

Appendix A

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

THE CITY OF SEATTLE, a Washington
Municipal corporation,

Defendant.

Case No. 2:18-cv-00736-JCC

**BRIEF OF THE NATIONAL
APARTMENT ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION OF DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT**

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1 **INTRODUCTION**

2 Amicus curiae, the National Apartment Association (hereinafter “the NAA”), appreciates
3 the Court’s permission to submit an amicus brief in this lawsuit. The City’s Statement of
4 Undisputed Material Facts contains numerous inaccuracies that do not reflect the experiences of
5 real players in the rental housing industry in Seattle and nationwide. Instead, the City’s 600-plus-
6 page “Record” is comprised of selective statements from academic papers that do not reflect
7 actual market conditions. The NAA writes to offer the Court a more experience-based
8 perspective.

9 **CORPORATE DISCLOSURE STATEMENT**

10 Amicus Curiae, the NAA, makes the following disclosures: (1) the NAA is a nonprofit
11 trade association which has no parent corporation; and (2) no publicly held company owns 10%
12 or more of its stock.

13 **STATEMENT OF THE INTERESTS OF AMICUS CURIAE**

14 The NAA is a trade association for owners and managers of rental housing. The NAA is
15 comprised of 160 state and local affiliated apartment associations. The NAA encompasses over
16 78,000 members representing more than 9.3 million rental homes throughout the United States,
17 Canada, and the United Kingdom. The NAA, which is the leading national advocate for quality
18 rental housing, is also the largest trade organization dedicated solely to rental housing.

19 As part of its business, the NAA creates and disseminates educational, operational, and
20 advocacy services for its members. In doing so, the NAA advocates for fair governmental
21 treatment of rental housing businesses nationwide, including advocating for the interests of the
22 rental housing business community at large in legal cases of national concern.

23 The NAA’s members are faced with the issues presented in this case each day. The NAA
24 offers this amicus brief to emphasize to the Court a central principle in its industry: that it is not
25 in the business interests of rental housing providers to reject potential residents without good
26 cause.

1 The NAA adopts, by reference, the constitutional arguments advanced by Plaintiffs in
2 support of their Motion for Summary Judgment. Rather than repeat those arguments, the NAA
3 writes separately to assist the Court by providing a more realistic view of the business,
4 regulatory, and legal atmosphere in which the NAA's members, and all rental housing providers,
5 operate.

6 This brief describes the importance of tenant screening in the context of rental housing
7 and analogizes tenant screening to the Court's own, routine screening in its criminal docket using
8 factors that have been specifically authorized by Congress. The City of Seattle, in its zeal to ease
9 persons with criminal convictions into housing, has chosen to ignore the relevance of these
10 factors, thereby placing property owners and managers at risk as well as the neighbors who
11 already live in Seattle's apartment communities.

12 SEATTLE'S RENTAL HOUSING MARKET

13 Seattle is the fifth largest metropolitan rental housing market in the United States.¹ It
14 faces a critical shortage of supply over the next 10 years. Based on projections from a 2017 study
15 commissioned by the NAA and the National Multifamily Housing Council and conducted by
16 Hoyt Advisory Services, the Seattle metro area is expected to need 98,228 new apartment units
17 by 2030 to house its expanding renter population.

18 The NAA has 49,186 member units in Seattle, approximately 12% of the Seattle rental
19 market. The NAA members in Seattle range from individual persons who both own and manage
20 their own real estate investment portfolios to multinational, publicly traded corporations, or Real
21 Estate Investment Trusts (REITs) that may own their own properties, manage rental housing for
22 institutional investors, or some combination thereof.

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25 ¹ Hoyt Advisory Services, National Apartment Association, & National Multifamily Housing
26 Council, "Seattle Area Needs 98,228 New Apartments by 2030 to Keep Pace with Demand"
(2018), available online at: <http://www.WeAreApartments.org/data/metro/seattle> [last accessed
Nov. 2, 2018].

1 The profit margins derived from rental operations vary tremendously based upon a
 2 number of factors, including the age of the buildings, the energy efficiency of the buildings, and
 3 whether local or state law permits passing on certain costs to tenants (such as utility billing). The
 4 ideal business model is to rent to long-term tenants who will pay rent on a timely basis and not
 5 disrupt the apartment community or endanger their neighbors. That ideal model is rarely
 6 attainable due to changing market conditions, tenant turnover, and delayed receipt of rental
 7 payments. Nevertheless, the underlying assumption in rental housing is that owners/operators
 8 want to rent apartments to persons who will pay rent in buildings that operate at full occupancy.
 9 There is no cash flow generated by a decision not to rent a rental unit, and owners/operators are
 10 not in the business of “not renting” to persons. Therefore, it is contrary to the interests of rental
 11 housing providers to not rent to potential residents without very good cause.

12 ARGUMENT

13 The Seattle Fair Chance Housing Ordinance (“the Ordinance”) not only violates the First
 14 Amendment, as explained in Plaintiffs’ Motion for Summary Judgment, but it also ignores
 15 common sense and experience in predicting human behavior. It further impairs rental property
 16 owners’ ability to provide safe rental housing, and it creates liability concerns for rental housing
 17 owners and operators.

18 **A. Seattle’s Fair Chance Housing Ordinance Inhibits Rental Property Owners’ Ability** 19 **To Provide Safe Rental Housing For Residents.**

20 The rental housing business is premised upon the receipt of money in exchange for the
 21 use of safe, quality rental homes. A lack of safety in a rental housing environment risks driving
 22 out responsible, paying tenants.

23 Housing providers often screen applicants who wish to live in their rental homes. They
 24 do this with credit screening, employment verifications, interviews with prior landlords, and
 25 criminal background checks. This screening process allows the rental housing provider to gain a
 26 comfort level that the potential resident will fully comply with the terms of their lease agreement,

1 including, but not limited to, ensuring that the potential resident does not pose a foreseeable
2 safety risk to others.

3 Criminal background screening practices are not concealed attempts at housing
4 discrimination, as the City implies. Instead, they represent business judgments adopted to assess
5 the likelihood that an applicant will pose a danger to other residents and the property. This is
6 evidenced by the fact that most landlords do not outright exclude all potential residents with
7 criminal histories. On the contrary, the vast majority of property owners expend maximum effort
8 to devise screening policies that categorize their exclusions based on the type and severity of the
9 crime committed, the danger posed by a perpetrator of such crimes to other residents, and the
10 time elapsed since the crime was committed. Through such screening, property owners are able
11 to maximize occupancy of their units while minimizing the dangers faced by residents and
12 themselves.

13 Tenant screening is a basic risk management business function tailored to each
14 company's individual risk tolerance. One company may bar felons entirely. Others may rent to
15 persons with certain misdemeanor convictions. Others, like the Department of Housing and
16 Urban Development, bar persons with drug convictions and persons perceived to be involved in
17 illegal drug distribution or drug manufacturing. 42 U.S.C. § 3607(b)(4); 24 CFR § 982.553(a).
18 Seattle Housing Authority too considers applicants' history of drug-related, violent, and property
19 crimes when evaluating the suitability of aspiring residents of assisted housing communities
20 administered by the Seattle Housing Authority.²

21 Criminal background screening is, in many respects, necessary as rental community
22 residents demand that the apartment community in which they choose to live is a safe
23 environment for themselves, their family, and friends. Without the assurance of safe housing,

24 ² Seattle Housing Authority, "Admissions and Continued Occupancy Policy," p. 62 (adopted
25 Aug. 2017), available online at:
26 http://www.seattlehousing.org/sites/default/files/acop_master.pdf [last accessed Nov. 20, 2018]
(describing "grounds for denial due to criminal history").

1 residents will choose to live elsewhere. In this manner, the Ordinance deprives Seattle residents
2 of the safety they demand and places Seattle rental housing providers at a significant
3 disadvantage to property owners in neighboring communities.

4 Without question, the Ordinance deprives Seattle property owners of the needed tools to
5 protect themselves and their residents from potentially dangerous criminals. For these reasons it
6 is essential that rental housing providers be afforded the opportunity to screen all residents for
7 criminal history without the fear of running afoul of local law. Without the ability to screen,
8 apartment communities will be less safe.

9 **B. Seattle’s Ordinance Denies Rental Housing Providers The Ability To Avoid**
10 **Potential, Foreseeable Liability.**

11 Unlike most consumer transactions, renting an apartment involves a long-term
12 relationship where the resident can expect housing over a long period of time and the manager
13 can expect periodic payments for the use of the rental home. What makes parties comfortable
14 engaging in the leap of faith involved in such long-term transactions? The application process
15 allows each party to examine whether they are likely to live up to their respective obligations
16 under the lease contract. The tenant can interview other residents and visit social media to learn
17 the reputation of an apartment community. The property manager can review rental history,
18 credit history, and oftentimes, the criminal background of the prospective tenant to ascertain
19 whether the applicant is likely to pay rent on time and be a safe member of the rental community.

20 The other reason why property managers conduct background checks is the prospect of
21 third-party liability for acts committed by others. Washington, like other states, requires rental
22 housing providers to offer reasonably safe accommodations for their tenants or risk being found
23 negligent and liable for the tenant’s damages. In the context of the relationship of landlords and
24 tenants, a landlord has an affirmative obligation to maintain the common areas of the premises in
25 a reasonably safe condition for the tenant’s use. *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43,
26 47 (1996) (citing *Geise v Lee*, 84 Wn.2d 866 (1975)).

1 Screening potential residents for criminal history has therefore become a legal necessity
2 as landlords face potential liability for the foreseeable criminal actions of their residents. *Griffin*
3 *v. W. RS, Inc.*, 97 Wn. App. 557, 570, 984 P.2d 1070 (1999), *rev'd on other grounds by* 143
4 Wn.2d 81, 13 P.3d 558 (2001); *see also Faulkner v. Racquetwood Vill. Condo. Ass'n*, 106 Wn.
5 App. 483, 487, 23 P.3d 1135, 1137 (2001); *Hutchins v. 1001 Fourth Avenue Associates*, 116
6 Wn.2d 217, 224, 802 P.2d 1360 (1991); *Sharif v. Leahy*, No. 55453-1-I, 2006 Wash. App.
7 LEXIS 1103, at *10 (Ct. App. May 30, 2006). Under the Ordinance, a landlord would be unable
8 to avoid this potential liability, as the Ordinance denies property owners access to the tools
9 necessary to conduct a basic foreseeability analysis.

10 In a case certified by the Ninth Circuit Court of Appeals to the Washington Supreme
11 Court, the Court, in an en banc decision, affirmatively adopted the Restatement (Second) of
12 Torts section 344 holding that a property owner could be held liable for criminal acts committed
13 by third parties on the premises by showing a history of prior similar activity on the property.
14 *McKown v. Simon Prop. Grp. Inc.*, 182 Wn.2d 752, 767 (2015). “If the place or character of [the
15 landlord’s] business, or his past experience, is that he should reasonably anticipate careless or
16 criminal conduct on the part of third persons, either generally, or at some particular time, he may
17 be under a duty to take precautions against it, and to provide a reasonably sufficient number of
18 servants to afford reasonable protection.” *Id.* By forbidding owners and managers to inquire
19 about criminal history, the City effectively raises their exposure to liability by preventing them
20 from avoiding foreseeable risk of harm.

21 **C. “The Best Predictor of Future Behavior is Past Behavior.”**

22 “The best predictor of future behavior is past behavior.” This quote has been attributed to
23 psychologists Albert Ellis, Walter Michel, and B.F. Skinner, as well as Mark Twain. It captures
24 the common-sense observation that human beings are creatures of habit who often engage in
25 patterns of behavior. Criminal behavior is no exception. A criminal conviction, whether by trial
26 or guilty plea, reflects past conduct that may repeat in the future.

1 Congress's recognition of the potential for recidivism is reflected in rules and laws such
2 as the Federal Rules of Evidence ("FRE"), the Bail Reform Acts, the Federal Sentencing
3 Guidelines, and the federal Department of Housing and Urban Development's regulations. For
4 example, FRE 609 allows for the impeachment of witnesses by evidence of a prior criminal
5 conviction. For this fact alone, a juror is permitted to discount a witness's credibility.

6 Further, the Bail Reform Act, 18 U.S.C. § 3142 *et seq.*, lists a variety of factors to be
7 examined in order for the Court to decide whether a person charged with a crime should be
8 detained pretrial. Among those factors is prior criminal activity. Prior criminal activity may bear
9 on the likelihood that a defendant can be trusted to appear at trial. Significantly, setting bail also
10 involves consideration of factors like the safety of the community. *See* 18 U.S.C. § 3142(c)(1)
11 ("...or will endanger the safety of any other person or the community...").

12 Similarly, the sentencing "table" introduced in 1986 by the U.S. Sentencing Commission
13 explicitly requires courts to consider prior criminal activity in determining an appropriate
14 sentence. This rule reflects the belief that judges who face important decisions regarding the
15 lives of others should be provided with more (not less) information, consistent with the gravity of
16 the decisions to be made.

17 A bar for landlords to obtain this same information about prospective tenants
18 significantly impairs their ability to ensure the safety of their rental communities by
19 disempowering them to screen out those who are likely to endanger the safety of other residents.

20 Finally, the NAA directs the Court's attention to the example of the federal government
21 itself in its capacity as one of the country's largest landlords, through its Department of Housing
22 and Urban Development ("HUD"). HUD's regulations for Section 8 housing prohibit anyone
23 with a criminal history of drug activity from residing in one of its housing communities and from
24 receiving housing vouchers. *See* "Denial of admission and termination of assistance for criminals
25 and alcohol abusers," 24 CFR § 982.553 (a)(ii).

1 As these restrictions demonstrate, Congress clearly recognizes that past criminal actions
2 can be a high indicator of future criminal activity and understands the danger such individuals
3 may pose. Yet the Seattle Ordinance prohibits rental housing providers in Seattle from
4 considering or acting upon these concerns.

5 **D. Seattle’s Fair Chance Housing Ordinance Places Unfair Limitations on**
6 **Owners/Operators Who Use Sex Offender Registry Information.**

7 The Ordinance places unfair limitations on owners/operators who use sex offender
8 registry information during the applicant screening process. According to the Ordinance,
9 landlords are prohibited from categorically excluding applicants with criminal histories related to
10 sex offenses. Seattle Office for Civil Rights, *Fair Chance Housing Ordinance, SMC 14.09*
11 *Frequently Asked Questions*, August 23, 2018. While landlords are allowed to ask if any
12 members of the household are on a sex offender registry during the application process, they are
13 only allowed to take adverse action with respect to a prospective adult occupant, an adult tenant,
14 or an adult member of the household. SMC § 14.09.025(A)(3). Landlords are not permitted to
15 take adverse action based on registry information if there is a juvenile in the applicant’s
16 household who is a registered sex offender, or if an adult’s conviction occurred when he or she
17 was a juvenile. SMC § 14.09.025(A)(4)-(A)(5).

18 Landlords are further limited when taking adverse action against an adult tenant, an adult
19 occupant, or other adult household member since the landlord can *only* take adverse action if two
20 requirements are met: (1) the conviction for the sex offense must have occurred while the person
21 was an adult; AND (2) there is a “legitimate business reason” for taking the adverse action. The
22 Ordinance defines a “legitimate business reason” as a “policy or practice [that] is necessary to
23 achieve a substantial, legitimate, nondiscriminatory interest. To determine such an interest, a
24 landlord must demonstrate, through reliable evidence, a nexus between the policy or practice and
25 resident safety and/or protecting property.” SMC § 14.09.010. The Ordinance then provides a list
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1 of factors that landlords “should” consider when determining whether they have a legitimate
2 business reason for taking adverse action against an applicant.

3 However, “landlords of federally assisted housing subject to federal regulations that
4 require denial of tenancy, including but not limited to when *any member of the household*
5 [emphasis added] is subject to a lifetime sex offender registration requirement under a state sex
6 offender registration program” are exempt from the Ordinance. SMC § 14.09.115. There is no
7 reason to believe that landlords and tenants associated with federally assisted housing deserve
8 more protections from sex offenders than landlords and tenants who do not respectively own and
9 rent federally assisted housing. The Ordinance thus unfairly distinguishes between federally
10 assisted housing and other rental housing.

11 **CONCLUSION**

12 For the foregoing reasons, the NAA respectfully urges the Court to grant Plaintiffs’
13 Motion for Summary Judgment and to deny Defendant’s Cross-Motion for Summary Judgment.

14 Respectfully Submitted,

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PROOF OF SERVICE

1
2 I certify that on December ____, 2018, I electronically filed the foregoing document with
3 the Clerk of the Court using the CM/ECF System, which sent notification of such filing to all
4 ECF participant parties and parties-in-interest.

5 I declare under penalty of perjury under the laws of the United States of America that the
6 foregoing is true and correct.

7 EXECUTED on December ____, 2018, at Seattle, Washington.

8
9 _____
Kelly A. Mennemeier, WSBA #51838