of the various parties, such as landlords, tenants, and applicants.

Ultimately, the court held that the inquiry provision was not "narrowly drawn" and therefore violated the First Amendment. The court noted that the City considered a narrower version of the inquiry provision that banned inquiries about convictions more than 2 years old and rejected it without justification.

Even more troubling, the court pointed to fair chance housing ordinances in other jurisdictions and noted that their inquiry provisions were more limited. Some ordinances limit inquiries to a specific period of time (e.g., convictions older than three years) or to specific categories of criminal history. *See e.g.,* Berkeley, Cal., Mun. Code § 13.106.040, et seq.; Oakland, Cal., Mun. Code § 8.25.010, et seq.; Ann Arbor, Mich., Mun. Code, Title IX, Chapter 122, § 9:600, et seq. According to the court, because these ordinances allow landlords to ask a potential tenant about their most recent, serious offenses, they impose a significantly lower burden on the landlord's speech.

In our opinion, this reasoning is deeply flawed. It takes a huge leap and assumes that more limited inquiry provisions in other fair chance housing ordinances are just as effective as the Ordinance's inquiry provision. One of the three judges agreed, but they unfortunately do not represent the majority opinion of the court:

> 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. *Yim v. City of Seattle*, 63 F.4th 783, 810 (9th Cir. 2023) (Gould, R.M., concurring in part and dissenting in part)

## II. FAQ on the practical impacts of *Yim II* decision for advocates

***Q: What is next for this case?***

In June 2023, the 9th Circuit court denied the petition for en banc review, which means that the decision stands. The parties may petition the U.S. Supreme Court to review this case; the deadline for their request is the end of September 2023.

***Q: Who does this decision apply to?***

This decision applies to the jurisdictions that fall within the 9th Circuit, which includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. It also includes Guam and the Northern Mariana Islands.

Outside of the 9th Circuit, this decision is not binding, but will be highly influential. Advocates should also note that the plaintiffs' lawyers come from a conservative impact litigation firm and approach *Yim II* as a test case that could be replicated in other jurisdictions.

***Q: Does this decision have implications for restrictions on landlord inquiries outside of the criminal records context?***

Likely yes. Laws that restrict landlords from asking about other types of information, such as past eviction history, may need to be examined.

***Q: Is there helpful language in the decision for advocates?***

There is useful language from the court about the need for housing for people with records, including endorsing the city's legitimate goals for its policies. The introduction discusses at length the problem of housing for people with records and the racial impact. Some examples of the court's language include:

> The City's stated interests—reducing barriers to housing faced by persons with criminal records and the use of criminal history as a proxy to discriminate on the basis of race—are substantial. *Yim v. City of Seattle*, 63 F.4th 783, 794 (9th Cir. 2023).

> The barriers people with a criminal history face trying to find stable housing are well-documented. Approximately 90% of private landlords conduct criminal background checks on prospective tenants, and nearly half of private landlords in Seattle say they would reject an applicant with a criminal history. As a result, formerly incarcerated persons are nearly 10 times as likely as the general population to experience homelessness or housing insecurity, and one in five people who leave prison become homeless shortly thereafter. *Id. at* 787.

> [The] "prison to homelessness pipeline" has a host of negative effects on communities. Persons without stable housing are significantly more likely to recidivate, with one study estimating that people with unstable housing were up to seven times more likely to re-offend. They are less likely to be able to find stable employment and access critical physical and mental healthcare. *Id.* at 788.
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> [C]riminal history screening exacerbates ... affordability challenges by disqualifying persons from rental housing even when they have the financial means to afford the housing and could live there successfully. *Id.*
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> These consequences are not borne equally by all Americans. In the United States, people of color are significantly more likely to have a criminal history than their white counterparts. Discriminatory law enforcement practices have resulted in people of color being "arrested, convicted and incarcerated at rates [that are] disproportionate to their share of the general population." In 2014, for example, African Americans comprised 12% of the total population, but 36% of the total prison population.5 As of 2018, one in nine Black men ages 20–34 was incarcerated, and one in three Black men had spent time in prison over the course of his lifetime. *Id.*
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> The correlation between race and criminal history can result in both unintentional and intentional discrimination on the part of landlords who take account of criminal history. A landlord with a policy of not renting to tenants with a criminal history might not bear any racial animus, but the policy could nevertheless disproportionately exclude people of color. On the flip side, a landlord who does not wish to rent to non-white tenants could mask discriminatory intent with a "policy" of declining to rent to tenants with a criminal history. A 2014 fair housing test conducted by the Seattle Office of Civil Rights found evidence of the latter practice, reporting that testers belonging to minority groups were frequently asked about their criminal history, while similarly situated white testers were not. It also found incidents of differential treatment based on race in housing 64% of the time, including incidences of this practice. *Id.* at 788–89.

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