11-20-2018

Brief of Amici Curiae Fred T. Korematsu Center for Law and Equality and ACLU of Washington in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment

Fred T. Korematsu Center for Law and Equality

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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-736-JCC

BRIEF OF AMICI CURIAE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AND ACLU OF WASHINGTON IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In *Griggs v. Duke Power Co.*, 410 U.S. 424, 431 (1971), the Supreme Court recognized that Congress, in enacting Title VII of the 1964 Civil Rights Act, sought to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." In 2015, the Supreme Court explicitly endorsed the notion that the 1968 Fair Housing Act incorporated this disparate impact principle, which reached governmental or private policies that resulted in disparate impact harming individuals from a protected group if those policies were "artificial, arbitrary, and unnecessary." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015) (quoting *Griggs*, 410 U.S. at 431).

The Seattle City Council, in enacting the Fair Chance Housing Ordinance, sought to remove an artificial, arbitrary, and unnecessary barrier to accessing housing by preventing landlords from inquiring about arrest records, criminal conviction records, or criminal history in screening prospective tenants. In doing so, the Council recognized that a person's criminal history was not predictive of whether a person would be a good neighbor or tenant and that the criminal justice system disproportionately arrests people of color.[1] In other words, the practice of screening tenants based on criminal history was found to be "artificial, arbitrary, and unnecessary," and the practice resulted in disparately excluding households that included individuals of certain protected groups. Regardless of whether this practice masked covert

[1] In addition to disproportionate arrests, a report on race and Washington's criminal justice system, published simultaneously in the flagship law reviews of Washington State's three law schools, concluded that facially neutral policies "have a disparate impact on people of color" and "racial and ethnic bias distorts decision-making at various stages in the criminal justice system, thus contributing to disproportionalities in the criminal justice system." Research Working Group, Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 Seattle U.L. Rev. 623, 629 (2012); 87 Wash. L. Rev. 1, 6 (2012); 47 Gonzaga L. Rev. 251, 256 (2012).

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discrimination or unintentionally discriminated against members of a protected class, the Council recognized the harm and, pursuant to its broad police powers to safeguard public welfare, instituted a race-neutral measure to address this harm.

II. IDENTITY AND INTEREST OF AMICI CURIAE

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center"), is a non-profit organization based at the Seattle University School of Law.[2] A full description of the Korematsu Center's interest and identity is set forth in its motion for leave to file, Order, Dkt. 28 at 1, and the instant brief is filed with leave of the Court, Dkt. 37 at 3.

The ACLU of Washington is a statewide nonpartisan, nonprofit organization with over 80,000 members and supporters that is dedicated to the preservation of civil liberties and civil rights, including working to remedy race discrimination generally and working to reduce racial disparities in the criminal justice system, in both state and federal courts.

III. BACKGROUND

Amici adopt and incorporate by reference the factual background set forth in the City of Seattle's Combined Opposition to Plaintiffs' Motion for Summary Judgment and Cross Motion for Summary Judgment ("Seattle Cross MSJ"), Dkt. No. 33 at 2-7.[3]

IV. ARGUMENT

A. Screening Tenants Based on Criminal History, Though Facially Neutral, Disparately Impacts Communities of Color.

Before the Fair Chance Housing Ordinance was enacted, Seattle landlords were permitted to inquire, often through third party vendors, about a prospective tenant's arrest

[2] The Korematsu Center does not, in this Brief or otherwise, represent the official views of Seattle University.

[3] Page references reflect pagination in the document. The cited pages are pages 8-13 as reflected in the ECF header.

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records, criminal conviction records, or criminal history. This screening practice could extend to any member of the applicant's household if such persons were to reside on the property.

This screening practice disparately impacts certain minority groups. While Black people make up about 13% of the general population, they represent 35% of the prison population. Ashley Nellis, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 4 (2016), https://www.sentencingproject.org/wpcontent/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf. Similarly, Hispanics make up 17% of the general population, but represent 21% of the prison population. *Id.*

Racial disparities in the criminal justice system for both Washington State and King County are comparable to national statistics. In Washington, Black people make up 3.4% of the state's population but 18.4% of the incarcerated population. Preamble, City of Seattle, Ord. 125393 at 2 (2017) [hereinafter Preamble], https://seattle.legistar.com/View.ashx?M=F&ID=5387389&GUID=6AA5DDAE-8BAE-4444-8C17-62C2B3533CA3 (SR 589). Hispanics and Latinos represent 11.2% of the state's population but 13.2% of the incarcerated population. *Id.* While Native Americans make up 1.3% of the state's population, they represent 4.7% of the incarcerated population. *Id.* In King County, Black people represent 6.8% of the population, but in September 2018, they represented 35.8% of the detention population and 28.4% of the booking population. King Cty. Dep't of Adult & Juv. Det., *Detention and Alternatives Report* 1-2 (Sept. 2018), https://www.kingcounty.gov/~/media/courts/detention/documents/KC_DAR_Monthly_Breakouts_09_2018.ashx?la=en. Native Americans in King County represent 1.1% of the population, but in September 2018 represented 2.4% of the detention population and 2.3% of the booking population. *Id.* Latino

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and Hispanic populations are aggregated with the white population in King County detention data, so incarceration and booking rates are unknown. *See id*.

These statistics are not surprising given the historical and contemporary treatment of minorities by the criminal justice system. Black people were targeted for criminal intervention and imprisonment beginning in the Reconstruction era and after passage of the Thirteenth Amendment. Heather Ann Thompson, *From Researching the Past to Reimagining the Future: Locating Carceral Crisis and the Key to Its End, in the Long Twentieth Century,* in *The Punitive Turn: New Approaches to Race and Incarceration* 46-47 (Deborah E. McDowell et al. eds., 2013). In the wake of the Civil War, emancipation threatened southern whites who were determined to maintain power and control over the plantation economy. *Id*. at 46. Accordingly, they subjected newly-freed, poor Black men to new criminal laws that punished behavior such as vagrancy and loitering. *Id.* This had the effect of doubling the Black prison population, going "from 8,056 in 1870 to 16,748 in 1880." McDowell et al., *Introduction* to *The Punitive Turn*, *supra*, at 6. "African Americans had clearly become a dominant fixture in the nation's penal system by the close of the nineteenth century." *Id*.

During Reconstruction and afterwards, freed Black people were moved into penal institutions to shore up a new form of enslavement through the convict leasing system, in which incarcerated men were leased to plantations and later to large corporations in industries like coal to provide a new form of enslaved labor. Ian F. Haney López, *Post Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama,* 98 Cal. L. Rev. 1023, 1041-42 (2010); *see generally* Douglas A. Blackmon, *Slavery by Another Name: The Re-enslavement of Black Americans from the Civil War to World War II* (2009). This system was in place from 1870 until after World War II, and represented a "horrific example of

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exploitation" that evaded the Thirteenth Amendment's prohibition of involuntary servitude because it was instituted through criminal convictions. Haney López, *supra*, at 1041.

Purposeful racial discrimination in the criminal justice system did not cease with the end of convict leasing in the 1940s, although the role of crime took a back seat to other avenues of exploiting Black labor and segregating people of color in the first half of the twentieth century. From 1910 to 1960, large swaths of the southern Black population were moving north to escape the racial caste system of the South. Loïc Wacquant, *From Slavery to Mass Incarceration, Rethinking the "Race Question" in the United States* in *Globalization of Racism* 94, 98-99 (Donaldo Macedo & Panayoto Gounari eds., 2006). Due in large part to restrictive covenants, Black Americans were forced to live in crowded, underserved, sectioned-off corners of northern cities, areas that came to be known as "urban ghettos" and that were blighted by crime, prone to clashes and rioting. *Id*. By the 1950s and 60s, Black communities were no longer willing to live under overtly discriminatory and separate but unequal policy, and thus began the civil rights movement for equal treatment under the law. The civil rights movement often required activists and people of color to break the very laws that oppressed them. Haney López, *supra*, at 1032.

While the racialization of crime in the nineteenth century began largely as a southern response to emancipation, the racialization of crime in the twentieth century began as a national response, or "backlash," to the civil rights movement. *Id*. at 1031-32. "[I]t was not that the United States had a crime problem in the 1960s that somehow became racialized, but rather, the nation had a racial problem that deliberately became criminalized." George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. Rev. 1746,

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1781 (2012) (citing Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as "Law and Order" in Postwar American Politics* in *Race and American Political Development* 234, 236 (Joseph Lowndes et al. eds., 2008)). Law-and-order policy and rhetoric proved effective in dampening the equalizing effects of civil rights legislation. In part to counteract civil rights efforts, Congress passed legislation that led to the "war on crime" and eventually to mass incarceration during the same time that they were passing anti-discrimination legislation. Haney López, *supra*, at 1032. In fact, in 1968, the same year Congress passed the Fair Housing Act, it also passed the Omnibus Crime Control and Safe Streets Act, increasing the number of prosecutable crimes, expanding sentencing, and defining new terms of "limited citizenship and social membership for offenders and ex-offenders." Lipsitz, *supra,* at 1781-82. From the late 1960s through the 1970s with the brief but significant rise in violent crime rates, and into the 1980s and 90s with the war on drugs, politicians and government actors capitalized on the symbolic representation of the Black offender and "super predator" to push a new form of racial stratification and segregation: mass incarceration. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 44-58 (2012).

In short order, numerous local, state, and federal legislative reforms and law enforcement practices such as three-strikes laws, federal drug enforcement, and stop-and-frisk, worked to amass confinement and conviction of millions of people, disproportionately people of color. *Id*. at 185-189. "[O]ver a one hundred year period, 1880 to 1980, the nation added a total of 285,000 inmates to its prison systems. During just the ensuing twenty years, 1980 to 2000, the nation added about 1.1 million inmates." Henry Ruth & Kevin Reitz, *The Challenge of Crime: Rethinking Our Response* 283 (2006). While three out of 200 young white people were incarcerated in 2000, one out of nine young Black people were incarcerated. Glen C.

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Loury et al., *Race, Incarceration, and American Values* 23 (2008). In twelve states, more than half of the prison population is Black. Nellis, *supra*, at 3. In Washington, Black people are incarcerated at 5.7 times the rate of white people. *Id.* at 17.

Today, there are an estimated 100 million adults in the United States, about one-third of the adult population, with a criminal record. Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 Ind. L. J. 421, 423 (2018) (citing U.S. Dep't of Just., *Survey of State Criminal History Information Systems 2012*, at 3 (2014)). At the end of 2016, there were more than 4.5 million individuals in the United States under community correctional supervision, and 100,000 under supervision in Washington. Danielle Kaeble, *Probation & Parole in the United States*, U.S. Dep't of Just. Bureau of Just. Stat. 1, 12 (2016), https://www.bjs.gov/content/pub/pdf/ppus16.pdf. Given the racial disparities of the criminal justice system, these numbers mean that a large and increasing number of people, disproportionately people of color, are living in the community with a criminal record. For those people, criminal record screening practices inevitably have a disparate impact, regardless of discriminatory intent.

B. This Practice of Screening Tenants Based on Criminal History Must Be Viewed in the Context of the History of Discrimination in Housing, Nationally and Locally.

Racial discrimination in housing has been carried out in the United States during much of our nation's history through government action such as exclusionary zoning, public housing policies, and redlining, as well as through private action such as the use of racially restrictive covenants, steering, and the practice of screening tenants based on criminal history. Because more obvious and recognizable forms of discrimination have become less common, subtle forms of discrimination have come to plague those seeking housing. Consistent with

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the legal standard that its regulatory actions can be legally justified if informed by "history, consensus, and common sense,"[4] the Seattle City Council enacted the Fair Chance Housing Ordinance to address some of the practices that produced racially disparate outcomes. *See* Preamble, at 1-5 (SR 588-92).

Housing discrimination became a tool of segregation starting in the post-Reconstruction era, as state actors and white society took steps to maintain social stratification based on race. One mechanism that involved both government and private actors used the threat of violence to keep people of color from residing in certain towns altogether. "[S]undown towns," which began to spring up across America in the early twentieth century, intentionally "drove out their black populations or took steps to forbid African Americans from living in them." James T. Loewen, *Sundown Towns and Counties: Racial Exclusion in the South*, 15 S. Cultures 22, 23 (2009). They were named for the ominous signs posted throughout the towns which contained racial slur-laced threats, such as "N[*****] don't let the sun set on you here." *Id*. at 39 (alteration, asterisks substituted).

While we tend to associate such blatant racism with the South, "sundown towns were rare in most of Dixie," and are instead an example of the often overlooked yet widespread racial discrimination in the northern United States. *Id*. In Illinois alone, "about 500 [ ] communities—two-thirds of all incorporated municipalities larger than 1,000—were sundown towns." *Id.* at 23. Washington was not immune from this practice. In Washington's Tri-Cities, "Pasco was the only one of the three cities that allowed black residents" in the 1940s. Robert

[4] Commercial speech restriction need not "produce empirical data to support its conclusion that a speech restriction is necessary. Instead, it may rely on 'history, consensus, and "simple common sense."'" *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (citation omitted).

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Bauman, *Jim Crow in the Tri-Cities, 1943-1950*, 96 Pac. Nw. Q. 124, 126 (2005). Kennewick, in contrast, "was hostile to the mere presence of African Americans." *Id*. A sign on the bridge between Pasco and Kennewick "said something to the effect that blacks were prohibited in Kennewick after sundown." *History of Segregation in the Tri-Cities*, NBC Right Now (Feb. 5, 2009), http://www.nbcrightnow.com/story/9798449/history-of-segregation-in-the-tri-cities.

During the same period, in the first decades of the twentieth century, local governments adopted racial zoning ordinances that prevented people of color from living in certain neighborhoods based on the principle that it was necessary to prevent African Americans from getting too "close to the company of white people." Richard Rothstein, *The Color of Law* 44 (2017). Once racial zoning practices consigned Black people to living in certain neighborhoods in urban centers, businesses that were typically associated with degradation and depravity—like pollution-causing industrial sites, "taverns, liquor stores, night clubs, and houses of prostitution"—were permitted to open in Black neighborhoods but would be considered zoning violations if they were to open in white neighborhoods. *Id*. at 50.

After this practice of explicit racial zoning was found to be unconstitutional in *Buchanan v. Warley*, 245 U.S. 60 (1917), those seeking to maintain racial segregation did so through other means, including through racially restrictive covenants. This method of racial segregation received the blessing of the Supreme Court when it reasoned that the Fifth, Thirteenth, and Fourteenth Amendments did not "[prohibit] private individuals from entering into contracts respecting the control and disposition of their own property." *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926). From the 1920s until the period immediately following World War II, communities across the country, including Seattle neighborhoods, were rife with racially restrictive covenants. *See* Seattle Civil Rights & Labor History Project,

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Segregated Seattle, https://depts.washington.edu/civilr/segregated.htm (last visited Nov. 19, 2018).

The Supreme Court did not prohibit state enforcement of racially restrictive covenants until 1948. *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948). Although private individuals wrote the racially restrictive covenants into contracts for sale and deeds, the state had a direct role in enforcing these covenants. The Court acknowledged this in *Shelley*, holding that these were "cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights." *Id.* at 19. Notably, though, the Court left open the option of private citizens voluntarily adhering to such covenants. *Id.* at 13. As a result, these covenants persisted and can still be found in deeds to land throughout Seattle. *See Segregated Seattle*, *supra*.

In the 1930s, the federal government continued to perpetuate housing discrimination through the practice of redlining. The Federal Housing Administration was created for the purpose of "[advising] developers on what factors to use to determine whether a neighborhood would receive financing." Rajeev Majumdar, *Racially Restrictive Covenants in the State of Washington: A Primer for Practitioners*, 30 Seattle U. L. Rev. 1095, 1101 (2007). In making these assessments, the Federal Housing Administration assigned integrated neighborhoods "diminished values." *Id*. at 1102. The government and banks worked together to draw literal maps of where Black people would be able to secure mortgages to purchase homes, drawing red lines around Black neighborhoods. *See, e.g.*, Seattle & King County Public Health, *Redlining Map & Racial Restrictive Covenants in Seattle – King County, WA*, https://www.kingcounty.gov/depts/health/data/~/media/depts/health/data/documents/population-maps/redlining-map-with-covenant-layer.ashx (last visited Nov. 19, 2018).

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Redlining was prevalent in Seattle during this time. A 1975 report by the Central Seattle Community Council Federation showed that in Seattle's Central District, "[banks] would not loan to Central Area African Americans, and if they did, they charged more than they charged Euro Americans," a surcharge known as the "Ghetto Tax." Henry W. McGee, Jr., *Seattle's Central District, 1990—2006: Integration or Displacement?* 39 Urb. Law. 167, 211 (2007). The practice of redlining resulted in extreme de facto segregation across Seattle with African Americans confined to proscribed areas of the city south of the Montlake Cut. *See id.* at 167. In response to pressure from the Black community, the State of Washington attempted to address the issue in 1977 by passing the Mortgage Disclosure Act and the Fairness in Lending Act. *See id*. at 220. Though not successful in remedying the cascading effects of years of redlining, the State's response in passing such prohibitory legislation signaled the State's recognition of its responsibility for the outcomes that originated from redlining. *Id*.

Congress passed the Fair Housing Act in 1968 with the express purpose of prohibiting discrimination in the sale or rental of housing. Fair Housing Act, Pub. L. No. 90-284, Title VIII of the Civil Rights Act of 1968, 82 Stat. 81 (1968) (FHA). Although some of the prohibited practices, such as notices, statements, or advertisements "with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race," 42 U.S.C. § 3604(c) (2012), were relatively easy to police, other practices proved difficult to identify and address. "Steering" became a common form of housing discrimination in the 1970s and 1980s. Realtors and landlords would show prospective homebuyers or tenants "housing located only in areas traditionally inhabited by members of the prospect's race." James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of*

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Fair Housing, 42 Vand. L. Rev. 1049, 1059 (1989). Fair housing audits in the 1980s found that realtors and landlords routinely told about, invited to inspect, and actually showed fewer apartments to Black auditors than to their white counterparts, George Galster, *Racial Discrimination in Housing Markets During the 1980s: A Review of the Audit Evidence*, 9 J. Plan. Educ. & Res. 165, 170 (1990), effectively perpetuating segregation through private and less obvious means.

Exclusionary zoning ordinances also became more popular after passage of the FHA as a "race-neutral" way to maintain segregation. *Cf. Developments in the Law – Zoning, VIII. Exclusionary Zoning*, 91 Harv. L. Rev. 1624, 1627-28 (1978) (describing the use of exclusionary zoning and its disparate racial impact, noting that "[e]conomic-racial exclusion may well be called the racism of the seventies"). Realizing that exclusionary zoning has racially discriminatory effects, this Circuit recently found that such zoning practices may be unconstitutional or may violate the FHA. In *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, city officials in Yuma, Arizona, denied developers' request to re-zone an area for "higher-density, moderately priced housing" in response to racially-tinged outcry from the city's residents. 818 F.3d 493, 499-501 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 295 (2016). The court held that the developer's disparate treatment and disparate impact claims could proceed, determining that exclusionary zoning practices that result in segregation, whether as a result of conscious or unconscious bias, can violate the FHA. *Id*. at 509, 513.

C. Facially Neutral Practices Sometimes Mask Covert Discrimination or May Cause Unintentional Discrimination.

Although discrimination today is less likely to be overt, practices that are neutral on their face can serve to conceal both covert and unintended forms of discrimination.

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Particularly where there is a long history of discrimination, courts have recognized that practices or policies that are facially neutral can mask covert discrimination. *See, e.g., Tex. Dep't of Hous.*, 135 S. Ct. at 2522 (recounting the history of housing discrimination and segregation and noting that the FHA "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment"); *Griggs*, 401 U.S. at 432 (relating employer's history of overt employment discrimination and finding that "good intent or lack of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups"); *Gaston Cty. v. United States*, 395 U.S. 285, 297 (1969) (finding "impartial" use of a facially neutral literacy test for voting would perpetuate racial inequalities resulting from historically segregated education system).

Facially neutral practices might also result in unintended disparate outcomes for communities of color. *See Ave. 6E Invs. LLC*, 818 F.3d at 503 (recognizing that barriers to housing "can occur through unthinking, even if not malignant, policies" that "'can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme'" (quoting *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1185 (8th Cir. 1974))). The pervasiveness of such subtle discrimination through criminal record screening is apparent in the research. Even when controlling for factors such as age, education, physical appearance, and criminal background information, Black people are more likely than white people to be screened out of opportunities due to having a criminal record. Studies of hiring practices have concluded that the negative effect of a criminal record was "substantially larger" for Black job applicants than for white job applicants. Devah Pager, et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal*

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Records, 623 Annals Am. Acad. 195, 199 (2009) (describing results of study conducted in 2004 in New York City); Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 957-59 (2003) (describing results of study conducted in 2001 in Milwaukee). More limited studies testing the impact of a criminal record on tenants searching for housing came to similar conclusions. *See* Equal Rights Center, *Unlocking Discrimination: A DC Area Testing Investigation About Racial Discrimination and Criminal Records Screening Policies in Housing* 6 (2016), https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf (finding Black women with a criminal record searching for housing in Washington D.C. area were treated differently forty-seven percent of the time); Greater New Orleans Fair Housing Action Center, *Locked Out: Criminal Background Checks as a Tool for Discrimination* 17-18 (2015), http://www.gnofairhousing.org/wpcontent/uploads/2015/09/Criminal_Background_Audit_FINAL.pdf (finding differential treatment toward Black testers posing as prospective tenants with a criminal record fifty percent of the time).

The problem is compounded by the substantial inaccuracies present in criminal records databases, including a high rate of false positives due to incorrect identification, misleading information, reporting of sealed records and expungements, and missing disposition information. *See* Persis S. Yu & Sharon M. Dietrich, Nat'l Consumer Law Ctr., *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* 3, 15-29 (2012), https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf. Because of the comparatively large numbers of people of color who have had contact with the criminal justice system that would show up on a routine background check, even if that contact did not result in conviction or is not accurate, people of color are disproportionately impacted by use of criminal records. *See* Kimani Paul-Emile, *Beyond Title*

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VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age, 100 Va. L. Rev 893, 907-10 (2014). Whether the resulting discrimination is intentional but covert[5] or unintended, people of color suffer from the disparate results.

Though disparate impact theories of liability present one avenue to address such outcomes, the relief comes after the damage has been done, and the victims of discrimination are rarely able attain redress because of the difficulty of bringing and proving such claims. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 Am. U. L. Rev. 357, 392-94 (2013) (conducting a qualitative analysis of disparate impact claims under the FHA and finding less than twenty percent of the claims successful). Furthermore, where the disparate impact results from structures and institutions that have evolved as part of the culture over time, individual lawsuits are unlikely to make a significant difference in the problem on a societal level in a way that addresses the underlying racism. *Cf.* Lipsitz, *supra*, at 1800 ("The tort model of individual injury that dominates civil rights law … largely fails to address and redress the dimensions of discrimination that are structural and systemic.").

Local governments have the authority under the Washington Constitution to proactively address discrimination in their communities. *See* Wash. Const. art. XI, § 11 ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."). It is of special note that the Seattle City Council, in effecting a remedy for a practice that it recognized had a

[5] Whether by instituting a blanket ban on renting to tenants with a criminal history knowing that it will exclude many applicants of color, or by using criminal history as a reason not to rent when the applicant is Black or Latino, criminal history has the potential to provide landlords with a facially neutral way to hide discriminatory intent. *See Locked Out, supra*, at 17 (finding "[c]riminal background screening policies are used as tools for discrimination").

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racially disparate effect, chose a race-neutral method. In doing so, the Council acted well within the bounds approved by the Supreme Court. *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788-90 (plurality opinion) (Kennedy, J., concurring) (recognizing that legislative branches of government may devise general measures to address the impact of policies and procedures on members of particular races); *Tex. Dep't of Hous.,* 135 S.Ct. at 2524 ("local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset"). Such measures are geared toward preventing unnecessary discrimination from occurring by looking at disparate outcomes and working to address the underlying causes of the disparities. *Cf. id.* at 2525 (approving of local housing authorities' race neutral efforts to address the consequences of discrimination). Furthermore, local governments have often been at the forefront of providing additional protections to address inequalities in their populations. *See* Amici Curiae Brief of the National League of Cities et al., at 3-10, *Masterpiece Cake Shop, Ltd. v. Colo. Civil Rights Comm.*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127318, at *3-10 (cataloging instances of greater municipal protections or grants of rights than available under federal law). Such protections are necessary to address the perpetuation of racially disparate outcomes here.

D. The Justifications Offered for this Particular Practice Are Not Supported by the Evidence and Instead May Mask Covert Discrimination or May Result in Unintended Discrimination.

Landlords' use of criminal records as a purported tool for maintaining safety and avoiding liability is a smoke screen for preserving the long-standing system of racial discrimination in our community. Although criminal record screening practices have yet to be expressly prohibited in federal anti-discrimination legislation, the U.S. Department of

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Housing and Urban Development's (HUD) General Counsel reaffirmed in 2016 that tenants may have cognizable disparate impact claims related to criminal record screening in housing. Helen R. Kanovsky, HUD, *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* 5 (Apr. 4, 2016) [hereinafter HUD Guidance], https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) (citing to *Tex. Dep't of Hous. & Cmty. Affs.*, 135 S. Ct. at 2525 (holding that disparate impact claims are cognizable under the FHA)). Several factors indicate that by continuing to participate in criminal record screening, landlords are engaging in de facto discrimination with no evidence that supports a substantial or legitimate interest in doing so.

Plaintiffs argue that safety is a substantial interest that justifies the use of criminal records to screen out high risk applicants. Pls.' Mot. Summ. J., Dkt. 23 at 19.[6] Widespread use of criminal record screening based on increasingly easy access to criminal records seems to reinforce the erroneous assumption that criminal records screening leads to a greater likelihood of safety. Schneider, *supra*, at 428-29. Despite the growing and largely unregulated trend of tenant criminal record screening, there is no empirical research that substantiates the assumption that criminal screening in housing does in fact lead to safer housing conditions. *See* Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 Psychiatric Servs. 224, 225 (2009); *see also* Merf Ehman & Anna Roesti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record Is No Crystal Ball*, N.Y.U. J. Legis. & Pub. Pol'y Quorum 1, 16-17 (2015)

[6] Page reference reflects pagination in the document. The cited page is page 23 as reflected in the ECF header.

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(SR 510-11), http://www.nyujlpp.org/wp-content/uploads/2013/03/Ehman-Reosti-2015-nyujlpp-quorum-1.pdf. The absence of data to support the practice indicates that landlords justify screening out applicants with a criminal record on "[b]ald assertions based on generalizations and stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record." HUD Guidance, *supra*, at 5.

Research also shows that criminal record screening practices, including blanket bans, do not have the intended effect of reducing crime, especially violent crime. One study conducted in Knoxville, Tennessee, tracked the effectiveness of a year-long residency-applicant-screening practice that systematically denied housing to individuals with a record of sex, violent, or property crimes. John W. Barbrey, *Measuring the Effectiveness of Crime Control Policies in Knoxville's Public Housing,* 20 J. Contemp. Crim. Just. 6, 15 (2004). The study found that screening out applicants with a criminal record had a small correlative link to decreased property crimes but had no discernable impact on violent crime, such as aggravated assault and rape. *Id.* at 24-25.

Furthermore, having a criminal record is not indicative of tenant success,[7] even among chronically homeless adults with mental illness. Malone, *supra*, at 227. A 2009 study of Seattle's supportive housing environment showed that having a criminal record had no statistically significant impact on whether tenants were able to maintain their housing for an entire two-year period. *Id.* at 225. These findings run counter to common landlord beliefs that housing must be free of people with criminal records to be safe for other residents. *Id.* at 228.[8]

[7] Housing success for the study was defined as "maintaining continuous retention of housing for two years or, if moved out before then, going to appropriate living situations." Malone, *supra*, at 225.

[8] In discussing limitations on this study, Malone points out that "generalizing the results…to other situations may not be valid." *Id.* at 229. However, Malone then points out that the study results "call into question the wisdom of

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Plaintiffs also express fear that leasing to a tenant with a criminal record will expose them to liability for any harm caused by that tenant upon other tenants. Pls.' Mot. Summ. J., Dkt. 23 at 5. Such fear of tort liability may be exploited by tenant screening companies that "often invoke the threat of premises liability suits in advertisements." David Thatcher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & Soc. Inquiry 5, 15 (2008). While in limited contexts landlords may be liable for harm caused to tenants on leased premises, the plaintiffs' suggestion that landlords have an affirmative duty in Washington to protect tenants from the criminal acts of third parties is misleading.

In Washington, neither statutes nor case law place a duty on landlords to conduct tenant criminal record screenings or to protect tenants from conduct of third parties. *See* Wash. Rev. Code § 59.18.257 (2016); *Griffin v. W. RS, Inc.*, 18 P.3d 558 (2001).[9] As the City points out, the Ordinance effectively eliminates foreseeability in this context by prohibiting review of a potential tenant's criminal history. Seattle Cross MSJ, Dkt 33 at 17. Landlords simply cannot foresee what they are legally prohibited from knowing, and therefore their risk

policies attempting to predict tenancy success by the use of criminal background information," and although "[a] link between criminal history and housing failure has been assumed…empirical evidence of the link has not been studied or reported. The fact that the study found no link should help establish the need for larger, multisite studies…about the predictive utility of criminal background information." *Id.*

[9] In fact, the Washington Supreme Court declined to answer when directly presented with the question of whether landlords have a duty to protect tenants from third party criminal conduct where the landlord has control over the premises and the third party conduct was reasonably foreseeable. *Griffin*, 18 P.3d at 562 (declining to reach issue of landlord duty of care because jury found landlord negligence was not proximate cause of injuries); *but see Griffin v. W. RS, Inc.*, 984 P.2d 1070, 1073 (1999), *rev'd on other grounds*, 18 P.3d 558 (2001) (lower court finding that landlords have a special, though not absolute duty to the tenant where they assert control over the premises and the third party conduct was reasonably foreseeable). Courts in other jurisdictions have also declined to place liability on landlords for negligently screening tenants because of the impossibility of predicting unknown future criminal conduct. *See e.g. Castanada v. Olsher,* 41 Cal. 4th 1205, 1212, 1217 (2007) (rejecting argument that landlords have a duty to screen tenants for criminal history, in part, because it could raise liability for discrimination claims and would be "socially questionable"); *Dore v. Cunningham,* 376 So. 2d 360, 362 (La. 1979) (concluding that landlord's knowledge of perpetrator's criminal propensity and fact that he was invited onto premises by landlord created at most a remote association to injury).

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of liability for failure to screen is virtually non-existent.

E. Seattle's Fair Chance Housing Act Eliminates an Arbitrary, Artificial, and Unnecessary Practice that, Left Unchecked, Would Keep in Place and Perpetuate Racially Disparate Outcomes.

In 2014, the Seattle City Council assembled the Housing Affordability and Livability Advisory Committee (HALA) which issued a report in 2015. Seattle Housing Affordability & Livability Agenda, *Final Advisory Committee Recommendations to Mayor Edward B. Murray and the Seattle City Council* (2015) (SR 18-93) [hereinafter HALA Report]. The HALA Report identified many issues contributing to unstable housing in the City. One of its primary findings was that "[persons] with a criminal record, who are disproportionately lower income and people of color, need fair access to suitable housing options," and noted that "[studies] show that people with stable housing are more likely to successfully reintegrate into society and less likely to reoffend." HALA Report at 33 (SR 51). The HALA committee voted to recommend that the City Council develop legislation to reduce barriers to housing for people with criminal records. *Id*. at App. F-11 (SR 79). This finding and recommendation paved the way for the passage of the Fair Chance Housing Ordinance in 2017 to prevent private landlords from denying a rental application on the basis of an applicant having a criminal history. City of Seattle, Ord. 125393, § 2 (2017). The preamble to the Ordinance indicates that it was passed, in significant part, to address racial equity. Preamble, at 1-5 (SR 588-92) (explaining that the Ordinance "aims to address the racially disproportionate impact that exclusionary tenant screening practices have on our communities"). Thus, the City of Seattle recognized that the Fair Chance Housing Ordinance was necessary to prevent landlords from denying housing to people with criminal histories because doing so clearly disproportionately affects people of color and acts as de facto racial discrimination.

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The City's actions in passing the Ordinance in the name of racial justice are not only justified, but are a necessary step to address the structural racism that pervades the City's housing market. *See* William Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 Ky. L.J. 1, 19 (2011) (recommending proactive measures to address structural racism); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1844 (2000) (noting society's responsibility for remediating institutionalized racial practices).

As with racially restrictive covenants and redlining in decades past, and with issues of housing access in present times, Seattle has a responsibility to prevent unjust housing discrimination against people of color. In enacting the Fair Chance Housing Ordinance, Seattle has acted responsibly to eliminate an arbitrary, artificial, and unnecessary barrier to individuals and families seeking fair access to housing.

V. CONCLUSION

For these reasons, the Court should deny Plaintiffs' Motion for Summary Judgment, and grant Defendant's Cross-Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2018, the foregoing document was electronically filed with the United States District Court's CM/ECF system, which will send notification of such filing to all attorneys of record.

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